

# Privilege in Cross-Border Litigation

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## INTRODUCTION

From the perspective of business and culture, we have created a world of disappearing borders. International trade and communication and other cross-border activities have become the norm rather than the exception. Global markets and multi-jurisdictional transactions have provided us with a multitude of opportunities and advantages. It is no surprise, however, that this shift to borderless business has also resulted in an increase in disputes that span multiple jurisdictions. Cross-border litigation has become an especially hot topic with respect to products liability, competition, intellectual property and class action matters, yet it can arise from any transaction or pursuit having an international component.<sup>1</sup>

From a legal perspective, the borders that define our nations still matter. Those borders tend to reinforce our nations' distinct approaches to law, particularly with respect to procedural rules and customs. Whereas cross-border activity has drastically increased and will likely continue to do so, rules of procedure have not adapted. They remain largely local. This divergence between legal practices and the new realities of business has raised a variety of practical concerns about the litigation and discovery processes. Privilege, an exception to the rules of discovery, is a key source of uncertainty and unpredictability for litigants in foreign forums.

Differing approaches to rules of privilege can have serious implications for the rights and obligations of cross-border litigants. In an increasingly common scenario, litigants may be caught between multiple related lawsuits brought in multiple jurisdictions. They may be required to disclose information in one jurisdiction that is protected by privilege in another. By doing so, they may risk losing the privilege in the jurisdiction where it would otherwise attach. In another scenario, a litigant may discover that certain communications are not protected by privilege and be compelled to produce them, even though the litigant had a legitimate expectation of confidentiality based on local law.

This paper begins with an overview of some notable efforts to harmonize rules of privilege and procedure and to create predictability where conflicts arise in cross-border litigation. Despite these efforts, it seems

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<sup>1</sup> Donalee Moulton, "Cross-border litigation on the upswing" (2009) 28 *The Lawyers Weekly* 35, online: <[www.lawyersweekly.ca](http://www.lawyersweekly.ca)>.

that for the foreseeable future conflicting rules of privilege will continue to create headaches for litigants. Lawyers and their clients can nonetheless prepare themselves for the uncertainties that they will face in foreign forums. This paper considers privilege from a comparative perspective, focusing on some aspects of privilege where differences tend often to arise. It considers differences in privilege rules between Canada and the United States primarily, but also touches on issues that have developed in the United Kingdom and the European Community. Although the rules of privilege seem difficult to reconcile, the first step towards avoiding potential pitfalls is for lawyers and litigants to develop an awareness of the differences that can arise.

## UNCERTAINTY IN THE FORUM

Differences in rules of privilege can cause headaches for the courts as well as for litigants. Courts must consider whether and to what extent they should give credence to privilege rules of other jurisdictions (especially if there is previous, concurrent or pending litigation there), or whether they should refer exclusively to their own rules. Litigants would probably find it beneficial if courts adopted comity-driven choice of law rules respecting privilege. For example, under federal common law in the United States, the court will treat a question of privilege as governed by the law of the jurisdiction in which the communication was made, provided that jurisdiction has the most direct and compelling interest in the question and that its law is not contrary to the public policy of the forum.<sup>2</sup>

However, courts show inconsistent concern for comity. Even in jurisdictions that purport to care about it, local interests and familiarity with local law frequently take priority over a court's consideration of the laws of other jurisdictions. In particular, if the law of a foreign jurisdiction is unclear, a court will be more inclined to apply its own privilege law to the communication.<sup>3</sup> Similarly, if the communication has any connection at all with the forum, the court may opt to apply its own privilege law.<sup>4</sup> The practical effect is that litigants should not expect to have the benefit of privilege laws from their own jurisdiction when engaged in litigation abroad.

To compound the problem, although privilege is generally understood as a rule of evidence and a procedural right, characterizations of privilege vary. In Canada, for example, the privilege attaching to lawyer-client communications has evolved from a rule of evidence to a substantive right and a principle of fundamental justice.<sup>5</sup> The way in which privilege is conceptualized also varies. Many civil law jurisdictions do not view privilege as a right of the client like in common law jurisdictions. Rather, communications are protected by secrecy laws that require lawyers to maintain confidentiality over communications with their clients. The limited scope of discovery in civil law jurisdictions helps to preserve this confidentiality. These differing understandings of privilege have contributed to unwillingness by courts to apply foreign privilege rules in their own cases.

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<sup>2</sup> *Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992).

<sup>3</sup> Robert G. Morvillo and Robert J. Anello, "Attorney-Client Privilege in International Investigations" *New York Law Journal* (7 August 2008), online: <<http://www.law.com>>.

<sup>4</sup> Vincent S. Walkowiak, ed., *The Attorney-Client Privilege in Civil Litigation*, 4th ed. (Chicago: American Bar Association, 2008) at 607.

<sup>5</sup> *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875 and *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 383.

## **EFFORTS TO STANDARDIZE RULES OF PRIVILEGE AND PROCEDURE**

Regardless of jurisdiction, the underlying objectives of legal privileges are similar. Lawyer-client privileges are designed to promote honest and open communication between legal professionals and their clients by ensuring that those communications remain confidential. Attorney work product privilege, or litigation privilege as it is known in Canada, is designed to protect the confidentiality of a broader range of work prepared specifically in contemplation of litigation. Clients must be confident that their discussions with their lawyers will remain confidential, and that work prepared for litigation will not be obtained as evidence through discovery.

In these respects, we share a common understanding that privilege is an integral part of our legal systems and an appreciation of its importance to ensuring a fair adversarial process insofar as discovery obligations are engaged.

With few exceptions, we also share a common understanding that privilege rules are matters of evidence and procedure, not substantive law. This is unfortunate since most international efforts at standardization have focused on issues of substantive law rather than on rules of procedure,<sup>6</sup> despite the potentially serious consequences of conflicting procedural rules. However, there have been some attempts to standardize procedure, or at least to establish which laws take precedence when procedural differences arise. In general, international efforts to harmonize procedure have focused on issues such as personal jurisdiction, service of process and the recognition and enforcement of foreign judgments.<sup>7</sup>

Two notable efforts to standardize procedural rules do, however, touch on privilege. One is the *Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters* (the “*Hague Evidence Convention*”).<sup>8</sup> The second is the *Principles and Rules of Transnational Civil Procedure* (the “*Transnational Principles and Rules*”). Each is intended to be applied specifically in the context of international dispute resolution, with a view to increasing predictability, and to placing litigants on an equal footing in unfamiliar forums.<sup>9</sup>

### **Hague Evidence Convention**

The *Hague Evidence Convention* came into force in 1972. The *Convention* currently has just shy of 50 signatories; among those are the United States, the United Kingdom and many European countries. Canada is not a signatory. Countries implement the *Convention* by incorporating its rules of procedure into domestic laws.

The *Hague Evidence Convention* provides that evidence may be obtained from a foreign signatory state by sending a letter of request to the competent authority of that state. This procedure obviates the need to gather information through diplomatic or other cumbersome channels. The *Hague Evidence Convention*

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<sup>6</sup> Mary Kay Kane "Globalization and Cross-Border Litigation" (2001) 1:1 Global Jurist Topics 2, online: <<http://www.bepress.com/gj/topics/vol1/iss1/art2>>.

<sup>7</sup> American Law Institute and UNIDROIT, "Introduction: Principles and Rules of Transnational Civil Procedure Discussion Draft No. 2" (2001), online: <[http://www.ali.org/ali\\_old/ProjectsOnline\\_Introduction.htm](http://www.ali.org/ali_old/ProjectsOnline_Introduction.htm)>.

<sup>8</sup> 18 March 1970, 847 U.N.T.S. 231.

<sup>9</sup> Kane, *supra* note 6.

also provides rules regarding conflicting claims of privilege. Articles 11 and 21 provide that a person may refuse to give evidence once it has been requested if there is a privilege or like duty in respect of that evidence:

*Article 11*

*In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –*

*a) under the law of the State of execution; or*

*b) under the law of the State of origin, and the privilege or duty has been specified in the Letter; or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.*

*A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.*

...

*Article 21*

*Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence –*

...

*e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.*

Articles 11 and 21 offer a litigant the benefit of both local and foreign privilege law. *Renfield Corp. v. E. Remy Martin & Co.*<sup>10</sup> provides a good example of this. In that case, a United States court held that communications of in-house counsel in France were entitled to the protection of attorney-client privilege, despite the fact that French law does not recognize this privilege.

In practice, the *Hague Evidence Convention* has limited application with respect to privilege. Litigants in the United States tend to use local procedural and common law rules on discovery, privilege and evidence to gather information from abroad. Many countries are not signatories to the *Convention* (although its principles can be and often are applied by signatory states to assess requests made by non-signatory states through diplomatic or like channels). Also, the *Hague Evidence Convention* does not address the root of the cross-border privilege problem, which lies in the fundamentally different approaches to privilege taken in different jurisdictions.

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<sup>10</sup> 98 F.R.D. 442 (D. Del. 1982).

## Transnational Principles and Rules

In 1999, the American Law Institute and the International Institute for the Unification of Private Law (“UNIDROIT”), based in Rome, formed a working group. Its goal was to develop a draft set of uniform principles and rules for use in international commercial litigation: the *Transnational Principles and Rules*.<sup>11</sup> The working group intended these to apply when a plaintiff and defendant are residents of different jurisdictions and their dispute is not confined to one jurisdiction. The rules component was meant to be implemented in each jurisdiction by way of statute, to supersede inconsistent local law and to be supplemented by local law if that law was consistent with the rules.<sup>12</sup>

The working group released a draft of the *Transnational Principles and Rules* in 2000 and a revised version in 2001. In 2004, it released a final version of the project,<sup>13</sup> which consisted only of the principles component, and excluded the rules.

The *Transnational Principles and Rules* were intended in part to address the problem of cross-border privilege. The working group’s objective was to “harmonize the concept of privilege and create an amalgam of both the civil and common law traditions by casting the privilege net widely”.<sup>14</sup> Rules 24 to 24.4 of the 2000 draft rules addressed evidentiary privileges. Rule 24 protected information “covered by”

- legal professional privileges;
- settlement communications between counsel; and
- national defence and security.

Rule 24.2 provided that a court should recognize other forms of privilege, if a communication was privileged under the law of the place with the “most significant relationship to the parties to the communication”. By its wording, this rule provided the opportunity for the court to recognize a foreign privilege. However, the rule also gave the court discretion to refuse to recognize a privilege if it determined that the need for the evidence in the pursuit of truth was of greater significance than the need to maintain its confidentiality.

Rules 27 to 27.4 of the revised 2001 rules altered the approach to evidentiary privileges. Whereas the types of information to be protected remained the same, rule 27.2 stated that information could not be compelled if covered by other privileges under “applicable law”. This change removed the explicitly comity-driven choice of law approach seen in the 2000 draft, which approach had specifically asked which jurisdiction had the most significant relationship to the parties to the communication.

Section 18 of the working group’s final product, released in 2004, states as follows:

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<sup>11</sup> American Law Institute and UNIDROIT, “Principles and Rules of Transnational Civil Procedure Discussion Draft No. 2” (2001), online: <[http://www.ali.org/ali\\_old/transrules.htm](http://www.ali.org/ali_old/transrules.htm)>. The project was originally entitled the “Transnational Rules of Civil Procedure”: see American Law Institute and UNIDROIT, “Preliminary Draft of Transnational Rules of Civil Procedure” (2000), online: <<http://www.unidroit.org/english/documents/2000/study76/s-76-02-e.pdf>>.

<sup>12</sup> American Law Institute and UNIDROIT, “Rules with Commentary: Principles and Rules of Transnational Civil Procedure Discussion Draft No. 2” (2001), online: <[http://www.ali.org/ali\\_old/ProjectsOnline\\_RulesCommentary.htm](http://www.ali.org/ali_old/ProjectsOnline_RulesCommentary.htm)>.

<sup>13</sup> American Law Institute and UNIDROIT, “Principles of Transnational Civil Procedure” (2004), online: <<http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>>.

<sup>14</sup> Javier H. Rubinstein and Britton B. Guerrina, “The Attorney-Client Privilege and International Arbitration” (2001) 18:6 *Journal of International Arbitration* 587 at 600.

*18. Evidentiary Privileges and Immunities*

*18.1 Effect should be given to privileges, immunities, and similar protections of a party or nonparty concerning disclosure of evidence or other information.*

*18.2 The court should consider whether these protections may justify a party's failure to disclose evidence or other information when deciding whether to draw adverse inferences or to impose other indirect sanctions.*

*18.3 The court should recognize these protections when exercising authority to impose direct sanctions on a party or nonparty to compel disclosure of evidence or other information.*

Section 18 lacks a clear and predictable procedure for a court faced with conflicting rules of privilege emanating from different jurisdictions. It is unclear whether and, if so, when the court should apply foreign privilege rules.

The working group's changes since the first draft illustrate the difficulties faced in constructing a methodology that would work across jurisdictions. The result was a retreat to more vague and elastic principles.

Although the working group's efforts represent a laudable first step towards achieving standardization and predictability with respect to privilege in cross-border litigation, they have not, for now, yielded a practical solution. Further, it is unlikely that any international consensus on rules of privilege will be achieved in the near future. In the meantime, we must familiarize ourselves with the differences across jurisdictions.

## **COMMUNICATIONS BETWEEN LAWYER AND CLIENT**

The privilege that covers communications between lawyer and client goes by many names. In the United States it is known as the attorney-client privilege; in Canada it is the solicitor-client privilege; in the United Kingdom it is legal advice privilege; and in the European Community it is legal professional privilege. Regardless of its name, this form of privilege protects the confidentiality of communications exchanged between lawyer and client in connection with the provision of legal advice. In many jurisdictions this privilege is considered necessary for fairness in the adversarial process and crucial to maintenance of the rule of law.

In Canada, there are three requirements for solicitor-client privilege:

- a communication must be made between a lawyer and a client;
- which entails the seeking or giving of legal advice; and
- which is intended to be confidential by the parties.<sup>15</sup>

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<sup>15</sup> *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 835. See also *Descôteaux et al. v. Mierzwinski*, *supra* note 5 at 872-873.

The privilege also attaches to materials that are “directly related to the seeking, formulating or giving of legal advice or legal assistance”.<sup>16</sup> The privilege applies regardless of whether litigation is ongoing or contemplated.<sup>17</sup> The Supreme Court of Canada has repeatedly recognized the importance of the privilege, declaring it “a principle of fundamental justice and civil right of supreme importance in Canadian law”.<sup>18</sup> It has further stated as follows:

*Solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.*<sup>19</sup>

In the United States, attorney-client privilege similarly attaches to communications made in confidence between client and counsel, for the purpose of obtaining or rendering legal advice.<sup>20</sup>

In both Canada and the United States, the privilege is permanent. It outlasts the lawyer-client relationship, and even extends beyond the death or dissolution of the client.

While this privilege is understood similarly across common law jurisdictions, the extent of the privilege can vary. Differences in the scope of the privilege can jeopardize a party’s expectations of confidentiality. Some relatively major differences are as follows:

- who constitutes the client in respect of whom the privilege applies;
- whether communications with in-house counsel are protected;
- whether communications with lawyers from other jurisdictions are protected; and
- when the privilege is deemed to be waived.

Although this list is by no means exhaustive of the differences in lawyer-client privileges across jurisdictions, each is worthy of consideration by cross-border litigants. Some of these differences are discussed below.

### **Scope of the privilege**

Not all communications exchanged between lawyers and clients are protected by privilege. In the United States, the privilege attaches to communications but not to the facts underlying those communications.<sup>21</sup> Documents which hold factual information are usually not privileged. This includes factual information concerning the relationship between attorney and client. Attorney-client privilege also does not extend to facts that the attorney comes across in the course of his or her work, even if they are communicated in confidence between attorney and client.

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<sup>16</sup> *Susan Hosiery Ltd. v. Canada*, [1969] 2 Ex. C.R. 27 at 33.

<sup>17</sup> *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.

<sup>18</sup> *Lavallee, Rackel & Heintz v. Canada*, [2002] 3 S.C.R. 20 at para. 36.

<sup>19</sup> *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 35.

<sup>20</sup> Christopher Scott D'Angelo, “The scope and use of the attorney-client privilege in the U.S. and its applicability to communications at home and abroad” (2006) *Defence Counsel Journal* at 1, online: <<http://www.allbusiness.com/legal/4093726-1.html>>.

<sup>21</sup> David M. Brodsky, “Updates on the corporate attorney-client privilege” (2007) 8 *Sedona Conference Journal* 89 at 90.

In Canada, the privilege is broader. While facts that exist independent of a lawyer-client communication are not privileged,<sup>22</sup> as in the United States, the leading Canadian commentator urges against drawing too fine a distinction between fact and communication “lest the privilege be seriously emasculated”.<sup>23</sup> Canadian courts have readily heeded that advice. Further, most factual information concerning the lawyer-client relationship – e.g., fee arrangements<sup>24</sup> – will be treated as privileged.

The exceptions to the lawyer-client privilege also differ from one jurisdiction to another. The variety of exceptions may catch unsuspecting litigants by surprise. For lawyers who have clients from foreign jurisdictions, it may be an unpleasant task to explain to their clients why their lawyer-client communications cannot be absolutely confidential.

In Canada, there are three main public policy exceptions to solicitor-client privilege: (1) where a communication has been created for an unlawful purpose, (2) where innocence is at stake in a criminal trial and (3) where disclosure is in the interests of public safety.

In the United States, there are exceptions similar to the first and third Canadian exceptions. In addition, there is, for example, a “fiduciary” exception, which precludes fiduciaries who obtain legal advice in the execution of their fiduciary obligations from asserting the attorney-client privilege against their beneficiaries.<sup>25</sup>

Many countries have established anti-terrorism legislation that requires lawyers to disclose otherwise privileged information about their clients under specific circumstances. For example, after the events of September 11, 2001, the Canadian government passed legislation to counteract money laundering and terrorist financing. The law required lawyers to report all suspicious transactions and all transactions over \$10,000 to the government. This raised serious concerns among lawyers’ professional regulatory bodies about the effect of this legislation on the rights of clients to confidentiality, as well as on the independence of the legal profession. The courts eventually enjoined the government from requiring lawyers to report.<sup>26</sup> However, the injunction is interim in nature, and this issue of reporting is far from settled.

### **Identifying the Client**

The problem of client identification generally arises in the context of a relationship between a lawyer and a corporate client. Some jurisdictions view communications with only a discrete group of officers or directors as attracting the lawyer-client privilege, while other jurisdictions have extended the privilege to communications with any employee of the company. There is also a question of whether the privilege attaches to communications with subsidiaries and former employees of the corporate client.

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<sup>22</sup> See, e.g., *Dusik v. Newton* (1983), 1 D.L.R. (4th) 568 (B.C.C.A.).

<sup>23</sup> John Sopinka et al., *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 734.

<sup>24</sup> *Hayes v. New Brunswick (Minister of Justice)*, 2008 NBQB 112.

<sup>25</sup> *Wachtel v. Health Net*, 482 F.3d 225 (3d Cir. 2007).

<sup>26</sup> Janice Mucalov, “Self-Governance – Walking the Tightrope”, Canadian Bar Association, online: <<http://www.cba.org/CBA/national/oct04/cover.aspx>>.

Canadian courts have had few reservations about affording a broad protection to communications between lawyers and their corporate clients' employees. This is unsurprising, given the importance attributed to the lawyer-client privilege. Courts have extended protection to confidential communications between lawyers and company employees, regardless of the employees' position in the corporate hierarchy.<sup>27</sup> The courts have also extended the privilege to employees of subsidiary companies.<sup>28</sup>

United States courts have also taken a fairly liberal approach to identifying the client. In *Upjohn v. United States*,<sup>29</sup> the Supreme Court of the United States considered which employees, having communicated with their corporate employer's attorney, were entitled to privilege in respect of their communications. The Supreme Court held that even low-level employees should have the benefit of confidential communications with their employer's legal counsel. In rejecting the suggestion that only the communications of a narrow class of employees could attract privilege, the court stated this:

*Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice.*<sup>30</sup>

In sharp contrast, courts in the United Kingdom have narrowly identified the client. This restriction is the result of the decision in *Three Rivers District Council v. The Governor and Company of the Bank of England, No. 5*.<sup>31</sup> In that case, the Court of Appeal held that bank employees who were not part of a small group who corresponded regularly with the bank's external lawyers were not the client *vis-à-vis* those lawyers. They were instead third parties. Thus far, the House of Lords has specifically declined to rule on the correctness of the Court of Appeal's approach.<sup>32</sup>

### **Communications with In-House Counsel**

Communications with in-house counsel also pose privilege-related problems for companies engaged in cross-border business. There is a general divide between common law jurisdictions and civil law jurisdictions on the question of whether privilege attaches to communications with in-house counsel. Common law jurisdictions, including Canada, the United States and the United Kingdom, apply the same rules of privilege to lawyer-client relationships irrespective of whether the lawyer is in private practice or works in-house. The perspective of many common law jurisdictions was well captured Lord Denning, who made the following observation about in-house counsel:

*They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only,*

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<sup>27</sup> Sopinka *et al.*, *supra* note 23 at 744.

<sup>28</sup> Gilles Letourneau, "The status and content of solicitor-client privilege in Canada: questions still unanswered," (2007) 8 Sedona Conference Journal 113 at 121-122. See also *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)* (1988), 28 C.P.C. (2d) 101 (Ont. H.C.J.).

<sup>29</sup> 449 U.S. 383 (1981).

<sup>30</sup> *Id.* at 390.

<sup>31</sup> [2003] EWCA Civ 474.

<sup>32</sup> [2004] UKHL 48.

*and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.*<sup>33</sup>

The Supreme Court of Canada has stated that if “an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is ‘in house’ does not remove the privilege or change its nature”.<sup>34</sup> Problems arise, however, where the lines become blurred between the lawyer’s role as counsel and the lawyer’s role as business advisor.<sup>35</sup> Regarding this, the Supreme Court of Canada has stated:

*Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose.*<sup>36</sup>

The privilege only extends to in-house communications which relate to the lawyer’s role as counsel, and not to the lawyer’s role as business advisor or to some other role.

In the United States, courts also take the view that in-house counsel’s communications with their employers are protected, but, traditionally, have taken a firmer stance against privilege if a communication includes both legal advice and facts or business advice. However, one recent case from Illinois, *Roth v. AON Corp.*,<sup>37</sup> suggests possible expansion of the protection for communications which contain a mix of business and legal subject matter. In *Roth*, the court refused disclosure of an e-mail and an attachment concerning both business and legal issues. The e-mail had been sent by a CFO to in-house counsel as well as to several fellow executives.

In contrast to common law jurisdictions, many civil law jurisdictions do not protect communications between in-house counsel and their clients as they do for private practitioners, even if the communications contain legitimate legal advice. There are a variety of policy reasons for this different approach. In-house lawyers in many civil law jurisdictions receive different training and have different qualifications than private practitioners. They are not necessarily governed by the same professional bodies and may not have the same professional status as private practitioners. In addition, the employment relationship is sometimes thought to be lacking the degree of independence necessary to justify the privilege.<sup>38</sup>

In 1982, the European Court of Justice established the scope of the lawyer-client privilege for the European Community in *AM & S Europe, Ltd v. Commission of the European Communities*.<sup>39</sup> The court held that although protection of confidentiality of lawyer-client communications was a common basic right among member states, it did not extend to communications between in-house counsel and their clients. The court’s main rationale was that the employment relationship of in-house counsel rendered them incapable of providing independent legal advice.

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<sup>33</sup> *Alfred Crompton Amusement Machines v. Customs and Excise Commissioners (No. 2)*, [1972] 2 All E.R. 353 at 376 (C.A.).

<sup>34</sup> *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 21.

<sup>35</sup> Ken B. Mills, “Privilege and the In-House Counsel” (2003) 41:1 Alberta Law Review 79 at 84.

<sup>36</sup> *Pritchard v. Ontario (Human Rights Commission)*, *supra* note 34 at para. 20.

<sup>37</sup> Case No. 04 C 6835, 2008 U.S. Dist. LEXIS 106161 (N.D. Ill. 8 January 2009).

<sup>38</sup> *Morvillo and Anello*, *supra* note 3.

<sup>39</sup> [1983] 1 All E.R. 705.

The question of whether the privilege applies to communications with in-house counsel will be raised again soon at the European Court of Justice in a case on appeal from the European Court of First Instance, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities*.<sup>40</sup> At issue in that case was whether two e-mails exchanged with in-house counsel of Akzo Nobel, a Dutch chemicals company, were privileged in the context of a competition investigation. The e-mails had been seized by investigators during a search of the United Kingdom offices of an Akzo Nobel subsidiary. Akzo Nobel asserted that the e-mails contained legal advice regarding the company's competition law compliance programme, and claimed legal professional privilege on that basis. In September 2007, the Court of First Instance held that, considering the closeness of the relationship between the in-house lawyer and his client, the e-mails did not merit protection.

Although the Court of First Instance's decision was consistent with *AM & S Europe*, it also highlighted the conflicting approaches to lawyer-client privilege in common law and civil law jurisdictions. It remains to be seen how the European Court of Justice will address the conflict.

## **WORK PREPARED IN CONTEMPLATION OF LITIGATION**

Whereas lawyer-client privileges tend to be viewed as fairly absolute, other types of privilege are more relative and qualified concepts. Litigation privilege, as it is known in Canada, or attorney work product privilege, as it is called in the United States, extends beyond advice sought or provided in the course of the lawyer-client relationship, to protect documents prepared for the purposes of litigation. The privilege may extend to documents created by third parties, such as expert witnesses.

In Canada, litigation privilege, unlike solicitor-client privilege, is not recognized as a substantive rule of law, and protection of the privilege is not nearly as strong. Rather, litigation privilege has had "to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process".<sup>41</sup> Litigation privilege attaches to communications which are created for the dominant purpose of litigation, whether anticipated or ongoing.<sup>42</sup> Its purpose is to create a "zone of privacy" in order to facilitate fair and private preparation for litigation.<sup>43</sup> It serves "to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship".<sup>44</sup>

United States courts similarly view attorney work product privilege as promoting the adversary system by safeguarding the fruits of a lawyer's trial preparations from discovery attempts of the opponent.<sup>45</sup> The Supreme Court described this privilege in *Hickman v. Taylor*<sup>46</sup> as giving the lawyer a "certain degree of

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<sup>40</sup> Cases T-125/03 and T-253/03, [2007] All E.R. (D) 97 (Sep.).

<sup>41</sup> *Blank v. Canada (Minister of Justice)*, [2006] S.C.R. 319 at para 61.

<sup>42</sup> Robert W. Hubbard et al., *The Law of Privilege in Canada* (Aurora, Ont.: Canada Law Book, 2008) at 12-2.

<sup>43</sup> *Blank v. Canada (Minister of Justice)*, supra note 41 at paras. 27 and 34.

<sup>44</sup> *Id.* at para. 27.

<sup>45</sup> *United States v. Amer. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

<sup>46</sup> *Hickman v. Taylor*, 329 U.S. 495 (1946)

privacy ... free from unnecessary intrusion”, and discouraging “[i]nefficiency, unfairness and sharp practices”.<sup>47</sup>

In the United States, the privilege enjoys a qualified protection. It does not attach to documents that are prepared in the ordinary course of business or which would have been created despite litigation.<sup>48</sup> The privilege has been incorporated into the *Federal Rules of Civil Procedure* in Rule 26(b)(3). The Rule contains a significant exception. If an adversary can demonstrate that it “has substantial need of the materials in the preparation of the party’s case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means” then the privilege may be lifted.

### **Expiration Date**

Litigants who are unfamiliar with Canadian law should be careful not to expect information developed for litigation purposes to be privileged indefinitely. In Canada, litigation privilege has an expiry date. Since the privilege is meant to protect documents prepared in anticipation of litigation, the privilege ends with the litigation “of which it was born”.<sup>49</sup>

There is an exception to the expiration rule in the event of related litigation, meaning “separate proceedings that involve the same or related parties and arise from the same or a related cause of action”.<sup>50</sup>

In the United States, attorney work product privilege continues even when the litigation is completed.<sup>51</sup>

### **CONCLUSION**

The multitude of approaches to and interpretations of common privileges suggests that a uniform international view is unlikely to be achieved. Although we share an understanding of the importance of maintaining confidentiality in the lawyer-client relationship and the adversarial process, our views differ as to how and to what extent this confidentiality should be protected.

Lawyers and litigants should learn about the differences and, where possible, use them to their advantage. A safe assumption is that a court will apply local privilege law, barring exceptional circumstances. Familiarity with privilege laws of foreign jurisdictions with which one will or may become involved can only assist in the event of cross-border litigation.

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<sup>47</sup> *Id.* at 510-11.

<sup>48</sup> *Diversified Indus. Inc. v. Meredith*, 572, F.2d 596, 609 (8th Cir. 1977).

<sup>49</sup> *Blank v. Canada (Minister of Justice)*, *supra* note 41 at para. 8.

<sup>50</sup> *Id.* at para. 39.

<sup>51</sup> *U.S. v. Pfizer Inc.*, 560 F.2d 326, 334 (8th Cir. 1977).

## **ABOUT THE PRESENTERS**

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