

Privilege not breached when lawyer disclosed confidential email

By **James R.G. Cook**

Law360 Canada (March 11, 2025, 10:25 AM EDT) -- Solicitor-client privilege in Canada is a fundamental right that belongs to a lawyer's client. In most circumstances, only the client can waive privilege. A lawyer may face sanctions by a court or their provincial law society if they disclose a client's privileged information without their authorization.

Where the client and their lawyer become involved in a dispute, however, the lawyer may be entitled to disclose some of the client's documentation and information to third parties as part of the proceedings.

Issues may arise concerning the scope of privileged information and documentation that a lawyer is permitted to disclose, as demonstrated by *Milot Law v. Sittler*, 2025 ABCA 72, which arose from a dispute between a tax lawyer and his former clients.



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The tax lawyer had been retained by the clients to deal with their outstanding debt of approximately \$4 million to the Canada Revenue Agency (CRA). The clients had been involved with a company that had perpetrated a large-scale tax evasion scheme. They refiled their taxes following the discovery of the scheme but were assessed a gross negligence penalty by the CRA. By the time their relationship with the lawyer came to an end they owed him more than \$167,109 in legal fees.

Before the lawyer could take steps to collect the fees, the clients made an assignment in bankruptcy under the *Bankruptcy and Insolvency Act* (the BIA). During the subsequent bankruptcy proceedings, the lawyer reviewed statements received from the clients' trustee in bankruptcy and determined that they had failed to disclose all of their assets to the trustee.

The lawyer's dilemma was that he knew this information because he had obtained it while working as the clients' lawyer.

The lawyer sent a letter to the clients and advised that he would disclose their assets to the trustee if they did not do so. The clients did not respond.

The lawyer then consulted with the practice adviser for his provincial regulator, the Law Society of Ontario, and was directed to Rule 3.3-5 of the *Rules of Professional Conduct*, which provides: "A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required." The Law Society of Alberta has the same rule.

The lawyer decided to provide the clients' bankruptcy trustee with previously undisclosed records and other information about the clients' assets in redacted form. This led to further requests for disclosure to the clients from the trustee, who also commenced an application against them for alleged undervalue transfers. The estate ran out of funds, however, so the trustee was unable to pursue the application.

The lawyer obtained an order under s. 38 of the BIA to step into the trustee's shoes and continue the application. In response, the clients sought to disallow the lawyer from acting against them in the bankruptcy proceeding on the basis that he could not rely upon their privileged information.

In August 2023, a chambers judge determined that almost everything that had been provided to the trustee by the lawyer was information and documentation that the clients were themselves obligated to have disclosed as part of the bankruptcy process. In that regard, the chambers judge reasoned that had the trustee conducted a formal examination of the lawyer, the lawyer would have been compelled to produce the information and documentation. The only exception would have been communications protected by solicitor-client privilege.

The chambers judge further determined that the lawyer had not disclosed any communications or documents protected by privilege with one exception — an email that concerned a second mortgage on property owned by the clients through a trust. The chambers judge concluded, however, that this single exception "was not nothing" and that the lawyer ought to have made further redactions to the already-redacted email. The chambers judge decided that the lawyer had "breached privileged to that limited extent" by failing to do so.

A subsequent request by the lawyer to have the chambers judge reconsider the decision by reviewing the entire chain of communications involving the email was refused.

The lawyer was granted leave to appeal the decision: *Milot Law Professional Corp. v. Sittler*, 2024 ABCA 116.

On appeal, the Alberta Court of Appeal referred to well-established principles that the right to communicate in confidence to a lawyer is a fundamental civil and legal right that is protected by solicitor-client privilege, and that such privilege can only be waived by the client: *Canada v. Solosky*, [1980] 1 SCR 821; *0678786 BC Ltd. v. Bennett Jones LLP*, 2021 ABCA 62, at paragraph 40.

While privilege applies to a "continuum of communications" that are directly related to seeking or formulating legal advice, clients cannot otherwise cloak financial records and business documents with solicitor-client privilege simply by providing them to a lawyer to seek legal advice. In this regard, there is a distinction between pre-existing documentation and documents that were created during the course of the solicitor-client relationship for the purposes of legal advice: *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3, at paragraph 43.

A wider duty of confidentiality also encompasses the solicitor-client relationship. A lawyer may not voluntarily disclose to others any facts which they learn while representing a client: *Clark v. Law Society of Alberta*, 2000 ABCA 242, at paragraph 23.

For the appeal, the clients argued that their former lawyer had improperly breached privilege and/or the duty of confidentiality by disclosing their financial information and documents to the trustee in bankruptcy. The Court of Appeal disagreed.

First, the BIA provides a statutory override of the rules and principles surrounding a lawyer's duty to

protect confidentiality. The clients' financial information was not privileged information.

Second, while a client's lawyer would ordinarily not be authorized to disclose of non-privileged information about a client's assets to a trustee, the lawyer here was also one of the clients' creditors. In the circumstances, the appellate court reasoned that the lawyer acted properly by seeking guidance from his provincial law society and then disclosing no more than he determined necessary for the purposes of trying to collect the substantial legal fees owing by the clients.

With regard to the impugned email, the Court of Appeal stated that the lawyer tried to sincerely *avoid* disclosing information unnecessarily, but this prudent course of action led to an erroneous decision of the chambers judge that was based on an incomplete version of the communication at issue. In the Court of Appeal's view, the chambers judge erred by refusing to reconsider the decision based upon a review of the unredacted email string.

The Court of Appeal granted the lawyer leave to admit the full email as fresh evidence, determined that the impugned portion did not contain any legal advice, and concluded that the lawyer did not breach solicitor-client privilege by disclosing it.

The lawyer's application against the clients under the BIA will now continue in the ordinary course.

The appeal decision represents no small measure of exoneration for the lawyer involved, overturning a finding of breach of solicitor-client privilege that arose from a case where he had proactively taken appropriate steps to try and avoid that very result. The decision illustrates what steps should be taken in similar circumstances when determining what to disclose to avoid breaching any duties of privilege or confidentiality.

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