Overview of Privilege and Confidentiality

These materials were prepared by John S. Logan and Michael Dew, both of Jenkins Marzban Logan LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, June 2011.

© John S. Logan and Michael Dew
OVERVIEW OF PRIVILEGE AND CONFIDENTIALITY

I. Introduction .......................................................................................................................................................2
   A. What is Privilege?.............................................................................................................................................................................. 2
   B. Privilege as a Rule of Evidence.................................................................................................................................................. 2
   C. Partial Privilege .................................................................................................................................................................................. 3
   D. Blanket v. Case-by-Case Privilege .................................................................................................................................................. 3
   E. Terminology...................................................................................................................................................................................... 4

II. Legal Advice Privilege .......................................................................................................................................5
   A. Test for, and Special Status of, Legal Advice Privilege........................................................................................................ 5
   B. Communication must be with a Lawyer........................................................................................................................................ 6
   C. Communication must be for the Purpose of Giving Legal Advice........................................................................................ 7
   D. Legal Advice Privilege Starts Early, Belongs to the Client, and Can Last Forever.............................................................. 7
   E. Exceptions to Legal Advice Privilege........................................................................................................................................ 8

III. Litigation Privilege ............................................................................................................................................9
   A. Statement of the Test......................................................................................................................................................................... 9
   B. Litigation Privilege is Not a True Solicitor-Client Privilege...................................................................................................... 9
   C. A Lesser Privilege than Legal Advice Privilege................................................................................................................................ 9

IV. Settlement Privilege ........................................................................................................................................10
   A. Statement of the Test for Settlement Privilege ................................................................................................................................ 10
   B. Rationale for Settlement Privilege ............................................................................................................................................... 10
   C. Relevance of the Words “Without Prejudice” .................................................................................................................................. 11
   D. Settlement Privilege is Not Limited by the Pleadings.................................................................................................................. 11
   E. Exceptions to Settlement Privilege............................................................................................................................................... 12
   F. Waiver of Settlement Privilege ................................................................................................................................................... 12

V. The Implied Undertaking ....................................................................................................................................13
   A. Statement of the Implied Undertaking Rule................................................................................................................................. 13
   B. The Rationale for the Implied Undertaking Rule .......................................................................................................................... 13
   C. The Implied Undertaking Rule Binds Both Lawyer and Client (and Insurer) ........................................................................... 14
   D. Expiration of the Implied Undertaking ...................................................................................................................................... 14
   E. Consequences for Breach of the Implied Undertaking .............................................................................................................. 15

VI. Confidentiality ..................................................................................................................................................15
I. Introduction

A. What is Privilege?

Privilege is a doctrine that protects specific categories of information from disclosure in court:

The law recognizes a number of communications as worthy of confidentiality. The protection of these communications serves a public interest and they are generally referred to as privileged. (R. v. McClure, 2001 SCC 14 at para. 26)

In R. v. Gruenke, [1991] 3 S.C.R. 263, Madam Justice L’Heureux-Dubé explained that privilege operates as a rule of evidence to exclude relevant information from consideration by decision makers:

If the aim of the trial process is the search for truth, the public and the judicial system must have the right to any and all relevant information in order that justice be rendered. Accordingly, relevant information is presumptively admissible. Exceptions may be found both in statutory form, and in the common law rules of evidence, which have developed in order to exclude evidence that is irrelevant, unreliable, susceptible to fabrication, or which would render the trial unfair. Courts and legislators have also been prepared to restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy. The latter are the source of privileges for certain private communications. (R. v. Gruenke, [1991] 3 S.C.R. 263 per L’Heureux-Dubé J.)

Thus, privilege is, primarily, a rule of evidence that prevents admission into evidence of certain types of “special” information. The law of privilege recognizes that there are certain types of communications and relationships that are integral to the just operation of society, and the law of privilege is designed to foster those communications and relationships by assuring people that the resulting evidence will not be admissible in court. Privilege presumes that the harm to society from people not sharing such information and forming specific supportive relationships exceeds the harm to society due to compromise of the truth finding process in our courts.

B. Privilege as a Rule of Evidence

Privilege, when applied as an exclusionary rule of evidence, is based on different considerations than most other rules of evidence:

It is important to remember that the rationale underlying resort to privilege or privacy rights is diametrically opposed to that underlying most ordinary evidentiary rules of exclusion. Privilege and privacy interests would exclude evidence despite the fact that such evidence might further the truth-seeking process. On the other hand, ordinary rules of exclusion are generally motivated by the desire to further the truth-seeking process, in that they tend to exclude evidence which might be unreliable, which might mislead or prejudice the trier of fact, or which might otherwise prejudice the fairness of the trial. (R. v. O’Connor, [1995] 4 S.C.R. 411)

Because privilege as a rule of evidence hinders the goal of determining the true facts underlying the dispute between the parties, the Supreme Court of Canada has said that privilege as a rule of evidence should be interpreted restrictively:

The categories of privileged communications are, however, very limited - highly probative and reliable evidence is not excluded from scrutiny without compelling reasons. (R. v. Gruenke, [1991] 3 S.C.R. 263 per L’Heureux-Dubé J.)

The doctrine of privilege acts as an exception to the truth-finding process of our adversarial trial procedure. Although all relevant information is presumptively admissible at trial, some probative and trustworthy evidence will be excluded to
1.1.3

...serve other overriding social interests ... Since the existence of privilege impedes the realization of the central objective of our legal system in order to advance other goals, the question of privilege is essentially one of public policy. (A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536 at para. 33 per L’Heureux-Dubé J.)

Despite the forgoing, not all privileges are applied restrictively. For example, legal advice privilege is closely guarded and will generally be applied to exclude even very probative evidence.

C. Partial Privilege

Applying privilege as a rule of evidence is a balancing process that involves assessing whether sensitive information should be excluded because doing so is more important than using that information to further the truth finding process. Because sensitivity and probative value will depend on the facts of the particular case, privilege is not absolute, but may be partial:

While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in many situations of partial privilege. The degree of protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation. Partial privilege may signify that only some of the documents in a given class must be produced. Documents should be considered individually or by subgroups on a “case-by-case” basis. (A.M. v. Ryan, [1997] 1 S.C.R. 157 at para. 18)

D. Blanket v. Case-by-Case Privilege

Many cases speak of certain types of privilege as being “blanket,” “prima facie,” “common law” or “class” privileges. In R. v. Gruenke, [1991] 3 S.C.R. 263, Lamer C.J. commented on the meaning of these terms as follows:

[“Blanket,” prima facie, common law, or “class” privilege terms] used to refer to a privilege which was recognized at common law and one for which there is a prima facie presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e. Why they should be admitted into evidence as an exception to the general rule). ... The term “case-by-case” privilege is used to refer to communications for which there is a prima facie assumption that they are not privileged (i.e. are admissible). The case-by-case analysis has generally involved an application of the “Wigmore test,” which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case. (R. v. Gruenke, [1991] 3 S.C.R. 263 at 286 per Lamer C.J.)

More recently, the Nova Scotia Court of Appeal confirmed the distinction between class privilege and case by case privilege:

The law generally recognizes two broad categories of privilege. The first is a “blanket” privilege acknowledged as belonging to a class. Documents and communications falling into this class are prima facie privileged. An example of a blanket privilege is solicitor/client privilege. The second is a “case-by-case” privilege. This refers to communications for which there is a prima facie assumption that they are not privileged. But they may acquire privileged status in particular cases by application of the four-part “Wigmore” test (para. 53 below). (Brown v. Cape Breton (Regional Municipality), 2011 NSCA 32 at para. 50)
Thus, class (or “blanket”) privileges are those that arise at common law (e.g., legal advice privilege, spousal privilege, informer privilege) and which *prima facie* apply to make information covered by them inadmissible at trial. On the other hand, *ad hoc* privilege, which is determined by application of *Wigmore’s* four factors is not a class/blanket privilege but is assessed on a case by case basis.

### E. Terminology

Courts have acknowledged that there is considerable confusion with respect to the terminology used to describe the different species of privilege:

While Major J. [in *Smith v. Jones*, [1999] 1 SCR 455] spoke in terms of client-solicitor privilege, he in fact limited his observations to circumstances in which litigation privilege would apply. It is unclear whether Major J. used the phrase “solicitor-client privilege” in the same sense that I use it or whether he used the term in a way that conflates client-solicitor privilege with litigation privilege. As Watson and Au observe in *Solicitor-Client Privilege and Litigation Privilege in Civil Litigation*, supra, at 333-35, there is considerable confusion with respect to terminology in this area of the law. (*General Accident Assurance Company v. Chrusz* (1999), 180 D.L.R. (4th) 241 at para. 117 (Ont. C.A.))

[Neilson J. (as she then was)] was not asked to consider the “litigation privilege” on which the plaintiff respondents also relied in this Court. By that expression, counsel meant what is more commonly known as solicitor’s brief privilege in British Columbia. As we shall see, Ontario courts use the term “litigation privilege” interchangeably with “the without prejudice rule,” to mean what I am calling settlement privilege in these reasons. (*B.C. Children’s Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177 at para. 44)

There is particular confusion between legal advice privilege and litigation privilege:

[S]olicitor-client privilege and the litigation privilege … often co-exist and one is sometimes mistakenly called by the other’s name. (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 1)

Part of this confusion arises from the fact that the phrase “solicitor-client privilege” has been used as a collective term including both legal advice privilege and litigation privilege:

It was not uncommon [around 1980] to treat “solicitor-client privilege” as a compendious phrase that included both the legal advice privilege and litigation privilege. (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 4)

Solicitor client privilege at common law … includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice … and the privilege that attaches to documents gathered and prepared by a solicitor for the dominant purpose of litigation. (*College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 25, citations omitted)

The Supreme Court of Canada has indicated that the terms “solicitor-client privilege” and “legal advice privilege” can be used synonymously and interchangeably, but that “legal advice privilege” is distinct from litigation privilege:

The Minister contends that the solicitor-client privilege has two “branches,” one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the “legal advice privilege”; the second, as the “litigation privilege.”

Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals.
1.1.5

and not with two branches of the same tree. Accordingly, I shall refer in these reasons to
the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed
use the two phrases—solicitor-client privilege and legal advice privilege—synonymously
and interchangeably, except where otherwise indicated. ([Blank v. Canada (Minister of
Justice), 2006 SCC 39 at para. 6-7])

To avoid the confusion that arises from using the broader phrase “solicitor-client privilege” to refer to one or
both of legal advice privilege and litigation privilege, it is helpful to use the terms “legal advice privilege” and
litigation privilege:

For the purposes of these reasons, I will use the phrase “legal advice privilege” (as used in
Gower v. Tolko Manitoba Inc. 2001 MBCA 11) to refer to the privilege that attaches to
communications between solicitor and client for the purposes of obtaining legal advice, and
“litigation privilege” (as used in Gower v. Tolko Manitoba Inc., 2001 MBCA 11 and General
Accident Assurance Co. v. Chrusz, 1999 CanLII 7320 (Ont. C.A.)) to refer to the privilege that
attaches to communications and material produced or brought into existence for the
dominant purpose of being used in the conduct of litigation. ([College of Physicians of B.C. v.
British Columbia (Information and Privacy Commissioner), 2002 BCCA 665 at para. 28])

II. Legal Advice Privilege

A. Test for, and Special Status of, Legal Advice Privilege

Legal advice privilege protects the contents of communications passing between a lawyer and client for the
purpose of giving or receiving legal advice:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as
such, the communications relating to that purpose, made in confidence by the client, are at
his instance permanently protected from disclosure by himself or by the legal adviser,
extcept the protection be waived. ([Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 873])

Note that it is not a requirement of legal advice privilege that litigation be in contemplation or in existence, it
applies whenever a client seeks legal advice:

At the time the employer in this case consulted its lawyer, litigation may or may not have
been in contemplation. It does not matter. While the solicitor-client privilege may have
started life as a rule of evidence, it is now unquestionably a rule of substance applicable to
all interactions between a client and his or her lawyer when the lawyer is engaged in
providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or
in some other non-legal capacity ... ([Canada (Privacy Commissioner) v. Blood Tribe
Department of Health, 2008 SCC 44 at para. 9])

Legal advice privilege ranks the highest amongst privileges:

As the British Columbia Court of Appeal observed [in this case], solicitor-client privilege is
the privilege “which the law has been most zealous to protect and most reluctant to water
down by exceptions.” Quite simply it is a principle of fundamental importance to the
administration of justice. ([Smith v. Jones, [1999] 1 S.C.R. 455 at para. 50])

Indeed, solicitor-client privilege, which applies equally in the criminal and civil contexts, is a principle of
fundamental justice:

Solicitor-client privilege has been recognized by this Court as a principle of fundamental
justice, which applies equally to both civil law and criminal law. ([Maranda v. Richer, 2003
SCC 67 at para. 57])
No similar protection is presumed for other relationships:

[C]ommunication between a doctor and his patient, do not occupy the unique position of solicitor-client privilege or resonate with the same concerns. This privilege, by itself, commands a unique status within the legal system. The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself. The solicitor-client relationship is a part of that system, not ancillary to it. (R. v. McClure, 2001 SCC 14 at para. 31, emphasis added)

B. Communication must be with a Lawyer

In order to meet the requirement that the lawyer be acting in a professional capacity, it is necessary that the lawyer be duly qualified to practice law. However, the lawyer need not necessarily be qualified in the jurisdiction in which the advice is provided in order for legal advice privilege to apply. In Gower v. Tolko Manitoba Inc., 2001 MBCA 1, a BC lawyer provided legal advice in relation to alleged sexual harassment complaint that occurred in Manitoba. The Manitoba Court of Appeal held that the report providing advice was protected by legal advice privilege:

Although the Canadian law in this area was at first rather restrictive in finding that the solicitor must be duly qualified to practice law in the jurisdiction in question, the more recent jurisprudence, and the better in my opinion, acknowledges the globalization of business and legal advice. (Gower v. Tolko Manitoba Inc., 2001 MBCA 11 at para. 21)

Lord Denning M.R. famously explained that communications with in-house counsel may be protected by legal advice privilege:

Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. 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, 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 … I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned. (Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2), [1972] 2 All E.R. 353 at 376 (C.A.))

After approving of the above passage in R. v. Campbell, R. v. Shirose, [1999] 1 S.C.R. 565 (at para. 50) Mr. Justice Binnie said the following:


Similarly:

[Legal advice privilege] will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. 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. (Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31 at para. 21)

C. Communication must be for the Purpose of Giving Legal Advice

Legal advice privilege protects not only communications related to the law, but includes all advice within the
realm of a continuing legal context:

[Legal advice privilege] is not confined to telling the client the law and it includes advice as
to what should be done in the relevant legal context. (Samson Indian Nation and Band v.

Whether communications are made to the lawyer himself or employees, and whether they
deal with matters of an administrative nature such as financial means or with the actual
nature of the legal problem, all information which a person must provide in order to obtain
legal advice and which is given in confidence for that purpose enjoys the privileges attached
to confidentiality. (Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 876)

I am satisfied that a communication which does not make specific reference to legal advice
is nevertheless privileged if it falls within the continuum of communication within which
the legal advice is sought or offered: see Manes and Silver, supra, p. 26. If the rule were
otherwise, a disclosure of such documents would tend in many cases to permit the
opposing side to infer the nature and extent of the legal advice from the tenor of the
documents falling within this continuum. Thus, the intent of the rule would be frustrated.
(No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of B.C., 1996 CanLII 2311 at
para. 5 (B.C.S.C.)

However, communications made for the purpose of providing business advice will not be protected. In
Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31, Ms. Pritchard sought judicial review of the
Ontario Human Rights Commission’s handling of her complaint and requested disclosure of a legal opinion
provided to the Commission by its in-house counsel, and apparently relied on by the Commission in handling
her complaint. The Commission claimed that the legal opinion was protected by legal advice privilege. The
Supreme Court explained that whether communications with in-house counsel are protected by legal advice
privilege depends on the nature of the communications:

Like corporate lawyers who also may give advice in an executive or non-legal capacity,
where government lawyers give policy advice outside the realm of their legal
responsibilities, such advice is not protected by the privilege

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. Whether or not the privilege will attach
depends on the nature of the relationship, the subject matter of the advice, and the
circumstances in which it is sought and rendered. (Pritchard v. Ontario (Human Rights
Commission), 2004 SCC 31 at paras. 19 - 20)

The Supreme Court found that the opinion provided to the Commission by in-house counsel in that case met
all of the requirements for legal advice privilege and was protected from disclosure.

D. Legal Advice Privilege Starts Early, Belongs to the Client, and Can Last Forever

Legal advice privilege may apply to protect confidential communicated before the lawyer was formally
retained, and even if the lawyer is never retained:
Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion. (Minter v. Priest, [1930] A.C. 558 at 573 per Viscount Dunedin)

Legal advice privilege belongs to the client:

It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. (Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, 2002 SCC 61 at para. 24)

The client does not have to "claim" the privilege for it to apply:

Privilege does not come into being by an assertion of a privilege claim; it exists independently. (Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, 2002 SCC 61 at para. 39)

Legal advice privilege may last beyond the termination of the retainer, and sometimes even beyond the death of the client:

So important is the privilege that the courts have also stipulated that the confidentiality of communications between solicitor and client survives the death of the client and enures to his or her next of kin, heirs, or successors in title. (Geffen v. Goodman Estate, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211)

E. Exceptions to Legal Advice Privilege

The Supreme Court of Canada recently affirmed that courts should interfere with legal advice privilege in only rare circumstances, and that the categories of exceptions are limited:

A rare exception … is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes … The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained “as close to absolute as possible to ensure public confidence and retain relevance” … (Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 at para. 10, citations omitted)

[S]olicitor-client privilege … has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship … The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions … (Ontario (Public Safety and Security) v. Criminal Lawyers’ Association, 2010 SCC 23 at para. 39)

Courts have confirmed that legal advice privilege may be overridden by legislation, but that such intent would have to be clearly stated:

In Descôteaux v. Mierzewinski, [1982] 1 S.C.R. 860, at p. 875, this Court held that legislation may infringe solicitor-client privilege (let alone litigation privilege), though such legislation would be interpreted restrictively. (Blank v. Canada (Minister of Justice), 2006 SCC 39 para. 68)

[O]ur Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents … (Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 at para. 11)
III. Litigation Privilege

A. Statement of the Test

Litigation privilege is a rule of evidence that protects from disclosure in court documents or communications made for the dominant purpose of litigation:

Two factual determinations must be made to assess whether litigation privilege attaches to a document:

a. Was litigation in reasonable prospect at the time the document was produced, and

b. If so, what was the dominant purpose for its production? (*Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 43)

In *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, the BC Court of Appeal indicated that the “dominant purpose” element necessarily requires that litigation be in reasonable contemplation:

If litigation was not “in reasonable prospect,” then the Documents were not produced for the dominant purpose of litigation. (*College of Physicians* at para. 85)

Thus, the reasonable contemplation of litigation requirement should likely be considered first and, if satisfied, the dominant purpose requirement evaluated.

When evaluating a claim of privilege one must consider the circumstances and intent when the document was created:

> The proper time to consider whether the test is met is when the particular documents that are in issue, namely the reports that accompanied the witness statements and photographs, were created. (*Sauvé v. ICBC*, 2010 BCSC 763 at para. 32)

> The test is not the dominant purpose, as things have turned out, but the dominant purpose at the time the document was made. (*Brayley v. Pappas* (1991) 64 B.C.L.R. (2d) 37 at para. 8 (S.C.))

B. Litigation Privilege is Not a True Solicitor-Client Privilege

Historically “solicitor-client privilege” was used as a compendious phrase that included both legal advice privilege and litigation privilege, but litigation privilege is not a true solicitor-client privilege because, unlike legal advice privilege, it does not depend on the existence of a lawyer-client relationship:

Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel … (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 32)

C. A Lesser Privilege than Legal Advice Privilege

Courts have acknowledged that litigation privilege is not as sacred as legal advice privilege:

> There is nothing sacrosanct about this form of privilege. (*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. 321 at para. 24 (Ont. C.A.) per Carthy J.A.)

In recent times courts have tended to narrow the scope of litigation privilege in favour of broader discovery:
While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. (Blank v. Canada, 2006 SCC 39 at para. 61 (per Fish J.))

Litigation privilege expires upon final resolution of the litigation for which the documents were produced:

[T]he principle “once privileged, always privileged,” so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration. (Blank v. Canada, 2006 SCC 39 at para. 37)

In that case, Mr. Blank had been charged with 13 regulatory offences, but all of those charges were stayed. Later, the Crown laid new charges, but then stayed those charges as well. Mr. Blank then commenced proceedings against the Crown for, amongst other things, abuse of its prosecutorial powers. Mr. Blank sought disclosure of documentation relating to the charges laid against him, but the Crown resisted disclosure of certain materials on the basis of privilege. The Supreme Court of Canada held that the documents could not be withheld on the basis of litigation privilege because that privilege had expired when the charges had been stayed.

Fish J. explained that once the litigation has ended, there is no purpose in maintaining confidentiality:

Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case “on wits borrowed from the adversary” (Blank v. Canada, 2006 SCC 39 at para. 35)

IV. Settlement Privilege

A. Statement of the Test for Settlement Privilege

Settlement privilege protects from disclosure in court communications made for the purpose of effecting settlement. The test for settlement privilege has been stated as follows:

In The Law of Evidence in Canada, the test for the application of settlement privilege is described as follows:

a) A litigious dispute must be in existence or within contemplation;

b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

c) The purpose of the communication must be to attempt to effect a settlement. (J. Sopinka, S.N. Lederman & A.W. Bryant, The Law of Evidence in Canada, 2d. ed. (Toronto: Butterworths, 1999) at para. 14.207)

(Sharbern Holding Inc. v. Vancouver Airport Centre Ltd., 2008 BCSC 442 at para 70)

B. Rationale for Settlement Privilege

Settlement privilege is premised on the assumption that settlement of disputes is more likely if parties are able to speak freely about the issues and without fear that concessions made in settlement discussions will later be used against them:

The uniting theme in the authorities and academic literature to which we were referred, is that the purpose of the settlement privilege is, as it has been since the 18th century, to protect parties from disclosing express or implied admissions made during the course of settlement negotiations. (B.C. Children’s Hospital v. Air Products Canada Ltd., 2003 BCCA 177 at para. 66 per Huddart J.A., dissenting)
The law acknowledges that for the purpose of achieving settlement a party make concessions despite strong evidence to the contrary and that such concessions, made as they are only for the purpose of achieving settlement, have little probative value:

The theory at the root of the policy justifying the privilege is that the value of encouraging settlement outweighs the probative value of these admissions. (B.C. Children’s Hospital v. Air Products Canada Ltd., 2003 BCCA 177 at para. 66 per Huddart J.A., dissenting)

C. Relevance of the Words “Without Prejudice”

In Belanger v. Gilbert (1984), 58 B.C.L.R. 191 (C.A.), the BC Court of Appeal confirmed that merely using the words “without prejudice” will not automatically establish settlement privilege:

Even if the letter had been marked as without prejudice it would not, in my judgment, assist the [plaintiff] in this case. Not all letters so marked are to be held inadmissible. (Belanger v. Gilbert (1984), 58 B.C.L.R. 191 at para. 6 (C.A.))

Regardless of whether the words “without prejudice” are used, settlement privilege will only apply if the test for settlement privilege is satisfied:

[T]he rule which excludes documents marked ‘without prejudice’ has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation … (Belanger v. Gilbert (1984), 58 B.C.L.R. 191 at para. 6 (C.A.) citing Re Daintrey, Ex p. Holt, [1893] 2 Q.B. 116)

The foregoing confirms that the words “without prejudice” are neither essential nor conclusive of whether a communication is protected by settlement privilege.

D. Settlement Privilege is Not Limited by the Pleadings

Settlement privilege protects all discussions related to settlement of the issues in dispute in the litigation, and is not limited to the issues raised by the pleadings. In Cowichan Tribes v. A.G. of Canada, 2007 BCSC 1855, the parties discussed a business deal for an extended lease at a settlement conference dealing with rents to be paid for the current lease. Myers J. held that the discussions regarding the future lease were protected by settlement privilege:

Litigation is often settled by coming to an agreement on issues that are broader than that comprised in the litigation itself. It would make no sense to limit settlement privilege only to discussions that are strictly confined to the issues comprised in the litigation.

It would also make little sense to attempt to parse out the parts of the discussions that relate to the litigation issues from those that do not. The former would be privileged, the latter would not. (Cowichan Tribes v. A.G. of Canada, 2007 BCSC 1855 at paras. 24-25)

Apart from being inadmissible at trial, communications protected by settlement privilege are not subject to disclosure (under the Rules of Court regarding document discovery and examination for discovery) in ongoing litigation:

All the cases emphasize that no bars should be placed in the way of one who wishes to compromise, and to allow the production [under the Rules of Court] is by definition to inhibit. Such barriers to settlement should only be permitted if the other competing interest absolutely demands it. (B.C. Children’s Hospital v. Air Products Canada Ltd., 2003 BCCA 177 at para 29 citing Middelkamp v. Fraser Valley Real Estate (1992), 71 B.C.L.R. (2d) 276 at 299 (C.A.))
E. Exceptions to Settlement Privilege

Various exceptions to settlement privilege may apply depending on the circumstances of the individual case:

Exception where dispute as to whether settlement reached

If the parties to an alleged settlement agreement disagree as to whether settlement was reached, the court will have no option but to review the settlement communications to decide the dispute: *B.C. Children’s Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177 at para. 20).

Exception to prevent double recovery

The settlement paid to the plaintiff by the settling defendant may be revealed to other non-settling defendants where such is necessary to prevent double recovery by the plaintiff: *Ashcroft v. Dhaliwal*, 2008 BCCA 352 at para. 43.

Exception in relation to evidentiary arrangements

In some cases a settling defendant may agree to provide evidence to assist the plaintiff in its ongoing claims against other defendants. Because such agreements should influence the weight the court should give to such evidence, the interests of justice require disclosure of the details of such agreements if the case against the non-settling defendants goes to trial: *B.C. Children’s Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177 at para. 36.

Exception in relation to limitation period issues

It may be that settlement communications are inadmissible in relation to the substantive dispute, but admissible for the purposes of the limitation period issues: *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 273 at para. 21 (C.A.), but see *Canada (Attorney General of) v. Forsberg*, 1996 CanLII 562 (B.C.S.C.).

Exception for threats


Exception where fraudulent attempts to obtain settlement

If a party commits fraud in an attempt to procure settlement, an exception to settlement privilege will be made to allow proof of that fraud: *Bertram v. Canada*, [1996] 1 F.C. 756 (C.A.), *Berry v. Cypost* (No. 1), 2003 BCSC 1827 at para. 25.

Exception for criminal offences

Settlement privilege does not apply to communications which are themselves criminal, or which disclose an intention to commit a criminal offence: *Berry v. Cypost* (No. 1), 2003 BCSC 1827 at para. 25.

Ad hoc exceptions to settlement privilege

The categories of exceptions to settlement privilege are not closed and that a party may obtain disclosure of settlement communications if they can show that the public interest in disclosure exceeds the public interest in maintaining confidentiality: *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 19.

F. Waiver of Settlement Privilege

Settlement is a jointly held privilege and therefore cannot be expressly waived without the consent of both parties:
The consent of both parties to the dispute is required for the privilege to be waived, even if there has been only one communication. (Canada (Attorney General of) v. Forsberg, 1996 CanLII 562 at para. 3 (B.C.S.C.))

Nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed. (B.C. Children’s Hospital v. Air Products Canada Ltd., 2003 BCCA 177 at para. 16 citing Walker v. Wilsher (1889), 23 Q.B.D. 335)

Settlement privilege may also be waived by implication. For example, in Mackenzie v. Brooks, 1999 BCCA 623 the BC Court of Appeal held that a party who had referred to without prejudice communications in an affidavit could not later claim that those communications were not admissible on the issue of costs. By swearing the affidavit that party had, for its part, waived privilege over the communications and the contents of the communications were admissible against it should the other party wish to lead that evidence.

V. The Implied Undertaking

A. Statement of the Implied Undertaking Rule

The implied undertaking of confidentiality is a rule that prevents collateral use of information produced under compulsion of the Rules of Court:

The law delineating the scope of the implied undertaking of confidentiality respecting use of information obtained through the litigation discovery process draws a bright line. Use of that information within the litigation is permitted use. Use outside the litigation for an “alien” or “collateral” purpose is not permitted without the consent of the affected party or an order of the court. (Sovani v. Gray et al.; Jampolsky v. Shattler et al., 2007 BCSC 403 at para. 49)

The implied undertaking of confidentiality applies even though the information disclosed may not have been confidential or otherwise sensitive to begin with:

[The implied undertaking] covers innocuous information that is neither confidential nor discloses any wrongdoing at all. (Juman v. Doucette, 2008 SCC 8 at para. 5)

Information covered by the implied undertaking rule is not privileged (Juman v. Doucette, 2008 SCC 8 at para. 56), rather the rule simply restricts how a receiving party may use information governed by an implied undertaking. The implied undertaking obligation is also separate and distinct from obligations under Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165: see Sovani v. Gray et al.; Jampolsky v. Shattler et al., 2007 BCSC 403 at paras. 33-40.

The implied undertaking is owed to the court rather than the party that disclosed the information covered by the undertaking: Professional Components Ltd. v. Rigollet, 2010 BCSC 688 at para. 23.

B. The Rationale for the Implied Undertaking Rule

The implied undertaking rule is justified on the view that full disclosure is required in civil litigation to ensure that justice is done, and that such disclosure is more likely where privacy interests are protected as much as possible:

A party to a civil proceeding is under compulsion to produce information in order to comply with discovery rules. The implied undertaking of confidentiality provides some protection of privacy by assuring the litigant that the information will not be used for a collateral purpose outside the litigation. This encourages the litigant to live up to his or her wide discovery obligations and so indirectly aids in getting at the truth in a civil action. (Bodnar v. The Cash Store Inc., 2010 BCSC 660 at para. 21)
C. The Implied Undertaking Rule Binds Both Lawyer and Client (and Insurer)

In *Juman v. Doucette*, 2008 SCC 8, the Supreme Court of Canada confirmed that clients are bound by the implied undertaking rule. In that case a childcare worker was sued after a child in her care suffered a brain injury. The childcare worker gave evidence on examination for discovery and that information became known to the child’s parents. The Supreme Court of Canada confirmed that the parents would have had to apply for a court order permitting them to disclose the information obtained on discovery to the police had they wanted to make such disclosure:

Here, if the parents of the victim or other party wished to disclose the appellant’s transcript to the police, he or she or they could have made an application to the B.C. Supreme Court for permission to make disclosure, but none of them did so ... (*Juman v. Doucette*, 2008 SCC 8 at para. 5)

[T]he law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled ... (*Juman v. Doucette*, 2008 SCC 8 at para. 27, emphasis added)

The foregoing confirms that both lawyers and clients are bound by implied undertakings with respect to information disclosed under compulsion of the Rules of Court.

In *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474, the Court held that the defendants’ insurer was also bound by the implied undertaking:

A party who has documents from earlier litigation that are impressed with the implied undertaking simply cannot make use of those documents without the concurrence of the party from whom they were obtained or leave of the court. The implied undertaking protects documents or oral discovery obtained in earlier litigation from being used for any purpose “collateral” to that litigation. Thus, the documents cannot be used for internal strategic review in subsequent litigation. They cannot be used for the purposes of drafting pleadings. They cannot be sent to counsel for the purposes of obtaining an opinion in new litigation. All of these obligations bound the named defendants in the Current Action as well as ICBC in its conduct of that litigation. (*Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 at para. 25)

D. Expiration of the Implied Undertaking

If the action settles before information subject to the implied undertaking is disclosed in court, the undertaking will remain in effect with respect to that information:

The fact that the settlement has rendered the discovery moot does not mean the [disclosing party’s] privacy interest is also moot. The undertaking continues to bind. (*Juman v. Doucette*, 2008 SCC 8 at para. 51)

Since the purpose of the implied undertaking is to protect the confidentiality of information, it is arguable that once the documents and information have been made public in court proceedings the undertaking should end because there is no confidentiality left to protect. Thus, the implied undertaking of confidentiality generally expires when information subject to the undertaking is disclosed at trial:

Here, the Union elected to make the Documents public and cannot be said to be prejudiced if the defendants, like any other member of the public, use them for other purposes. The fact the Union disclosed the Documents prior to trial does not, in my respectful view, alter this fact. What happened in the discovery room is superseded by what the Union did in the courtroom.
... Furthermore, even if the defendants had entered the Documents into evidence, the obligation would have terminated at that time in accordance with the law reviewed above.  

Depending on the circumstances, the implied undertaking may continue despite material being filed in interlocutory proceedings:

(a) the implied undertaking does not end when information, produced by an adverse party under compulsion of discovery (the "Producing Party"), is filed in court by the receiving party (the "Receiving Party") in support of an interim application;

(b) in considering a Receiving Party's application for leave to be relieved from the implied undertaking, the court may consider, as one factor in support of leave, the fact that the information was filed in court for a legitimate purpose and became part of the court record; and

(c) the implied undertaking of a Receiving Party ends, with respect to information produced by the Producing Party, when that information is filed in court by the Producing Party itself.  
(Bodnar v. The Cash Store Inc., 2010 BCSC 660 at para. 45)

E. Consequences for Breach of the Implied Undertaking

Breach of the implied undertaking is punishable by contempt of court, but other remedies may be applied:

Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court.  
(Juman v. Doucette, 2008 SCC 8 at para. 29)

VI. Confidentiality

Generally, confidentiality represents an obligation imposed by law or by contract on a party not to disclose certain facts or information:

The concept of confidentiality is a chameleon, taking different legal hues from the circumstances in which it is found. It may arise in respect of information because of the nature of the information itself, because of the nature of the relationship between the persons giving and receiving the information, or both. In some cases, confidentiality gives rise to an obligation resting on the recipient to maintain the secrecy in which the information was shrouded before it was communicated to the recipient. Secrecy may also be required of a recipient despite relatively widespread knowledge of the information. Confidentiality may also give rise to an obligation resting on the recipient not to disclose or to make use of communicated information even though that information is so widely known that it is public knowledge.  
(Stewart v. Canadian Broadcasting Corp., 1997 CanLII 12318 at para. 106 (Ont. S.C.))

Lawyers are required to keep client information confidential:

A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly1 authorized by the client; or is required by law or by a court.  
(Law Society of British Columbia Professional Conduct Handbook, Chapter 5-1)

The law implies a term into the contract whereby a professional man is to keep his clients' affairs secret and not to disclose them to anyone without just cause (see
What is confidential is generally broader than what is privileged i.e. information may be confidential without being privileged:

There is no doubt that lawyers are under an obligation to keep confidential all documents and other communications made to them by their clients, but not all such communications are subject to solicitor-client privilege and a claim of privilege does not convert non-privileged documents into privileged documents. (British Columbia (Securities Commission) v. B.D.S., 2003 BCCA 244 at para. 45)

Non-payment of legal fees in this context [i.e. an application by counsel to be removed from the record when his client, a criminal accused, is unable to pay legal fees] does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel’s ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts. (R. v. Cunningham, 2010 SCC 10 at para. 31)

Unlike privilege, confidentiality alone does not act as a rule of evidence:

However confidential information (e.g. between doctor and patient, priest and penitent) may be found to be privileged by application of the Wigmore test for *ad hoc* privilege:

The case-by-case analysis has generally involved an application of the “Wigmore test” (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case. (R. v. Gruenke, [1991] 3 S.C.R. 263)

The Court in R. v. Gruenke, [1991] 3 S.C.R. 263 summarized the Wigmore test for *ad hoc* privilege as follows:

Given that the Wigmore criteria play a central role in this case, I will set out the “test” below for ease of reference (Wigmore, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision, para. 2285):

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of 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.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. (R. v. Gruenke, [1991] 3 S.C.R. 263)