This summary is not intended to encompass every aspect of the law of privilege in all Canadian provinces, but provides a general overview of the concept, including in the province of Quebec.

I. State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.

Privilege facilitates honest and direct communication between a lawyer and client in order for the lawyer to fully represent the client. Attorney-client privilege or solicitor-client privilege as more commonly known in Canada will arise where:

- a client seeks advice from a lawyer;
- a lawyer provides advice in his/her professional capacity;
- the communication between the client and the lawyer relates to legal advice; and
- the communication between the client and the lawyer is made in confidence.

Solicitor-client privilege attaches to both written and oral communications that are intended to be made in confidence, in the course of seeking or providing legal advice, and must be prefaced on the lawyer’s expertise in the law. Once established, solicitor client-privilege has a broad and general scope of unlimited duration. It applies to any legal advice on contentious or non-contentious issues.

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1 *R v McClure*, 2001 SCC 14, para 2 [*McClure*].
2 Solicitor-Client Privilege is known as “Professional Secrecy” in Quebec.
5 *Pritchard v Ontario (Human Rights Commission)* 2004 SCC 31 [*Pritchard*].
Lawyers providing the advice must be registered with a law society and be in good standing. The courts have generally recognized the benefit of privilege to clients who, in good faith, confided in a person they believed to be a lawyer. Solicitor-client privilege is codified in the relevant professional regulation legislation in most provinces. In-house or public sector counsel are able to grant their "client" the benefit of privilege when they are consulted as counsel. However, given the wide variety of roles in-house counsel often fulfill, privilege would not apply when they are providing business advice or on public policy.

For privilege to arise, the information disclosed must have been done so in confidence or on the basis that it will not be disclosed to third parties. Therefore, the presence of a third party during consultation with a lawyer may be considered a waiver of privilege. Having another lawyer or spouse present, will not constitute a waiver. Privilege can be protected if it is demonstrated that the third party's presence at a meeting between a client and a lawyer is useful and necessary.

To invoke solicitor-client privilege, the lawyer must not be consulted as a friend or colleague, or as a director or manager of the company or public body employing him or her, or for any other reason that does not concern his or her role as a lawyer. Privilege does not extend to communications that are unrelated to legal advice, when the lawyer is not consulted in his or her professional capacity, that are not intended to be confidential or that are intended to facilitate unlawful conduct.

In Quebec, solicitor-client privilege is known as ‘professional secrecy’. In Descôteaux v Mierzwinky, the Supreme Court of Canada (“SCC”) held that professional secrecy has two components: a substantive rule, which protects the confidentiality of attorney-client communications and therefore implies a duty of discretion, and; a rule of evidence, which consists of the client’s right not be obligated to reveal communications held with their attorney before the Court. Professional secrecy shares many similarities with common law solicitor-client privilege.

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7 R c Littlechild, (1980) 51 CCC (2d) 406.
8 Pritchard, supra note 5; Hinse c Procureur général du Québec, 2009 QCCS 3255; Protection de la jeunesse - 18849, 2011 QCCS 1825.
9 Ibid at para. 49.
11 Ibid.
14 9016-4864 Québec Inc. c Lemoine, 2012 QCCS 975.
15 Gedamu c McGill University, 2014 QCCS 160.
16 Dubord c Dubord, 2013 QCCS 3851.
17 Solosky v The Queen, [1980] 1 SCR 821.
18 Descôteaux et al v Mierzwinski, [1982] 1 SCR 860 [Descôteaux].
Professional secrecy is codified within the Professional Code (s. 60.4 para. 1), the Act respecting the Barreau du Québec (s. 131 para. 1), and section 9 of the Quebec Charter of Human Rights and Freedoms. Section 9 is the most important provision as it places professional secrecy among fundamental human rights. Quebec is the only province in Canada that elevates solicitor-client privilege to a quasi-constitutional right that applies to all professionals - not only lawyers. Furthermore, the Civil Code of Québec ("CCQ"), in conjunction with paragraph 3 of section 9 of the Quebec Charter, reinforces the obligation of professional secrecy with respect to the inadmissibility of protected information as evidence. Section 2858 of the CCQ provides that the judge must automatically raise any violation of professional secrecy and exclude any evidence arising therefrom.

II. Does the jurisdiction recognize/preserve the attorney-privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants’ communications qualify?

Common interest privilege is recognized in Canada and may arise in a variety of ways. The basic tenet of common interest privilege is that it can be established in litigation or in aid of anticipated litigation. The concept of common interest privilege has been broadened to include situations when there is a fiduciary duty, or fiduciary-like duty such as trustee-beneficiary relationships, contractual obligations or an agency relationship.

For the common interest principle to arise, the following conditions must be satisfied:

- that the common interest is actually established at the time the information at issue is provided;

20 Ibid at para. 29, “In the context of Quebec’s statutory framework, the term “Professional Secrecy” refers to this institution in its entirety. Professional Secrecy includes an obligation of confidentiality, which, in areas where it applies, imposes a duty of discretion on lawyers and creates a correlative right to their silence on the part of their clients. In relation to third parties, Professional Secrecy includes an immunity from disclosure that protects the content of information against compelled disclosure, even in judicial proceedings, subject to any other applicable legal rules or principles.”
21 Professional code, C-26, governs all professionals and which states that “Every professional must preserve the secrecy of all confidential information that becomes known to him in the practice of his profession”.
22 Act respecting the Barreau du Québec, B-1, “(1) An advocate must keep absolutely secret the confidences made to him by reason of his profession”.
23 Charter of Human Rights and Freedoms. C-12 [Quebec Charter]
24 Quebec Charter, supra note 23 at s 9.1.
25 Civil Code of Quebec, 1991 [CCQ].
26 “2858. The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute. The latter criterion is not taken into account in the case of violation of the right of Professional Secrecy.”
27 Buttes Gas and Oil Co v Hammer (No 3), [1980] All ER 475 at pp 483-84.
28 Pritchard, supra note 5.
the common interest may exist notwithstanding an ongoing dispute between the parties (ex. as between co-defendants or third parties to the litigation);\textsuperscript{30}

the legal advice must be relevant to the claim of each of the parties claiming the common interest\textsuperscript{31}.

In commercial transactions, it is not necessary for the parties’ interests to be identical; parties are entitled to want the same outcome for different reasons.\textsuperscript{32}

Quebec courts apply common law principles of common interest privilege, unless there are legislative provisions to the contrary.\textsuperscript{33}

In Canada, it is common practice to enter into common interest privilege agreements as between co-defendants and/or third parties to formalize the relationship and to ensure the free flow of information. These types of agreements also provide protection to the client if/when a common interest privilege agreement is terminated. They are often entered into in conjunction with standstill or tolling agreements with respect to claims as between the parties and/or third parties.

III. Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g., failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.

While solicitor-client privilege is not absolute, it is considered to be as close to absolute as possible in accordance with the goals of maintaining public confidence and retaining relevance.\textsuperscript{34} Exceptions to solicitor-client privilege occur when public policy prevails. Common exceptions for solicitor-client privilege in Canada include:

- The risk of wrongful conviction, when the communication applies to a core element of the offense, there is a genuine risk of wrongful conviction and the privileged information is the only source of the information;\textsuperscript{35}

- the nature of the communication is criminal in nature, or includes legal advice to be used in the commission of a crime;\textsuperscript{36}

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\item \textsuperscript{30} CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman (2001), 55 OR (3d) 794 and Hospitality Corp. of Manitoba Inc. v American Home Assurance Co 2002 CarswellMan 505.
\item \textsuperscript{31} Ibid.
\item \textsuperscript{32} Trillium Motor World Ltd v General Motors of Canada Ltd 2014 ONSC 1338.
\item \textsuperscript{33} 3312402 Canada Inc. c Accounts Payable Chexs Inc, 2005 CanLII 31360 (QC CS).
\item \textsuperscript{34} Canada, supra note 3, ch 11 at 10.
\item \textsuperscript{35} Dunbar, supra note 34. Additionally, the Crown is not allowed to use disclosed privilege information as direct evidence against the accused. (R v Brown 2002 SCC 32 at 102).
\item \textsuperscript{36} Canada, supra note 3 ch 11 at 190.40. A three-part test may be used to determine when this exemption applies: the communications must relate to proposed future conduct, the client knows or ought to know that their future conduct is unlawful, and finally that the wrongful conduct must be clearly wrong. (McDermott v McDermott 2013 BCSC 534).
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• a clear, serious and imminent threat to public safety, to the extent necessary to verify the existence of a threat;\textsuperscript{37}

• when a compelling public interest exists as established by the clarity of the risk to an identifiable person or group, the risk is that of possible death or bodily harm, and imminence;\textsuperscript{38}

• legislation with clear, precise and unequivocal language;\textsuperscript{39}

• allegations that a lawyer or one of their associates has committed professional negligence or misconduct, or for the lawyer to collect their fees;\textsuperscript{40}

• when giving effect to a testators’ intentions\textsuperscript{41}.

The National Assembly of Quebec adopted Bill 180 to allow the disclosure of confidential information when the protection of persons is at stake. For example, the Act amends section 131 of the Act respecting the Barreau du Québec to allow protected information to be disclosed in order to prevent an act of violence, including suicide. The Quebec courts have established that a waiver of Privilege must be clear and unequivocal\textsuperscript{42}, and that any such waiver - explicit or implicit - must be interpreted restrictively.\textsuperscript{43}

IV. Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.

The recent case of Iggillis Holdings v Canada (MNR)\textsuperscript{44} upheld the concept of common interest privilege. The Court held that sharing legal advice with other parties during a transaction is insufficient to waive privilege when a common interest is established. This solidified the rationale that clients’ interests are better served if lawyers are able to collaborate without revoking their privilege.\textsuperscript{45}

\textsuperscript{37} Canada, supra note 3 ch 11 at 190.45 and Mahjoub (Re) 2013 FC 1096.

\textsuperscript{38} Smith v Jones, [1999] 1 SCR 455.

\textsuperscript{39} Newfoundland and Labrador (Attorney General) v Newfoundland and Labrador (Information and Privacy Commissioner) 2011 NLCA 69. Legislation that seeks to deny Solicitor-Client Privilege will be interpreted restrictively. (Blood, supra note 4 para 11).

\textsuperscript{40} Federation of Law Societies of Canada Model Code of Conduct, r 3.3-4 and r 3.3-5.

\textsuperscript{41} Geffen v Goodman Estate, [1991] 2 SCR 353.

\textsuperscript{42} Pothier v Raymond, 2008 QCCA 1931, para 2; Schenker du Canada ltée v Groupe Inters and Canada Inc., 2012 QCCA 171, para 25.

\textsuperscript{43} English Montreal School Board v Boyle, 2001 CanLII 38593 (QC CA), para 4; BCE Inc. v Ontario Teachers' Pension Plan Board, 2011 QCCS 6004, para 23.

\textsuperscript{44} 2018 FCA 51.

In *Alberta (Information and Privacy Commissioner) v University of Calgary*, the Alberta privacy commissioner wanted to compel document production from the University of Calgary, and the university refused as the information was privileged. The chambers judge originally ruled that there was sufficient statutory authority to compel the document production under the *Alberta Freedom of Information and Protection of Privacy Act*. On appeal, it was found that “any privilege of the law of evidence” did not include solicitor-client privilege. This rule was found to be consistent with a modern, purposive-contextual approach to statutory interpretation, rather than a preciously used ‘plain-meaning’ rule. In this case, the SCC rejected the privacy commissioner’s appeal citing that any legislation that purports to override privilege must be “clear, explicit and unequivocal.” Ultimately, the university was not required to produce the documents over which solicitor-client privilege is claimed.

In the 2010 decision *Chambre des notaires du Québec v. Attorney General of Canada and Canada Customs and Revenue Agency*, the Quebec Superior Court declared provisions of the *Income Tax Act* granting auditors of the Canada Customs and Revenue Agency the right to make mandatory information disclosure requests to lawyers (regarding their clients) to be unconstitutional and ineffective. The motion for declaratory judgement was allowed and the documents in question were found to be contained within solicitor-client privilege.

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46 *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 [University].
49 Ibid.