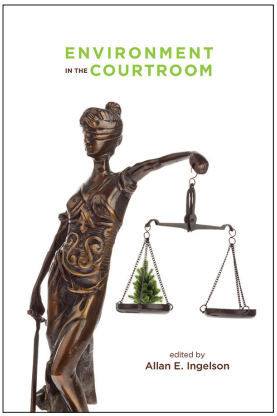
UNIVERSITY OF CALGARY
Press



ENVIRONMENT IN THE COURTROOM

Edited by Allan E. Ingelson

ISBN 978-1-55238-986-7

THIS BOOK IS AN OPEN ACCESS E-BOOK. It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

Cover Art: The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist's copyright.

UNIVERSITY OF CALGARY
Press
press.ucalgary.ca

Acknowledgement: *We acknowledge the wording around open access used by Australian publisher,* **re.press**, *and thank them for giving us permission to adapt their wording to our policy* http://www.re-press.org

46

Privilege in Environmental Enforcement

ERIN EACOTT

1. Privilege 101—Its Purpose

In both prosecutions and civil litigation there is a basic rule regarding disclosure of evidence. In prosecutions, the rule is that an accused has a right to all relevant information regarding the prosecution so that the accused can make full answer and defence. For civil litigation, the axiom is that all relevant evidence should be available to the parties in the litigation.

Privilege is an exception to these rules because it precludes obtaining and/or tendering relevant evidence. Privilege has been found by the courts to apply in situations where disclosure of the relevant information would cause serious harm to people, the judicial process or the public's interest. From a prosecution perspective, these are situations where the need to protect the information outweighs the accused's right to full answer and defence.

Types of Privilege Found in Environmental Enforcement

This article discusses the several key types of privilege that are encountered in environmental enforcement, namely:

- Informer Privilege
- Investigative Technique
- Ongoing Investigation
- Third Party *Privacy* (not privilege)

* *Counsel, Public Prosecution Service of Canada, Regulatory and Economic Crime Team, Edmonton, Alberta. Any views or opinions expressed in this article are solely those of the presenter and are in no way to be taken as the view, policy or opinion of the Attorney General of Canada, the Director of Public Prosecutions or the Public Prosecution Service of Canada.*

- National Interest Privilege
- Cabinet Confidences
- Solicitor-Client Privilege
- Work Product/Litigation Privilege

Informer privilege and solicitor-client privilege are the two main types of class privilege. This means there is a *prima facie* presumption of inadmissibility of relevant information.

The other types of privilege listed above are types of case-by-case privilege. This means there is a *prima facie* presumption of admissibility. For the information in a particular case to be inadmissible, it must meet a common law test, such as the Wigmore test. In general, the tests balance the interests in keeping the relevant information secret with the accused's right to make full answer and defence (or in the civil context, in the party's interest in full disclosure).

Many of the types of case-by-case privilege, such as investigative privilege, fall under the category of public interest privilege, whereby it is in the public's interest to keep the information secret. Public interest privilege is protected by both common law and section 37 of the *Canada Evidence Act*.

The remainder of this article briefly discusses each of the above listed types of privilege, in order of how they may be encountered over the course of an environmental investigation through to a prosecution.

INFORMER PRIVILEGE

Informer privilege arises when a person has provided information to officers about an investigation and the person wishes to remain anonymous.

The purpose of informer privilege is two-fold. First, it protects people who have provided information to officers. Second, it encourages people to come forward to the police with information regarding offences.[1]

Informer privilege is only granted by the Crown. It is not granted to every witness who wishes their identity to remain a secret. Once granted, only the informant can waive the privilege.

In order to protect informer privilege, prosecutors redact all information from disclosure that could identify an informant. In some cases, even indicating the existence of an informant can identify them.

In environmental enforcement, investigations often commence as a result of a tip by a member of the public, for example that a spill has occurred or wildlife has been killed or injured. In some cases, the tipster wishes to remain

anonymous. This anonymity can be especially important in rural areas where a limited number of people may have witnessed the incident. In some cases, it is the employee of the company that committed the offence who provides the tip, and the employee is concerned that they might lose their job as a result. Such whistleblower cases are an example of where simply indicating the existence of an informant could identify him or her (the offending company could, for instance, go on a hunt to identify the employee).

There are several ways that members of the public can provide tips of environmental offences. Crime Stoppers is one example. In addition, each province has its own environmental violation hotline. Such hotlines are anonymous and a type of informer privilege. Even the tip sheet recorded by the person who took the hotline call is protected by informer privilege.[2]

INVESTIGATIVE TECHNIQUE

An investigative technique used by officers is privileged where disclosure of the technique would undermine the use of the technique in current and future investigations. Investigative technique is an example of case-by-case privilege. The court must balance whether the interests in keeping the technique secret override the accused's right to full answer and defence.

Investigative technique privilege arises in environmental enforcement, particularly in wildlife trafficking. It often results in the sealing of an Information to Obtain a Search Warrant (i.e. the contents of the Information to Obtain remain sealed in court and unavailable to the public or the individual upon whom the Search Warrant is executed). An example of investigative technique which may be deemed privileged in wildlife trafficking is the type of undercover vehicle used.

ONGOING INVESTIGATION

Information about an ongoing investigation by officers is privileged where its disclosure would undermine the investigation. For example, people might destroy evidence if they know the details of the investigation.

Ongoing investigation is an example of case-by-case privilege. The court must balance the public interest in disseminating information on the investigation with the importance of keeping investigative information secret.

There are many reasons for information in an ongoing investigation to be privileged. For instance, disclosure may:

i) Result in the destruction of evidence and/or lack of cooperation by witnesses;
ii) Breach the rights of the individual being investigated. They are innocent until proven guilty;
iii) Breach privacy rights of third parties;
iv) Contaminate the minds of potential witnesses and/or jurors.

(There have been cases where police have revealed too much information about an investigation thus resulting in the trial being moved from the jurisdiction where the offence occurred.[3])

Civil actions against police have been successful where police provided investigative information to the public, particularly where charges did not result from the investigation. Police have been held liable for damages for adverse publicity, loss of business and damage to reputation.[4]

R. v. Trang is a helpful case regarding privilege for investigative technique and ongoing investigation.[5]

THIRD PARTY PRIVACY

Third party privacy is not a type of privilege. However, it is important in all prosecutions, including environmental prosecutions, and serves a similar purpose.

The Crown protects third party privacy by redacting personal information from disclosure provided to the accused. For example, core personal information redacted for third parties, such as witnesses, includes home addresses, phone numbers, driver's licences, dates of birth, and social insurance numbers.

It is beyond the scope of this chapter to address third party records (documents). For further information on protecting the privacy and confidentiality of third party records, see the Supreme Court of Canada cases of: *R. v. O'Connor*,[6] *R. v. Mills*,[7] and *R. v. McNeil*.[8]

NATIONAL INTEREST PRIVILEGE

National interest privilege exists where disclosure of information could affect international relations, national defence or national security.

National interest privilege is protected by section 38 of the *Canada Evidence Act* and applies to criminal and civil trials, as well as federal tribunals. National interest privilege is a type of case-by-case privilege. The relevant

test for inadmissibility under s.38 of the *Canada Evidence Act* is set out in *R. v. Ribic*.[9]

Cases involving radioactive materials which have potential environmental and human health impacts are a potential example of where information could be deemed to be privileged for national defence/security.

CABINET CONFIDENCES

Documents of the Privy Council (this includes the Prime Minister's Cabinet) are privileged. This includes memorandums with proposals/recommendations; discussion papers providing background, analysis or policy options; records to brief Ministers; and draft legislation.

Section 39 of the *Canada Evidence Act* protects Cabinet confidences. Section 39 indicates that the privilege is automatic. Where a Minister or the Clerk of the Privy Council certifies in writing that the information is a confidence of the Privy Council, then the disclosure of the information is refused without examination or hearing by the court. There are exceptions to the privilege of Privy Council documents. For instance, Privy Council documents more than 20 years old are not privileged.

Cabinet confidences are more likely to arise in civil and administrative environmental law matters, such as judicial review. However, they can arise in environmental prosecutions. In one environmental prosecution, I requested documents to assist in understanding the reasons why environmental legislation was drafted that way it was. I wanted the information for the purposes of sentencing so that I could better explain the harm of the offence (failure to provide documents) to the court. I was advised that I could not obtain certain documents because they were Cabinet confidences.

SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege is communication between a solicitor and client for the purpose of seeking or giving legal advice which is intended to be confidential. Not all communications between counsel and client are privileged. Only communications that relate to the provision of confidential legal advice are privileged. Solicitor-client privilege can only be waived by the client. If the client causes the communication to be disclosed to a third party, solicitor-client privilege is deemed to be waived.[10]

Solicitor-client privilege is arguably the most frequent privilege encountered in environmental enforcement. Communications between Crown coun-

sel (such as Public Prosecution Service of Canada counsel, Provincial Justice counsel, Department Legal Services Unit (DLSU) counsel) and an investigative agency is privileged.

During investigation of environmental offences, officers frequently encounter communications between the offender and their counsel or between a third party (witness) and their counsel for the purpose of seeking or giving confidential legal advice.

Solicitor-Client Privileged Documents and Execution of a Search Warrant—What Happens?

If solicitor-client privilege documents are found during the execution of a search warrant, what happens? There is no statutory process that sets out what an officer should do if solicitor-client privilege documents are found during the execution of a search warrant. There are cases that provide some guidance. Practically speaking, where solicitor-client privilege documents are found (and the location being searched is not a law office[11]), the following occurs:

1. At the time of the execution of the search warrant, the individual being searched makes a claim of solicitor-client privilege over document(s); or, the officer doing the search believes document(s) may be solicitor-client privileged;
2. The officer places the document(s) in a sealed envelope and labels it;
3. At the completion of the search, the officer takes the sealed envelope to Queen's Bench/Superior Court;
4. Defence counsel attends Queen's Bench/Superior Court to review and release to the officer any documents that are not solicitor-client privileged. Defence counsel will usually divide the documents into three groups: documents that are clearly solicitor-client privileged, documents that are not solicitor-client privileged, and documents that are potentially solicitor-client privileged;
5. Defence counsel brings an application to have the court review the remaining documents for a determination of solicitor-client privilege. This should be defence counsel's application. However, in cases where defence counsel has been slow or unreceptive in bringing the application, the Crown has brought it. The party claiming privilege has the onus of proof on a balance of probabilities. The Court usually reviews each document.

This process is slightly different when dealing with electronic seizures by warrant. Officers will often seize a computer or a mirror image that they have made of a hard drive. Officers then search the computer or image offsite, using search terms relevant to the warrant. They make copies of the relevant documents (electronically or as printouts) for the investigation.

There can be claims that solicitor-client privilege documents exist on the computer or image. There are several options to deal with these solicitor-client privilege claims. The option used is often chosen by agreement of Crown and defence counsel.

First, the computer or image can be sealed and taken to Queen's Bench/Superior Court to later be reviewed onsite by defence counsel accompanied by an officer. This option is not practicalwhere the computer or image containes a large amount of material to be reviewed. In addition, Queen's Bench/Superior Court often does not have a lot of secure storage space and so is not keen to receive computers.

Second, the computer or image are not sealed. The investigating officer searches the computer or image offsite for documents relevant to the warrant. Alternatively, an officer independent from the investigation (e.g. from another agency such as the RCMP, or a retired RCMP officer) does the search. The officer can then make a copy of, and retain for the investigation, the relevant documents that are *not* potentially solicitor-client privileged. Alternatively, the officer can print relevant documents *including* those that are potentially solicitor-client privileged, seal them, and take them to Queen's Bench/Superior Court for review and/or a privilege application by defence counsel.

CLAIMS OF SOLICITOR-CLIENT PRIVILEGE: CHOOSE YOUR OWN ADVENTURE

Imagine that you are defence counsel for an oil company that is being investigated for an oil spill under the *Fisheries Act* and under your applicable provincial environmental act. The investigating officers kindly advise that they will be executing a Search Warrant on the oil company later this week. As defence counsel, you think that some of the documents relevant to the search warrant are solicitor-client privileged. Here is where you get to "choose your own adventure". On the day the officers arrive to execute the warrant, you claim solicitor-client privilege over which of the following:

a) *All* of the documents related to the oil spill incident;

b) Several previously existing documents that you had the vice-president of the oil company send to you by email the previous day;
c) The oil company's internal investigation report of the oil spill incident;
d) Documents which are confidential legal advice between a lawyer and the oil company;
e) Some combination of the above.

The following part of this chapter discusses each of the options a) thru d) above.

a) *All* of the documents related to the oil spill incident:

It is not appropriate to claim solicitor-client privilege over all of the documents related to an incident or investigation. Defence counsel in past environmental investigations have attempted to do this. It is like trying to throw a magic cloak of privilege over all of the documents. But no such magic cloak exists. Solicitor-client privilege only applies to documents related to seeking or giving confidential legal advice. Throwing the magic cloak of privilege over all of the documents is contrary to the administration of justice. It results in boxes of documents to syphon through in Queen's Bench/Superior Court. This takes a lot of time and expense, and the court does not have space to securely store such large amounts of documents.

During the execution of a search warrant, there may be a large group or category of documents that defence counsel, or the alleged offender, have not had time to review and for which they are uncertain whether solicitor-client privilege may apply. It is prudent to claim solicitor-client privilege over this large group of documents, and then later attend at Queen's Bench/Superior Court to review and make a determination. This is not an infrequent occurrence, and it is very different than attempting to throw a magic cloak of privilege over all of the documents.

b) Several previously existing documents that you had the vice-president of the oil company send to you by email the previous day:

Pre-existing documents are not made privileged just by virtue of being passed to a lawyer (see *Kilbreath v. Saskatchewan (Attorney General)*[12]). I have witnessed such attempts in environmental enforcement cases. It may be that some

of the documents sent to you by email are legitimately solicitor-client privileged, but they would not be made so simply by being sent to you.

c) The oil company's internal investigation report of the oil spill incident:

A company's internal investigation report of an incident under investigation may or may not be solicitor-client privileged. It depends upon the purpose for which the report was created. Internal investigation reports, also known as environmental audits, are often done by a company after an incident. The primary purpose of the report is usually to determine what happened and how to make changes to prevent a future incident. A company's written procedures often require that an internal investigation report be done following an incident. An internal investigation report does not become solicitor-client privileged by simply being sent to a lawyer, or by simply marking the report as solicitor-client privileged. I have seen both such attempts in environmental enforcement cases.

To be solicitor-client privileged, internal investigation reports need to be created for a purpose of seeking or giving legal advice. This need not be the exclusive purpose, but must be at least one of the purposes of the report. It is not enough for a lawyer to tell a company, "you need to do an internal investigation report". This does not make the report solicitor-client privileged. The lawyer actually needs to do something with, or intend to do something with, the report related to providing confidential legal advice to the company. Once the report is shared with a third party, the solicitor-client privilege is deemed to be waived.

d) Documents which are confidential legal advice between a lawyer and the oil company:

This is the only option from a) thru e) above where an appropriate claim of solicitor-client privilege is obvious: documents are solicitor-client privileged where they are for the purpose of seeking or giving confidential legal advice.

WORK PRODUCT/LITIGATION PRIVILEGE

Work product privilege attaches to the work product of Crown counsel in criminal and regulatory (including environmental enforcement) proceedings. Work product privilege includes documents such as Crown counsel's interviews, memorandum, correspondence, briefs, and records of phone conversations. When preparing for trial, Crown counsel may discover new evidence, for instance when speaking with a witness, and all new evidence must be

disclosed. Such a disclosure obligation means that work product privilege is a little narrower than litigation privilege.

Litigation privilege is the same type of privilege as work product privilege, but litigation privilege exists in the civil realm and applies to counsel for the alleged offender in criminal and regulatory offences. Litigation privilege attaches to documents and communications prepared or gathered by counsel, or under counsel's direction, for the "dominant purpose" of anticipated litigation. For litigation privilege to apply to a document, litigation cannot be one of the purposes or even the substantial purpose for the creation of the document; litigation must be the dominant purpose of its creation.[13]

Communications and documents related to settlement negotiations fall under work product and litigation privilege.

Communication between Lawyer and Expert Witness

The Ontario Court of Appeal case of *Moore v. Getahun*[14] holds that communications between counsel and an expert, including draft reports, are covered by litigation privilege, as long as the communications do not interfere with the expert's independence and objectivity. All of the "foundational information" upon which the expert's opinion is based must be disclosed. I would argue that the principles outlined in this case apply equally to Crown counsels' communications with expert witnesses in criminal and regulatory cases, including environmental enforcement.

The Court of Appeal explained that lawyers' communication with experts in civil cases is crucial in developing expert reports that "are comprehensible and responsive to the pertinent legal issues in the case."[15] This applies equally in environmental investigations and prosecutions. In environmental investigations and prosecutions, scientific experts are used to convey complicated evidence. These experts are usually unfamiliar with the legal system and have never written an expert report for court or testified. Crown counsel need to openly discuss and review draft reports with expert witnesses to ensure that their opinions are clear, understandable by a lay person and will assist the Court. As described by the Ontario Court of Appeal, disclosure of such communications would:

- "inhibit careful preparation" of expert witnesses and their reports;
- "discourage participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion";[16] and

- "would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation."[17]

Reports Generated by or for the Offender

In environmental investigations, officers often wish to seize reports, such as expert reports or internal investigation reports, generated by or for a company following an environmental incident for which it is being investigated. Such reports are not protected by litigation privilege if the reports were obtained by the company for determining what happened in the incident and improving the company's practices. The reports *are* protected by litigation privilege if the reports were obtained by the company for the dominant purpose of anticipated litigation.18

In my experience with environmental enforcement, defence counsels' claims of litigation privilege over internal investigation reports seized during search warrants are usually retroactive attempts to apply litigation privilege to the reports. The reports were truly done on the basis of internal procedures which required the report to be done to determine what happened in the incident and to make improvements. At the time the reports were done, they were not done for the dominant purpose of potential litigation.

If a document is prepared in the ordinary course of business, such as pursuant to corporate policy, or would have come into existence despite the anticipated litigation, litigation privilege does not apply, even if one of the document's purposes is anticipated litigation.[19]

Conclusion

In conclusion, there are many types of privilege that can arise in environmental enforcement from an investigation through to a prosecution. This article addresses some but not all of the possible types of privilege that can arise. The most common types of privilege in environmental enforcement are ongoing investigation, solicitor-client privilege and work product or litigation privilege. For a thorough review of privilege, see the periodical by R. Hubbard., S. Magotiaux and S. Duncan, *The Law of Privilege in Canada,* Canada Law Book.

NOTES

1 *R v Leipert*, [1997] 1 SCR 281 (SCC).
2 *Ibid*.
3 *R v Feeney*, 1998 CarswellBC 347 (SC).
4 See for example, *Uni-Jet Industrial Pipe Ltd v Canada (Attorney General)* (2001), 156 Man R (2d) 14; 2001 MBCA 40.
5 *R v Trang* (2002), 168 CCC (3d) 145 (ABQB).
6 [1995] SCJ No 98.
7 [1999] 3 SCR 668.
8 2009 SCC 3.
9 *R v Ribic* (2003), 185 CCC (3d) 129, [2005] 1 FCR 33 (FCA), leave to appeal to SCC refused 185 CCC (3d) 129n. This test is nicely summarized in Robert W Hubbard, Susan Magotiaux & Suzanne M Duncan, *The Law of Privilege in Canada* (Toronto: Canada Law Book, 2006) (2 vol looseleaf) at 4.130.
10 *R v Lavallee*, [2002] 3 SCR 209; *Canada v Solosky* (1979), 50 CCC (2d) 495 (SCC).
11 Where the location being searched is a law office, the steps to be taken are clearly set out in *R v Lavallee, ibid*; and *Maranda v Richer*, [2003] 3 SCR 193 (SCC).
12 *Kilbreath v Saskatchewan (Attorney General)*, 2004 SKQB 489.
13 The leading case on litigation privilege is *Blank v Canada (Department of Justice)*, 2006 SCC 39. See also *Lizotte v Aviva Insurance Company of Canada*, [2016] 2 SCR 521.
14 *Moore v Getahun*, 2015 ONCA 55 (CanLII) at paras 50-78.
15 *Ibid* at para 62.
16 *Ibid* at para 71.
17 *Ibid* at para 65.
18 But see *R v Bidzinski et al*, 2007 MBQB 138. *Bidzinski* holds that documents made in reasonable anticipation of a civil litigation are not protected by litigation privilege for the purposes of production in a criminal investigation. In *Bidzinski*, the Manitoba Queen's Bench found that written witness statements taken in anticipation of civil litigation were not protected by litigation privilege when seized during a criminal investigation because the civil proceeding and criminal proceeding were not related.
19 See for example, *Transalta Corporation v Market Surveillance Administrator*, 2015 ABQB 180.