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Environmental Law: Key Strategies for Everyday Practice

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Solicitor-Client, Litigation, and Settlement Privilege

Environmental Law: Key Strategies for Everyday Practice

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SOLICITOR-CLIENT, LITIGATION, AND SETTLEMENT PRIVILEGE

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SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege is that which attaches to communications relating to legal advice between solicitor and client. For the privilege to attach, there need only be correspondence between the solicitor and client for the purpose of seeking or giving legal advice (*R. v. McClure*, [2001] 1 S.C.R. 445, paras. 31-37). It is not necessary that any litigation be in existence or contemplated, or that the correspondence be in furtherance of litigation. The privilege in question belongs to the client and can only be waived by the client.

Three conditions must be met to establish that communication between a lawyer and his or her client satisfies the solicitor-client privilege criteria. These conditions were listed in *Solosky v The Queen*, [1980] 1 SCR 821, at para. 28, [*Solosky*]; and are as follows:

1. The communication must be between a lawyer and client; and
2. Which entails the seeking or giving of legal advice; and
3. Which is intended to be confidential by the parties.

The extent of this privilege extends beyond just direct communication between a lawyer in private practice and a layperson client. The privilege extends also to materials “directly related to the seeking, formulating or giving of legal advice or legal assistance” (e.g. working papers). (*Susan Hosiery Ltd. V Canada*, [1969] 2 Ex. C.R. 27, para 7).

While it is widely accepted that solicitor-client privilege be as close to absolute as possible, there are exceptions that may be considered. Exceptions to the solicitor/client privilege were also listed by the Court in *Solosky* at paragraph 24, and are as follows:

1. Communication where legal advice is neither sought nor offered (lawyer not contacted in his professional capacity); and
2. Where communication is not intended to be confidential; and
3. Where guidance is sought to facilitate the commission of a crime or fraud.

LITIGATION PRIVILEGE

The leading case on litigation privilege in Canada is *Blank v Canada (Department of Justice)*, 2006 SCC 39, [*Blank*]. The court in *Blank* held that the main focus of litigation privilege is to protect communication between lawyers, their clients, and third parties, to allow them privacy to prepare for litigation without fear of adversarial interference or premature disclosure (*Blank*, para 27). Important