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## SOLICITOR-CLIENT PRIVILEGE AND LITIGATION PRIVILEGE - WHAT IS EXEMPT FROM DISCLOSURE, AND FOR HOW LONG?



In September, 2006 the Supreme Court of Canada distinguished, for the first time, two related but conceptually distinct exemptions from compelled disclosure: the solicitor-client privilege (also known as legal advice privilege) and the litigation privilege. The dividing line between the two exemptions is often blurred because the two exemptions often co-exist and are sometimes called by the same name.

In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 Canada's highest court dealt with Mr. Blank's request that the federal government disclose all records pertaining to earlier prosecutions of himself and his company for certain alleged regulatory offences (some of which charges were quashed, and others were stayed prior to trial). The federal government refused to disclose numerous documents on various grounds, including "solicitor-client privilege".

In deciding the case, the court set out the characteristics of solicitor-client privilege and litigation privilege. A summary of those characteristics is as follows:

### A. Solicitor-client privilege

- applies only to confidential communications between the client and his solicitor;
- exists any time a client seeks legal advice from his solicitor, whether or not litigation is involved;
- supporting rationale is to ensure that individuals can obtain proper and candid legal advice knowing that what they confide in a solicitor will not be revealed; and
- lasts indefinitely.

## B. Litigation privilege

- not restricted to communications between lawyer and client;
- applies to communications of a non-confidential nature between the solicitor (or unrepresented litigant) and third parties in the course of preparing for litigation;
- applies only in the context of litigation;
- applies to all litigants, whether or not they are represented by counsel;
- supporting rationale is based on the need to permit litigants to investigate and prepare a case for trial in private; and
- comes to an end upon the termination of the litigation that gave rise to the privilege, unless there are closely related proceedings which are continuing or reasonably anticipated.

Now that the Supreme Court of Canada has confirmed that litigation privilege (which applies to things such as expert opinions and other information used to advance one's side of a lawsuit) ends with the litigation, insurers should consider retaining counsel early in the claim or litigation process to ensure that sensitive documents are cloaked with legal advice privilege and so receive lasting exemption from disclosure. Otherwise, sensitive documents might be construed as having been created merely to further litigation, in which case the documents would only temporarily be protected from disclosure. Insurers should also ensure that they maintain a document destruction policy for documents used in litigation that has been concluded.

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