Privilege: The Law of Secrets

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So often when the topic of privilege arises, eyes will start to glaze over and all is tuned out while we think of something more interesting. It is certainly not the sexiest of topics, but it is a critical one when dealing with claims generally or when embroiled in litigation. Whether already engaged in litigation or simply seeking advice, privilege issues arise and can have an impact on how things are addressed moving forward. Privilege can be confusing and, notwithstanding the general belief that so long as a lawyer is involved, everything is protected, it is not. While the scope of privilege is pretty broad, there are limitations. It would be so much easier if privilege were as simple as television would have us believe, but it does not work that way.

We have all heard the terms "solicitor-client privilege" and "litigation privilege", but what they mean and how they are applied can get confused or twisted in practice. This article is an attempt to clarify these categories and provide a bit of a guide practically. Unfortunately, we need to begin by stepping back in history to flesh it out and set the stage. At this point it is time to jump down the rabbit hole of privilege.

In 2006 in the case of *Blank v. Canada (Department of Justice)*[1], the Supreme Court of Canada, for the first time, considered the distinction between solicitor-client privilege and litigation privilege. In this particular case, the Crown had originally laid charges against Blank *et al* for regulatory offences which were later stayed. They then sued the government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers. Blank requested all relevant records under the *Access to Information Act*, but received only some as the government claimed privilege over the balance. The Court held to establish litigation privilege over a document, counsel must establish:

1. The litigation was ongoing or was reasonably contemplated at the time the document was created; and
2. The dominant purpose of creating the document was to prepare for that litigation.[2]

Ultimately, the Court determined the Minister's claim of litigation privilege under the *Access to Information Act* failed because the privilege had expired. The documents requested related to the penal proceedings against Blank which had already terminated.

In the course of its decision, the Court addressed the distinction between litigation privilege and solicitor-client privilege. Solicitor-client privilege is somewhat self-

[1] *Blank v. Canada (Department of Justice)*, 2006 SCC 39
[2] *Blank, supra* at paragraphs 38, 59-60

explanatory. It is intended to protect all communication between a solicitor and his client, whether oral or written, to ensure the confidentiality of the interactions. The need for frank discussion and total disclosure between the solicitor and the client is critical if counsel is to properly and effectively advance their client's case. Such communication will only occur if the client does not have to be concerned about whether they should or should not divulge sensitive information for fear it would be used against them in some fashion. Sometimes this is also referred to as "legal advice privilege". Solicitor-client privilege is not limited to any particular litigation nor is litigation even required for it to exist. In the event there is litigation, unlike litigation privilege, solicitor-client privilege does not come to an end when the case ends. The privilege attaching to the solicitor-client relationship also cannot be waived by the solicitor except in very specific circumstances, it can only be waived by the client as it is their privilege.

Litigation privilege is more focused and is specific to actual litigation. It is intended to protect against the disclosure of materials gathered and created in the context of litigation. Litigation privilege does extend to both oral and written communications, but rather than with the client, the privileged communication is between the lawyer and third parties such as experts or other witnesses. Continuing with the *Blank* decision, the Court cites from R.J. Sharpe's "Claiming Privilege in the Discovery Process"[3] to better enunciate the intent of litigation privilege:

> Litigation privilege, on the other hand, is geared directly to the process of litigation. …Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversarial process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).[4]

Very generally, litigation privilege creates a temporary protected bubble around information shared and generated for the explicit purpose of litigation. The test for determining the existence of litigation privilege is referred to as the dominant purpose test. The Court stated:

> I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to be consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure….[5]

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[3] R.J. Sharpe's "Claiming Privilege in the Discovery Process",[3] in *Law in Transition: Evidence*, [1984] *Special Lect. L.S.U.C.* 163

[4] *Blank, supra* at para 28

[5] *Blank, supra* at para 60

It should be noted there is still debate within the courts as to whether litigation privilege would attach to documents "gathered or copied – but not *created* – for the purpose of litigation".[6] Though recognizing the merit in attaching litigation privilege to such information as being "consistent with the rationale and purpose of litigation privilege"[7], the Court cautioned against the broad strokes noting care must be taken to ensure relevant and material information which would otherwise be properly disclosed in the litigation is not being improperly exempted. Ultimately, this was left for another day without the Court making a definitive statement on whether such documents would be subsumed under litigation privilege or not.

Solicitor-Client Privilege

Over the years, solicitor-client privilege has evolved from a rule of evidence to a substantive rule of law. While the general belief is any communication between a lawyer and his client is privileged, the reality is such a belief is wrong. The legal test for when solicitor-client privilege may be claimed on a document was set out by the Supreme Court of Canada in *Solosky v. The Queen*[8]. Three criteria must be met:

(i) a communication between solicitor and client;
(ii) which entails the seeking or giving of *legal advice*; and
(iii) which is intended to be confidential by the parties.

The transition from a rule of evidence to a rule of law was first stated in *Solosky* and it has subsequently been confirmed by the Supreme Court on multiple occasions, including in *Geffen v. Goodman Estate,* wherein Justice Wilson stated solicitor-client privilege was a "fundamental civil and legal right"[9] and in *Smith v. Jones*, where Justice Cory stated "[it] has long been regarded as fundamentally important to our judicial system" and "now it has evolved into a substantive rule"[10].

Solicitor-client privilege is not absolute, there are exceptions. If the guidance being sought "is to facilitate the commission of a crime or fraud, the communication will not be privileged"[11] irrespective of whether the lawyer has any knowledge of such activities. Between 1999 and 2010 the Supreme Court of Canada has rendered 13 decisions in cases directly involving solicitor-client privilege. A few examples include: In *Smith v. Jones*[12], the Supreme Court recognized a "public safety exception" which would permit disclosure of client communications where a lawyer reasonably believes a clear, serious and imminent threat to public safety exists. In *R. v. Campbell*[13], they reviewed the "criminal-fraud exception" and the doctrine of waiver of privilege in the context of a

[6] *Blank, supra* at para 62
[7] *Blank, supra* at para 62
[8] *Solosky v. The Queen*, [1980] 1 SCR 821
[9] *Geffen v. Goodman Estate,* [1991] 2 S.C.R. 353
[10] *Smith v. Jones,* [1999] 1 S.C.R. 455
[11] *Solosky, supra*
[12] *Smith, supra*
[13] *R. v. Campbell,* 1999 CanLII 676

"reverse sting" operation. In *R. v. McClure*[14] they recognized the "innocence at stake exception" to privilege. This case was particularly notable because, for the first time, the Supreme Court expressly recognized solicitor-client privilege as a principle of fundamental justice under Section 7 of the *Charter of Rights and Freedoms*. In *R. v. Brown*[15] the Court clarified and amplified a number of aspects of *McClure*. The Court held a *McClure* application could seek not only the disclosure of the solicitor-client file, but as well solicitor-client communications through testimony of the solicitor. There is a high barrier for success in such applications.

Ultimately, the Court has categorically stated "the only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions".[16] The "full answer and defence" was created by the Supreme Court in *McClure,* but to date, the exception has never been successfully applied. The "public safety" exception is broader. It requires a "clear, serious and imminent" threat to public safety to override the privilege.

In *AARC Society v. Sparks,*[17] a 2018 decision from the Alberta Court of Appeal, AARC challenged a Master's dismissal of its application to have the Defendant produce its communications on the basis of the "future crimes and fraud exception" to solicitor-client privilege. By way of background, Sparks, a contract computer technician for AARC, was using the passwords of AARC employees to spy on them. She downloaded thousands of records from AARC and then she and her lawyer proceeded to distribute some of the confidential AARC record to the CBC. The Court outlined the law and rationale behind the exception noting:

> …An exception exists when such communications "between a lawyer and a client are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime" or as part of committing a crime. The rule does not apply to these communications, because "the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice".[18] [Citations omitted]

The Court also considered its ability to exercise its jurisdiction under rule 5.11 of the Alberta *Rules of Court* to inspect communications over which solicitor-client privilege has been claimed. It noted:

> Before a court orders the inspection of allegedly privileged communications there must be a sufficiently evidentiary basis to support an inference that may justify the exception to solicitor-client privilege. The applicant must show *prima facie*

[14] *R. v. McClure*, [2001] 1 SCR 445
[15] *R. v. Brown*, 2002 SCC 32
[16] *Smith, supra; Brown, supra;* and *Criminal Lawyers' Assn v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23
[17] *AARC Society v. Sparks*, 2018 ABCA 177
[18] *AARC, supra* at para 2

evidence that those communications were made in furtherance of, or to facilitate, the client's own misconduct.[19]

Ultimately, in this case the Court found there was sufficient evidence and ordered Sparks to turn over records of communication relating to the taking and distributing AARC records for review by a judge of the Court of Queen's Bench.

More practically for insurers, the Courts have also addressed the issue of solicitor-client privilege in the context of insurance. In *General Accident Assurance Co v. Chrusz*[20] the Court addressed the issue of whether communications between an independent adjuster and and insurance company's lawyer were protected. It concluded they are not unless the adjuster serves as a channel of communication between the insurance company and the solicitor and those communications meet the criteria for the existence of privilege. The claim arises from a fire loss. The insurer immediately retained an independent adjuster to investigate the accident. The adjuster reported the fire may have been deliberately set and the insurer retained a lawyer for legal advice relating to the fire and any claim under the policy. The Court noted solicitor-client privilege can extend to communications between a solicitor or client and a third party noting an old English decision, *Bunbury v Bunbury*[21]. Though not a lot of case law exists, what is out there seems to establish two principles:

(i) not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege; and

(ii) where the third party serves as a channel of communications between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by privilege as long as those communications meet the criteria for the existence of the privilege.[22]

The Court concluded the communications between the lawyer and the insurer were protected by solicitor-client privilege, but not the communications between the adjuster and the insurer's lawyer nor the communications between the adjuster and the insurer as the adjuster was retained to perform functions of "investigating and reporting". As the adjuster was simply gathering information from sources extraneous to the insurer and passing it along to the insurer/insurer's lawyer and his retainer did not extend to any function which could be said to be integral to the solicitor-client relationship, it was not protected.

One of the most concerning areas of insurance relate to bad faith claims. Solicitor-client privilege is often claimed over communications between insurers and their counsel. In *Davies v. American Home Assurance Co.*[23] the Court delved into issue. In this case the

[19] *AARC, supra* at para 5
[20] *General Accident Assurance Co v. Chrusz*, 1999 CarswellOnt 2898
[21] *Bunbury v Bunbury* (1839), 48 ER 1146 (Eng Rolls Ct)
[22] *General Accident, supra* at para 106
[23] *Davies v. American Home Assurance Co.*, 2002 CarswellOnt 2225

claim arose from an unfortunate accident in which the insured lost a finger. The insurer investigated and retained counsel, but it did not accept or deny the claim until after litigation was commenced for exemplary and punitive damages for the insurer's failure to comply with its duty of good faith. The insurer then denied the claim on the basis the insured had deliberately cut off his finger. The issue relating to privilege was whether the insurer was required to produce all legal opinions prepared by counsel in relation to the insured between the accident and the date the claim was denied. The Court denied the request and confirmed the mere assertion of a bad faith claim against an insurer was insufficient to destroy the solicitor-client privilege attaching to communications of legal opinions from the insurer's counsel to the insurer.

It should be noted, however, the solicitor-client privilege between an insurer and its counsel must still meet the test for privilege. In *Intact Insurance Company v. 1367229 Ontario Inc.*[24], a broad claim for solicitor-client privilege was specifically rejected. The Court stated:

> The basic principles that govern lawyer/client privilege are commonly known. The party seeking the privilege has the onus of showing on a balance of probabilities an evidentiary basis for the privilege. **It is well known that privilege does not attach to all communications or documents that pass between a lawyer and their client.** The privilege attaches only when legal advice is sought from or provided by the client's lawyer.[25] [Citations omitted] [Emphasis added]

In effect, merely because counsel is retained at the outset of a claim does not mean all communications between counsel and the insurer will be covered by solicitor-client privilege. Content of the communications is critical. Opinions and advice respecting the matter will likely be privileged, but a general exchange of information may not be if the test is not met. However, this does not necessary preclude the protection of litigation privilege providing the proper test is met as will be discussed below.

Litigation Privilege

As noted above, litigation privilege is not restricted to communications between a solicitor and client. It contemplates communication between a solicitor and third parties with the objective of protecting the adversarial process and allowing each party involved in litigation to be left to properly prepare their positions without interference or fear of premature disclosure.

The Court in *Keefer Laundry Ltd. v. Pellerin Milnor Corp*[26] was asked to consider whether litigation privilege applied to the conclusions/opinions in the expert's reports when the experts inspected the equipment at the same time without evidence any observations made were kept secret from each other. The Court held the Defendant in this case had failed to demonstrate it had litigation privilege over the documents, but it gave an

[24] *Intact Insurance Company v. 1367229 Ontario Inc.*, 2012 CarswellOnt 11874
[25] *Intact Insurance, supra* at para 14
[26] *Keefer Laundry Ltd. v. Pellerin Milnor Corp*, 2006 BCSC 1180

extension to file further evidence to establish litigation privilege. In respect of the application of litigation privilege to reports generally, the Court stated:

> Reports from third parties are privileged if they are produced for the dominant purpose of furthering contemplated litigation. The Courts will examine the true nature of the relationship of the third party to the litigation and the services rendered before recognizing privilege in third party communications.[27] [Citations omitted]

Litigation privilege is not a blanket coverage. Each document must be looked at specifically to determine:

1. that the litigation was ongoing or was reasonably contemplated at the time the document was created; and

2. that the dominant purpose of creating the document was to prepare for that litigation.[28]

The Court continued noting:

> To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of fit. Care must be taken to limit the extent of the information that is revealed in the process of establishing "dominant purpose" to avoid accidental or implied waiver of the privilege that is being claimed.[29]

Interestingly, in Alberta, the test is a one-part test, not a two part test originally set out in *Opron Construction Co.*[30] and reiterated by the Court by Master Funduk in *Stobbe v. Westfair Foods Ltd.*[31]: "The test is intent of the author or his superiors when he created the document."[32]

Lawyer's brief privilege is in respect of the lawyer's file itself. It is intended to protect the lawyer's work product "including any notes and information or reports collected to prepare for litigation or give legal advice. If a group of unprivileged documents is collected the collection itself becomes privileged."[33] This does not mean the litigation privilege will necessarily attached to the lawyer's file *holus bolus*, "there must be an

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[27] *Keefer Laundry, supra* at para 94
[28] *Keefer Laundry, supra* at para 96
[29] *Keefer Laundry, supra* at para 98
[30] *Opron Construction Co.* (1989), 100 A.R. 58 (Alta. C.A.)
[31] *Stobbe v. Westfair Foods Ltd.*, 1998 ABQB 267
[32] *Stobbe, supra* at para 16
[33] *Keefer Laundry, supra* at para 103

exercise of the lawyer's skill and judgment in assembling the allegedly privileged information."[34]

What does this mean in the context of insurance?

It is common for insurers to retain independent adjusters to act on their behalf to investigate claims. Unfortunately, not every report or document supplied by the adjuster will be determined to be privileged. Each document must be reviewed and analyzed on its own to determine what the dominant purpose was for its creation. If documents were created or collected solely for the purpose of quantifying a claim, the communications or documents may not be covered by litigation privilege.[35] It also follows, as noted above, even if counsel has been retained, it does not automatically mean the documents are privileged. The test being applied is the dominant purpose test and for the documents to be covered by litigation privilege or as part of the lawyer's brief, the test must be met.

Discussed above was solicitor-client privilege in bad faith claims. Similarly, litigation privilege can also trump bad faith claims, providing the dominant purpose test is met. For example, in *Kavanagh v. Peel Mutual Insurance Co*[36] the Court was asked to consider the allegation of bad faith and whether privileged documents should be disclosed. Before turning to the analysis of whether the dominant purpose behind the creation of the documents was investigation and claims determination or anticipated litigation, the Court cited the decision of *Davies, supra*: "litigation privilege, when properly asserted, trumps relevance in almost all circumstances…"[37] The Court concluded because of the insurer's obligation to investigate and adjust claims in good faith, there is no reality to the litigation during the initial meeting between the insured and the adjuster. However, as soon as the report setting out the concerns of the policy breach and the details giving rise to such suspicion, "the reality of litigation crystallized"[38] and the report and all subsequent reports and communications were subject to litigation privilege.

Accident and investigative reports are also documents over which litigation privilege is maintained. However, as with all documents pertaining to claims, it must meet the dominant purpose test. In *Garnett v. Lockhart*[39] the reports in question related to witness statements taken by the Defendant manager following an incident and the resulting report on the incident itself. The Defendant manager considered them to be "one of the internal incident reports we have on stuff like this"[40]. The reports were required for security purposes and typically kept for a week and destroyed. Due to an early demand by Plaintiff counsel, the report was kept and subsequently provided to counsel. The Court concluded the report was not part of "lawyer's work product" and did not give rise to

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[34] *Keefer Laundry, supra* at para 105
[35] See *Sathiyapalan v. Citadel General Assurance Co*, 2004 CarswellOnt 278; upheld on appeal in 2004 CarswellOnt 9972
[36] *Kavanagh v. Peel Mutual Insurance Co*, 2010 ONSC 4653
[37] *Kavanagh, supra* at para 23
[38] *Kavanagh, supra* at para 24
[39] *Garnett v. Lockhart*, 2001 CarswellNB 90
[40] *Garnett, supra* at para 4

litigation privilege. Typically, incident reports taken in the normal course of business are not privileged as they are not created for the dominant purpose of litigation.

Similarly, in *Panetta v. Retrocom Mid-Market Real Estate Investment Trust*[41] the issue related to privilege claims over investigative notes and reports. In this case it was a slip and fall in the parking lot of a Wal-Mart. The adjuster sent a letter to the Plaintiff seeking details of the incident and the Defendants subsequently took the position this letter marked the beginning of litigation privilege as it was "notice of an intended claim". The Plaintiff disagreed arguing notice of loss or injury is different than notice of litigation. The Court actually found in favour of privileging the adjusters reports on the basis from the moment the Plaintiff fell and was injured, she was in an adversarial position. The Court stated:

> I think that, in third-party or tort claims (as opposed to claims by an insured against his or her own insurer), there is no preliminary investigative phase where privilege does not attach to notes, reports and files of adjusters. In third-party insurance claims, the sole reason for any investigation by or on behalf of an insurer is because of the prospect of litigation. It is naïve to think otherwise; and the fact that the investigation may be used to arrive at a pre-lawsuit settlement does not detract from the point that I make. The prospect of litigation inherently includes the prospect of settlement.
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> I agree with the submissions of Wahlman that there is no purpose for the creation of documents by an insurer in a tort context other than: (1) for anticipated litigation; (2) for setting reserves; or (3) for seeking legal advice. For completeness, I would add, as a corollary to (1): for the purpose of settlement, which I see as inextricably entwined with "anticipated litigation".[42]

It is important to note the distinction between the records deemed producible in the *Garnett* case versus the records in the *Panetta* case. The first pertain to documents created by the insured in the normal course of business to record an incident had occurred. In the latter case, the documents were created by the insurer to investigate a claim being advanced. It is a critical distinction when determining the dominant purpose for the creation of the record.

Two cases out of Saskatchewan, *Ghebreeskel v. Westfair Foods Ltd.*[43] and *Cochrane v. Loblaw Properties West Inc.,*[44] further confirm the principle in *Garnett*. Both cases involve slip and fall incidents with the Plaintiffs seeking documents prepared by store employees relating to the incidents. In both cases the Defendants refused production of same on the basis of litigation privilege; however, the Court granted the applications for disclosure. After applying the dominant purpose test, the Court concluded the documents were not created for litigation purposes, rather as store policy and informing the grocery store of the circumstance of the accident. In *Cochrane* the Court stated "…it could be said that

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[41] *Panetta v. Retrocom Mid-Market Real Estate Investment Trust*, 2013 ONSC 2386
[42] *Panetta, supra* at paras 61-62
[43] *Ghebreeskel v. Westfair Foods Ltd.*, 2006 CarswellSask 116
[44] *Cochrane v. Loblaw Properties West Inc.*, 2006 CarswellSask 54

there was no one dominant purpose, and the evidence purporting to indicate reasonable prospect of litigation was simply the Defendant's experience in industry practice."[45]

In Alberta, such reports appear to be treated differently. *Mowat v. Canada Safeway Ltd.*[46] is an action arising from a slip and fall incident in a grocery store. As in the other cases, following the incident a store employee created an accident report over which the Defendant claimed privilege. The Plaintiff brought an application for disclosure. The application was dismissed. The Court held though litigation had not been threatened at the time the document was created nor had it been requested by counsel, it was protected because in businesses where the public regularly attends, occupier's liability is a fact of business.[47] Notwithstanding it was store policy to prepare an accident report, the Court held the purpose of the report was to give to counsel if litigation occurs.[48] This conclusion was reached again in *Stobbe*. Interestingly, this case was considered in *Cochrane, supra* and rejected. It would appear, the one-part test as enunciated by the Court of Appeal and the conclusion such incident reports are protected by litigation privilege are unique to Alberta. Whether such an approach would hold up under the scrutiny of the Supreme Court of Canada is uncertain and caution should prevail when asserting privilege over incident reports created at the time an incident occurred.

As well in insurance claims, we often see issues arising with surveillance. Such evidence is also a common record over which litigation privilege is claimed and such claims have been upheld as being created for the dominant purpose of litigation. However, as a cautionary warning, be careful how you make use of the surveillance.

In *Thorpe v. Insurance Corp of British Columbia*[49] the action involved a claim on policy for accident benefits following an accident. The Plaintiff attended an independent medical examination following which the doctor concluded the Plaintiff continued to be totally disabled from work. The Defendant then forwarded a copy of the surveillance video to the doctor which depicted the Plaintiff completing normal work tasks resulting in a second report in which the doctor concluded the Plaintiff was capable of performing moderate labouring tasks. As a result of being classified as only partially disabled, the benefits were cut off. The Plaintiff applied to have the video surveillance referenced by the doctor produced. The Court concluded though it may not have been the Defendant's intent to waive privilege, because the insurer relied on the videotape to the insured's detriment, fairness and consistency required it to be disclosed.

Conversely, in *Do v. Esmaili*[50] the insurer had obtained video surveillance of the Plaintiff subsequent to Examinations for Discovery. When Examinations were reconvened later, activities of the Plaintiff captured in the surveillance were put to the Plaintiff which he denied. At subsequent Examinations, the Plaintiff admitted he had not been truthful to

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[45] *Cochrane, supra* at para 28
[46] *Mowat v. Canada Safeway Ltd., 1991 CarswellAlta 762*
[47] *Mowat, supra* at para 4
[48] *Mowat, supra* at para 5
[49] *Thorpe v. Insurance Corp of British Columbia*, 2001 BCSC 1086
[50] *Do v. Esmaili*, 2002 BCSC 245

his medical consultants nor at prior Examinations about his activities. The Plaintiff then sought discovery of the surveillance over which the Defendant asserted lawyer's brief privilege. The Court dismissed the application stating, "it would be inconsistent, and illogical, to hold that the immunity is secure in document discovery but not secure in oral discovery."[51]

In effect, surveillance can be used to impeach the credibility of a witness without losing the protection of privilege, but if it is released to a third party for use adverse to the Plaintiff's position, in the interest of fairness, any privilege which would otherwise attach is waived.

In *Lizotte v. Aviva Insurance Company of Canada*[52] the issue in dispute was whether the Quebec insurance regulator could compel production of Aviva's entire claim file for an insured as part of an inquiry into an adjuster even where Aviva claimed litigation privilege over a portion of the file. The legislation required insurers to forward "any required document" to the regulator on request. Aviva refused to produce all portions of the file over which litigation privilege was claimed. The Supreme Court dismissed the regulator's application on the basis litigation privilege cannot be abrogated absent clear, express statutory provision. The Court stated:

> There are two types of privileges in our law: class privileges and case-by-case privileges. A class privilege entails a presumption of non-disclosure once the conditions for this application are met. …
>
> In my opinion, litigation privilege is a class privilege. Once the conditions for its application are met, that is, once there is a document created for "the dominant purpose of litigation" and the litigation in question or related litigation is pending "or may reasonably be apprehended", there is a "*prima facie* presumption of inadmissibility" in the sense intended by Lamer, C.J. in *R. v. Gruenke*.[53] [Citations omitted]

The Court further held litigation privilege is subject to clearly defined exceptions and not to a case-by-case balancing exercise and can be asserted against third parties, including investigators or regulators who have a duty of confidentiality.

On a final note, there is an additional class of privilege known as settlement privilege. This privilege is often marked with the words "Without Prejudice", but it is not the words which triggers the privilege, rather the content of the communication. For settlement privilege to attach to communications, it must be in furtherance of an attempt to settle a dispute.

The leading authority on settlement privilege is *Sable Offshore Energy Inc. v. Ameron International Corp.*[54] In this case the Court was dealing with the request to disclose settlement amounts in a Pierringer Agreement. Ultimately, the Court stated:

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[51] *Do, supra* at para 16
[52] *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52
[53] *Lizotte, supra* at paras 32-33
[54] *Sable Offshore Energy Inc. v. Ameron International Corp*, 2013 SCC 37

> Settlement privilege protects the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible. The protection is for settlement negotiations, whether or not a settlement is reached….
>
> As with other class privileges, there are exceptions. To come within those exceptions, a defendant must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement.[55] [Citations omitted]

In *Union Carbide Canada Inc. v. Bombardier Inc.*[56] the parties had participated in a private mediation to resolve a matter after signing a standard mediation agreement with the standard confidentiality clause: "Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding." During the mediation, the Defendant accepted the offer a day following the mediation, but there was a disagreement over the terms of the Release. The Defendant never sent the funds and the Plaintiff brought an application for homologation of transaction. The Defendant brought a motion to strike on the basis the allegations referred to events taking place during the mediation process. The Court held while the mediation agreement showed on its face a common intention on the part of the parties to be bound by confidentially in respect of anything that might transpire in the course of the mediation, it stated "the parties did not renounce the common law rule, which also applies in Quebec, that communications made in the course of negotiations can be used to prove the terms of a settlement".[57]

Some of the exceptions to settlement privilege were set out by the Alberta Court of Appeal in *Belletrix Exploration Ltd. v. Penn West Petroleum Ltd.*[58]:

a) to prevent double recovery: *Dos Santos (Committee of) v. Sun Life Assurance Co of Canada*;
b) where the communications are unlawful, containing for example, threats or fraud;
c) to prove a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement: Comrie v. Comrie,;
d) it is possible the settlement posture of the parties can be relevant to costs. That is clearly the case with offers made under the *Rules of Court*, but also with respect to informal offers: *Mahe v. Boulianne*; *Calderbank v. Calderbank*.[59] [Citations omitted]

Absent coming within one of these exceptions, the Court will typically follow the common law rule in favour of protecting settlement privilege.

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[55] *Sable Offshore, supra* at paras 17 and 19. See also: *Trombley v. Pannu*, 2016 BCCA 324; *Hansraj v. Ao*, 2004 ABCA 22; *Singh v. PCPO*, 2018 ONSC 203
[56] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35
[57] *Union Carbide, supra* at para 68
[58] *Belletrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10
[59] *Belletrix, supra* at para 29

Ultimately, the onus of proving privilege lies on the party making the assertion.[60] Jurisdictional differences for disclosure procedures in the *Rules of Court* of the various jurisdictions can also lead to differences when privilege is applied. The takeaway is privilege is not absolute, but once the assertion of privilege has been made and providing the respective tests have been met, the Courts are loathe to abrogate absent clear violations or the communications falling within the clearly defined exceptions.

Privilege is a privilege, not always a right, so understanding it and applying that knowledge can be critical when handling claims.

[60] See: *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1996), 39 Alta LR (3d) 141 (Alta CA); and *Hamalainen (Committee of) v. Sippola* (1991), 62 BCLR (2d) 254 (BCCA)