

## PRIVILEGE FROM CANADIAN AND U.S. PERSPECTIVES: REVERENCE VS. SKEPTICISM

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**F**OR counsel representing U.S. businesses with global aspirations, it is no longer enough to be an expert on state and federal law. In assessing corporate risks and exposure, attorneys must be increasingly mindful of cross-border issues. While not expected to know the law of foreign jurisdictions in detail, they nevertheless need to recognize and flag issues requiring the input of qualified foreign counsel. A good example is “cross-border” attorney-client privilege, as illustrated by the 2010 *Akzo Nobel* decision, in which the European Court of Justice reaffirmed the European Union’s (EU) problematic policy of denying privilege to in-house counsel with respect to antitrust investigations.<sup>1</sup> Canada may not hold surprises of the magnitude of *Akzo Nobel*, but there are nevertheless significant aspects of the Canadian law of privilege that U.S. attorneys should know—particularly given the interconnectedness of the U.S. and Canadian economies under the North American Free Trade Agreement (NAFTA).

Consider the increasingly common scenario in which the general counsel of a U.S. multinational, together with external counsel, deals with a U.S. lawsuit (a class action or multi-district litigation), only to learn that a copycat class action has been launched in the Canadian courts. The U.S. legal team decides to hold a conference call with company officials in Canada—would such a conversation be shielded by attorney-client privilege in Canada? Would it make a difference if Canadian in-house or external counsel were in on the call? What if analysts or investigators involved in the U.S. defense are included? Such questions should ideally

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1. Case C-550/07P, *Akzo Nobel Chems. Ltd. and Ackros Chems. Ltd. v. Comm’n*, 2010 E.C.R. I-08301.

be considered prior to responding to the Canadian suit, rather than in the course of discoveries or at trial.

Cross-border privilege issues are significant for U.S. corporate attorneys as well. Consider the merger and acquisition (M&A) context. What would happen if a Canadian shareholder of a Canadian subsidiary brought a Canadian oppression action with respect to an acquisition that was mainly centered in the United States? Suppose U.S. financial advisers had gone to Canada to gather information about the subsidiary as part of the transaction process; would their findings be privileged in the Canadian action? Does Canada have anything comparable to the United States' work product doctrine and, if so, how might that apply in such a situation? Here, as in the previous example, a key question for U.S. counsel is whether there is a possibility that information that could not be exposed under the U.S. law of privilege could be brought in through the back door by means of the Canadian suit—or the other way around, as in situations initially involving only a Canadian branch operation but which are complicated by an action in a U.S. court by a U.S. shareholder.

## I. THE FRAMEWORK OF LAWYER-CLIENT PRIVILEGE IN THE UNITED STATES AND CANADA

This article focuses on the principles of lawyer-client privilege that apply in the United States and common-law Canada.<sup>2</sup> As will be shown, there are differences between the two countries with respect to this type of privilege. These appear largely to be derived from a fundamental difference in the attitude of courts on the issue. Canadian judges have tended to treat attorney-client privilege rather reverently, giving it the status of a constitutional right, while their American counterparts have been more inclined to circumscribe it in the interests of fully-informed judicial decision-making. This attitudinal difference has not generally led to a wide divergence between Canadian and U.S. law, as Canadian jurisdictions generally fall within the spectrum of views typically endorsed by the various U.S. federal circuits. But the Canadian judicial approach might be expected to produce more favorable treatment of borderline or novel privilege claims, increasing the prospects of an expansion of attorney-client privilege over the long term.

Having said this, it also appears (as discussed *infra*) that the "privilege gap" between Canada and the United States is not as pronounced, and arguably may even be reversed, in the special case of an attorney's work product.

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2. The discussion of Canadian law in this article is confined to Canada's common law provinces and territories. The law of attorney-client privilege in the Province of Quebec, a civil code jurisdiction, is not considered. The article discusses United States law from an academic perspective only and is not intended to imply that either author is licensed to practice in any U.S. jurisdiction.

## A. SOLICITOR-CLIENT PRIVILEGE VS. LITIGATION PRIVILEGE

Canadian and U.S. legal privilege operate under essentially the same framework. Under Canadian law, privilege applies to communications between a lawyer and his or her client. In the United States, this is known as “attorney-client privilege,” while in Canada it is most often called “solicitor-client privilege.”<sup>3</sup> The basic test of solicitor-client privilege in Canada—a communication between solicitor and client which entails the seeking or giving of legal advice and is intended to be confidential by the parties<sup>4</sup>—is virtually the same as the U.S. test. The fundamental conceptual similarity can be seen when the standard formulations of their elements are compared side-by-side:

Canada	United States
(i) a communication;	i) a communication;
(ii) between solicitor and client;	(ii) between privileged parties;
(iii) which entails the seeking or giving of legal advice; and	(iii) for the purpose of obtaining or providing legal assistance for the client; and
(iv) is intended to be confidential by the parties. <sup>5</sup>	(iv) in confidence. <sup>6</sup>

Solicitor-client privilege is rooted in centuries of English and Canadian precedent. As it has evolved in Canada, solicitor-client privilege has ceased to be merely a rule of evidence. Instead it has become a substantive rule of law<sup>7</sup> and even a constitutional right.<sup>8</sup> In the words of the Supreme Court of Canada, while solicitor-client privilege is not absolute,<sup>9</sup> it “must be as close to absolute as possible to ensure public confidence

3. Solicitor-client privilege is occasionally used in Canada as a class term subsuming the Canadian equivalents of both attorney-client privilege and the U.S. “work product doctrine” (discussed *infra*). Those who favor this language have adopted “legal advice privilege” as the name for the Canadian equivalent of attorney-client privilege. While this nomenclature does not appear to have been widely adopted by practitioners, it has been endorsed by some courts, see *AFS and Co. Ltd. v. Canada*, 2001 FCT 422, para. 21 (Can. Fed. Ct.).

4. *Solosky v. R.*, (1979), [1980] 1 S.C.R. 821, 837 (Can.) (Laskin, C.J.).

5. *Id.*

6. DAVID M. GREENWALD ET AL., *JENNER & BLOCK LLP, PROTECTING CONFIDENTIAL LEGAL INFORMATION: A HANDBOOK FOR ANALYZING ISSUES UNDER THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 1* (2011). The authors acknowledge their indebtedness to this invaluable publication, which can be downloaded online, as a guide to the U.S. law of privilege.

7. See *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 (Can.); *Blank v. Canada* (Minister of Justice), 2006 SCC 39, [2006] 2 S.C.R. 319, para. 24 (Can.).

8. *Lavallee, Rackel & Heintz v. Canada* (Att’y Gen.), 2002 SCC 61, [2002] 3 S.C.R. 209, para. 71 (Can.).

9. See *Smith v. Jones*, [1999] 1 S.C.R. 455, para. 51 (Can.).

and retain relevance.”<sup>10</sup> In line with this position, a recent Ontario decision stated that solicitor-client privilege “is so important that no matter how important or probative the information might be, the truth seeking function of the justice system must generally yield to the importance of maintaining the privilege.”<sup>11</sup> The role of the privilege as a constitutional principle is illustrated by a recent British Columbia decision which found provisions of a money-laundering statute that authorized law-office searches to be violations of the “principles of fundamental justice” enshrined in the Canadian constitution by virtue of the threat they constituted to solicitor-client privilege.<sup>12</sup> Another recent British Columbia case described solicitor-client privilege as “a critical civil right,” “virtually an absolute privilege,” and “a cornerstone value in our democracy.”<sup>13</sup>

By contrast, U.S. judges generally take a less reverential attitude toward attorney-client privilege claims, typically balancing them rather critically against their possible negative effect on the fact-finding process.<sup>14</sup> The absence of a strongly constitutionalized understanding of privilege in the United States has arguably left attorney-client privilege more vulnerable to political pressures than it would be in Canada. For example, the privilege and the work product rules came under pressure in the United States as a result of the political and regulatory reaction against corporate misconduct post-Enron, a period that gave rise to the well-known January 20, 2003 memorandum of Deputy United States Attorney General Larry D. Thompson, according to which:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure, including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel.<sup>15</sup>

While Canadian regulators have followed the U.S. trends established by Sarbanes-Oxley and Dodd-Frank, solicitor-client privilege has not been one of the objects of reform efforts north of the border.

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10. *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, para. 35 (Can.). See also *Blank*, [2006] 2 S.C.R. 319, para. 26 (the “confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice”).
  11. *L’Abbé v. Allen-Vanguard Corp.*, 2011 ONSC 7575, para. 28 (CanLII) (Can. Ont. Sup. Ct. J.).
  12. *Fed’n of Law Soc’ys of B.C. v. Canada (Att’y Gen.)*, 2011 BCSC 1270, para. 144 (CanLII) (Can. B.C. Sup. Ct.), *aff’d* 2013 BCCA 147, paras. 103–04 (CanLII) (Can. B.C.C.A.) (similar analysis of the privilege issue).
  13. *British Columbia (Auditor Gen.) v. British Columbia (Att’y Gen.)*, 2013 BCSC 98, paras. 23–25 (CanLII) (Can. B.C. Sup. Ct.).
  14. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976). An exception is noted *infra* note 154.
  15. Memorandum from Larry D. Thompson, Deputy Att’y Gen. to Heads of Dep’t Components of U.S. Att’ys on Principles of Fed. Prosecution of Bus. Orgs. 7, (Jan. 20, 2003). Note that the memorandum proceeded to emphasize that waiver of privilege was not to be considered an “absolute requirement,” but would nevertheless be considered a factor in judging the adequacy of corporate cooperation.

Solicitor-client privilege can be distinguished from a second type of privilege, “*litigation privilege*,” inasmuch as solicitor-client privilege is what is called a “class” privilege. In essence, this means that anything falling within the definition of solicitor-client privilege is presumed inadmissible. Thus, an assertion of solicitor-client privilege will normally fail in Canada only if the court is satisfied that it falls within one of the very few recognized exceptions.<sup>16</sup> In contrast, litigation privilege attaches to communications of the lawyer or client that, while not protected by solicitor-client privilege, are produced for the dominant purpose of litigation (whether actual or contemplated). The applicability of this Canadian counterpart to the U.S. “work product” rule is determined on a case-by-case basis through a balancing of the interest in maintaining a “zone of privacy” around the lawyer’s work on a case with other competing interests.<sup>17</sup> Unlike solicitor-client privilege, which has been “strengthened, reaffirmed and elevated in recent years,”<sup>18</sup> litigation privilege has been reduced in scope. As the Supreme Court of Canada confirmed in *Blank*, the Canadian test for the privilege has shifted from one of “substantial purpose” to that of “dominant purpose” (in other words, litigation must have been the dominant, rather than merely a substantial purpose for the creation of the communication in question).<sup>19</sup> As one Canadian appellate court has observed, litigation privilege “does not have the same stature as the solicitor-client privilege.”<sup>20</sup> Nevertheless, where the dominant purpose test has been satisfied, it can apply quite broadly. For example, in British Columbia, unlike Ontario, photocopies of otherwise unprivileged public documents are generally held to be privileged.<sup>21</sup>

In the United States, a similar hierarchical distinction between attorney-client privilege and the work product rule is reflected in the fact that the work product rule is usually characterized as a “doctrine” rather than as a privilege. The Canadian terms “dominant purpose” and “substantial purpose” appear to roughly mirror (respectively) the “primary motivating factor” and “because of” tests that have been applied by U.S. courts. Because provincial civil procedure rules are subject to the authority of the Supreme Court of Canada, the affirmation of the “dominant purpose” test in *Blank* means that the country’s common law jurisdictions

16. For discussion of the “crime-fraud” exception, see *infra* p. 321.

17. *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, para. 34 (Can.). On related issues of nomenclature, see *supra* note 3.

18. *Blank*, [2006] 2 S.C.R. 319, para. 61.

19. *Id.* para 60. See also *Gen. Accident Assurance Co. v. Chrusz* (1999), 45 O.R. 3d 321, para. 32 (Can. Ont. C.A.) (establishing the “dominant purpose” test in Ontario, where previously the “substantive purpose” test had been favored by some authorities).

20. *Morrissey v. Morrissey* (2000), 196 D.L.R. 4th 94, para. 20 (Can. Nfld. C.A.) (Cameron, J.A.).

21. *Hodgkinson v. Simms* (1988), 33 B.C.L.R. 2d 129, 142–43 (Can. B.C.C.A.); *Teck Cominco Metals Ltd. v. Foster Wheeler Pyropower, Inc.*, 2010 BCCA 51, para. 19 (CanLII) (Can. B.C.C.A.); *Cahoon v. Brideaux*, 2010 BCCA 228, para. 35 (CanLII) (Can. B.C.C.A.). The contrary Ontario view is expressed in *General Accident*, 45 O.R. 3d 321, paras. 38–41.

now sit squarely in the “primary motivating factor” camp (to adopt the U.S. term). This contrasts with the United States, where most courts appear to favor the “because of” test.<sup>22</sup>

U.S. counsel should accordingly be aware that Canadian courts may be less likely to extend privilege over documents that were not prepared primarily for the purpose of litigation (much like in the U.S. Fifth Circuit).<sup>23</sup> But the Canadian rule may not be as strict as that enunciated by the First Circuit in *United States v. Textron, Inc.*, where the court upheld an Internal Revenue Service (IRS) request for a company’s tax accrual work papers on the basis that “the work product privilege is aimed at protecting work done for litigation, not in preparing financial statements.”<sup>24</sup> *Textron* has proven highly controversial because the majority essentially interpreted the words “for the purpose of litigation” so as to exclude all materials prepared in the ordinary course of business and “generic corporate documentation.”<sup>25</sup> The ruling was by a margin of 3-2, with a strong dissent preferring the Second Circuit’s ruling in *United States v. Adlman*, where, *inter alia*, it was noted that “in anticipation of litigation” does not mean the same thing as “prepared . . . for trial.”<sup>26</sup> As discussed *infra*, *Textron* has been widely criticized, including by the D.C. Circuit in *United States v. Deloitte LLP*.<sup>27</sup>

Note that, in contrast to Rule 26(b)(3)(A)(ii) of the U.S. Federal Rules of Civil Procedure, there is no general rule in Canada that litigation privilege is defeated by a demonstration by the other side that it has a “substantial need” for the materials to prepare its case and could not obtain the materials or their equivalent by any other means without undue hardship.<sup>28</sup>

## II. PRIVILEGE AND THIRD-PARTY COMMUNICATIONS

As the business world becomes increasingly complex, lawyers resort with ever greater frequency to external assistance in dealing with the needs of their clients. For example, a client carrying on business internationally may have documents that require translation, or an engineer might be needed to translate the meaning of a corporation’s technical records into terms that are understandable to the lawyer. In the leading

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22. See, e.g., FED. R. CIV. P. 26(b)(3)(A) (codifying the work product doctrine as it applies in U.S. district courts).
  23. *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. Unit A Feb. 1981) (“We conclude that litigation need not necessarily be imminent, as some courts have suggested, as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.”) (internal citations omitted).
  24. *United States v. Textron, Inc.*, 577 F.3d 21, 31 (1st Cir. 2009).
  25. Adam M. Braun, *Open Reservations?: United States v. Textron Inc. and Its Application to International Tax Accounting*, 86 NOTRE DAME L. REV. 823, 829–30 (2011).
  26. *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998).
  27. See *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010). See also *infra* p. 317.
  28. A. W. BRYANT, S. N. LEDERMAN & M. K. FUERST, *THE LAW OF EVIDENCE IN CANADA* 977 (3d ed. 2009).

Canadian case, *Susan Hosiery Ltd. v. Canada*, the Exchequer Court (a predecessor of today's Federal Court) held that where an accountant is used by the lawyer as a representative:

... for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an accountant in carrying out such task, does not make the communications he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer . . . .<sup>29</sup>

The debate over the limits of the *Susan Hosiery* principle<sup>30</sup> went on for three decades before being resolved by the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz*.<sup>31</sup> The court reined in expansive interpretations of third-party privilege by making it clear that only if it is "performing a service on the client's behalf which is integral to the client-solicitor function" can a third-party communication be privileged. On the facts in *General Accident*, this was held not to include communications made by an insurance claims adjuster to the attorney representing the insurer who had hired him. As a general rule, collecting information relevant to a case is too remote from the lawyer-client relationship to merit protection. In support of this, the majority in *General Accident* referred to the U.S. Revised Uniform Evidence Rules in which "representative of the client" is defined as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."<sup>32</sup> While Canadian courts appear to have rejected the "agency" analysis sometimes applied in the United States,<sup>33</sup> there appears to be little practical difference between the doctrines, as U.S. courts tend to restrict the privilege to those agents who are closely involved and of great importance in facilitating the attorney-client relationship.<sup>34</sup>

In extending solicitor-client privilege to third parties, Canadian courts have sometimes referred to the importance of the fact that the third party in question is a "conduit of communication" between lawyer and client.

29. *Susan Hosiery Ltd. v. Canada* (Minister of Nat'l Revenue) [1969] 2 Ex. C.R. 27 (Can.).

30. See J. Douglas Wilson, *Privilege in Experts' Working Papers*, 76 CAN. BAR REV. 346, 367 (1997).

31. See Gen. Accident Assurance Co. v. Chrusz (1999), 45 O.R. 3d 321 (Can. Ont. C.A.).

32. UNIF. R. EVID. 502(2) (cited by *General Accident* (1999), 45 O.R. 3d 321, para. 124).

33. Discussed immediately below in relation to *General Accident* (1999), 45 O.R. 3d 321.

34. See *Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002); see also *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) ("[S]ecretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts" are said to fall within the privilege while a similar result cannot be achieved "simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices . . ."). Cf. *General Accident*, 45 O.R. 3d 121, discussed *infra* for the Canadian "functional" analysis.

This accounts for the protection accorded to translators, for example. But cases like *General Accident* show that the metaphorical "conduit" must run directly from client to solicitor; the principle will not generally apply to conduits that assemble, analyze, or interpret information brought in from a source other than the client and its counsel. In *Potash Corporation of Saskatchewan Inc. v. Mosaic Potash Esterhazy LP*,<sup>35</sup> for example, the Saskatchewan Court of Queen's Bench held that reports authored by technical advisors, who had assembled, analyzed, and interpreted information about the operations of a mining client in order to assist counsel, did not fall under the privilege. In addition to *General Accident*, the leading nineteenth-century English authority of *Wheeler v. Le Marchant* also maintained that, in the words of Justice Gabrielson of the Saskatchewan court, "informational assistance to counsel provided by the expert is not subject to solicitor-client privilege."<sup>36</sup> The *General Accident* principle has been expressly accepted not only in Saskatchewan but also in a number of other Canadian provinces, including British Columbia,<sup>37</sup> and has been endorsed as the correct approach by the leading Canadian evidence textbook.<sup>38</sup>

The Ontario Court of Appeal in *General Accident* concluded that the insurance investigator was neither a conduit for communication nor a "translator" (even in the extended sense that would include medical advisors who "interpret" medical concepts for the lawyer). The court then considered whether the materials prepared by the investigator could fall within the privilege by virtue of being a product of what was essentially the solicitor's function. This "functional approach" was, in the view of Justice Doherty, conceptually superior to the "agency" principle that had sometimes been referred to in Canada and, as noted above, is generally accepted in the United States. As Justice Doherty wrote:

If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.<sup>39</sup>

The Ontario Court of Appeal concluded that while an insurance report might be helpful to a solicitor, and even necessary to his or her work (in a certain sense), its creation is nevertheless part of the function of the ad-

35. See *Potash Corp. of Sask. Inc. v. Mosaic Potash Esterhazy LP*, 2010 SKQB 460 (CanLII) (Can. Sask. Q.B.).

36. *Id.* para. 24 (citing *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675 (Eng.) (in which privilege was held not to apply to a surveyor's report to a solicitor)).

37. *Coll. of Physicians and Surgeons of B.C. v. British Columbia (Info. & Privacy Comm'r)* (2002), 9 B.C.L.R. 4th 1 (Can. B.C.C.A.).

38. BRYANT ET AL., *supra* note 28, § 14.104.

39. *Gen. Accident Assurance Co. v. Chrusz* (1999), 45 O.R. 3d 321 para. 120 (Can. Ont. C.A.) (Doherty, J.A., dissenting). While Doherty J.A. dissented in part, the majority expressly adopted his views with respect to this aspect of solicitor-client privilege. *Id.* para. 51 (majority opinion).



juster. In other words, it is ancillary, rather than integral, to the solicitor-client function. Thus, an insurance report is not privileged.

Subsequent case law has expanded on what is needed for a communication to be integral to the solicitor-client function. To qualify, a communication must be made in the context of correspondence of a type that would normally, or at least frequently, be conducted between client and solicitor. In *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*,<sup>40</sup> which involved a citizen's lawsuit against a municipal authority over an expropriation, communications between the authority's lawyer and an independent project manager, who had directed the property acquisitions, were held to fall under the scope of the authority's solicitor-client privilege. The British Columbia Supreme Court recognized that the local authority had essentially "outsourced" central functions to the manager, including the function of communicating with the authority's counsel.<sup>41</sup> In contrast, claims of privilege with respect to the lawyer's communications with a property appraiser and a geotechnical consultant were not allowed—their function being to prepare reports that, while helpful, were ancillary to the solicitor-client relationship rather than integral to it.<sup>42</sup>

While the jurisprudence in this area is still developing, the privilege rulings in *Camp Development* suggest that a third party is more likely to fall within the scope of solicitor-client privilege in situations where it is fulfilling a role that would ordinarily have been part of the client's role but which the client has chosen to "outsource." Such choices are often made where the client's staff lacks the time, resources, or experience to perform the work efficiently "in house." In *Camp Development*, for example, the project manager was the municipal authority's "agent" not only in the sense of doing something on behalf of the authority, but also in the sense of performing precisely the sort of activity that a municipal authority would normally perform on its own behalf, if it had the time and staff resources to do so (i.e., manage its own expropriation program). In contrast, the insurance adjuster in *General Accident* and the appraiser and geotechnical consultant in *Camp Development* also acted on behalf of the municipal authority, but they performed functions that are not normally part of the business of such an authority.

*Camp Development* was a significant influence on *Barrick Gold Corp. v. Goldcorp Inc.*,<sup>43</sup> in which the *General Accident* principle was invoked to bring the client's "deal team" under the solicitor-client privilege. As Justice Campbell of the Ontario Superior Court of Justice observed, this recognizes the "practical reality in major commercial projects where

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40. *Camp Dev. Corp. v. S. Coast Greater Vancouver Transp. Auth.*, 2011 BCSC 88 (CanLII) (Can. B.C. Sup. Ct.).

41. *Id.* para. 60.

42. *Id.* para. 70.

43. *Barrick Gold Corp. v. Goldcorp Inc.*, 2011 ONSC 1325 (CanLII) (Can. Ont. Sup. Ct. J.).

teams of individuals with focused expertise are assembled.”<sup>44</sup> In other words, the complex and time-consuming nature of many modern business acquisitions may make it impractical for a company involved in such an acquisition to handle it internally. Even though the required skills and functions may, in the broadest sense, be available “in house,” it is simply more efficient to engage a skilled, outside team to assist with the process. As a result of *Barrick*, such a team will likely be protected by solicitor-client privilege (although Justice Campbell makes it clear that there is no “automatic” deal team privilege, and that each case needs to be judged on its facts).<sup>45</sup>

If the decision is generally followed in Canada, the *Barrick* ruling will offer a significant amount of comfort to lawyers and clients involved in complex transactions. Under U.S. law, a somewhat similar privilege has been held to apply to consultants and others whose duties make them the “functional equivalent” of an employee.<sup>46</sup> While we are not aware of a specific deal team privilege in the United States, to the extent that both Canadian and U.S. courts accept functional criteria as determining the extent of lawyer-client privilege, it would seem reasonably likely that they would take a similar position on the issue. The Delaware principle that disclosures to investment bankers do not, in appropriate circumstances, constitute waiver could perhaps be described as an example of a comparable privilege.<sup>47</sup> While *Barrick* was only a brief handwritten ruling with respect to an interlocutory motion, the judge’s reasoning nevertheless suggests (in conjunction with *Camp Development*) that Canadian courts are likely to interpret *General Accident* in a practical way that recognizes the role that consultants and outsourcing play in modern business. This practical approach contrasts with the formalism for which the European Court of Justice ruling in *Akzo Nobel* has been criticized.<sup>48</sup>

#### A. COMMON INTEREST PRIVILEGE IN A COMMERCIAL CONTEXT

Like their U.S. counterparts, Canadian courts have consistently held that privilege is not waived where solicitor-client communications are shared by the client with a third party, provided that the third party and the client themselves share a “common interest.” Historically, under both U.S. and Anglo-Canadian common law, common interest has been found among parties that share a common position with respect to anticipated or actual litigation. In other words, if such parties share legal advice among themselves in furtherance of their common interest in existing or potential litigation, that advice will not necessarily lose its

44. *Id.* para. 19.

45. *Id.*

46. *In re Bieter Co.*, 16 F.3d 929, 936 (8th Cir. 1994).

47. *See* 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VCN, 2010 WL 2280734, at \*11-12 (Del. Ch. May 31, 2010) (Noble, V.C.).

48. *See* Case C-550/07P, *Akzo Nobel Chems. Ltd. and Ackros Chems. Ltd. v. Comm’n*, 2010 E.C.R. I-08301.

privilege.<sup>49</sup> But courts in several of Canada's common law provinces have extended the common interest privilege to include certain non-litigious commercial situations. As the British Columbia Court of Appeal noted in *Maximum Ventures Inc. v. De Graaf*, this shift is partly attributable to the "increased emphasis on the protection from disclosure of solicitor-client communications" referred to earlier.<sup>50</sup> The unanimous court stated:

Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.<sup>51</sup>

In Canada, the shift is also partly in recognition of the sheer complexity of modern corporate life. One of the first cases to find a common interest privilege in a non-litigious commercial situation, *Archean Energy Ltd. v. Canada (Minister of National Revenue)*, concerned the complicated restructuring of a corporate group. The Alberta court held that it would have been "virtually impossible" for counsel (who was common to the restructuring entities) to "identify privilege ownership in respect of each of the 365 individual documents."<sup>52</sup> The federal Ministry of National Revenue (comparable to the IRS) had challenged various privilege claims on the basis that the wrong party had made them, while not denying in most cases that the documents were privileged with respect to another group member. The court rejected this as an overly formalistic approach not in keeping with the *Income Tax Act* provision requiring the Ministry to carry out its activities with due respect for solicitor-client privilege.<sup>53</sup>

The extension of this principle to disclosures made in commercial negotiations was nevertheless far from a "given." In *Pinder v. Sproule*, another Alberta ruling, the court expressed strong doubt that the common interest privilege could be pressed into service in cases involving commercial negotiations:

The "common interest" exception was developed for parties with a common interest in litigation, not in business transactions. Potential parties to a merger or other business transaction are in many ways adverse in interest, and it strains the common interest exception to

49. See *Buttes Gas and Oil Co. v. Hammer et al.* (No. 3), [1980] 3 All E.R. 475, 483 (C.A.) (Lord Denning described "common interest privilege" as "a privilege in aid of anticipated litigation in which several persons have a common interest").

50. *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510, para. 14 (CanLII) (Can. B.C.C.A.).

51. *Id.* See also *Canada (Minister of Nat'l Revenue.) v. Welton Parent Inc.* (2006), 60 D.T.C. 6093, para. 107 (Fed. Ct.) (note the obiter comment of J. Gauthier, stating "[t]his concept [i.e., the common interest privilege] applies to information that is shared among parties to a commercial transaction and ensures that such sharing does not result in a waiver of the privilege vis-à-vis parties outside of the group").

52. *Archean Energy Ltd. v. Canada (Minister of Nat'l Revenue)*, [1998] 1 C.T.C. 398, para. 19 (Can. Alta. Q.B.).

53. *Id.*

try and fit disclosures between such parties within that exception.<sup>54</sup>

In *Pitney Bowes of Canada Ltd. v. Canada*, the Federal Court considered *Pinder*. While agreeing that parties to a merger or other business transaction will be adverse in interest in certain respects, and accepting that not all privileged documents can be disclosed without loss of privilege in commercial negotiations, the Federal Court nevertheless concluded:

Still, in many commercial transactions, the parties will want to negotiate on the footing of a shared understanding of each other's legal position. They will seek legal advice from reputable solicitors whose opinions will be respected by the other parties. Indeed, the solicitors may represent more than one party to the deal. The sharing of legal opinions will ensure that each party has an appreciation of the legal position of the others and negotiations can proceed in an informed and open way. The advice may be provided for one or more party on the understanding that others should be provided copies. The expectation, whether express or implied, will be that the opinions are in aid of the completion of the transaction and, in that sense, are for the benefit of all parties to it. Such circumstances, in my view, create a presumption that the privilege attaching to the solicitor-client communications remains intact notwithstanding that they have been disclosed to other parties.<sup>55</sup>

This principle was taken to its natural—and, for commercial lawyers, welcome—conclusion by the Supreme Court of British Columbia in *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*:

To my mind, the economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.<sup>56</sup>

While the implications of this doctrine have yet to be worked out, it appears to increase the likelihood of successfully maintaining privilege over solicitor-client communications where these are disclosed in transactional situations. An obvious and important example would be privileged documents in a transactional data room.

The U.S. position appears broadly consistent with this (with the caveat that courts in the United States have been less willing to extend the com-

54. *Pinder v. Sproule* (2003), 333 A.R. 132, para. 62 (Can. Alta. Q.B.) (finding the communications in question privileged on other grounds, however).

55. *Pitney Bowes of Canada Ltd. v. R.*, 2003 FCT 214, (2003), 225 D.L.R. 4th 747, para. 20 (Fed. Ct.). This position was adopted by the Alberta Court of Queen's Bench. *Scott & Associates Eng'g Ltd. v. Ghost Pine Windfarm, LP*, 2011 ABQB 339, para. 30 (CanLII) (Can. Alta. Q.B.).

56. *Fraser Milner Casgrain LLP v. Canada (Minister of Nat'l Revenue)*, 2002 BCSC 1344, para. 14 (CanLII) (Can. B.C. Sup. Ct.) (Lowry, J.).

mon interest privilege—also known as the “community of interest privilege”<sup>57</sup>—to interests that are purely commercial). In decisions such as *Hewlett-Packard Co. v. Bausch & Lomb* and *Tenneco Packaging Specialty and Consumer Products, Inc. v. S. C. Johnson & Son, Inc.*<sup>58</sup> federal courts have found attorney-client privilege in transactional situations where a legal opinion was shared with potential purchasers with clear stipulations with respect to its confidentiality. In *Hewlett-Packard*, the U.S. District Court for the Northern District of California expressed a view similar to that of the British Columbia court in *Maximum Ventures*:

Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying.<sup>59</sup>

Nevertheless, the U.S. District Court for the Southern District of New York has stated that, while litigation need not be actual or contemplated for the common interest doctrine to apply, the common interest must still be a *legal* interest and not merely a commercial or business interest.<sup>60</sup> Thus, the privilege was held to apply in *United States v. United Technologies Corp.* where members of a consortium of companies shared legal advice in order to achieve the best possible tax result for each company. While the various consortium members were not united by the prospect of litigation, they had a common interest in minimizing their respective taxes, which the court considered to be a legal interest.<sup>61</sup>

As is commonly the case in commercial matters, Canadian jurisprudence in this area is sparser and less developed, but it does appear that there is a greater openness in Canada to accepting common-interest claims that are founded in considerations of commercial convenience, as *Archean Energy* suggests. Moreover, in addition to the U.S. considerations discussed above, the Third Circuit’s *Teleglobe* ruling adds the additional restriction that privileged information-sharing under the

57. *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 363–64 (3d Cir. 2007). This Third Circuit ruling emphasized a distinction between community of interest (common interest) and co-client (joint client) privileges. The former applies in cases featuring multiple parties with generally aligned interests who are represented by separate counsel while the latter applies where multiple parties (typically members of a corporate group, as was the case with BCE and Teleglobe in *Teleglobe*) are represented by a single in-house legal group and/or by the same external counsel. For an argument that the community of interest privilege should not be recognized, see Grace M. Giesel, *End the Experiment: the Attorney-Client Privilege Should not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475 (2011–12).

58. See *Hewlett Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987); see also *Tenneco Packaging Specialty & Consumer Products, Inc. v. S.C. Johnson & Son, Inc.*, No. 98 C 2679, 1999 WL 754748 (N.D. Ill. Sept. 14, 1999).

59. *Hewlett Packard*, 115 F.R.D. at 311.

60. *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 739 F.Supp.2d 515, 563 (S.D.N.Y. 2010).

61. See *United States v. United Techs. Corp.*, 979 F.Supp. 108 (D. Conn. 1997).

community of interest doctrine is limited to sharing between *attorneys* rather than sharing with or among *clients*.<sup>62</sup> It is important that Canadian and U.S. transactional lawyers (and in-house teams involved in transactions) closely study the current state of the common interest doctrine on both sides of the border before agreeing to share their advice with acquirers or sellers in the interest of completing a deal.

#### B. JOINT INTEREST AND SHAREHOLDER DISPUTES

Joint interest privilege is a "special case" of common interest privilege in which the shared interest must have existed at the time the document (or other purportedly privileged communication) was created rather than merely at the time of disclosure.<sup>63</sup> As an Alberta court has stated, "neither party may assert privilege as against the other regarding communications coming into existence at the time the joint interest subsisted."<sup>64</sup> Under both U.S. and English law, this doctrine is the foundation for the important proposition that in many circumstances, a business corporation cannot assert attorney-client privilege against its own shareholders. In the United States, this rule was stated in *Garner v. Wolfenbarger*, a 1970 Fifth Circuit ruling on a shareholder derivative suit:

[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.<sup>65</sup>

The Fifth Circuit panel looked to English law for precedent, and particularly to *Gouraud v. Edison Bell Gower Telephone Co.*, an 1888 Chancery ruling which held, in a shareholder representative action against a company, that the company could not assert privilege against the shareholders, the documents in question having ultimately been paid for by their investments in the company.<sup>66</sup> To the objection that *Gouraud* was out of date and not applicable to American corporations the Court responded, as seen in the quotation above, by turning the existence of attorney-client privilege in such circumstances into a presumption that is rebuttable where the shareholders can "show cause." Thus, this is often referred to as the "good cause" exception to attorney-client privilege.

Canadian courts have taken a significantly different view. In 1988, in *McPherson v. Institute of Chartered Accountants of British Columbia*, the British Columbia Court of Appeal held that the reasoning in *Gouraud* was "erroneous" in light of the subsequent (1897) decision of the House

62. *In re Teleglobe*, 493 F.3d at 364.

63. *Commercial Union Assurance Co. PLC v. Mander*, [1996] 2 Lloyd's Rep. 640 (Q.B.) (Eng.).

64. *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, (2008) 456 A.R. 244, para. 27 (Can. Alta. Q.B.).

65. *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

66. *Id.* at 1101-02.

of Lords in *Salomon v. Salomon & Co.*, which (as is well known) emphasized the legal separateness of a corporation from its members (shareholders). In particular, *Salomon* made it clear that shareholders do not have a property interest in the corporation's property, which the British Columbia Court of Appeal held to encompass documents containing legal advice.<sup>67</sup> Similarly, in *FCMI Financial Corp. v. Curtis International Inc.*, the Ontario Superior Court of Justice referred to the Supreme Court of Canada's assertion that "solicitor-client privilege must be as close to absolute as possible"<sup>68</sup> before dismissing the plaintiffs' argument that the principle in *Garner v. Wolfenbarger* ought to be imported into Canada. This is another example of the Canadian tendency to regard lawyer-client privilege as almost sacrosanct, despite the challenge it may pose to judicial fact-finding.

### C. INVESTIGATIONS

How Canada's *General Accident* analysis applies to internally conducted investigations is an important issue that has not yet been conclusively resolved. In *Hydro One Network Services Inc. v. Ontario (Ministry of Labour)*,<sup>69</sup> an Ontario judge held that an internally produced report seized under a search warrant was protected by solicitor-client privilege. The in-house counsel's affidavit that the report had been prepared for the purpose of providing legal advice, together with words to that effect printed on the cover page of the report, was sufficient to persuade the court of the privilege. In contrast, another Ontario judge (at a higher level of trial court) held in *Prosperine v. Regional Municipality of Ottawa-Carleton* that the defendant municipality could not claim privilege over an investigative report that was conducted by an outside consultant in which information was gathered from outside sources. In that judge's opinion, the consultant "was not acting only as a messenger or translator" and "did more than use its expertise to assemble information provided by [the municipality's] staff and explain it to the [municipality's] legal department."<sup>70</sup>

It appears that the primary basis of the court's ruling in *Prosperine* was that the information came from outside the company. The degree to which it mattered that the information was collected by an external con-

67. This principle was reaffirmed by the British Columbia Court of Appeal. *Discovery Enters. v. Ebco Indus.*, 1998 CanLII 6453, para. 23 (Can. B.C.C.A.). See *McKinlay Transp. Ltd. v. Motor Transp. Ind'l Relations Bureau of Ontario (Inc.)* (1992), 3 W.D.C.P. 2d 478, para. 7 (Can. Ont. Gen. Div.) ("The law since *Salomon* is that a shareholder does not have a property interest in the underlying assets of the corporation. The shareholder's only property interest is in the shares of the corporation.").

68. *FCMI Fin. Corp. v. Curtis Int'l Inc.*, 2003 CanLII 23179, para. 29 (Can. Ont. Sup. Ct. J.), citing *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 para. 35 (Can.).

69. *Hydro One Network Servs. Inc. v. Ontario (Ministry of Labour)*, [2002] O.J. No. 4370, 118 A.C.W.S. 3d 144 (Can. Ont. C.J.) (QL).

70. *Prosperine v. Ottawa-Carleton (Reg'l Mun.)* (2002), 37 C.B.R. 4th 135 (Can. Ont. Sup. Ct. J.).

sultant is less clear. In the subsequent Ontario case of *Royal Bank of Canada v. Société Générale (Canada) et al.*, an internal committee had been struck to report to the plaintiff bank's general counsel with respect to the circumstances surrounding an account holder's alleged fraud. While noting that the report in this case was prepared by the bank itself, the court analogized the committee's function to a client's preparation of a letter to its solicitor outlining the facts of its situation and requesting legal advice, and held such a function was, under the *General Accident* test, "essential to the operation of the solicitor/client relationship."<sup>71</sup> The court came to this conclusion despite the fact that the report mixed business and legal issues, which in its view were "necessarily intertwined" under the circumstances.<sup>72</sup>

In light of *General Accident* and these cases, it would appear that the most effective ways for general counsel to protect the solicitor-client privileged status of internal investigations in Canada would be to (i) ensure that they draw on internal sources; (ii) limit the reports to legal issues, except where business issues are necessarily intertwined with legal ones; (iii) have them conducted "in house," where feasible, rather than by consultants; and (iv) clearly mark them as "prepared for the purpose of providing legal advice." None of these steps will ensure a finding of privilege in all types of cases, and some of them may not be required in every case, but utilizing as many as possible should at least improve the odds that a successful argument in favor of privilege can be made.

A noteworthy difference between Canada and the United States is that Canadian regulators have not adopted the practice of requesting "voluntary" privilege waivers with respect to the internal activities and investigations of corporate entities that are under investigation. In the United States, this practice appears to be common in SEC investigations and also in environmental investigations involving the DOJ and EPA, among others. It does not appear to exist in any systematic form in any Canadian regulatory arena, and we would expect that the Canadian view of solicitor-client privilege as a substantive constitutional right would tend to inhibit the development of any such practice in the future. This does not mean, of course, that Canadian regulators would not argue vigorously in some situations that solicitor-client privilege does not apply.

#### D. DISCLOSURES TO AUDITORS

As a postscript on regulatory investigations, it is worth noting the 2005 Ontario Divisional Court ruling in *Philip Services Corp. (Receiver of) v. Ontario Securities Commission*, which established that where a company provides its auditors with solicitor-client privileged documents, having been compelled to do so by law, those documents retain their privilege in

71. *Royal Bank of Canada v. Société Générale (Canada) et al.*, [2005] O.T.C. 902, para. 12, 2005 CanLII 36727, (Can. Ont. Sup. Ct. J.).

72. *Id.* para. 6.



the hands of the auditor.<sup>73</sup> The ruling, which is consistent with the Canadian courts' generally favorable attitude toward privilege,<sup>74</sup> involved an Ontario Securities Commission (OSC) investigation into Philip Services Corp. in the course of which Philip's auditor, Deloitte & Touche, had provided the investigators with privileged documents that it had obtained from Philip in the course of its audit when Philip had not given its consent. The Divisional Court, which hears appeals from OSC decisions, held that there is only a limited waiver of privilege when documents are provided to an auditor. Among other things, the court held that the OSC's subsequent unauthorized publication of extracts from the Philip documents did not affect their privileged status. As a matter of principle, "[t]he surreptitious delivery of confidential material cannot be sanctioned" by permitting that material, once improperly revealed, to be used in litigation.<sup>75</sup>

*Philip Services* recognizes a limited waiver of privilege in cases of disclosure of privileged documents for audit purposes. While counsel for Philip focused on the conceptual awkwardness of applying a doctrine of waiver to disclosure that is compelled by statute—in that case, Ontario's *Business Corporations Act*<sup>76</sup>—the court did not emphasize involuntariness in its ruling, focusing instead on the broader principle enunciated above, stating:

... the message from the Supreme Court jurisprudence is clear: restrictions on solicitor-client privilege to attain other important societal objectives are to be closely scrutinized and restricted to what is absolutely necessary for the competing objective so as to achieve the minimal necessary impairment of solicitor-client privilege.<sup>77</sup>

In *Minister of National Revenue v. Grant Thornton et al.*, the Federal Court stated that the limited waiver doctrine extends to disclosures to auditors that are not "strictly mandated by statute," e.g., where an auditor, not having made a formal "demand," is voluntarily provided with privileged documents in the course of its work on a fairness opinion.<sup>78</sup> In the words of the Chief Justice of the Federal Court, "under the [limited waiver] doctrine, the intention of the privilege holder is key."<sup>79</sup> Note that the situations described in *Philip Services* and *Grant Thornton* involved

73. See *Philip Servs. Corp. v. Ontario Sec. Comm'n* (2005), 77 O.R. 3d 209 (Can. Ont. Div. Ct.).

74. *Canada (Minister of Nat'l Revenue.) v. Welton Parent Inc.* (2006), 60 D.T.C. 6093, para. 105 (Fed. Ct.) (expressly stating this with regard to both the common interest privilege and the doctrine in *Philip Services*).

75. *Philip Servs. Corp.*, 77 O.R. 3d 209 para. 87 (internal citation omitted).

76. *Business Corporations Act*, R.S.O. 1990, c. B.16 § 153(6) (Can. Ont.).

77. *Philip Servs. Corp.*, 77 O.R. 3d 209 para. 51. The fact that disclosure was compelled, or effectively compelled, by statute may still be significant. *But see* *Jourdain v. Ontario*, 2008 CanLII 35684, para. 54 (Ont. Sup. Ct. J.).

78. *Canada (Minister of Nat'l Revenue) v. Grant Thornton et al.*, 2012 FC 1313, para. 48 (Fed. Ct.).

79. *Id.* para. 47. The court in *Grant Thornton* went as far as to state that where the document was created for the purpose of providing legal advice, it was irrelevant to the consequent finding of privilege that "it does not appear to contain any legal

the passing of privileged documents to an accountant or auditor, as opposed to a claim of privilege over an accountant's working papers.

A concept of "selective waiver" similar to Canada's "limited waiver" has been accepted in the Eighth Circuit in the case of attorney-client privileged documents voluntarily provided to the SEC or other regulators for the purposes of an investigation,<sup>80</sup> but this has been rejected in most other circuits.<sup>81</sup> An example of the difference in the U.S. approach is *United States v. Massachusetts Institute of Technology*, in which M.I.T. had provided attorney-client privileged documents to a U.S. Department of Defense auditor, apparently on the understanding that the documents would not be further disseminated.<sup>82</sup> Subsequently, the IRS demanded copies of the same documents in aid of an unrelated investigation.<sup>83</sup> The First Circuit panel concluded that the documents had lost their privilege on the ground that there is a "general principle that disclosure normally negates the privilege" that is "worth maintaining."<sup>84</sup> This view was amplified by the Sixth Circuit, which rejected "the concept of selective waiver, in any of its various forms" in its 2002 ruling in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*.<sup>85</sup>

These and other U.S. cases reviewed by the authors appear to have been primarily concerned with voluntary disclosure rather than compelled disclosure, which was the issue in *Philip Services*.<sup>86</sup> Having acknowledged this distinction, it is worth noting that the court in *Philip Services* appeared to imply that, under the law in Ontario, solicitor-client privilege could in some cases be maintained even where the initial disclosure is voluntary.<sup>87</sup> As there is relatively little Canadian case law on this

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thinking or analysis, and may even simply list facts that are otherwise discoverable." *Id.* para. 42.

80. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

81. JEROME G. SNIDER ET AL., CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 2.06[3] (2013); see, e.g., *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685 (1st Cir. 1997); see also *Westinghouse Elec. Corp. v. Philippines*, 951 F.2d 1414, 1424-27 (3d Cir. 1991).

82. *Mass. Inst. Of Tech.*, 129 F.3d at 683.

83. *Id.*

84. *Id.* at 685. Counsel for M.I.T. also argued that the disclosure to the Defense Department came under common interest privilege on the basis that both the university and the government had an interest in the proper performance of the defense contracts that were the subject of the investigation. *Id.* at 685-86.

85. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002).

86. Note also that the court in *Philip Services* took a broad and practical view of the meaning of "compelled." The court stated: "Whether the statute is formally invoked or not, company and auditor alike are aware of it and the company must be deemed to have acted under it, as a form of practical compulsion." *Philip Servs. Corp. v. Ontario Sec. Comm'n* (2005) 77 O.R. 3d 209 para. 44 (Can. Ont. Div. Ct.).

87. *Id.* para. 48, referring to *British Coal Corp. v. Dennis Rye Ltd.* (no. 2), [1988] 3 All E.R. 816, para. 48 (C.A.), which concerned voluntary disclosure. The court also stated: "Even if the statute [that compelled disclosure] did not exist, the fundamental importance of solicitor-client privilege would dictate the narrow waiver rather than the broad." *Philip* 77 O.R. 3d 209 at para. 57.

issue,<sup>88</sup> it is difficult to state a definitive Canadian position. But the court's *obiter* comments in *Philip Services* hint, at least, that Ontario courts might be closer on this issue to the pro-privilege Eighth Circuit than to the First or Sixth Circuits.

U.S. common law is similar to Canada's in not according privileged status to accountant-client communications.<sup>89</sup> While some states have created a statutory privilege, and while Internal Revenue Code § 7525 does create a privilege in certain narrowly-defined situations,<sup>90</sup> it appears that in most cases no privilege applies.<sup>91</sup> One exception, established in the Second Circuit ruling in *United States v. Kovel*, applies where an accountant's work consists simply in assisting client-attorney communication by "interpreting" financial concepts and information.<sup>92</sup> But the court cautioned against stretching this principle too far:

Nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam.<sup>93</sup>

Subsequent case law has generally limited this exception to situations analogous to interpretation. In *United States v. Ackert*, for example, the Second Circuit denied privilege over records of discussions between internal counsel of Paramount Corporation and an accountant who had once advised that company about an investment proposal that had become a focus of an IRS audit.<sup>94</sup> While the accountant had been interviewed by counsel in aid of his client's case, the court held that attorney-client privilege did not result. That privilege, it observed, "protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client."<sup>95</sup>

While the outcomes of such disputes are often quite similar in Canada and the United States, the distinct attitudes of the two legal systems toward privilege are nonetheless evident from the decided cases and the deep respect of Canadian courts for lawyer-client privilege versus the

88. *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. 3d 121, para. 45 (citing *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980)) (for the proposition that voluntary disclosure generally constitutes waiver of attorney-client privilege but not of work product privilege.). Note that the majority's discussion in *General Accident* was not in the context of disclosure to regulatory authorities.

89. *Couch v. United States*, 409 U.S. 322, 335 (1973).

90. 26 U.S.C.A. 7525(a)(1) (West 2013).

91. See GREENWALD, *supra* note 6, at 35-37 (a useful account of the history of § 7525).

92. *United States v. Kovel*, 296 F.2d 918 at 922 (1961).

93. *Id.* at 921.

94. *See United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999).

95. *Id.* at 139. Note, however, that a more privilege-friendly rule is observed in the Delaware state courts, particularly with respect to disclosures to investment bankers in the course of corporate transactions. See *3Com Corp. v. Diamond II Holdings, Inc.*, No. 3933-VCN, 2010 WL 2280734, at \*1, \*6 (Del. Ch. May 31, 2010).

U.S. courts' entrenched skepticism. As the limited nature of the exception in *Kovel* might suggest, U.S. litigation over the disclosure of accountants' work and advice has tended to focus on the work product doctrine rather than the attorney-client privilege. Typically, the issue arises with respect to tax accrual work papers, the documents prepared by an independent auditor assessing (per SEC requirements) a public company's contingent tax liabilities with respect to the possibility of an unfavorable reassessment of its returns by the IRS. A range of approaches has been taken to this issue.

The U.S. work product doctrine dates from the Supreme Court's 1947 ruling in *Hickman v. Taylor*,<sup>96</sup> which in turn gave rise to U.S. Federal Rule of Procedure 26(b)(3), providing that "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative," at least in the absence of an adequate demonstration of "need."<sup>97</sup> In its 1984 ruling in *Arthur Young*, the U.S. Supreme Court unanimously reversed a Second Circuit decision creating a privilege for independent auditors' work papers, analogous to the attorneys' work product doctrine.<sup>98</sup> This ruling did not directly address the applicability of the *Hickman* work product doctrine itself,<sup>99</sup> however, and in subsequent cases litigants accordingly asserted that tax accrual work papers qualified under that doctrine as documents "prepared in anticipation of litigation."

The applicability of the U.S. work product doctrine to tax accrual work papers hinges, therefore, on the meaning of "in anticipation of litigation." Initially, two standards were in play, with the more popular (adopted in nine circuits)<sup>100</sup> being the liberal "because of" standard. In *United States v. Adlman*, a Second Circuit panel interpreted Rule 26(b)(3) to include not only documents prepared to assist at trial but also those prepared in anticipation of litigation even if the event triggering the litigation had not yet occurred.<sup>101</sup> But while tax accrual work papers generally passed *Adlman's* "because of" test, they did not fare as well under the competing (if less widely adopted) "primary motivating purpose" test, set out as follows by the Fifth Circuit in *United States v. Davis*: "[l]itigation need not necessarily be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."<sup>102</sup> In both *Davis* and the subsequent ruling in *United States v. El Paso Co.*, the Fifth Circuit ruled that the work of preparing a tax return

96. See *Hickman v. Taylor*, 329 U.S. 495 (1947).

97. FED. R. CIV. P. 26(b)(3); See BRYANT, *supra* note 28.

98. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-21 (1984).

99. *Id.* at 817-18.

100. Christopher R. Wray, *On the Road Again: The D.C. Circuit Reinvigorates the Work Product Doctrine in United States v. Deloitte & Touche*, 87 NOTRE DAME L. REV. 1797, 1809 n.40 (2012).

101. *United States v. Adlman*, 134 F.3d 1194 at 1198-99. Note that a key consideration was whether the documents "would have been created in essentially similar form irrespective of the litigation." *Id.* at 1202.

102. *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).

“was not primarily motivated to assist in future litigation over the return,”<sup>103</sup> which meant that it was not protected by the work product doctrine. The majority in *El Paso* was blunt in stating that, in its view, Congress’ intent was to provide the IRS with “broad latitude” to enforce the tax law and that requiring targets of IRS investigations to surrender accountants’ work papers was therefore justified on the grounds of IRS convenience, as this “analysis may be useful to the IRS as a ‘roadmap’ through a company’s tax return.”<sup>104</sup> (While the authors know of no precisely similar case in Canada, it is nevertheless difficult to imagine this type of reasoning in a Canadian judgment, given the constitutionalized nature of solicitor-client privilege in Canada.)

In 2009, the First Circuit rendered its controversial *Textron* ruling.<sup>105</sup> While purporting to apply *Adlman*, the majority in that case actually produced what amounted to a new standard—“prepared for use in litigation”—that left even less room for work product protection than the “primary motivating purpose” test. The decision prompted a strong response, not least by its own dissenters, who described the majority as “simply wrong”<sup>106</sup> and as having “recharacterize[d] the facts as suits its purposes.”<sup>107</sup> This dissent was echoed in *United States v. Deloitte LLP*,<sup>108</sup> a 2010 ruling by the D.C. Circuit which, as one scholar has noted, is especially significant because D.C. Circuit “evidence rulings govern the United States Tax Court.”<sup>109</sup> Pronouncing itself unconvinced by *El Paso* and *Textron*, the *Deloitte* court concluded that “a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation.”<sup>110</sup> It also rejected the Government’s argument that the privilege had been waived because the independent auditor was potentially an adversary in future litigation, holding that an independent auditor generally cannot be a potential “adversary” of its client in the required sense.<sup>111</sup>

#### E. SELF-EVALUATION PRIVILEGE (SELF-CRITICAL ANALYSIS PRIVILEGE)

One key type of litigation-related privilege that has advanced more quickly in the United States than in Canada is self-evaluation privilege or, as it is sometimes called, self-critical analysis privilege. Since 1970, when it was recognized in the District of Columbia in *Bredice v. Doctors Hospi-*

103. *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982). Garwood J., dissenting, took particular issue with this “efficiency” argument. *Id.* at 546 (Garwood, J. dissenting).

104. *Id.* at 545 (majority opinion).

105. *See United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009).

106. *Id.* at 40.

107. *Id.* at 39.

108. *See United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010).

109. Wray, *supra* note 100, at 1810.

110. *Deloitte*, 610 F.3d at 138.

111. *Id.* at 140.

*tal, Inc.* with respect to hospital medical staff reviews,<sup>112</sup> recognition of this privilege has spread to a number of U.S. jurisdictions in a variety of forms. In addition to hospital committee reports, self-evaluation privilege is also widely recognized in equal employment opportunity lawsuits (where a public interest exists in allowing employers to undertake self-evaluations of affirmative action efforts and workplace diversity)<sup>113</sup> and environmental audits (generally in a limited form).<sup>114</sup> Another area in which self-evaluation has been accepted as privileged (in some states) is with respect to insurance company regulatory compliance reviews. At least eight U.S. states and the District of Columbia have enacted laws in keeping with the “Insurance Compliance Self-Evaluative Privilege Model Act” (the U.S. Model Act) that was adopted in 1998 by the National Conference of Insurance Legislators.<sup>115</sup> It bears repeating that the self-investigative privilege generally tends to be limited in scope and that, because it has developed primarily at the district court level, the privilege is inconsistently applied across the United States.<sup>116</sup>

In Canada, the development of self-evaluation privilege is even less advanced. In a 2002 ruling, an Ontario court referred to *Bredice* in the course of deciding that a hospital’s peer reviews and “quality assurance reports” were privileged with respect to a medical malpractice suit.<sup>117</sup> While stating that the U.S. “exceptional necessity” test for approval of production of “quality assurance” reports is not the rule in Ontario, the court did accept the D.C. Circuit’s analysis of the public interest that justifies the privilege.<sup>118</sup> In Ontario, this privilege has continued to be recognized in subsequent medical malpractice cases, although not yet at the appellate level.<sup>119</sup> The “quality assurance” privilege protects peer review documents as such, rather than the material facts that an investigation reveals.<sup>120</sup> Note that in most Canadian jurisdictions, other than Ontario, the self-evaluation privilege has been established in the medical context by means of statute.<sup>121</sup>

In the mid-2000s, a number of Canadian insurance industry groups began to advocate for the statutory extension of privilege to insurance companies’ internal self-evaluations, in order to promote frank self-analysis

112. *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970) (“There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded.”).

113. *Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379, 387–88 (N.D. Ga. 2001).

114. See *infra* note 128 for examples.

115. A.J. Kritzman and Michael T. Griffin, *Regulatory: When Internal Audit Reports are Privileged*, INSIDE COUNSEL (Dec. 21, 2011), <http://www.insidecounsel.com/2011/12/21/regulatory-when-internal-audit-reports-are-privile>.

116. GREENWALD, *supra* note 6, at 284.

117. *Steep v. Scott*, (2002) 62 O.R. 3d 173, para. 43 (Can. Ont. Sup. Ct. J.).

118. *Id.* para. 43.

119. See, e.g., *Redman v. Hosp. for Sick Children*, 2010 ONSC 3769, para. 33 (CanLII) (Can. Ont. Sup. Ct. J.).

120. *Id.* para 33.

121. See, e.g., Evidence Act, R.S.B.C. 1996, c. 124 § 51 (Can. B.C.); see also Alberta Evidence Act, R.S.A. 2000, c. A-18 § 9 (Can. Alta.).

with respect to risk profiles and company performance.<sup>122</sup> Recent amendments to Alberta's Insurance Act have begun that process, establishing a self-evaluative privilege for those subject to that legislation.<sup>123</sup> A similar provision has been enacted under the Manitoba Insurance Act, although at the time of writing Manitoba's provision had not come into force.<sup>124</sup> The Alberta and Manitoba provisions are broadly comparable to those of states following the U.S. Model Act in stating, as a general rule, that "an insurance compliance self-evaluative audit document is privileged information and is not discoverable or admissible as evidence in any civil or administrative proceeding."<sup>125</sup> As in the corresponding provisions under U.S. state law, a number of exceptions are then set out—e.g., with respect to fraud<sup>126</sup>—in addition to which there are also "limited waiver" provisions that apply where information has been provided (voluntarily or involuntarily) to certain third parties—notably auditors, the board of directors or certain government officials.<sup>127</sup>

The difference between Canada and the United States in this area is particularly significant in environmental audits. While twenty U.S. states have established a statutory privilege for voluntary environmental audits under certain circumstances, Canadian provinces have not followed suit.<sup>128</sup> Moreover, Canadian courts have not, to date, proved sympathetic to assertions of privilege with respect to such audits, although the number of decisions in which this issue has been addressed is very small.<sup>129</sup> An unfortunate consequence of the paucity of litigation in this area is that a ruling of doubtful correctness, *Gregory v. Canada (Minister of National Revenue)*, has stood for over twenty years as an impediment to the confi-

122. See, e.g., CANADIAN COUNCIL OF INSURANCE REGULATORS, FINAL REPORT ON PRIVILEGE MODEL AND WHISTLE BLOWER PROTECTION 2 (2008).

123. Insurance Act, R.S.A. 2000, c. I-3, § 816.2 (Can. Alta.) [hereinafter Alta. Ins. Act].

124. The Insurance Amendment Act, S.M. 2012, c. 29, § 23 (Can. Man.) (adding a self-evaluative privilege provision as § 87.1 of The Insurance Act, C.C.S.M., c. I40 (Can. Man.)) [hereinafter Man. Ins. Act].

125. Alta. Ins. Act § 816.2(2); Man. Ins. Act § 87.1(2) (not yet in force); cf. KAN. STAT. ANN. § 60-3351(a) (West 2013) ("an insurance compliance self-evaluative audit document is privileged information and is not discoverable, or admissible as evidence in any legal action in any civil, criminal or administrative proceeding."). The absence of any reference to criminal proceedings in the Alberta and Manitoba statutes is because criminal law and associated rules of evidence fall under federal jurisdiction in Canada.

126. Alta. Ins. Act § 816.2(6)(b); Man. Ins. Act, § 87.1(6)(b) (not yet in force). Fraud is also an exception under the Kansas statute. See KAN. STAT. ANN. § 60-3352(a)(3).

127. Alta. Ins. Act § 816.2(4); Man. Ins. Act § 87.1(4) (not yet in force). Note that the corresponding provision of the Kansas statute differs in a number of respects that are beyond the scope of this overview. See KAN. STAT. ANN. § 60-3351(d).

128. See, e.g., ALASKA STAT. ANN. §§ 09.25.450–490 (West 2002); S.C. CODE ANN. §§ 48-57-10 to -110 (2002); TEX. REV. CIV. STAT. ANN. § 4447cc (West 2001). For an EPA article regarding state privilege and immunity statutes, see John A. Lee & Bertram C. Frey, *Environmental Audit Immunity Laws and Self-Disclosure Policies: A State-By-State Comparison*, U.S. ENVTL. PROT. AGENCY, [http://www.epa.gov/Region5/enforcement/audit/article\\_auditlaws/intro.html](http://www.epa.gov/Region5/enforcement/audit/article_auditlaws/intro.html) (last updated 2004).

129. See R. v. McCarthy Tétrault (1992), 95 D.L.R. 4th 94 (Can. Ont. Prov. Div.); see also R. v. Polysar Rubber Corp. (1994), 17 C.E.L.R. (N.S.) 307 (Can. Ont. Prov. Div.).

dent assertion of an environmental audit privilege.<sup>130</sup> The court in *Gregory* appears to have based its ruling against a finding of privilege on the premise that the only documents that can maintain solicitor-client privilege after having been prepared for a lawyer by another person are accounting documents.<sup>131</sup> Such a distinction is not widely understood to have been intended by the Exchequer Court in the leading case of *Susan Hosiery*, discussed above,<sup>132</sup> and would need to be reconsidered (at a minimum) in light of the more recent rulings in *General Accident and Camp Development*.<sup>133</sup>

In *Canada (Attorney General) v. Skeena Cellulose Inc.*, a British Columbia judge recognized that the “public interest is surely enhanced when [a company] voluntarily undertakes a third party assessment” and that there would be a “chilling effect”<sup>134</sup> if environmental audits were routinely seized. On the other hand, there is a strong public interest in prosecuting environmental offenses. Recognizing that these interests need to be balanced, the judge concluded that “an appropriate balance is met by an order requiring Skeena to disclose portions of the risk assessment documents that relate specifically to the subject incident described in the search warrant. The balance of those documents should be kept confidential.”<sup>135</sup>

While *Skeena Cellulose* is interesting insofar as it gives considerable—although by no means absolute—weight to an environmental version of the quality assurance privilege, the ruling does not appear to have been cited in any subsequent cases, nor do any subsequent cases appear to have addressed the issue directly. As things currently stand in Canada, therefore, it would be difficult to give a confident opinion that privilege would attach to a voluntary environmental audit.<sup>136</sup> Avoiding a “chilling” effect on self-audits may require Canadian regulators themselves to develop firm guidelines with respect to the circumstances under which disclosure will be required.<sup>137</sup>

130. *Gregory v. Canada (Minister of Nat'l Rev.)*, [1992] 92 D.T.C. 6518 (Can. Fed. T.D.). See FREDERICK COBURN, *TOXIC REAL ESTATE MANUAL*, III-15 (2011).

131. *Gregory*, 92 D.T.C. at 6524.

132. *Susan Hosiery Ltd. v. Canada (Minister of Nat'l Revenue)* [1969] 2 Ex. C.R. 27 (Can.).

133. *Gen. Accident Assurance Co. v. Chrusz* (1999), O.R. 3d 121 para. 32 (Can. Ont. C.A.); *Camp Dev. Corp. v. S. Coast Greater Vancouver Transp. Auth.*, 2011 BCSC 88 (CanLII) (Can. B.C. Sup. Ct.)

134. *Canada (Att'y Gen.) v. Skeena Cellulose Inc.*, 37 C.E.L.R. (N.S.) 32, para. 36 (Can. B.C. Sup. Ct.).

135. *Id.* para. 37.

136. Environmental audits can also raise privilege issues under the federal Access to Information Act. R.S.C. 1985, c. A-1 (Can.) [hereinafter AIA]. See *Hibernia Mgmt. & Dev. Co. Ltd. v. Canada-Nfld. & Lab. Offshore Petrol. Bd.*, 2012 F.C. 417 (Can. Fed. Ct.) (in which the privilege was denied).

137. See COBURN, *supra* note 127, at III-16.



### III. PRIVILEGE AND CLIENT MISCONDUCT

#### A. THE "CRIME-FRAUD" EXCEPTION

As is the case under U.S. law, Canadian law lifts solicitor-client privilege in the case of communications that concern ongoing or contemplated crimes or fraud. Because it is not part of an attorney's function to give advice in furtherance of illegal activity, communications respecting such activity are not protected by the privilege.<sup>138</sup> In the United States, this is usually called the "crime-fraud" exception; in Canada, it is known by the same name or, alternatively, as the "future crimes and fraud" exception.

The "fraud" element of the exception under Canadian law is typically more applicable in a business context than its "criminal" aspect. But the scope of this "fraud" element—whether, for example, it extends to all tortious acts, or to breaches of regulatory requirements, or even to breaches of contract—has not yet been resolved in Canada. In 2007, Justice Perell of the Ontario Superior Court of Justice referred to the crime-fraud exception as the "exception for communications in furtherance of unlawful conduct" and appears to have held that it includes not only fraud, but all torts.<sup>139</sup> But Justice Perell admitted that such a view "may be contentious" in light of a 1988 ruling in which another Ontario judge had declined to extend the exception to all torts, limiting it instead to instances of "fraud or dishonesty," including breach of trust, trickery and "sham contrivances."<sup>140</sup>

In *Dublin*, Justice Perell referred to the British Columbia case of *Goldman, Sachs & Co. v. Sessions*, in which the scope of the crime-fraud exception was described in a manner that appears to be even broader than his own interpretation.<sup>141</sup> The British Columbia court had stated:

[I]ntended crimes and frauds are but instances of the application of the general principle that the privilege does not attach to communications in relation to intended unlawful conduct. In this context, "unlawful conduct" has a broader meaning than simply conduct that is prohibited by the criminal law. It includes breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty.<sup>142</sup>

It is important to note that this expansive view of the exception is based on a debatable interpretation of obiter dicta of the Supreme Court

138. *Goldman, Sachs & Co. v. Sessions*, 1999 CanLII 5317 (Can. B.C. Sup. Ct.) (quoting *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, 168) ("[I]t cannot be the solicitor's business to further any criminal object.")

139. *Dublin v. Montessori Jewish Day Sch. of Toronto* (2007), 281 D.L.R. 4th 368, paras. 42–47 (Can. Ont. Sup. Ct. J.).

140. *Id.* para. 37 (citing *Rocking Chair Plaza (Bramalea) Ltd. v. Brampton (City)* (1988), 29 C.P.C. 2d 82 (Can. Ont. H.C.J.). Because Perell, J. concluded that the conduct in the case met both standards, it was not necessary to resolve the issue definitively.

141. *Dublin*, 281 D.L.R. 4th 368, paras. 42–47.

142. *Goldman*, 1999 CanLII 5317; see also *Nw. Mettech Corp. v. Metcon Servs. Ltd.* (1997), 78 C.P.R. 3d 86 (Can. B.C. Sup. Ct.) (including breach of fiduciary duty and breach of confidence as unlawful conduct for this purpose).

of Canada. Specifically, the Supreme Court had quoted a passage from a 1964 note in the *Harvard Law Review* referring in passing to the crime-fraud exception as having effect in the case of a "crime or tort" or with respect to "unfounded claims or illegal projects."<sup>143</sup> The British Columbia court held that "the adoption into the analysis by the Court, without qualification, of [these] words" implied an endorsement of the expansive concept of the crime-fraud exception on which they were presumably based.<sup>144</sup> In so doing, the court has arguably placed an unusual amount of weight on obiter dicta. Similarly, the correctness of the expansive view of the exception taken in *Dublin* could also be doubted, given that the appellate court that granted leave to appeal in that case expressly agreed with Justice Perell's admission that his analysis in that ruling "might be contentious," referring to the "sanctity of solicitor-client privilege."<sup>145</sup>

The upshot is that the scope of the crime-fraud exception in Canada is currently "uncertain and controversial."<sup>146</sup> There are signs of a more expansive interpretation, as we have seen, but there are also indications of the persistence of a more conservative approach, as indicated in the leave to appeal ruling in *Dublin* and even in the Supreme Court of Canada, which, in an obiter comment (in a case not directly raising crime-fraud issues), stated that the exception is "extremely limited" and "rare."<sup>147</sup>

It should be noted that, under Canadian common law, more is required to give effect to the crime-fraud exception than the mere assertion that the otherwise privileged documents will evidence a criminal or fraudulent intent.<sup>148</sup> Furthermore, the Supreme Court of Canada has approved the ruling of the Oregon Supreme Court in *State ex rel. North Pacific Lumber Co. v. Unis*, that "[g]ood-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action" will continue to be protected by privilege even if the recommended action is later found to have been improper.<sup>149</sup>

Like their Canadian counterparts, courts in the United States have struggled to define the scope of the crime-fraud exception. But due in part to the influence of Dean Wigmore, who believed that the "fraud"

143. *R. v. Campbell*, [1999] 1 S.C.R. 565, para. 58 (Can.) (citing *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730, 730-31 (1964)).

144. *Goldman*, 1999 CanLII 5317, para. 15.

145. *Dublin*, 281 D.L.R. 4th 368, paras. 2, 4 (the appeal was subsequently abandoned).

146. See 5. *What do I do when there is a possibility of a crime or fraud occurring?*, CAN. BAR ASS'N, <https://www.cba.org/cba/activities/includes/inhouse-faq-5.aspx> (last visited Sept. 3, 2013) (using these words to describe the state of this area of the law in general).

147. *Blood Tribe Dept. of Health v. Canada (Privacy Comm'r)*, [2008] 2 S.C.R. 574, para. 10. Note that the ruling cites *Campbell* on this point, suggesting that it did not intend its statement here as a rejection of the relatively open view taken by the Supreme Court in that case with respect to the issue. *Campbell*, 1 S.C.R. 565, para. 60.

148. *Dublin*, 281 D.L.R. 4th 368, paras. 42-47.

149. *State ex rel. N. Pac. Lumber Co. v. Unis*, 579 P.2d 1291, 1295 (Or. 1978) (cited favorably in *Campbell*, 1 S.C.R. 565, para. 60).

element of the exception could not logically exclude intentional torts,<sup>150</sup> expansive interpretations of the exception appear to be more firmly established in the United States than in Canada. A recent ruling of the U.S. District Court for the Southern District of New York, for example, lists several New York cases in which “courts have construed the exception to reach conduct beyond the technical definitions of crimes or frauds.”<sup>151</sup> An earlier case from the same court held that the name “crime-fraud” was “shorthand” that should not be taken literally so as to circumscribe the exception too restrictively.<sup>152</sup> Moreover, it appears that some courts have attempted to make this clear by renaming the exception the “crime/fraud/tort exception.”<sup>153</sup> On the other hand, there are courts (e.g., those of Massachusetts) in which more restrictive views have apparently continued to be sustained in many cases.<sup>154</sup>

### B. UP-THE-LADDER REPORTING

As fiduciaries and by regulation, lawyers owe their clients a duty of confidentiality. This obligation can create an ethical and professional dilemma when the lawyer learns that a client has acted or intends to act in a dishonest, fraudulent or criminal manner. Lawyers in Canada are bound by professional rules of conduct that deal specifically with the proper response to cases of crime or fraud in a corporate context. Under the *Rules of Professional Conduct* of the Law Society of Upper Canada (the governing body for Ontario lawyers), when a lawyer who is retained by an organization learns that the organization has acted, is acting, or intends to act dishonestly, fraudulently, criminally, or illegally, an “up the ladder” notice procedure is triggered.<sup>155</sup> This procedure requires the lawyer to advise the person who instructs him or her of the illegal conduct. Should that person refuse to stop the conduct, the lawyer must then take his or her concern “up the ladder” to successively more senior persons within the organization and eventually (if those persons refuse to stop the conduct) to the board of directors. If the board of directors refuses to stop the conduct, then the lawyer must withdraw. The Commentary to the rule states that, to be reportable on an up-the-ladder basis, conduct must be such as would lead to “substantial harm to the organization” rather

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150. *Madanes v. Madanes*, 199 F.R.D. 135, 148 (S.D.N.Y. 2001) (citing 8 J.H. Wigmore, *Evidence* § 2298 (McNaughton rev. 1961)).
  151. *Amusement Indus., Inc. v. Stern*, No. 07 Civ. 11586 (LAK)(GWG) 2013 WL 498724, at \*2 (S.D.N.Y., Feb. 11, 2013).
  152. *Madanes*, 199 F.R.D. at n.4.
  153. *Olvera v. Cnty. of Sacramento*, 2011 U.S. Dist. LEXIS 144598, at \*4 (E.D. Cal., Dec. 15, 2011).
  154. *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 13 (D. Mass. 1997) (quoting *Purcell v. Dist. Att’y for the Suffolk Dist.*, 676 N.E.2d 439 (Mass. 1997)). It appears that Massachusetts may take a more “Canadian” approach to attorney-client privilege generally. See *in re Grand Jury Investigation*, 437 Mass. 340, 351 (Mass. 2002) (“[t]he attorney-client privilege is among the most hallowed privileges of Anglo-American law.”).
  155. LAW SOC’Y OF UPPER CAN., RULES OF PROFESSIONAL CONDUCT, R. 2.02(5.1) (2012).

than being “genuinely trivial.”<sup>156</sup> A failure to satisfy reporting requirements under a regulation is given as an example of such non-trivial conduct.<sup>157</sup>

Adopted in 2004, the Law Society of Upper Canada’s up-the-ladder reporting rules are the nearest Canadian counterpart to the U.S. requirements under § 307 of the Sarbanes-Oxley Act of 2002. By 2012, as part of a nationwide effort to standardize legal professional conduct requirements, the law societies of Alberta, British Columbia, Manitoba,<sup>158</sup> Nova Scotia,<sup>159</sup> and Saskatchewan<sup>160</sup> had adopted substantially the same rule, although the Alberta and British Columbia provisions are triggered under slightly different circumstances. In the case of Alberta, the “up the ladder” reporting obligation is triggered only where fraudulent, criminal, or illegal conduct is at issue (omitting the reference to merely “dishonest” conduct found in the Ontario provision).<sup>161</sup> In British Columbia, the trigger is dishonest, criminal or fraudulent conduct (omitting the reference to “illegal” conduct found in the Ontario provision).<sup>162</sup>

One significant difference between these responses to the corporate scandals of the early 2000s is that, under Sarbanes-Oxley, the “reporting up” (up-the-ladder) rules have been supplemented by “reporting out” rules. SEC Rule 205.3(d)(2)(i), implemented under Sarbanes-Oxley, permits (while not requiring) an attorney to disclose confidential client information to the SEC, without client consent, if the attorney reasonably believes that such disclosure is necessary “to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors.”<sup>163</sup> The American Bar Association’s Model Rules of Professional Conduct also allow lawyers to disclose information “related to the representation” if the “up-the-ladder” process has failed to produce a satisfactory response. In particular, ABA Model Rule 1.13 permits such disclosure “to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization”<sup>164</sup>

In Canadian jurisdictions, confidentiality provisions of professional conduct rules may continue to forbid the lawyer from disclosing the information in those communications voluntarily outside the context of litiga-

156. *Id.* commentary to rules 2.02(5)–(5.2).

157. *Id.* Note that, while rule 2.02(5.2) ostensibly requires a lawyer to move up the ladder when a corporate official “refuses to cause the wrongful conduct to stop,” the commentary states that the lawyer should move up the lawyer when, having complained to the required person, the conduct does not stop—presumably regardless of whether the required person has refused or agreed to stop it. *Id.* § 2.02(5.2)(b).

158. LAW SOC’Y OF MAN., CODE OF PROF’L CONDUCT, § 2.02(9) (2011).

159. N.S. BARRISTERS’ SOC’Y, CODE OF PROF’L CONDUCT, § 2.02(8) (2013).

160. LAW SOC’Y OF SASK., CODE OF PROF’L CONDUCT, § 2.02(8) (2012).

161. LAW SOC’Y OF ALTA., CODE OF CONDUCT, § 2.02(11) (2012).

162. LAW SOC’Y OF B.C., CODE OF PROF’L CONDUCT, § 2.02(8) (2012).

163. 17 C.F.R. § 205.3(d)(2)(i) (2003).

164. MODEL RULES OF PROF’L CONDUCT § 1.13.

tion.<sup>165</sup> A similar tension exists in some U.S. states, as state bar confidentiality rules that are not in line with ABA Model Rule 1.13 may conflict with the SEC's safe harbor for attorney disclosures.<sup>166</sup>

Note that under the Canadian provisions generally, the ultimate report can be directed to the board of directors as a whole, and not necessarily to an independent board committee as is required under Sarbanes-Oxley. One reason for the difference in approach could be that independent board committees are less common in Canada.

#### IV. CONCLUSION

It is not surprising that countries whose legal systems are generally similar<sup>167</sup> would have similar laws relating to privilege, including similar distinctions between attorney-client privilege and the zone of privacy surrounding a lawyer's work product. But as we have seen, there are some significant differences between American and Canadian treatments of privilege, many of which appear to be rooted in a fundamental distinction between the American and Canadian understandings of the concept. In Canadian jurisprudence, privilege has come to be seen as an important element in the country's regime of constitutionally-protected rights. This may be because the docket of the Supreme Court of Canada is weighted toward criminal rather than commercial cases, so that doctrine around privilege issues has tended to develop in cases where the court's sense of itself as protector of the individual against the forces of the state has been engaged.<sup>168</sup> In the United States, where the legal system has not constitutionalized the concept of privilege in this way, the courts tend to take a skeptical view of privilege claims, regarding them as limited exceptions to the important principle that justice should be done on the basis of the fullest possible factual record. Even the term "privilege" is used less freely in the United States, where work product is merely a "doctrine," unlike its Canadian counterpart, "litigation privilege."

If we imagine U.S. and Canadian attorney-client privilege doctrines as circles in a Venn diagram, there will of course be a large region of overlap. But it is the marginal cases that tend to occupy us as legal practitioners, and as this article has shown, the fundamental distinction between U.S. and Canadian conceptions of attorney-client privilege may generate different results in a number of situations that are potentially important for businesses with cross-border operations. While Canadian common

165. See 6. *When am I required to raise a matter "up the ladder"?*, CAN. BAR ASS'N, <https://www.cba.org/cba/activities/includes/inhouse-faq-6.aspx> (last visited Sept. 3, 2013).

166. Barry R. Temkin & Ben Moskovits, *Lawyers as Whistleblowers Under the Dodd-Frank Wall Street Reform Act*, N.Y. ST. B.A. J., July-Aug. 2012, 11, 12.

167. With the exception of Quebec, which is not a common law jurisdiction and is not considered in this article.

168. *Solosky* and *McClure* are among the leading Supreme Court of Canada cases on solicitor-client privilege that involved the rights of criminal defendants or prison inmates. See *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 (Can.); see also *Solosky v. R.*, (1979), [1980] 1 S.C.R. 821, 837 (Can.).

law courts generally tend to be more protective of this privilege, there are certain situations—notably with respect to the work product doctrine—in which Canadian protections may be weaker than what U.S. counsel are accustomed to. Given the incongruities between Canadian and U.S. doctrine in this area, it is always prudent for counsel to make privilege issues a priority when dealing with commercial litigation and transactions with U.S.-Canadian cross-border components.