Section 30 – Legal Advice

The Trial Division of the Newfoundland and Labrador Supreme Court recently reviewed the scope of the legal advice exception found in section 30 of the *Access to Information and Protection of Privacy Act, 2015* in *Newfoundland and Labrador (Information and Privacy Commissioner)* v. *Eastern Regional Integrated Health Authority*, 2015 NLTD(G) 183 (*Eastern Health* case). While this guidance document relies heavily on that case, many aspects of the decision confirm long held positions of this Office.

The Court noted the distinction between solicitor and client (legal advice) privilege and litigation privilege (both of which are covered by the legal advice exception). This guidance piece discusses litigation privilege on page 4.

As section 3 of the *ATIPPA, 2015* indicates, the default position is that citizens have a right of access to records subject to limited exceptions that are necessary to preserve the ability of government to function, to accommodate established and accepted rights and privileges of others and protect from harm confidential proprietary and other rights of third parties. The legal advice exception is intended to accommodate the established solicitor and client and litigation privileges. Therefore, in order to truly understand the exception we must understand what underpins these privileges at law.

Solicitor and Client Privilege

The Court in the *Eastern Health* case reviewed the current state of the law regarding solicitor and client privilege and noted that "the primary rationale for the privilege is to enable full and candid communication between a solicitor and client so that the client may obtain fully-informed and effective legal advice in order to exercise his or her legal rights in an informed manner." The Court also noted that "an individual's right to obtain such advice promotes both access to justice and the efficiency of the adversarial process."

This very important rationale is why the *ATIPPA, 2015* carves out the legal advice exception as it does. It balances the overarching right of access against this significant privilege. The privilege has been noted by the Supreme Court of Canada to have evolved to a principle of fundamental justice[1].

When relying on this exception it is important not to forget its purpose as this helps to define its scope and when it is appropriate to use.

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[1] Canada (National Revenue) v. Thompson, 2016 SCC 21 (CanLII), <http://canlii.ca/t/grxb3>,

The necessary elements for a valid claim of solicitor and client privilege are:

1. a communication between a solicitor, acting in his or her capacity, and the client;
2. the communication must entail the seeking or giving of legal advice, and
3. the communication must be intended to be confidential.

This three-part test has been articulated by this Office[2] and Courts, including the Supreme Court of Canada[3] many times. In the *Eastern Health* case, the Court went on to articulate some other principles and considerations when testing to see if the exception applies:

> 1. *In any given circumstance, the determination of the scope of the privilege must be informed by both the particular context and the rationale for the privilege. Considerations which might influence the determination of the scope of the privilege in the context of a criminal investigation or prosecution may not necessarily influence to the same extent a determination in the context of civil litigation or, as here, an access to information request pursuant to statute.*

Every request for access to information, and the decision regarding exceptions that may be made, is unique. The legal test is a constant; its application depends upon the context and circumstances of each case.

It should also be remembered that section 30 is a discretionary exception, and public bodies should consider whether there is actually any harm in releasing the information. If not, the information can be released, even in cases where the exception clearly applies. Further, section 30 is also subject to section 9 (the "public interest override"), so careful consideration of the reasons for withholding and disclosing information is essential in all cases where section 30 is relied upon (see our guidance document on applying the public interest override for more information).

> 2. *Because of the fundamental and quasi-constitutional nature of the privilege, the scope should not be unduly restricted.*

The privilege between a solicitor and client is one of the most protected privileges under the law. It has in the past been found to be akin to a constitutional right.[4] The thinking behind this level of protection is that people will not fully inform their counsel of the facts unless they can be assured that it will be kept confidential in almost all circumstances. Protecting this privilege to such a great degree is in the public interest, it is said, because without it access to and the quality of justice would be compromised.

[2] A-2008-002, A2008-14, A-2012-006 and A-2013-004
[3] *Solosky v. The Queen, [1980] 1 SCR 821 (S.C.C.); Blank v. Canada (Minister of Justice), [2006] 2 S.C.R. 319.*
[4] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574.

3. *The capacity in which a party sends or receives a communication is not determinative of the privilege; in each case the context of the communication must be assessed.*

The question of whether the solicitor was acting in his or her legal capacity requires information about their role in your public body – do they sometimes function as an advisor in a non-legal sense? In what capacity were they speaking in the document in question? What third parties were privy to the communications? What role, if any, did the third parties have in the process? Therefore, even if the sender is legal counsel, it is conceivable that the communication may not meet the definition of legal advice.

4. *The communication must relate to the giving or seeking of legal advice. There is a difference between legal advice – advice on legal rights and duties in order to assess past conduct or guide future conduct – and legal information – information about the law generally and relevant legal procedure. However, to be privileged, a particular communication need not specifically request or offer advice provided that it may reasonably be considered as part of a 'continuum of communication' in which advice is sought or tendered. Within such a continuum, the privilege may extend to the communication of legal information.*

Each record must be examined in relation to the privilege to determine if in fact it relates to advice. General information about the state of the law may not constitute advice. However, if the larger context of the record is in relation to the pursuit of advice in order to decide on a course of action, the advice itself does not need to be present in the record for it to fit within the exception. This is what the Court referred to as being part of the continuum of communication.

5. *In assessing a claim for privilege, a distinction between facts and communication is not helpful. Providing an otherwise non-privileged document to a lawyer in order to obtain legal advice does not cause privilege to attach to the document. A client's internal communication that does not constitute the passing on of confidential legal advice or directly involves the seeking of legal advice will be not privileged. Accordingly, an attachment to an otherwise privileged e-mail may or may not be privileged in and of itself.*

The privilege and therefore the exception only applies to the advice itself which may include supporting documents but will not include documents that are attached but are otherwise not related to obtaining legal advice. All three elements of the test must be met in order for the exception to apply. In the example given above, the element of the seeking of advice is the defining characteristic. We sometimes see public bodies treat all communication with lawyers as privileged. This presumption is flawed as it ignores step 2 of the test.

6. *The client must subjectively intend that the communication be kept confidential. Further, the intention must be objectively reasonable in all*

the circumstances, thus requiring an assessment of intention not unlike the analysis required to assess a reasonable expectation of privacy.

Stamping something as confidential or writing confidential in an email subject line does not make it confidential for this test. You need to be able to establish that it was the intent of the parties that it be confidential and that confidentiality must have been a reasonable thing to expect in the circumstances. Therefore the record cannot pass the test unless a reasonable and informed person in the position of the client would expect the communication to be confidential.

7. *Communications within an employer's organization between in-house counsel and employees enjoy the privilege, assuming of course that the employee can reasonably be considered to represent the client; however, whether the privilege attaches to any particular communication depends on the nature of the relationship, the subject matter of the communication and advice and the surrounding context and circumstances.*

In-house counsel has always raised the added question of which role the person was carrying out at the time of the communication. In-house counsel, more than outside counsel, tends to be consulted on a combination of legal and non-legal matters. Their opinions are often sought on policy decisions or courses of action that have no particular legal significance (the usual course of business). Justice Orsborn noted that: "Particularly where in-house counsel are involved, and where the issues involved are related to the daily management and operation of a large hospital as well as to potential legal issues, the lack of evidence of specific context and circumstances raises the real possibility that, in one or more instances, the necessary onus will not have been met."

8. *Communications between a third party and a lawyer will be protected by the privilege if the third party can be considered to be a 'channel of communication' between the lawyer and the client and if the communication would be privileged if directly between the client and the lawyer. Further, although the law is less clear on the point, if, functionally, the third party's role is essential to the operation or existence of the solicitor-client relationship, privilege remains available to protect communications with the solicitor.*

Examples of a "channel of communication" may include the clerical staff at the solicitor's office, a paralegal or an expert witness retained by a party.

9. *The privilege exists to protect the confidentiality of communication between solicitor and client, not the solicitor client relationship. The privilege is distinct from a solicitor's ethical duty of confidentiality.*

<u>Litigation Privilege</u>

With respect to litigation privilege, Justice Orsborn (in the *Eastern Health* case) said that the principles could be stated as follows:

1. *The purpose of litigation privilege is to provide a protected private zone of communication and work in order to facilitate investigation and preparation for a proceeding in the adversarial system.*
2. *The litigation which establishes the boundaries of the privilege may extend to proceedings related to the 'primary' litigation.*
3. *The privilege expires with the litigation although it may continue if related litigation remains pending or may reasonably be apprehended.*
4. *To enjoy litigation privilege, it is not necessary that a communication be either confidential or be between a solicitor and client; indeed, it is not necessary that a solicitor client relationship exist. The privilege is available to all litigants, whether or not represented by counsel, and extends to communications with third parties.*
5. *Two requirements are necessary to establish a privilege over any particular document:*
    i. *The dominant purpose for the preparation of the document must be the litigation in question. This requires an assessment of the context and circumstances in which the document was created.*
    ii. *Litigation must have been in reasonable contemplation at the time of preparation of the document. This requires an objective assessment of the circumstances at the time – it is not a matter of opinion.*

The facts of the *Eastern Health* case were such that the particular litigation that may have initially attracted litigation privilege was moot by the time this case was heard, although it had not been formally discontinued. The judge stated:

> *…The fact that no formal discontinuance has been filed does not change the fact that nothing has happened in over three years and the requested relief is no longer able to be granted. What is the reasonable possibility of related litigation? There is no evidence that related litigation is contemplated or likely.*
>
> *The litigation is over. There is no evidence to support the assertion that, to use the words of Fish, J. in Blank, at paragraph 34 – "litigants or related parties remain locked in what is essentially the same legal combat".*
>
> *Accordingly, any and all claims for litigation privilege must fail. …*

Justice Orsborn also clearly articulated an important distinction between solicitor and client privilege and litigation privilege:

> *To the extent that a document is indeed properly subject to solicitor client privilege, that privilege does not terminate. Again, to quote Fish, J.A. in Blank,*

> *at paragraph 50 – "anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged".*

While solicitor and client privilege is forever, this concept does not apply to litigation privilege. Litigation privilege is "neither absolute in scope nor permanent in duration".[5]

In the final review of the records to which a claim of solicitor and client privilege had been applied, Justice Orsborn made the following general comments:

> *....I did not assume that the purpose of a communication was to seek or give legal advice simply because a communication was to or from counsel. I considered the legal advice component of the privilege to be less likely to be established if a communication was simply copied to counsel.*
>
> *Further, unless the content and context – insofar as they could be gleaned – clearly established otherwise, I have not found to be privileged internally-generated documents – including e-mail attachments.*
>
> *I have not considered as privileged:*
>
> *i. communications which, although sent or copied to or from counsel, involve operational or logistical issues such as security for staff, meeting attendance or dealing with the media;*
> *ii. communications between counsel and the police;*
> *iii. generally, communications concerning a request for information by the Citizens Representative;*
> *iv. communications with Crown counsel;*
> *v. generally, communications forwarding 'operational' documents originally created by hospital staff for transmission to other non-counsel hospital staff, and*
> *vi. communication of otherwise public documents such as court pleadings.*

Summary of Tests for the Section 30 Exception

If a public body is relying on the exception of solicitor and client (legal advice) you must be able to show that:

1. the document was a communication between a solicitor, acting in his or her capacity, and the client;
2. the communication entailed the seeking or giving of legal advice, AND
3. the communication was intended to be confidential.

If a public body is relying on litigation privilege you must be able to show that:

[5] Blank v. Canada (Minister of Justice), 2006 SCC 39

1. the dominant purpose for the preparation of the document must be the litigation in question, AND
2. litigation must have been in reasonable contemplation at the time of preparation of the document.

The *Eastern Health* case and the other cases referred to in the document are excellent resources for additional education and assistance when considering whether or not to apply section 30.

Please also feel free to call or email us if you require any further assistance in interpreting this or any other section of the *ATIPPA, 2015*.