210 Pragmatic Practices- Protecting Privilege

Steve Cannon
President
Constantine Cannon

Ivan K. Fong
Executive Vice President, Chief Legal
Cardinal Health, Inc.

J. Alberto Gonzalez-Pita
Executive Vice President & General Counsel
Tyson Foods, Inc.

Susan Hackett
Senior Vice President & General Counsel
Association of Corporate Counsel

Mahmud Jamal
Partner
Osler, Hoskin & Harcourt LLP

Faculty Biographies

Steve Cannon
President
Constantine Cannon

Ivan K. Fong

Ivan K. Fong recently joined the General Electric Company (GE) as senior counsel, e-commerce and information technology. He is GE's lead e-commerce lawyer and is responsible for providing legal and policy advice on e-commerce issues company-wide.

Prior to joining GE, Mr. Fong served as deputy associate attorney general at the U.S. Department of Justice, where he advised the attorney general, the associate attorney general, and the senior leadership of the department on a wide range of legal and policy issues, including e-commerce and other Internet-related issues. Before his government service, Mr. Fong was a partner with Covington & Burling in Washington, DC. He also served as a law clerk to Justice Sandra Day O'Connor of the Supreme Court of the U.S. and Judge Abner J. Mikva of the U.S. Court of Appeals for the DC Circuit.

Mr. Fong is a member of the council of the ABA's section of science and technology and chairs the section's life and physical sciences division. He is also a member of the American Law Institute, a fellow of the American Bar Foundation, and a trustee of Stanford University.

He received his S.B. and S.M. from MIT, where he was elected to Phi Beta Kappa and Tau Beta Pi. He received his J.D. with distinction from Stanford Law School and his B.C.L., a post-graduate law degree, from Oxford University, where he was a Fulbright scholar.

J. Alberto Gonzalez-Pita

J. Alberto Gonzalez-Pita is the executive vice president and general counsel of Tyson Foods, Inc., in Springdale, Arizona, where he is responsible for overseeing the company's legal, ethics, compliance, and internal audit departments. Tyson Foods, a Fortune 100 company, is the world's leading processor and marketer of chicken, beef and pork, generating over $25 billion in revenues from 300 facilities, and offices in 26 states and 20 countries.

Mr. Gonzalez-Pita was previously an officer of Bell South Corporation, serving as the vice president of international legal, regulatory, and external affairs for BellSouth's operations in Latin America, Europe, and Asia. Prior to then, he was an executive partner at White & Case LLP, where he was chair of the firm's global privatization and Latin America practice groups. While in private practice, Mr. Gonzalez-Pita represented the governments of Argentina, Panama, Venezuela, and Uruguay in a number of significant transactions, including privatizations of companies in the oil, gas, power, telecommunications, and steel industries. He also represented numerous private sector companies and financial institutions in a wide variety of domestic and international acquisitions, dispositions, joint ventures, financings, and securities offerings. He previously worked with the law firms of Walton, Lantaff, Schroeder & Carson, Patton & Kanner, and McDermott, Will and Emery in their Miami offices.

Mr. Gonzalez-Pita serves on ACC's Board of Directors, on the steering committee of the ABA's minority counsel program and on the board of directors for the Fayetteville Chamber of Commerce. He previously served as co-chair of the International Bar Association's corporate counsel committee, co-chair of The Conference Board's Council of Senior International Attorneys and as a trustee of St. Thomas University School of Law. He is a member of the Florida Bar Association, ACC, ABA, International Bar Association, American Arbitration Association, and Maritime Law Association of the United States.

Susan Hackett

Susan Hackett joined Association of Corporate Counsel (ACC) in 1989, as senior vice president and general counsel. She is currently focused on ACC's advocacy efforts including ACC's amicus program, the development of in-house legal ethics and professionalism resources, testimony and representation before decision-making authorities, in-house corporate responsibility initiatives and, multijurisdictional practice (MJP) reform. She also focuses on attorney-client privilege protection, revision of the Federal Sentencing Guidelines, e-discovery evidentiary reform, and civil justice reform initiatives. Corporate pro bono and diversity initiatives, including diversity pipeline projects, and liaisons with the bars of color.

Before joining ACC, she was a transactional attorney at Patton Boggs, a large DC law firm, and clerked for several DC employers while in law school and sitting for the bar.

Ms. Hackett is a member of the boards of directors of Equal Justice Works and Street Law, Inc., and a former member of the board of the Minority Corporate Counsel Association (MCCA). She has been an appointed liaison to several ABA Presidential Commissions and task forces, including: the commission on the multijurisdictional practice of law, the commission on alternatives to the billable hour, the joint committee on lawyer regulation, the ABA task force on Sarbanes-Oxley Section 307, and the attorney-client privilege task force.

She is a graduate of a dual B.A. from James Madison College at Michigan State University, and a graduate of the University of Michigan Law School, where she served as President of Phi Delta Phi, the international honorary legal fraternity.

Mahmud Jamal

Mahmud Jamal is a litigation partner at Osler, Hoskin & Harcourt LLP. His practice includes commercial litigation, class actions, and antitrust and regulatory litigation. He has argued before trial and appeal courts across Canada, including 10 appeals before the Supreme Court of Canada. Mr. Jamal was ranked by Lexpert as one of the "Top 40 Lawyers Under 40" in Canada and he is listed in the Canadian lexpert directory and in best lawyers in Canada.

Prior to joining Osler, Mr. Jamal served as law clerk at the Supreme Court of Canada and at the Quebec Court of Appeal.

Mr. Jamal has acted as pro bono counsel for the Canadian Bar Association and the Canadian Civil Liberties Association.

Mr. Jamal received a B.A. from the University of Toronto and law degrees from McGill and Yale Law Schools.

ACC Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACCA.COM

ACC ANNUAL MEETING 2006
SESSION 210:

"Pragmatic Practices for Protecting Privilege"

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ACC thanks Osler, Hoskin and Harcourt LLP for their gracious sponsorship of this session.

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The following resources are included within these course materials:

ACC's Bibliography of privilege related material of special interest to corporate counsel

In-House Counsel and Solicitor-Client Privilege: A Canadian Perspective, by Mahmud Jamal of Osler, Hoskin and Harcourt LLP.

(An additional document that examines privilege best practices at work in a variety of legal departments will be offered onsite (it was not ready as of the time of this CD's pressing); it will also be added to the Annual Meeting webpage that houses written materials online after the meeting, if you would like an electronic copy.)

For additional reading, consider the following resources available via ACC's Virtual Library:

ACC's Privilege Protection Homepage:
http://www.acca.com/php/cms/index.php?id=84

Written Submission (prepared by ACC) to the US Senate Judiciary Committee for hearings on September 12, 2006, on behalf of the Coalition to Preserve the Attorney-Client Privilege:
http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf

Ruling of Judge Lewis Kaplan in the KPMG/*U.S. v. Stein* Case:
http://www.acca.com/public/attyclientpriv/kpmg_decision.pdf

ACC's Comments to the Federal Rules study committee examining FRE 502 and limited waiver provisions:

http://www.acca.com/resource/v7465

Report of the ABA Attorney-Client Privilege Task Force on Privilege Erosion in the Audit Context:
http://www.abanet.org/buslaw/attorneyclient/materials/hod/0806_report.pdf

Report of the ABA Attorney-Client Privilege Task Force on Individual/Employee Rights under Attack:
http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf

American Bar Association Attorney-Client Privilege Task Force Homepage:
http://www.abanet.org/buslaw/attorneyclient/home.shtml

IN-HOUSE COUNSEL AND SOLICITOR-CLIENT PRIVILEGE

OVERVIEW

- Why Is This Important?
- Rules Of Privilege
- General Application To In-House Counsel
- Specific In-House Issues
- Privilege "Best Practices"
- Dealing With the Tax Authorities
- Limited Waiver And CRA
- CRA Access to Tax Working Papers
- International Privilege Issues

1. WHY IS THIS IMPORTANT?

- Institutional and individual concerns
- Institutional:
  - purpose to facilitate full and frank communication between lawyer and client in seeking and giving legal advice – the corporation's secrets
  - who wants to know corporate secrets?
    - regulators
    - competitors
    - litigants

1. WHY IS THIS IMPORTANT? cont'd

- Individual concerns
  - Legal duty to protect client confidences
    - Can result in liability
    - Standard of care – reasonably prudent solicitor
  - Ethical duty to protect client confidences
    - Can result in discipline
    - Standard of care - Rule 2.03 of the *Rules of Professional Conduct*:
      - "A lawyer shall at all times hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so."

2. RULES OF PRIVILEGE

- Where privilege does/does not apply
- Scope
- Approach of the courts where privilege found

2. GENERAL RULES cont'd

- Applies where:
  - Communications between solicitor and client
  - Involving the seeking/giving of legal advice
  - Where the communication is intended to be confidential by the parties
    - "All communications between client and lawyer and the information they share … *prima facie* confidential in nature" (*Foster Wheeler*, SCC, 2004)

2. GENERAL RULES cont'd

- Does *not* apply where
  - Legal advice not sought or offered
  - Communications not intended to be confidential
  - Furthering unlawful conduct

2. GENERAL RULES cont'd

- Scope of the privilege
  - Very broad and "jealously guarded" (*Pritchard*, SCC, 2004)
    - Any communications within "the usual and ordinary scope of the professional relationship"
    - "Any consultation for legal advice, whether litigious or not"
    - Arises "as soon as the client takes the first steps", "even before a formal retainer is established"
    - Once established, "considerably broad and all encompassing"

3. GENERAL APPLICATION TO IN-HOUSE LAWYERS

- Rules of privilege/confidentiality for in-house and outside counsel are *identical*
- *Alfred Crompton*, Lord Denning, adopted by SCC:
  - "regarded by the law as in every respect in the same position as those who practise on their own account"
  - "only difference is that they act for one client only, and not for several clients"
  - "same standards of honour and etiquette"
  - "same duties to their client and the court"
  - "must respect the same confidences"
  - "they and their clients have the same privileges"

3. GENERAL APPLICATION TO IN-HOUSE LAWYERS cont'd

- Same rules, different application
- Rules difficult to apply
  - In flux
    - flood of privilege cases from SCC
    - privilege "constitutionalized"
    - privilege under assault by regulators

4. SPECIFIC APPLICATION TO IN-HOUSE LAWYERS

- Who is the client?
- Legal *vs.* business advice
- Illustrations

4. SPECIFIC APPLICATION TO IN-HOUSE LAWYERS cont'd

- 1. Who is the client?
  - Determines who owns privilege / owed confidentiality duties
  - Privilege belongs to client, not the lawyer
    - client's right to privacy
    - can be waived only by client through informed consent

4. SPECIFIC APPLICATION TO IN-HOUSE LAWYERS cont'd

- Determines to whom confidentiality owed
  - Lawyer owes allegiance/ethical duties to the corporation (incl. subsidiaries), not its individual agents
  - *Rules of Professional Conduct*:
    - "The lawyer should recognize that his or her duties are owed to *the organization* and not to the officers, employees, or agents of the organization"

4. SPECIFIC APPLICATION TO IN-HOUSE LAWYERS cont'd

- 2. Legal *vs.* business advice
  - Privilege covers only legal advice
  - Does not cover "advice on purely business matters even where it is provided by a lawyer" (*Shirose*, SCC, 1999)
  - Critical for in-house counsel to keep responsibilities separate
    - Also required by *Rules of Professional Conduct*, Rule 2.01, "Competence"

4. SPECIFIC APPLICATION TO IN-HOUSE LAWYERS cont'd

- 3. Internal investigations
  - In-house counsel conduct internal investigations involving potential civil or criminal liability involving the corporation or its employees
  - Can be privileged, if done right

4. SPECIFIC APPLICATION TO IN-HOUSE LAWYERS cont'd

- Key factor: how the internal investigation set up and papered
- Whether a sufficient evidentiary nexus between the investigation and seeking/giving legal advice
  - mark files privileged and confidential
  - instructions from in-house counsel
  - investigation for the purpose of giving legal advice
  - corporate policy on investigations by in-house counsel

4. SPECIFIC APPLICATION TO IN-HOUSE COUNSEL cont'd

- 4. Board minutes
  - Where in-house counsel provide legal advice to Board
  - Or where reporting on actual or contemplated litigation
  - Courts will redact privileged from non-privileged
  - Prepare privileged and non-privileged versions of minutes – avoids the court redacting for you

4. SPECIFIC APPLICATION TO IN-HOUSE COUNSEL cont'd

- 5. Litigation privilege
  - Privilege over materials/information created with the dominant purpose of preparing for actual or reasonably anticipated litigation
  - Can sometimes claim litigation privilege over materials even before lawyers involved
    - Some courts take a bright-line "date" approach
    - Preferable to have counsel involved sooner

4. SPECIFIC APPLICATION TO IN-HOUSE COUNSEL cont'd

- 6. Common interest privilege
  - Evolving area
  - Common interest privilege recognized by SCC in *Pritchard* (2004)
  - Originated where parties have a common goal or seeking a common outcome; later extended to cases where fiduciary or like duty found to exist so as to create a common interest – *e.g.* trustee/beneficiary and some contractual or agency relations
  - Applies to sharing legal advice with other parties to a commercial transaction who "have a common interest in seeing the deal done", or to "facilitate completion of a commercial transaction", to "allow parties to be informed of the respective legal positions of others"
  - Privilege applies where sharing legal opinion "not with intent to waive privilege"

5. BEST PRACTICES

- Mark documents as “Privileged and Confidential”, and “Prepared for legal counsel for the purpose of providing legal advice” and/or “Prepared for legal counsel for the purpose of preparing for litigation”
- Preface emails or other documents with language such as “You have asked for my legal advice on the following issues…”.
- Use legal department letterhead rather than the general letterhead
- Sign letters and memoranda as legal counsel.

5. BEST PRACTICES cont’d

- Maintain a segregated confidential file of materials over which privilege is to be claimed (including e-mail folders for electronic documents)
- Label files “Privileged and Confidential”
- Emphasize to clients the importance of keeping legal advice confidential and of not sharing that advice with any third party

5. BEST PRACTICES cont'd

- Limit circulation of legal advice
- Where this is not possible or desirable, ensure recipients understand the importance of keeping the advice confidential, such as by marking the documents appropriately
- Circulating legal advice outside the organization will likely amount to waiver of privilege
- Have a corporate policy on who is authorized to waive privilege

5. BEST PRACTICES cont'd

- When retaining outside experts, legal counsel should prepare a retainer letter specifically confirming that the expert is retained for the purpose of assisting counsel in providing legal advice and/or to prepare for litigation. The expert should marks his or her report accordingly and direct the report to counsel's attention

6. DEALING WITH THE TAX AUTHORITIES

Solicitor-client privilege: the regulatory environment

- constitutional protection: all SCP information out of reach of the state (*Lavallee*, 2002, 4 CTC 143)
  - thus no statutory power to demand privileged documents
- but regulators – the CRA a classic example - are testing the limits of what constitutes SCP information
  - thirst for information: funding, Auditor General, GAAR (SCC) cases
- reflected in increasing aggressiveness
  - use of audit tools – audit requests; requirements; search warrants
  - challenges to privilege claims - repository, not acting *qua* counsel, lack of intention, waiver, fraud

Three Areas of Concern

- doctrine of limited waiver
- communications with a third party
- taxpayer's tax accrual working papers

7. Limited waiver doctrine – maintaining privilege where privileged material (legal opinion) provided to third party

- waiver depends on intention: waiver only when deliberate and knowing - not inadvertent
- doctrine of 'limited waiver' –
  - developed by the courts to balance competing interests
  - context arose where statutory obligation to provide information
- *IPL v MNR* 1996 1 F.C. 367 - providing a copy of a legal opinion to external auditors for a limited purpose
- followed in *Phillip,* 2005, OJ #4418 (ODC) and *Welton Parent* 2006 FC 67 (TD)
- *Philip*: SCP incursions narrow and only to allow competing objectives
- Justice position: may continue to rely on *obiter* in *Cineplex Odeon* 94 DTC 6407 (OGD); and *PIPS* 1995 3 FC 643 (FCTD).

Concerns

- Law is not clear
- US position – doctrine not recognized and disclosure complete waiver
- scope of limitation unclear: what if recipient must disclose to carry out mandate?
- scope unclear: whether doctrine applies where no statutory authority to compel?

Recommendation:
be clear as to disclosure

- focus on obligation, intention, and fairness
- client must document transaction: effectively adopt "*IPL*" letter setting forth:
  - content of release,
  - limited purpose of release,
  - authority relied upon for release, and
  - privilege otherwise to be maintained

Communication with third party - limits on privilege

- general rule: communications to or by a third party are not protected
- exceptions:
  - litigation privilege: communication or material prepared at lawyer's request for purpose of existing or apprehended litigation
  - legal advice privilege: *Welton Parent* - two schools of thought:
    - agency – where third party is the agent of the client for purpose of providing instructions to or receiving advice from the lawyer
    - function – where third party function is essential to the existence or operation of the S-C relationship
      - where third party "stands in the shoes" of the client
- concerns:
  - query the difference between approach of agency and function
  - query when third party information essential to provision of legal advice

Recommendation: exercise care

- exceptions are narrow
- document relationship through "*Welton Parent*" letter setting forth:
  - third party as agent of client
  - information provided essential to the provision of legal advice
- possible approach: client would engage third party to present the client's information supplemented by third party analysis all essential to the seeking of legal advice
- challenges likely:
  - legal advice suggested

8. CRA demand for access to taxpayer's tax accrual working papers

- concern: provides CRA with roadmap into taxpayer's transactions
  - system self assessment, not self audit
- yet generally no privilege regarding taxpayer working papers
  - US: not privileged as purpose is to allow auditors to evaluate tax reserves, not advise taxpayers as to legitimacy of transactions
  - but "fair play" practice: appears IRS will not request unless listed or reportable transaction
- CRA current status: further review after additional submissions from selected groups; expect position in spring

Recommendation: protect working papers

- consider preparation of working papers for purpose of seeking legal advice
  - purpose must be genuine
  - legal advice must relate to legal (not accounting) issue
  - legal advice can speak to legal risks of transactions which may subsume adequacy of reserve

9. INTERNATIONAL PRIVILEGE ISSUES

Solicitor-client privilege: limited or nonexistent in some jurisdictions

- traditional common law solicitor-client privilege is not universally recognized
- member EC states have “confidentiality” doctrines applying to registered lawyers with varying degrees of protection
- Japan recognizes privilege between a bengoshi (registered lawyer) and client but such communications are not privileged in hands of client
- China does not recognize legal professional privilege and broad governmental powers exist to collect and obtain evidence as necessary

Dealing with non-Canadian lawyers or agencies: solicitor-client privilege in the EC

- EC privilege analysis is markedly different from Canada/US/UK: *AM&S* decision (ECJ, 1982) holds that privilege attaches only to documents to and from independent lawyers entitled to practice their profession in one of the Member States
- In-house lawyers in EU generally not members of a regulated profession or bar
- Non-EU qualified lawyers excluded
- Thus, communications by Canadian lawyer (in-house or not) to EU client or entity may be privileged in Canada but not in EU
- EC has relied upon statements by in-house lawyers to obtain severe penalties because violation was committed "knowingly"
- Policy has been widely criticized and pending *Akzo Nobel* litigation may modify this position

The US civil discovery and production regime: hazards for Canadian production

- Settlement privilege generally not recognized in US: (*re Vitamins Antitrust Litigation*)
- There may be a risk in sharing documents and other recorded information obtained as a result of an internal investigation with domestic agencies; this material may then become subject to production by plaintiffs in US civil litigation;
- *Intel* decision also expands US civil discovery beyond that available under domestic rules (the foreign-discoverability threshold) by granting access to US productions for use in foreign proceedings
- In *Ford v. Hoffmann-LaRoche*, Ontario courts denied prohibition upon plaintiffs seeking fruits of discovery in parallel US actions;
- Combination of the above principles puts privileged matter in potential trans-border jeopardy

The US civil discovery and production regime: litigation/work product privilege

- Litigation privilege aims at providing a "zone of protection" for counsel preparing for litigation, whether actual or reasonably contemplated
- Unlike solicitor-client privilege, however, litigation privilege will end with either the litigation or the contemplation of litigation (*Ontario v. Lifford Wine Agencies*, Ont. C.A. 2005)
- *Chrusz (*Ont. C.A. 1999) maintained non-disclosure of a transcript of interview of employee on an internal interview by insurance co. lawyer and adjuster;
- However, US FRCP rule 26(b)(iii) enables production to parties where "substantial need" is made out and party unable to obtain without undue hardship;
- Thus, US will entertain a "balancing analysis" which is not supported under Canadian law

US waiver issues: solicitor/client privilege and regulatory agencies

- Providing privileged material gathered during an internal investigation to US regulatory agency generally acts as a complete waiver of any privilege;
- US has no recognition of the doctrine of limited waiver
- Antitrust Division (& SEC) often request waivers in co-operation arrangements and the fact of waiver now forms a component of sentencing guidelines for credit purposes (DOJ "*Thompson Memo"* 2003)

Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACCA.COM

Attorney-Client Privilege Erosion in the In-House Context

Supplemental Material
Complementing a Presentation by Susan Hackett

ACC's Attorney-Client Privilege homepage: (offers articles, resources, testimony, links, etc.)
http://www.acca.com/advocacy/attyclient.php

"Wither" Attorney-Client Privilege
An ACC Docket article by ACC's General Counsel, Susan Hackett, on Privilege in the In-house Context Post-Enron: http://www.acca.com/protected/pubs/docket/sept05/wither.pdf

ACC Policies and Comments/Testimony on Attorney-Client Privilege Issues:
http://www.acca.com/public/article/attyclient/debate.pdf
http://www.acca.com/public/comments/attyclient/privilege.pdf
http://www.acca.com/public/accapolicy/corpresponspolicy.pdf
http://www.acca.com/public/accapolicy/attyclient.pdf

ACC and its Coalition partners' testimony before the US House of Representatives Judiciary Subcommittee on Crime, Terrorism and Homeland Security, March 7, 2006:
http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf

ACC and its Coalition partners' testimony before the US Senate Judiciary Committee, September 12, 2006:
http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf

Testimony and Statements made at the Senate Hearings (Sept. 12, 2006):
http://www.acca.com/public/attyclientpriv/writtentestimonyussenate.pdf

Letter from former senior DOJ officials criticizing the DOJ's Thompson Memo and practices:
http://www.acca.com/public/attyclientpriv/agsept52006.pdf

ACC's 2005 survey: Is the Privilege Under Attack?
http://www.acca.com/Surveys/attyclient.pdf
ACC's 2006 survey: The Decline of the Attorney-Client Privilege in the Corporate Context
http://www.acca.com/Surveys/attyclient2.pdf

ABA Attorney-Client Privilege Task Force homepage:
This page contains the report of the Task Force to the ABA house, which is a law review type article that gives a great outline of privilege issues; it also has a resources section on which collected material resides, and info on Task Force activities. ACC is a member of the Task Force and supports their efforts. It also contains the two most recent resolutions on privilege passed by the ABA House in August of 2006, focusing on privilege erosion in the context of audits and problems associated with employee or individual rights (a la the KPMG issues).
http://www.abanet.org/buslaw/attorneyclient/home.shtml

The DOJ's Holder Memorandum is at:
http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html
The DOJ's Thompson Memorandum is at:
http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm
The DOJ's McCallum Memorandum is at:
http://www.acca.com/public/attyclntprvlg/mccallumwaivermemo.pdf
The DOJ's response to the ABA regarding proposals to amend the Thompson Memo:
http://www.acca.com/public/attyclientpriv/dojresponsetoaba.pdf

ACC's Sarbox 307 – Part 205 Rules homepage: This is the site of a significant number of primary and commentary resources on the SEC's new attorney conduct rules promulgated under the authority given in Sarbanes-Oxley Section 307, and codified at 17 CFR Part 205.
http://www.acca.com/legres/corpresponsibility/attorney.php

SEC Proceedings Against In-House Counsel
http://www.acca.com/protected/article/ethics/seccrimproceed.pdf

SEC speeches particularly informative to the attorney-client privilege and gatekeeper debate:
SEC's general counsel explains the 307 rules and their context:
http://www.sec.gov/news/speech/spch040304gpp.htm

SEC's director of enforcement speaks on lawyers' responsibilities as gatekeepers of client conduct and shareholder interests*:* http://www.sec.gov/news/speech/spch092004smc.htm

ACC's Amicus in a recent Texas Supreme Court case regarding the confidentiality of privilieged documents produced to an auditor by a client during the regular audit process and then sought in discovery by a third party in litigation against the client.
http://www.acca.com/public/amicus/txamicus.pdf

ACC's amicus brief on limited waiver concerns: (QWEST)
http://www.acca.com/public/amicus/qwest.pdf

ACC's Comments to the Federal Rules study committee examining FRE 502 and limited waiver provisions:
http://www.acca.com/resource/v7465

ACC's amicus briefs on the issue of government pressure on companies to deny employees' indemnification and fee advancement under corporate policies:

in the KPMG case (2 amicus on related issues as requested by Judge Kaplan):
http://www.acca.com/public/amicus/acckpmgamicusbrief.pdf and
http://www.acca.com/public/attyclientpriv/suppl-us-stein.pdf

in the Lake/Wittig case:
http://www.acca.com/public/amicus/lakewittig.pdf

Lawyers as Whistleblowers: The Emerging Law of Retaliatory Discharge of In-house Counsel
http://www.acca.com/protected/article/governance/wrong_discharge.pdf
The appendix to this article contains the ABA Model Rules of Professional Conduct 1.6 (Confidentiality) and 1.13 (Organization as Client), which are most relevant to this discussion. The issue of lawyers as whistleblowers raises privilege questions in the context of privileged attorney-

client conversations and information that the plaintiff lawyer would wish to introduce in order to make his or her case for retaliatory discharge.

Responsive Measures for Government Investigations
http://www.acca.com/protected/policy/compliance/respond.pdf

Corporate Counsel: Caught in the Crosshairs
http://www.acca.com/protected/article/attyclient/crosshair.pdf

The New Federal Sentencing Guidelines for Organizations: Great For Prosecutors, Tough on Organizations, Deadly for the Privilege
http://www.acca.com/protected/article/attyclient/sentencing.pdf

If you are an in-house counsel and not an ACC member, and therefore need a password to access some of these documents, please contact Susan Hackett at hackett@acca.com for a comp password you can use.

IN-HOUSE COUNSEL AND SOLICITOR-CLIENT PRIVILEGE: A CANADIAN PERSPECTIVE

ABA Spring Meeting
New York, April 2006

Mahmud Jamal
Osler, Hoskin & Harcourt LLP*

A. Introduction

In-house counsel to corporations are frequently confronted with thorny questions of solicitor-client privilege. While in theory in-house counsel are governed by the same rules of privilege and confidentiality as outside counsel, in practice these rules can be difficult to apply in the in-house context, particularly since the rules themselves have recently been in a state of flux. This *caveat* aside, this paper reviews the following issues in connection with privilege and in-house counsel: (i) who is an in-house counsel's client?; (ii) the importance of distinguishing in-house counsel's legal advice from purely business advice; (iii) privilege over internal corporate investigations; (iv) privilege over minutes of meetings of the corporation's board of directors; (v) privilege over internal memos; (vi) privilege in dealings with lawyers from outside the jurisdiction; (vii) privilege and statutory decision-makers; and (viii) litigation privilege and in-house counsel. The paper concludes with some practical suggestions on how in-house counsel can create and maintain privilege in the corporate context.

B. In-House Counsel Are Governed By the Same Rules of Privilege and Confidentiality As Outside Counsel …

It is well-known that the purpose of solicitor-client privilege is to facilitate full and frank communication between a lawyer and client in the seeking and giving of legal advice. As the Supreme Court of Canada has reminded us, the privilege is "based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable".[1] As the Supreme Court has recently reiterated, "[c]lients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function".[2]

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* With thanks to James Heeney of Osler, Hoskin & Harcourt LLP, for his research assistance. This is a revised and updated version of a paper delivered in May 2004 and again in December 2005 to the Ontario Bar Association's Corporate Counsel Section.

1 *R. v. Shirose*, [1999] 1 S.C.R. 565 at para. 49, *per* Binnie J.

2 *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 14, *per* Major J.

It is equally well-known that the privilege applies only to: (1) communications between a solicitor and a client; (2) involving the seeking or giving of legal advice; and (3) where the communication is intended to be confidential by the parties.[3] The privilege covers any communication that "falls within the usual and ordinary scope of the professional relationship", and extends "to cover any consultation for legal advice, whether litigious or not." The privilege arises "as soon as the potential client takes the first steps, and consequently even before the formal retainer is established".[4]

However, the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct.[5]

In recent cases, the Supreme Court has forcefully stated that "the privilege is jealously guarded", and "should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction" in a criminal case. The Court has underscored that "the privilege must be nearly absolute and that exceptions to it will be rare". The privilege, once established, is "considerably broad and all encompassing".[6]

What is perhaps less well-known is how the rules of privilege apply to in-house counsel. In principle, the rules themselves are identical: in-house counsel are governed by the same rules of solicitor-client privilege as outside counsel. The leading statement of this principle is Lord Denning's judgment in *Alfred Crompton Amusement Machines Ltd. v. Commissioner of Customs and Excise (No. 2)*, where he said this:

> The law relating to discovery was developed by the Chancery courts in the first half of the 19th century. At that time nearly all legal advisors were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisors, 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 advisors do legal work for their employer and 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 myself in my early days settled scores of affidavits of documents for the employers of such legal advisers. 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.[7]

Lord Denning's comments have been cited often by Canadian courts. For example, in one leading Canadian case, *IBM Canada Ltd. v. Xerox of Canada Ltd.*, the Federal Court of Appeal held as follows:

> There appears to be no doubt that salaried legal advisers of a corporation are regarded in law as in every respect in the same position as those who practise on their own account. They and their clients, even though there is only one client, have the same privileges and the same duties as their practising counterparts.[8]

The substance of these statements has recently been adopted by the Supreme Court of Canada, which has accepted unequivocally that communications between in-house counsel and their client are subject to the same privilege rules as outside counsel.[9] As the Court recently explained, "[i]f 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".[10]

In-house counsel are also governed by the same ethical rules of client confidentiality as outside counsel. Ontario's *Rules of Professional Conduct*, for example, do not distinguish between the ethical duties of confidentiality of in-house and outside counsel; all are bound by the same rules.[11] The courts have similarly rejected calls to exempt certain categories of lawyers from ethical rules. For example, in a recent case, the Supreme Court of Canada rejected the argument that Alberta's Crown prosecutors should be exempt from the provincial law society's rules of professional conduct in exercising prosecutorial discretion. The Court held that since all Crown prosecutors are required to be members of the provincial law society, all are bound by the law society's code of professional conduct.[12]

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3 *R. v. Solosky*, [1980] 1 S.C.R. 821 at p. 835, *per* Dickson J. (as he then was); recently affirmed in *Pritchard*, *ibid.*, para. 15.

4 *Pritchard*, *ibid.*, paras. 15-16.

5 *Ibid.*, para. 16.

6 *Ibid.*, paras. 16-18.

7 [1972] 2 All E.R. 353 at p. 376 (C.A.), affirmed on other grounds [1972] 2 All E.R. 1169 (H.L.).

8 [1978] 1 F.C. 513 at p. 516 (C.A.), *per* Urie J.A. See also *Antares Shipping Corporation v. Delmar Shipping Limited* (1980), 16 C.P.C. 115 at p. 117 (Fed. T.D.), *per* Dube J.; *Crown Zellerbach Canada Limited v. Deputy Attorney General for Canada*, [1982] C.T.C. 121 at p. 123 (B.C.S.C.), *per* Esson J. ("there is no distinction, for the purpose of a claim to legal professional privilege, between lawyers in private practice and salaried legal advisers"); John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (2nd. ed., 1999), §14.72, at p. 743 ("Lawyers who are employed by a corporation and therefore have only one client are covered by the privilege, provided they are performing the functions of a solicitor").

9 *Pritchard*, above, note 2, para. 19; *Shirose*, above, note 1, para. 49.

10 *Pritchard*, above, note 2, para. 21.

11 Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 2.03(1): "A lawyer shall at all times hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so". The only provincial rules of professional conduct that appear to distinguish in-house from outside counsel are the Law Society of Alberta's *Code of Professional Conduct*, Chapter 12, "The Lawyer in Corporate and Government Service". For discussion of the Alberta rules, see Ken B. Mills, "Privilege and In-House Counsel" (2003) 41 *Alberta Law Review* 79 at pp. 84-85.

12 *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 at para. 4, *per* Iacobucci and Major JJ. for the Court.

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C. … But The Rules Are In Flux

While the legal and ethical rules are the same for in-house and outside counsel, questions of solicitor-client privilege are nevertheless complicated, for in-house and outside counsel alike, because the law of privilege is in a state of flux. In recent years, the privilege has, paradoxically, been both strengthened and weakened.

The privilege has been strengthened, because the Supreme Court of Canada has recently declared that legal professional privilege is a constitutional right guaranteed under the *Canadian Charter of Rights and Freedoms*.

Of late, the Court has taken a strong interest in solicitor-client privilege, deciding more cases on privilege in the past five years than in the preceding twenty.[13] The Court has "constitutionalized the privilege", finding that a client's right to retain privilege over communications with a lawyer is constitutionally protected under both sections 7[14] and 8[15] of the *Charter*. The Court has also accepted that, in the criminal context, there is a privilege in the amount of fees a client pays a lawyer.[16] In a recent case, the Court even went as far as to say that there is a rebuttable presumption of fact that "all communications between client and lawyer and the information they share […] [are] considered confidential in nature".[17]

While the recent cases before the Supreme Court have arisen in the criminal context, there is good reason to believe that the same or a similar constitutional analysis will apply in the civil context. This could require reformulating the law of privilege through a constitutional framework even in civil cases.[18]

But the privilege has also been weakened, because recently there have been calls for exceptions to the almost-absolute character of the privilege.

For example, the recently enacted federal money laundering legislation tried to impose reporting obligations on lawyers when confronted by suspicious financial transactions by their clients. Lawyers have now been exempted from these reporting obligations, but only after a series of constitutional challenges were launched across Canada.[19]

Similarly, in Ontario, the Law Society of Upper Canada has proposed a new rule of professional conduct dealing with a lawyer's obligations when confronted with property relevant to a crime or offence.[20] This rule has been under consideration for some time and its status remains unclear.

Collectively, these recent developments have only further complicated the challenge in providing legal advice in what was already a difficult area of the law.

D. The Privilege And In-House Counsel

(i) *Who is the Client?*

In dealing with solicitor-client privilege a preliminary question frequently encountered is: who is the client? The answer to this question is particularly important, as the privilege belongs to the client, and can be asserted or waived only by the client or through his or her informed consent.[21]

The answer is also important in order to understand to whom in-house counsel owe their duties of confidentiality. Where a lawyer is employed in-house or retained by a corporation, the lawyer owes allegiance to the corporation, and not to its individual agents. The Ontario *Rules of Professional Conduct* make this clear, directing that "a lawyer should recognize that his or her duties are owed to the organization [which includes a corporation] and not to the officers, employees, or agents of the organization".[22] This overriding loyalty to the corporation, a fictional legal entity, rather than to the flesh-and-blood individuals in-house counsel deal with daily, raises significant potential conflict of interest issues of which in-house counsel need to be on guard.[23]

In addition, it is of course not uncommon for in-house counsel of a parent corporation to have responsibility for advising wholly-owned subsidiaries. The courts have generally extended the privilege and confidentiality protections to such subsidiaries as well, considering them to be the "client". The courts have taken a practical approach in this regard, concluding that it would

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13 The Court's recent cases are reviewed in Mahmud Jamal & Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003), 20 S.C.L.R. (2d) 213.

14 *R. v. McClure*, [2001] 1 S.C.R. 445, *per* Major J. Section 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

15 *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209, *per* Arbour J. Section 8 of the *Charter* provides: "Everyone has the right to be secure against unreasonable search or seizure".

16 *Maranda v. Richer*, [2003] 3 S.C.R. 193, *per* LeBel J.

17 *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456 at para. 42, *per* LeBel J. for the Court (released March 25, 2004).

18 For elaboration on this position, see Jamal & Morgan, above, note 7, pp. 234-247. The Supreme Court's recent decision in *Pritchard*, above, note 2, largely imports the Court's recent privilege decisions from the criminal context into the civil context, as though the same principles apply in both contexts without apparent qualification.

19 *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17. On March 25, 2003, the federal government announced that it was exempting lawyers from the reporting obligations under this legislation.

20 Law Society of Upper Canada, *Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence* (Report to Convocation), March 21, 2002.

21 *Lavallee*, above, note 15, para. 39.

22 Law Society of Upper Canada, *Rules of Professional Conduct*, Commentary to Rule 2.03(3).

23 See Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (2001+), chapter 20, "The Corporate Counsel", esp. pp. 20-7 to 20-10.

seriously erode the privilege to treat wholly-owned subsidiaries as independent third parties on the basis that they are separate legal entities.[24]

(ii) *Legal vs. Business Advice*

Solicitor-client privilege covers only legal advice, and not advice on purely business matters even where it is provided by a lawyer. This distinction is critical for in-house counsel, who frequently wear multiple hats when advising a corporation, or have multiple corporate responsibilities (such as corporate secretary or membership on the board of directors).

The courts have stressed this limitation, and warned that not everything said or done by in-house counsel is cloaked with privilege. Thus, while Lord Denning in *Alfred Crompton Amusement Machines Ltd.* accepted that the same rules of privilege apply to in-house counsel, he then immediately added that only communications made in the capacity of legal advisor are privileged, and not work done in any other capacity. He warned that in-house counsel "must be scrupulous to make the distinction":

> I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.[25]

Lord Denning's call for lawyers to be scrupulous in distinguishing between legal advice and business advice has been raised to the level of an ethical duty in Ontario. In this respect, the commentary to the rule on lawyer competence in the Law Society's *Rules of Professional Conduct* provides as follows:

> In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.[26]

Our Supreme Court has recently drawn the same distinction between legal advice and business advice. In *R. v. Shirose*, Binnie J. for the Court affirmed the rule enunciated by Lord Denning in *Alfred Compton* and stated as follows:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), *per* Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:
>
> > [I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.[27]

The Court made many of the same points in the recent *Pritchard* case, which held that a legal opinion from in-house counsel to the Ontario Human Rights Commission on whether or not to deal with a complaint under the Ontario *Human Rights Code* was privileged. Iacobucci J. for the Court underscored the importance of distinguishing corporate counsel's legal advice from advice "in an executive or non-legal capacity", flowing from their functionally distinct "legal and non-legal responsibilities". Iacbobucci J. stated that where "corporate lawyers […] also may give advice in an executive or non-legal capacity […] such advice is not protected by the privilege".[28] He also stressed the intrinsically fact-specific inquiry necessary when distinguishing between corporate counsel's legal and non-legal roles and advice. As he explained:

> 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[.][29]

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[24] *Mutual Life Assurance Co. of Canada v. Deputy Attorney General of Canada* (1988), 28 C.P.C. (2d) 101 at p. 103 (Ont. H.C.J.), *per* Saunders J.; *Morrison-Knusden Co. v. B.C. Hydro & Power Authority* (1970), 19 D.L.R. (3d) 726 (B.C.C.A.).

[25] Above, note 7, pp. 376-377.

[26] Law Society of Upper Canada, *Rules of Professional Conduct*, Commentary to Rule 2.01, "Competence".

[27] *Shirose*, above, note 1, at para. 50.

[28] *Pritchard*, above, note 2, at para. 19.

[29] *Ibid.*, para. 20.

(iii) *Internal Investigations*

In-house counsel are often asked by the corporation to conduct internal investigations into potential civil or criminal claims involving the corporation or its employees. These investigations can be protected from disclosure to third parties by solicitor-client privilege and litigation privilege, provided they are done properly. This section reviews how solicitor-client privilege can apply; litigation privilege is discussed below.

Courts have ruled both ways on the issue of whether such internal investigations are protected by solicitor-client privilege. In the first three cases below, the courts found such an internal investigation to be privileged; but in the last two, they found that it was not privileged. The key decisive factor appears to be whether there is a sufficient evidentiary nexus established between the investigation and the seeking or giving of legal advice.

In *Hydro-One Network Services Inc. v. Ontario (Ministry of Labour)*,[30] the court had to decide whether a report prepared by a non-lawyer employee at the request of in-house counsel to investigate into the causes of an accident was privileged. The purpose of the report was to allow counsel to provide legal advice to his superiors as requested by them. Investigators of the Ministry of Labour had seized the report pursuant to the execution of a search warrant. The court found that the report was privileged. The court noted that the report was intended to be kept confidential because it was marked "Privileged and Confidential", which was confirmed by the testimony of in-house counsel before the court. The court also highlighted that the cover page of the report stated that "This report is prepared for [in-house counsel] for the purpose of providing legal advice".

In *Singh v. Edmonton (City)*,[31] the Alberta Court of Appeal had to decide whether witness statements taken by employees conducting an internal investigation into another employee's alleged financial improprieties were privileged. The Court found that the purpose of obtaining the statements and other documents was to obtain legal advice, something that was invariably done by the company in cases of alleged misconduct by senior management. The Court therefore held that these statements were privileged, and refused to order them produced to the employee when he sued for wrongful dismissal. The Court ruled as follows:

> Sometimes courts are justifiably a little sceptical of claims by large organizations that every paper about every mishap is prepared to be laid before the solicitors of the organization. But this case does not involve splashing mud on a pedestrian, or a file clerk's tardiness. From the outset, very serious breaches of many branches of the law were alleged. And the topic was conduct in office of a high management official. Common sense and experience and rudimentary knowledge of the law would all suggest taking precisely the steps taken here, namely build up a dossier to show to a lawyer to get advice about what course to follow.[32]

[30] [2002] O.J. No. 4370 (O.C.J.), *per* Bentley J.

[31] (1994), 30 C.P.C. (3d) 277 (Alta. C.A.).

[32] *Id.*, p. 279.

In *Strong v. General Motors of Canada Ltd.*,[33] the court had to decide whether privilege applied to notes made by employees conducting an internal investigation at the request of in-house counsel into allegations that an employee sexually assaulted another employee. The company's personnel department brought the allegations to the attention of in-house counsel, who gave instructions to employees to investigate the matter, to obtain statements from other employees, and to maintain a confidential file. These materials were to be collected to allow in-house counsel to provide legal advice. The court held that the notes in the file were protected by solicitor-client privilege, as well as litigation privilege because there was a reasonable prospect of litigation arising out of the allegations.

By contrast, the claim of privilege was unsuccessful in *Prosperine v. Ottawa-Carleton (Regional Municipality)*.[34] In this case, a corporation sought to claim privilege over a report prepared by its outside consultant, Peat Marwick Thorne. The report had been commissioned by a municipality to investigate into a potential fraud committed by a contractor to the municipality. The municipality claimed that the report was privileged because Peat Marwick had been retained by an in-house solicitor. The court rejected this argument, finding that the most that could be said on the evidence was that the consultant was retained to perform work that may have facilitated the municipality in obtaining legal advice at some later time. The contract between the municipality and the consultant did not refer to the purpose of the investigation as being to facilitate the giving of legal advice, but rather referred only to the goals of quantifying the financial loss incurred and identifying improvements for the future.[35]

The claim of privilege was also unsuccessful in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*.[36] Here, in-house counsel for the B.C. College of Physicians obtained opinions from four experts to assist the College in assessing a complaint against a physician. The in-house lawyer then prepared two memos summarizing the opinions of the experts. The B.C. Court of Appeal accepted that the in-house lawyer was engaged in rendering legal advice when she obtained the experts' opinions, but found that the reports were nevertheless not privileged. The Court said that such third party communications are protected by legal advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between solicitor and client. The Court found that the experts were retained merely to provide information and opinions concerning the medical basis for the complaint. While these opinions were relevant, and even essential, to the legal problem confronting the College, the Court found that the experts' services were incidental to the seeking and obtaining of legal advice.[37]

These cases show that the circumstances where the privilege is found can be quite similar to cases where it is rejected. In the final analysis, much depends on the context and the factual record before the court establishing the specific nexus between the investigation and the legal advice sought or received.

[33] (1996), 4 C.P.C. (4th) 142 (Ont. Gen. Div.), *per* Master Peppiatt.

[34] [2002] O.J. No. 3316 (Sup. Ct.), *per* Aitken J., appeal dismissed [2003] O.J. No. 1414 (Div. Ct.), *per curiam*.

[35] *Id.*, paras. 8-9.

[36] [2002] B.C..J. No. 2779 (B.C.C.A.).

[37] *Id.*, para. 51.

(iv) *Minutes of Board Meetings*

The courts have found that legal advice provided by in-house counsel to the board of directors of the corporation is privileged, and it is therefore proper to refuse to disclose minutes of the board's meeting, or portions thereof, recording that advice. The same protection applies, under the rubric of litigation privilege, where in-house counsel reports on actual or pending litigation against the corporation. As held by the Nova Scotia Supreme Court in *Nova Scotia Power Corp. v. Surveyer, Nenninger & Chenevert Inc.*, in refusing to order production of board minutes recording legal advice from in-house counsel:

> In reviewing the two sections of the minutes of the Board of Directors […], it is clearly a situation of a summarization of legal advice given by counsel to a client. A summary or documentation of such advice, even through the medium of minutes of the board of directors' meeting, should be protected by the legal professional privilege. It is not unusual for "in house" general counsel to give legal advice relating to pending litigation or litigation to his client – the Board of Directors of the corporation and for that advice to be recorded in the minutes of that meeting. The confidentiality of giving advice in such a manner is as important and should be as "sedulously fostered" as the giving of legal advice by counsel to a client under any other situation.[38]

However, the courts will protect only the portion of the minutes specifically involving legal advice; the remainder may be ordered disclosed. As Farley J. warned in *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*:

> With respect to minutes of meetings, I would be of the view that the privilege only relates to that part which specifically involves the legal advice and secondly that the function of the meeting was reasonably necessary to deal with the aspect of developing or digesting the legal advice.[39]

(v) *Internal Memos*

Internal memoranda containing legal advice from in-house counsel to their clients are generally considered confidential documents subject to privilege. In-house counsel should, however, be cautious of how these memoranda (and other documents containing the substance of their legal advice) are circulated internally within the corporation. Indiscriminate circulation of legal memos can result in a loss of privilege.

For example, in *Toronto-Dominion Bank v. Leigh Instruments Ltd.*,[40] the Ontario Court (General Division) held that no privilege applied to a memo sent by a bank's general counsel to all of its branches commenting on the risks associated with comfort letters. In support of this conclusion, the Court noted that the bank's general counsel also performed several executive capacities within the bank, such as corporate secretary, and it was not clear from the evidence before the Court that he was acting in his capacity as general counsel in sending the memo. The Court also noted that the memo was a statement of corporate policy, rather than providing legal advice, in part because the memo was labelled as a "head office circular" rather than as a memorandum from the legal department. Most significantly, however, the Court pointed to the fact that the memo had been widely circulated within the bank, and sent to every branch and department, without any warning on the face of the memo that its contents were confidential. The Court therefore found that the memo was not intended to be confidential, and was not privileged.

A more generous approach was taken in *Quinn v. Federal Business Development Bank*,[41] where the Newfoundland Supreme Court found that an inter-office memo circulated within the Federal Business Development Bank that referred to "a legal opinion from our counsel" was privileged, even though it was not sent by in-house counsel but rather simply recorded counsel's advice. The Court ruled that "communications between two or more employees of a client commenting on legal advice received from the client's solicitor is subject to the protection of solicitor-client privilege".[42]

(vi) *Dealings with Lawyers from Outside the Jurisdiction*

It sometimes happens that in-house counsel is not called to the bar in the particular jurisdiction in which he or she is giving advice. This may be because an in-house counsel is brought in to advise the corporation from outside the jurisdiction, or because the corporation has wholly-owned subsidiaries outside the jurisdiction whose legal affairs are all referred to the parent corporation's in-house counsel. In these circumstances, does the privilege apply? The weight of authority suggests that it does. Sopinka, Lederman and Bryant in the *Law of Evidence in Canada* opine that "as long as one of the parties to the communication is a lawyer, though perhaps not called to the bar of the jurisdiction in which the issue arises, then the umbrella of privilege should cover the communication".[43]

In-house counsel should nevertheless be on guard in dealing with foreign subsidiaries or parent corporations, particularly those in the European Community. Given that in-house lawyers in many member states are employees and, under those countries' laws, are not subject to rules of professional ethics and discipline, European Community law as a whole does not extend the umbrella of privilege to in-house lawyers, even though certain member states' laws do extend such protection. As a result, communications from in-house counsel in Canada that may be privileged here are not necessarily privileged under EU law.[44]

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38 (1986) N.S.R. (2d) 327 at para. 10 (N.S.S.C.), *per* Kelly J.

39 [1995] O.J. No. 1867 at para. 23 (Ont. Gen. Div.), *per* Farley J.

40 (1997), 32 O.R. (3d) 575 (Ont. Gen. Div.), *per* Winkler J.

41 [1997] N.J. No. 105 (N.S.C.T.D.), *per* Hickman C.J.

42 *Id.*, para. 24, citing *Unwell Engineering Co. v. Mogilvesky* (1986), 8 C.P.C. (2d) 14 at p. 18 (Ont. H.C.J.), *per* Gray J.

43 Above, note 8, §14.68, p. 741. See *Mutual Life Assurance Co. of* Canada, above, note 18, at pp. 103-104, for a very good statement of the principles; *Homestake Mining Co. v. Texas Gulf Potash Co.* (1976), 2 C.P.C. 222 at pp. 225-226 (Sask. Q.B.), *per* Local Master Maher; and *Quinn v. Federal Business Development Bank*, [1997] N.J. No. 105 at para. 25 (N.S.C.T.D.), *per* Hickman C.J.

44 See Gavin Murphy, "Comparative Study of the Solicitor-Client Privilege Doctrine Under Canada's Competition Act and EC Competition Law Rules", unpublished, discussing *inter alia AM & S Europe Limited v. Commission*, [1982] E.C.R. 1575, and concluding that "[e]mployed in-house counsel do not benefit from the privilege […] the [European Court of Justice] has clearly stated that the privilege does not extend to in-house counsel".

(vii) *Statutory Decision-makers*

Where in-house counsel provide legal advice to statutory decision-makers on how to exercise statutory duties, that advice may be privileged.

In *Pritchard v. Ontario Human Rights Commission*,[45] the Ontario Court of Appeal had to decide whether privilege applied to a legal opinion provided by in-house counsel to the Ontario Human Rights Commission advising on whether to deal with a complaint of employment discrimination. The Court held that the opinion was privileged. The Court said that extending privilege to legal advice received by statutory decision-makers in exercising their statutory mandates would encourage internal debate about how best to serve the public interest. The Court also said that such decision-makers are often not lawyers and should therefore be encouraged to obtain legal advice about their statutory mandates. The Court reasoned as follows:

> On a policy basis, I find the submission of counsel for the Attorney General in the case at bar persuasive. Counsel submitted that it is desirable for statutory decision-makers to engage in internal debates about which of several possible interpretations of their statutory mandates best serve the public interest, and to be able to weigh those interpretations against other considerations, such as the procedures available to them to regulate or enforce different mandates. Statutory decision-makers, who are often persons with technical expertise in a particular area but not lawyers, need confidential legal advice with respect to the interpretation of relevant legislation and other legal issues in order to facilitate candid discussions.[46]

The Supreme Court dismissed an appeal from this decision, without, however, adopting the Court of Appeal's reasons. The Supreme Court found the opinion to be privileged without specifically relying on the Court of Appeal's policy rationale. The Court merely said that the 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".[47] This suggests that in-house counsel to statutory decision-makers are entitled to the cloak of privilege over communications with their clients on the same basis as other in-house counsel, and without relying on special policy rules for such in-house counsel. Instead, the ordinary rules apply without apparent qualification.

(viii) *Litigation Privilege*

It is well-established that in-house counsel are entitled to claim litigation privilege, that is, privilege over materials and information created with the dominant purpose of preparing for litigation.[48] Difficulties often arise where damaging internal memoranda are circulated within a corporation, before in-house counsel are brought into the loop, discussing a possible dispute. Can litigation privilege be claimed in these circumstances? The weight of authority supports the view that litigation privilege can still be claimed, provided that litigation was in "reasonable prospect". The following considerations and authorities support this view:

- Several courts have held that privilege may be claimed over documents as being made in contemplation of litigation even before a lawyer has been retained at the time the documents were prepared.[49]
- Documents can be prepared in contemplation of litigation, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated, even though the party preparing the document intended to settle the matter if possible without resort to a solicitor at all.[50]
- A number of cases have endorsed the approach of claiming privilege over all documents prepared after an event on a certain date that gives reality to the prospect of litigation. After this date, the party is viewed as preparing to meet anticipated litigation.[51]
- Privilege may be claimed over the results of an internal investigation conducted after a threat of litigation has been made, where the dominant purpose of launching the investigation was to prepare to meet the anticipated litigation.[52]
- In the absence of evidence to the contrary from the party opposing the claim of privilege, the claim of privilege should be sustained.[53]

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45 (2003), 63 O.R. (3d) 97 (C.A.), *per* Armstrong J.A. for the Court.

46 *Id.*, para. 54.

47 *Pritchard*, above, note 2, para. 21.

48 *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716 (Man. C.A.); and *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2003] 2 W.W.R. 279 (B.C.C.A.).

49 See *Rush v. Phoenix Assurance Co. of Canada* (1983), 40 C.P.C. 185 at para. 14 (H.C.J.), *per* Master Peppiatt; *R. v. Westmoreland* (1984), 48 O.R. (2d) 377 (H.C.J.), *per* Steele J. (a party gathering information in contemplation of probable litigation may claim privilege over that information).

50 See Rush, *id.*, at para. 14, citing *Gillespie Grain Company & Grain Insurance & Guarantee Company v. Wacowich*, [1932] 1 W.W.R. 916 at p. 919 (Alta.C.A.), *per* Clarke J.A.; and *Birmingham & Midland Motor Omnibus Company v. London & North Western Railway*, [1913] 3 K.B. 850 at p. 856, *per* Buckley L.J.

51 See, for example, *Romaniuk v. Prudential Insurance Co. of America*, [2000] O.J. No. 1527 at para. 20 (Sup. Ct.), *per* Epstein J. (on the date of denial of coverage, the dominant purpose shifted from investigating the possibility of an obligation to indemnify to preparing for litigation; privilege properly claimed over all documents prepared after that date); *Keirouz v. Co-Operators Insurance Assn.* (1983), 39 C.P.C. 164 at paras. 5-7 (Ont. H.C.J.), *per* Maloney J. (all documents prepared after the date on which there was a basis for anticipating litigation are privileged; it is not necessary that litigation should actually have commenced or be in preparation at the time that the documents are made in order for privilege to attach).

52 See *Catherwood (Guardian ad litem) v. Heinrichs*, [1995] B.C.J. No. 2658 at paras. 21-25 (B.C.S.C.), *per* Hood J. ("gathering evidence and considering the cause, and whether there is a defence to the proposed action, is part of the litigation process"); and *Re Highgrade Traders Ltd.*, [1984] BCLC 151 (C.A.)(documents brought into being with the dominant purpose of obtaining legal advice as to whether a legal claim should be made or resisted, and which would lead to a decision whether or not to litigate, are protected by legal professional privilege, and it is not necessary that the documents be brought into existence for the dominant purpose of actually being used as evidence in anticipated litigation, or only after a decision to make or resist a claim has been made).

53 *Watt v. Baycrest Hospital*, [1991] O.J. No. 1107 at p. 2 (Gen. Div.), *per* Steele J.; *Yri-York Ltd. v. Commercial Union Assurance Co. of Canada* (1987), 17 C.P.C. (2d) 181 at p. 186 (Ont. H.C.J.), *per* Callaghan A.C.H.C., as he then was. Thus, unless the party opposing privilege cross-examines on the affidavit of the affiant claiming

E. Some "Best Practices" For In-House Counsel On How To Create And Preserve Privilege

The foregoing review points to the following steps in-house counsel can take to enhance the likelihood of a court finding communications to be protected by solicitor-client or litigation privilege, in cases where it is otherwise appropriate to claim these protections:

- Mark documents as "Privileged and Confidential", and "Prepared for in-house counsel for the purpose of providing legal advice" and/or "Prepared for in-house counsel for the purpose of preparing for litigation".
- Use legal department letterhead rather than the general corporate letterhead.
- Sign letters and memoranda as legal counsel.
- Maintain a confidential file of materials over which privilege is to be claimed. Label these files accordingly.
- Where possible, limit circulation of legal advice within the corporation. Where this is not possible or desirable, ensure recipients understand the importance of keeping the advice confidential, such as by marking the documents appropriately as suggested above.
- When retaining outside experts, counsel should prepare a retainer letter specifically confirming that the expert is retained for the purpose of assisting counsel in providing legal advice and/or to prepare for litigation. Ensure that the expert marks his or her report accordingly and directs the report to counsel's attention.
- Be aware that communicating with foreign counterparts may (depending on the jurisdiction) result in loss of privilege if proceedings are commenced in the foreign jurisdiction.

While these measures will not guarantee that privilege will be found, they are simple steps and may help ensure that a corporation's confidences are not disclosed.

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privilege or leads evidence to rebut the claim of privilege, the claim of privilege should be sustained. In *Watt*, the claim of privilege was sustained even over interoffice memos that do not appear to have been copied to legal counsel.

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