

The Privilege of Invoking Privilege

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THE PRIVILEGE OF INVOKING PRIVILEGE

[1] This paper will briefly overview the law of privilege in a general manner. It will then focus on four new decisions on privilege issued by the Supreme Court of Canada in 2016: **Canada (Attorney General) v Chambre des notaires du Québec**, 2016 SCC 20; **Canada (National Revenue) v Thompson**, 2016 SCC 21; **Lizotte v Aviva Insurance Co. of Canada**, 2016 SCC 52; and **Alberta (Information and Privacy Commissioner) v University of Calgary**, 2016 SCC 53.

GENERAL REVIEW OF THE LAW OF PRIVILEGE

[2] It is not the intention of this paper to provide a treatise on all aspects of the law of privilege, but to focus on the four cases above. However, a brief review of the law of privilege is in order to provide context. The reader is referred for a more thorough discussion to a number of excellent texts: Paciocco, D.M. & Stuesser, L., *The Law of Evidence* (7th) 2015; Delisle, R., Stuart, D., Tanovich, D.M. & Dufraimont, L., *Evidence, Principles and Problems* (11th) 2015; and Sopinka, J., Lederman, S.N. & Bryant, A.W., *The Law of Evidence in Canada* (4th) 2014, from which texts virtually all of the material in this first section is taken.

[3] Rules of privilege are intended to protect important societal interests. They are divided into class privileges and case-by-case privileges. Class privileges are *prima facie* presumed to be confidential and protected communications are generally inadmissible. Class privileges include solicitor-client privilege, litigation privilege, spousal privilege, settlement negotiation privilege and informer privilege.

[4] Case-by-case privilege is determined by balancing the need for privacy in any given situation with the need for truth-seeking by disclosure, and is determined by application of the traditional Wigmore principles:

1. The communications must originate in a confidence that they will not be disclosed;
2. The confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.

(J.H. Wigmore, *The New Wigmore: A Treatise on Evidence* (2d), 2011)

[5] Solicitor-client privilege protects communication between a lawyer and a client, of a confidential nature, related to the seeking, forming or giving of legal advice. The privilege is said to be “nearly absolute” except where the communications are criminal in nature or made with a view to obtaining legal advice to facilitate the commission of a crime or a fraud; yet it may be overridden to enable an accused to establish innocence or where public safety is at risk. This privilege belongs to the client, and not the lawyer. It protects only communications where legal advice, not business or other advice, is sought. It remains in place if shared amongst those with a “common interest” or a “joint interest”, and although it was once said that it protects only communications and not “pure facts”, that distinction is erased by the cases examined below. The solicitor-client privilege will only be abrogated where “absolutely necessary”, which test is said to be “as restrictive a test as may be formulated short of an absolute prohibition in every case” (*Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at para 20).

[6] Litigation privilege exists to protect communications between a lawyer and third persons, if at the time of the making of the communication, litigation was commenced or anticipated and the dominant purpose for the communication was for use in litigation. Litigation privilege is different than solicitor-client privilege. They are distinct and “not two branches of the same tree” (*Blank v Canada (Ministry of Justice)*, 2006 SCC 39 at para 26). Solicitor-client privilege protects the solicitor-client relationship; litigation privilege facilitates the adversarial process. Solicitor-client privilege exists any time a client seeks legal advice; litigation privilege applies only in the context of litigation. Solicitor-client privilege is permanent and survives the termination of the relationship; litigation privilege is temporary and ends with the litigation. Solicitor-client privilege protects client confidences; litigation privilege does not require that the communications are made in confidence. Solicitor-client privilege was traditionally thought to be a higher privilege than litigation privilege, although again that has probably been altered by the *Lizotte* case below.

[7] Spousal privilege protects communications made between husband and wife during the course of their marriage and is now codified pursuant to ss 4(3) of the *Canada Evidence Act*, and in Alberta pursuant to the *Alberta Evidence Act*, s 8. In litigation, a spouse is required to testify but may refuse to answer questions under the claim of spousal privilege (*R v Zylstra* (1995), 41 CR (4th) 130, (Ont. C.A.)). It is a claim that belongs to the witness on the stand, and not the spouse.

[8] Settlement negotiation privilege protects discussions made during the course of settlement negotiations, for the purpose of facilitating settlement where the parties expressly or impliedly intend that their discussions will not be disclosed. Its fundamental purpose is to encourage settlement in civil matters and plea bargains in criminal matters. This class privilege may be overridden when