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Privilege and Other Grounds for Protecting a Union's Documents and Communications from Disclosure

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PRIVILEGE AND OTHER GROUNDS FOR PROTECTING A UNION'S DOCUMENTS AND COMMUNICATIONS FROM DISCLOSURE

I. Introduction

From time to time, a union will face requests for access to its documents and communications. The request may be from an employer seeking pre-hearing disclosure of the information, or attempting to call evidence through the union's witnesses regarding the information, in a grievance arbitration proceeding or a matter before the Labour Relations Board. A union member may also seek access to the union's documents and communications, as an opposing party to the union in a matter before the Labour Relations Board, such as a decertification application or a duty of fair representation complaint. In addition, a union member may apply to his or her union under the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("*PIPA*" or the "Act") for disclosure of his or her personal information, as a form of hearing discovery, or independently of any legal action against the union.

This focus of this paper regards the grounds upon which a union may resist an employer's attempts to access its documents and communications. However, we also briefly address issues arising in respect of access requests by union members in complaints against the union, and under *PIPA*.

II. Protecting a Union's Documents and Communications from Disclosure to the Employer

A union faced with an employer's requests, during legal proceedings, for disclosure of its internal documents and communications may oppose the request on a variety of grounds, including arguments that the information:

- is not relevant;
- is protected by a form of privilege; or
- must be excluded for labour relations policy reasons.

The provisions of *PIPA* do not provide additional grounds upon which a union can object to the disclosure of documents to an employer in legal proceedings.

A. Relevance

One argument that a union may make to resist an employer's disclosure requests, or attempts to elicit information during cross examination regarding a union's internal documents and communications, is to object on the basis of relevance.

In BC, arbitrators have jurisdiction to order the production of documents that are relevant or potentially relevant to the issues in dispute between the parties, prior to or during a hearing: *Pacific Press Ltd.*, (1982) 7 L.A.C. (3d) 316, [1982] B.C.C.A.A.A. No. 392 (Somjen); *The Government of the Province of British Columbia*, [1988] B.C.L.R.B.D. No. 60, B.C.I.R.C. No. C59/88; *British Columbia School District No. 65 (Cowichan)* (1996), 54 L.A.C. (4th) 378, [1996] B.C.C.A.A.A. No. 460, at para. 35 (Dorsey).

The BC Labour Relations Board has adopted Rule 7-1(a)(i) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 in respect of requests for disclosure of documents: *University of British Columbia*, [2010] 182 C.L.R.B.R. (2d) 200, B.C.L.R.B.D. No. 138. That Rule limits orders for production of documents to:

> all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact ...

The test for entry of documents and testimony into evidence during a hearing is actual relevance: *British Columbia School District No. 65 (Cowichan)*, at para. 35. In many cases, a union's documents and internal communications will simply not be relevant or potentially relevant to the issue before the arbitrator, and could not be used by an employer to prove or disprove a material fact.

In *Centre for Addiction and Mental Health* (2004), 133 L.A.C. (4th) 178, [2004] O.L.A.A. No. 957, Arbitrator Nairn rejected the employer's request for disclosure of email communications between union representatives respecting the grievor's issues and grievances. The Arbitrator held that the emails were not relevant to the issues before her (para. 20), which included a challenge to the employer's decision to terminate the grievor's employment, claims that the employer had failed to appropriately accommodate the grievor, and had harassed the grievor.

B. Privilege

In addition to raising issues of relevance, a union may also be able to argue that the documents or communications sought by the employer are subject to one of the various types of privilege.

1. Privilege Defined

Privilege is an exclusionary rule of evidence that protects certain classes of communications from disclosure to opposing parties, and from entry into evidence, in legal proceedings. The rationale for the rule has been described as follows:

> ... Although such evidence is relevant, probative and trustworthy, and would thus advance the just resolution of disputes, it is excluded because of overriding social interests.
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> In any discussion about privileges, one must keep in mind the constant conflict between two countervailing policies. On the one hand, there is the policy which promotes the administration of justice requiring that all relevant probative evidence relating to the issues be before the court so that it can properly decide the issues on the merits. On the other hand, there may be a social interest in preserving and encouraging particular relationships that exist in the community at large, the viability of which are based upon confidential communications. Normally these communications are not disclosed to anyone outside that relationship.
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> Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at 713, paras. 14.1 and 14.2

There are two main categories of privilege:

- "blanket," "class," "common law," or "*prima facie*" privilege, which describes privilege that has been recognized at common law, and pursuant to which communications are presumed to be inadmissible if the relationship fits within the protected class, unless the party urging admission into evidence can show why the communications should not be privileged, such as for example solicitor-client (legal advice) privilege; and
- "case-by-case" privilege, which refers to communications for which there is a *prima facie* assumption that they are not privileged, and are thus admissible into evidence, unless the party asserting privilege can show that the communications meet certain criteria, known as the Wigmore Test.

R. v. *Gruenke*, [1991] 3 S.C.R. 263, S.C.J. No. 80 at para. 26

2. Waiver

Privilege may be waived by the party that benefits from the privilege, either voluntarily, or by implication:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).
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> *Doman Forest Products Ltd.* v. *GMAC Commercial Credit Corp.* (2004), 36 B.C.L.R. (4th) 70, [2004] B.C.J. No. 2045 at para. 12 (C.A.), citing *S. & K. Processors Ltd.* v. *Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218, [1983 B.C.J. No. 1499 at para. 6 (S.C.)

In determining whether waiver has arisen by implication, the courts also looking for evidence of a voluntary intention by the privilege holder:

> ... In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 246, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.) [leave to appeal to S.C.C. refused [1980] 1 S.C.R. xii], it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.
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> *Doman Forest Products Ltd.*, at para. 12, citing *S. & K. Processors Ltd.*, at para. 10

3. Confidential Relationship Privilege

Unions have been quite successful in protecting their confidential communications with grievors or potential grievors from disclosure to employers, and from entry into evidence by employers, in grievance arbitration proceedings, on the basis of a type of privilege which we refer to as "confidential relationship privilege."

a. The Rule and Rationale

The Supreme Court of Canada has recognized confidential relationship privilege as a type of privilege that may arise on a case-by-case basis due to the confidential nature of communications between two parties.

The Supreme Court of Canada adopted the four part "Wigmore Test" to determine when confidential relationship privilege arises:

> (1) The communication must originate in a confidence that they will not be disclosed.
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> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
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> (3) The relation must be one which in the opinion of the community ought to be sedulously "fostered."
>
> (4) The injury that would have inured to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> (the "Wigmore Test")
>
> *Slavutch* v. *Baker* (1975), 55 D.L.R. (3d) 244, [1975] S.C.J. No. 29 at p. 6, citing *Wigmore on Evidence*, vol. 8, 3rd ed. (McNaughton Revision, 1961), para. 2285

b. The Labour Relations Context: Protecting a Union's Advice to a Union Member

Labour arbitrators have, aside from some exceptional cases, consistently held that communications between a union representative and a union member, respecting the union member's rights under a collective agreement, or a potential or existing grievance, are privileged pursuant to the Wigmore Test, and will not be admitted into evidence. In circumstances where the union member has not sought any advice about his or her rights, arbitrators have held that the communications with union representatives were not protected by confidential relationship privilege. Arbitrators have also held that the privilege does not arise in cases in which the communication could be characterized as involving fraud or attempted fraud. The privilege is for the benefit of the union member, and may only be waived by the union member.

Arbitrator McColl aptly stated the rationale behind arbitral rulings that communications between union representatives and a union member respecting the union member's rights under the collective agreement are privileged and inadmissible, in *Canada Safeway Ltd.* (1984), 21 L.A.C. (3d) 50. Although he did not refer to the Wigmore Test, he held that:

> ... there is something inherently objectionable about entertaining evidence concerning conversations between a grievor and his shop steward relating to matters in dispute. ... The communication between a shop steward and a grievor is by its very nature one given in confidence. The grievor ought to expect that conversations occurring in these circumstances are confidential in nature and will not be disclosed to the employer. ... [I]t would seem to me that there is indeed an extraordinary relationship between a shop steward and a grievor which would ordinarily require the relationship to remain confidential. While I agree that the relationship is not that of a priest and a penitent, nor a doctor and a patient, nor that of a lawyer and a client, in terms of industrial relations, the relationship is one of extraordinary confidentiality in ordinary circumstances. (at 59-61)

Arbitrators in subsequent decisions have relied on Arbitrator McColl's comments in determining that the communications between union representatives and grievors at issue before them were privileged under the Wigmore Test. In *British Columbia (Ministry of Transportation and Highways)* (1990), 13 L.A.C. (4th) 190, [1990] B.C.C.A.A.A. No. 110, Arbitrator Larson, reviewed Arbitrator McColl's decision, and stated the following in respect of union-grievor communications:

> It would not be accurate to say that all communications between shop steward-grievor would be privileged, but certainly those in respect of which the shop steward is consulted by the grievor about his rights under the collective agreement would be

> entitled to protection. The fundamental underpinnings of the grievance procedure would be destroyed if a shop steward could be compelled to disclose those conversations in evidence before an arbitration board.
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> The social imperative behind the solicitor/client privilege at common law is the need for honesty and candour in order that the solicitor might properly advise the client and provide an effective defense. In similar circumstances, that same imperative is present where a shop steward or, to go one step further, lay counsel is required to provide advice to a union member. (at paras. 23-24)

While Arbitrator Larson's decision was ultimately about the disclosure of communications between the employer's supervisors and human resources representatives, his comments respecting communications between shop stewards and grievors reflect the prevailing arbitral view. In *British Columbia Transit*, [1996] B.C.C.A.A.A. No. 93, Arbitrator Larson clarified the above comments stating that in each case the Wigmore Test would have to be satisfied for communications between shop stewards and grievors to be privileged (paras. 15-16).

c. Examples of Confidential Relationship Privilege in the Labour Relations Context

i. The Communications Must Originate in a Confidence that They Will Not Be Disclosed

The first factor in the Wigmore Test is a requirement that the parties to the communication have an expectation that the conversation will remain confidential. Arbitrators have held that this factor is met when the communication between the union representative and the union member is private, and contains advice respecting the union member's rights. In circumstances in which the union member did not seek any advice from the union representative, arbitrators have held that confidential relationship privilege did not apply.

In *Duke Point Remand Ltd.*, [2002] B.C.C.A.A.A. No. 159, Arbitrator McPhillips held that communications between a grievor and his union representatives were privileged, and would not be admitted into evidence. The grievance arose from the termination of the grievor for the alleged use of a banned substance on the employer's property during work hours. The employer sought to introduce evidence respecting an alleged conversation between the grievor and two shop stewards, in which the grievor allegedly admitted wrongdoing. One of the shop stewards had reported the conversation to the employer. The grievor denied making any such statements. In excluding the evidence, Arbitrator McPhillips held as follows:

> ... What occurred here was *a simple conversation about the dispute* between the Grievor and those entrusted with protection of his legal interests. That conversation must, in the interests of a properly functioning labour relations system, be protected. For that reason, this Board rules the evidence would be inadmissible at any point in the proceedings. ... (at para. 31; emphasis added)

The first Wigmore factor was obviously met as the grievor had consulted the shop stewards about his dispute with the employer.

In *Centre for Addiction and Mental Health*, Arbitrator Nairn denied an employer's request for an order for production of email communications between the grievor and his union representatives on the basis of confidential relationship privilege. The grievance addressed the termination of the grievor's employment on the ground of sick leave fraud, among other things. The communications sought by the employer were communications respecting a previous grievance by the grievor alleging that the employer had discriminated against him and harassed him. That grievance had been stayed pending resolution of the grievance before Arbitrator Nairn. The Arbitrator held that the emails met the Wigmore Test. In respect of the requirement of a confidential communication, the Arbitrator stated the following:

> ... There will be communications between a union and the employees it represents that are not captured by any privilege. *However, inherent in the relationship between union representative and grievor is an expectation that communications regarding particular advice as to an employee's rights and obligations under the collective agreement and the strategies to be pursued regarding one's grievances will not be disclosed.* (And see *British Columbia (Ministry of Transportation & Highways) and B.C.G.E.U., supra.) The fact that the grievor's communications may have been copied to other union representatives does not speak to any lack of confidentiality or expectation thereof. It is the institutional union which is clothed with the responsibility to represent the employee*. The first element of *Wigmore* is satisfied. (at para. 34; emphasis added)

In *Simon Fraser University*, [1997] B.C.C.A.A.A. No. 226, Arbitrator Laing held that the Wigmore Test was not met. The case addressed the employer's decision to end the grievor's trial period as a shipping clerk. The union was permitted to call evidence of conversations between the grievor's supervisor, who was also a bargaining unit member, and her shop steward, regarding her experiences with the grievor as compared with another employee who had previously held the shipping clerk position, and against whom she had filed a sexual harassment complaint.

Arbitrator Laing held that the requirement that the communication originate in confidence was not met. There was no discussion between the supervisor and the shop steward as to whether the conversation would remain confidential. There was also no indication that the grievor had consulted the shop steward in respect of her rights concerning her own grievance.

Arbitrator Gordon also admitted into evidence testimony respecting a conversation between a union member and a shop steward, in *Allied Savings Credit Union*, [1998] B.C.C.A.A.A. No. 14, which addressed a grievor's claim for weekly indemnity top up payments. The grievor had gone into the shop steward's office, closed the door and had a conversation with the shop steward about her future return to work. The grievor did not seek any advice from the shop steward about her rights under the collective agreement or in respect of any anticipated grievance. No grievance had been filed, or was contemplated at that time. The shop steward characterized the discussion as a "friend-to-friend" talk.

In *Canada Post Corp.* (1999), 81 L.A.C. (4th) 213, [1999] C.L.A.D. No. 275, Arbitrator Blasina ordered the union to disclose to the employer the notes the union's representative had taken during a disciplinary investigation meeting the employer had held with the grievor. He held that the meetings were "bipartisan" fact finding endeavours, and that there was no expectation of confidentiality as both the employer's and the union's representatives were present (para. 28). The first requirement of the Wigmore Test was therefore not met.

The Ontario Labour Relations Board also ordered a union to disclose to the employer its notes of a private conversation between union representatives and a union member in *Scott Environmental Group* (2011), 193 C.L.R.B.R. (2d) 6, [2011] O.L.R.D. No. 1210. That case involved an unfair labour practice complaint against the employer, and a decertification application. One of the union's witnesses testified in direct examination that the employer had terminated his employment, but later offered to give him his job back if he could get all of his friends to vote against the union. The employee also testified that shortly after his conversation with the employer he met with two union representatives and advised them of the employer's offer. The union representatives took notes of the conversation. Following the employee's testimony, the employer sought disclosure of the union's notes.

The Board held that the union's notes were not protected by confidential relationship privilege. There was no evidence that the employee had sought the union's advice during the meeting about how the employer's offer could be useful in a grievance. Further, since the employee had already testified about his conversation with the employer, and that he had met with the union's representatives to tell them about that conversation, there would be little if any damage to the union-member relationship if the notes were disclosed to the employer.

ii. Confidentiality Must Be Essential to the Relationship between the Parties / The Relationship Ought to be Fostered

The second and third factors of the Wigmore Test require that confidentiality be essential to a full and satisfactory relationship between the parties to the communication, and that the relationship is one that should be fostered by the community. Arbitrators have generally recognized that the relationship between a union and its members meets those requirements.

In *Emergency Health Services Commission*, [1993] B.C.C.A.A.A. No. 347, Arbitrator Taylor permitted the employer to call a union officer to testify about her role at meetings between the employer and the grievor to try to establish that the grievor's representational rights at the meetings had been met. However, the employer was not permitted to ask any questions respecting the union officer's confidential communications with the grievor. Arbitrator Taylor stated in that regard that:

> There is a labour relations imperative ... in fostering a climate in which members can communicate with shop stewards and supervisors with personnel officers in the secure knowledge that their discussions will remain confidential. ... (at para. 114)

In *Duke Point Remand Ltd.*, Arbitrator McPhillips stated the following, in finding that confidential relationship privilege applied in the case before him:

> In my view, the disclosure of whatever communication transpired in this meeting between Mr. Mutch and his two union representatives must remain confidential between them. *Trade-union representatives are in a statutorily mandated position of representing members in disputes with management and it would completely undermine that role to permit or compel those representatives to testify concerning matters disclosed to them in circumstances such as this.* ... (at para. 29; emphasis added)

In *Centre for Addiction and Mental Health*, Arbitrator Nairn, held that confidential relationship privilege applied to the communication before her. She stated, in respect of the second and third factors of the Wigmore Test, that:

> ... The grievance and arbitration process determines a vast array of legal issues that can have a significant impact on an employee. The element of *confidentiality is essential to the proper maintenance of that relationship in order to be able to freely and fully consult. The relationship is one grounded in public policy with the union bearing a statutory duty to properly represent employees* for whom it holds bargaining rights. ... (at para. 35)

iii. The Injury that Disclosure Would Cause to the Relationship Must be Greater Than the Benefit to be Gained by Disclosure

The final factor of the Wigmore Test requires a balancing of interests. In order for confidential relationship privilege to apply, the injury to the confidential relationship that would be caused by disclosure of the confidential communication must be greater than the benefit to be gained by disclosure for the correct disposal of the proceeding.

Arbitrator Laing, in *Simon Fraser University*, held that confidential relationship privilege did not apply in the case before him, as the first and fourth factors of the Wigmore Test were not met. In respect of the fourth factor, he stated,

> ... What seems of significance to arbitrators McColl and Larson is that there is an important social value in protecting these conversations so that grievors can obtain advice and guidance from their union steward without fearing their statements can be used against them, a situation somewhat analogous to a solicitor/client relationship.
>
> While that concern may, in a proper case, cause an arbitrator to exercise his discretion and override the priority of ensuring that all relevant evidence is before the tribunal so the matter can be fairly decided, *I am not persuaded that it extends to*

> *conversations between a steward and a member who is not a grievor.* In this case, the evidence is admittedly relevant. It does not arise between a grievor and her steward with respect to her rights and interests concerning her own grievance ... (at paras. 38-39; emphasis added)

Arbitrator Laing held that the personal and emotional difficulty that the non-grievor union member would experience as a result of testifying about her past complaint of sexual harassment was not greater than the benefit of a full and fair hearing on the merits of the grievance.

d. Exceptions to Confidential Relationship Privilege in the Labour Relations Context: Fraud and Waiver

i. Fraud

Arbitrators have held that communications between grievors and union representatives will not be privileged when the grievor has committed, or attempted to commit fraud *via* the communication. Presumably, fraudulent behaviour is to be taken into account in the analysis of the fourth Wigmore factor.

Arbitrator McPhillips in *Duke Point Remand*, although finding that confidential relationship privilege applied to the communications at issue before him, considered whether circumstances existed which would negate privilege:

> That is not to say the privilege could never be removed *where the circumstances dictated that the imperative of a fair and full hearing overrode the need to keep confidential the interactions between a union representative and a grievor.* However, that would only be in the most exceptional of cases *such as that in Canada Safeway Ltd., where ... the alleged privileged conversation had amounted to a fraud* ... (at para. 31; emphasis added)

In *Canada Safeway*, Arbitrator McColl determined that no privilege arose in the discharge case before him. One of the reasons for his finding was that the evidence that the union wanted to exclude was evidence that the grievor had tried to convince the shop steward to lie to the employer on his behalf. The Arbitrator characterized the grievor's actions in that regard as a "fraud" which the grievor "had hoped to perpetrate against the employer" (at 60).

In *Toronto Police Services Board* (2011), 210 L.A.C. (4th) 95, [2011] O.L.A.A. No. 381, Arbitrator Shime considered the employer's grievance to recover sick leave and other benefits paid to an employee who during her leave of absence due to mental health issues rejected the employer's offer of modified duties, and instead attended university and teachers' college. During the proceedings, the union's counsel objected to disclosure of documents and information in the possession of the employee's union representative respecting her claims for sick leave and benefits on the basis that they were privileged (para. 92). Arbitrator Shime stated in that regard:

> ... While communication with counsel/representative in a collective bargaining context may be privileged, fraudulent statements to counsel or a representative are not shielded by the doctrine of privilege. Nor are fraudulent statements made by a client for the purpose of having another person make a fraudulent submission on his/her behalf entitled to privilege. Mr. Hainsworth's representations about TR's desire and future career goals were fraudulent and not privileged. ... In effect, a fraudulent public assertion is not shielded by the doctrine of privilege. (at para. 94)

ii. Waiver: The Grievor's Right, Not the Union's

In circumstances in which confidential relationship privilege exists, an arbitrator may nonetheless order disclosure of the confidential communications to an employer where the privilege has been waived. It is the union member—grievor, and not the union, that may waive the privilege.

The issue of waiver may arise when a union member has previously brought a duty of fair representation complaint against the union, regarding the union's representation of him or her in the grievance that is subsequently referred to the arbitrator. In those circumstances, an arbitrator will likely order disclosure of the confidential communications to the employer.

In *Canada Safeway*, one of the reasons that Arbitrator McColl held that private conversations between the union representative and the grievor were not privileged in the discharge case before him was because the grievor had already testified about the conversations in a duty of fair representation complaint against the union. The grievor had thus waived the right to claim privilege over any of his conversations with the union representative in relation to the dispute before the arbitrator.

Arbitrator Nairn, in *Centre for Addiction and Mental Health*, commented on the waiver issue as follows:

> Although communications may not be privileged in all situations, it remains the grievor's right to waive any privilege which may attach. For example, should a grievor choose to assert that the union failed in its duty to fairly represent him ... , he will have effectively waived any right to confidentiality or privilege in those communications before the Ontario Labour Relations Board hearing that complaint. There is no issue of waiver here. (at para. 36)

In *Scott Environmental Group Ltd.*, the Ontario Labour Relations Board held that the union's notes of its private conversation with an employee were not protected by confidential relationship privilege because the employee had already testified in direct examination by the union about the conversation.

4. Grievance Communications Privilege

A labour relations specific privilege known as grievance communications privilege provides a further basis upon which a union may protect its documents and communications from disclosure to an employer, or from entry into evidence, in legal proceedings. A union's oral communications with the employer during grievance meetings, its notes of the meetings, and grievance correspondence with the employer, will normally be protected by grievance communications privilege.

a. Rule and Rationale

The courts, labour arbitrators, and labour relations boards, have all recognized grievance communications privilege as a class of privilege which protects all written and oral statements made by the parties during the grievance procedure from being admitted into evidence, unless both parties consent. The application of the privilege is not limited solely to settlement proposals, but instead covers any statements generally related to the grievance. It is also not necessary for the parties to expressly state that their communications are "without prejudice" for the privilege to apply. Grievance procedure communications are *prima facie* inadmissible, unless the party seeking to admit the evidence can show why it should nonetheless be admitted.

The rationale for grievance communications privilege has been described as follows:

> There was no quibbling, by either party, as to the importance that arbitral jurisprudence places on facilitation of frank and fruitful settlement discussions between the parties during the grievance procedure. As noted this has led to the acceptance of a broad expansive rule that any and all discussions, not only those relating to settlement offers, arising during the grievance procedure, are deemed to be privileged. The rationale for that broad protection was set out by Arbitrator Brandt in the *Labatts Breweries* decision as follows:
>
> > ... [A]rbitrators have long recognized that, in the interest of promoting and facilitating the settlement of disputes short of arbitration, communications that have been made in the course of the grievance procedure should be treated as privileged in nature

> since, were such evidence to be admitted, parties would be reluctant to take positions (in the hope of encouraging settlement) that might be prejudicial to their position in the event that the settlement could not be achieved as it was necessary to proceed to arbitration ... Although initially the privilege tended to attach to offers of settlement it has been extended to all statements relating to the subject matter of the grievance made in the course of the grievance process.
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> *William Osler Health System* (2010), 196 L.A.C. (4th) 290, [2010] O.L.A.A. No. 572, at para. 17 (Sheehan), quoting from *Labatts Breweries Ont.* (2004), 130 L.A.C. (4th) 263, [2004] O.L.A.A. No. 738 (Brandt)

b. Exceptions

Although statements made by the parties during the grievance procedure are privileged, they will be admitted into evidence if the party seeking to adduce the evidence can bring the circumstances within a recognized exception. Grievance procedure discussions have been admitted into evidence in the following circumstances:

- the party objecting to the evidence has waived its privilege;
- there was a dispute between the parties as to whether or not a grievance was settled during the grievance procedure;
- there was a dispute between the parties as to the scope of the grievance, and that issue was discussed during the grievance procedure; and
- the employer's stated grounds for discipline had allegedly changed.

In *Air Nova Inc.* (2002), 104 L.A.C. (4th) 1, [2002] C.L.A.D. No. 103, Arbitrator Christie considered evidence of grievance procedure discussions, over the objection of the union (para. 92). The Arbitrator held that although such discussions were normally privileged, the union had waived the privilege. The union had entered into evidence a letter from the employer to the grievor referencing the grievor's decision to reject the employer's offer to settle the grievance. The union had opened the door to evidence of the settlement discussions.

In *Lehigh Northwest Cement Ltd.* (2005), 142 L.A.C. (4th) 108, [2005] B.C.C.A.A.A. No. 169, Arbitrator Taylor admitted evidence of grievance meetings over the objection of the employer for the purpose of determining whether the parties reached an enforceable agreement that the grievor could work for one month beyond his mandatory retirement date (para. 14).

In *Loblaws Supermarkets Ltd.* (2011), 212 L.A.C. (4th) 175, [2011] O.L.A.A. No. 326, Arbitrator McNamee permitted evidence of grievance procedure discussions regarding the scope of a grievance to resolve a dispute between the parties in that regard.

In *Pirelli Cables and Systems Ltd.*, (2001), 101 L.A.C. (4th) 270, [2001] B.C.C.A.A.A. No. 333, Arbitrator Somjen admitted evidence of the employer's third step grievance response. While he recognized that grievance procedures discussion should be excluded from evidence in principle, there was confusion as to the employer's grounds for terminating the grievor's employment as the grounds stated in the termination letter were different than the reasons given on the employer's third stage grievance response form. Arbitrator Somjen permitted the union to cross examine one of the employer's witnesses respecting the form, for the purpose of clarifying the reasons for dismissal (para. 23).

The BC Labour Relations Board upheld the Arbitrator Somjen's decision in *Pirelli Cables & Systems Inc.*, [2002] B.C.L.R.B.D. No. 256, B.C.L.R.B. No. B256/2002, finding that he had correctly stated the general rule regarding the admissibility of grievance procedure communications. However, a reconsideration panel of the Board subsequently overturned the decision of the original panel:

[2003] B.C.L.R.B.D. No. 57, B.C.L.R.B. No. B57/2003. The reconsideration panel held that the issue of the admissibility at arbitration of statements made during the grievance procedure did not engage *Labour Relations Code* principles, but was instead an issue of the "common law of arbitration." The Board held that it should defer to the arbitral community in those circumstances, and allow the arbitral law to develop on the issue. Arbitrator Somjen's decision was not affected by the reconsideration panel's ruling.

Arbitrator Hope also granted the union's request to call evidence of the employer's statements during the grievance procedure in *Board of School Trustees, School District No. 68 (Nanaimo)* (1987), 6 C.L.A.S. 119, [1987] B.C.C.A.A.A. No. 220. The union wanted to show that the employer's stated reasons for demoting the grievor had changed in the time between the grievance procedure and the hearing. The union contended that during the grievance procedure the employer stated that the demotion was disciplinary, but that at arbitration the employer asserted that the demotion was non-disciplinary. Arbitrator Hope held that grievance procedure privilege did not prohibit the union from seeking to establish that the employer had changed its position (para. 8).

c. Examples

The Nova Scotia Supreme Court upheld a decision of an arbitrator to exclude evidence on the basis of grievance procedure privilege in *Nova Scotia (Department of Justice)* (2004), 136 L.A.C. (4th) 1, [2004] N.S.J. No. 425, upheld on appeal of different issues (2005), 140 L.A.C. (4th) 372, [2005] N.S.J. No. 210. The case before the arbitrator involved the termination of a corrections officer. After the grievance had been filed, the grievor of his own accord wrote to the employer making certain admissions of wrong doing, and asked for reconsideration. The arbitrator excluded the letter from evidence on the basis of grievance procedure privilege. The Nova Scotia Supreme Court held that the arbitrator had reasonable grounds to do so. The person to whom the grievor had written was the person who would be responsible for the employer's decision on the grievance at step three. In addition, the admissions in the excluded letter did not appear to add to those made formally before the arbitrator.

In *Upper Canada District School Board* (2007), 160 L.A.C. (4th) 433, [2007] O.L.A.A. No. 195, Arbitrator Simmons rejected the union's attempt to enter into evidence the employer's step two response to a prior grievance that the union had withdrawn on a "without prejudice" basis. The union was not able to bring the circumstances within an exception to the general rule respecting grievance procedure privilege (para. 44). In addition, the step two response could not be considered a settlement agreement between the parties.

Arbitrator Mikus also applied grievance procedure privilege in *Canadian Pacific Forest Products Ltd.* (1993), 31 L.A.C. (4th) 173, [1993] O.L.A.A. No. 19 which involved a termination grievance. During cross examination of the grievor, the employer's counsel attempted to question the grievor regarding a document which the counsel alleged the grievor had created, containing a chronology of the events leading to the grievor's termination. The employer wanted to use the document to show that the grievor had made prior inconsistent statements about those events (para. 7). The grievor denied creating the document. The union objected to the questioning on the basis that the document had been exchanged during the grievance procedure.

Arbitrator Mikus held the evidence was inadmissible. The Arbitrator rejected the employer's argument that grievance procedure privilege applied only to formal grievance meetings, as such a narrow interpretation would unduly restrict the opportunities for the parties to try to settle the grievance and would not promote good labour relations (para. 38). While the document was not exchanged during a formal grievance meeting under the collective agreement, the employer was aware that the purpose of the meeting was for the union to again try to convince the employer to reconsider its decision to terminate the grievor (para. 36). The fact that the employer had already provided its stage four response, did not exhaust the grievance procedure. The Arbitrator held that both parties had considered the meeting to be a continuation of the grievance procedure. Arbitrator Mikus also

held that if the employer did not intend to treat the meeting as a grievance meeting, it should have advised the union that any statements it made during the meeting would be with prejudice (para. 38).

In *Eurocan Pulp and Paper Co.* (2006), C.L.A.S. 54, [2006] B.C.C.A.A.A. No. 222, Arbitrator Burke denied the employer's request for disclosure of a union's notes of a joint fact finding meeting in a discipline matter, on the ground of grievance procedure privilege. The employer had asserted that it was entitled to the notes as the union's particulars of the grievance at a case management meeting had substantially deviated from the facts alleged by the grievor during the joint fact finding meeting. The Arbitrator noted that the joint fact finding meeting was established pursuant to a memorandum of agreement between the parties which specifically referenced the goal of reaching an agreement on the facts to assist the parties to resolve the grievance at steps two and three of the grievance procedure. Arbitrator Burke concluded that the joint fact finding meeting was part of the grievance procedure, and that the union's notes were privileged.

In *Maple Lodge Farms Ltd.* (1985), 21 L.A.C. (3d) 321, [1985] O.L.A.A. No. 4, Arbitrator Swan rejected the union's claim that the grievor's comments during a meeting with his supervisor were protected by grievance procedure privilege, and could not be used against him at arbitration to establish just cause for discipline. When the employer's supervisor had given the grievor a warning letter in respect of some unrelated conduct, the grievor threatened the supervisor with words to the effect of "you're going to get it." He was subsequently disciplined for his comment. The union argued that the discussion between the grievor and the supervisor were part of the grievance procedure, as the first step in the grievance procedure was a discussion between an employee and his supervisor, and a grievance could only be filed after that step had taken place.

Arbitrator Swan held that the grievor's statement was not protected by grievance procedure privilege, even assuming that the statement was made during the grievance procedure. The Arbitrator noted that the purpose of the privilege was to protect the integrity of the grievance procedure as a tool for reaching settlement, and held that the grievor's threat did not contribute towards settlement of the issue. He concluded that grievance procedure privilege "does not extend so far as to protect an employee who makes threatening comments to his supervisors, even in the course of the grievance procedure, from the usual disciplinary consequences of such an action" (para. 14).

In *Toronto Transit Commission* (1993), 34 L.A.C. (4th) 85, [1993] O.L.A.A. No. 62, Arbitrator Shime considered a termination grievance. During the hearing, the union sought to enter evidence of two other employees who had been terminated for similar reasons, but reinstated. One of the employees had been reinstated at step two of the grievance procedure. The other was reinstated pursuant to a without prejudice settlement agreement. The Arbitrator held that in respect of the first employee, the union could not enter evidence of the statements made during the grievance procedure to resolve the grievance. However, the union could enter evidence regarding the nature of the allegations against the employee, his disciplinary record, and the ultimate disposition of the grievance. Those were not matters that were covered by grievance procedure privilege. The union was not permitted to call evidence in respect of the employee who had been reinstated pursuant to the without prejudice settlement agreement.

Arbitrator McDonald, in *Fording Coal Ltd.*, [1997] B.C.C.A.A.A. No. 442 held that an "off the record" conversation between a foreman and a shop steward was not protected by grievance procedure privilege. During cross examination by the employer's counsel, the union's shop steward testified about an "off the record" conversation he had had with a foreman about testimony that had been given during the arbitration. The employer subsequently sought to have the off the record conversation ruled inadmissible. Arbitrator McDonald rejected the employer's request. The conversation had not occurred during the course of the grievance procedure, and there was no labour relations purpose to be served by the exclusion. The Arbitrator stated that "at best" in off the record conversations "all that the participants can hope for is that neither will repeat their conversation, and the confidence is thereby respected" (para. 26).

5. Settlement Privilege

Even when settlement discussions between an employer and a union occur outside of the grievance procedure, they are privileged, and therefore are generally exempt from disclosure and admission into evidence. Settlement privilege has been recognized by courts, labour arbitrators and labour relations boards. It applies to settlement discussions directly between the parties to a dispute, and to discussions between their legal counsel, either before or after the commencement of the hearing.

a. Rule and Rationale

The Court of Appeal of BC has held that the following documents are privileged, and are thus protected from disclosure, and are inadmissible in evidence:

- documents and communications created for settlement purposes, whether or not a settlement was reached: *Middlekamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276, [1992] B.C.J. No. 1947 (C.A.); and
- final settlement agreements: *British Columbia Children's Hospital v. Air Products Canada Ltd.*, [2003] B.C.J. No. 591, 2003 BCCA 177.

The following factors are necessary for settlement privilege to exist:

1. A litigious dispute must be in existence or within contemplation;
2. Communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed;
3. The purpose of the communication must be an attempt to affect a settlement.

Losenno v. Ontario (Human Rights Commission) (2005), 260 D.L.R. (4th) 298, [2005] O.J. No. 4315 at para. 21 (C.A.), citing *The Law of Evidence in Canada*, *supra* at 810, para. 14.207

The rationale for settlement privilege was stated by the Chief Justice McEachern of the Court of Appeal of BC as follows:

> ... the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket," *prima facie*, common law, or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment, *this privilege protects documents and communications for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached*. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. (*Middlekamp*, at paras. 18-19, emphasis added)

The BC Court of Appeal also recognized that there are exceptions to the settlement privilege rule, including, among other things, circumstances in which both parties to the settlement discussions consent to the discussions being entered into evidence, and fraud: *Middlekamp*, at para. 20.

The Court of Appeal has subsequently held that the exceptions to settlement privilege are not limited to those discussed in *Middlekamp* and will be decided on a case by case basis: *Dos Santos* v. *Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5, 2005 BCCA 4. The Court held that in order to establish an exception, a party has to show

> ... that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are

> both relevant, and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice. (at para. 20)

b. The Labour Relations Context

Settlement privilege has been applied by labour arbitrators, as a distinct form of privilege from grievance procedure privilege, to capture settlement discussions that take place outside of the grievance procedure. Arbitrator Sheehan described the rationale for that finding in *William Osler Health System*:

> ... [D]iscussions associated with an offer to settle a dispute that lie outside the grievance procedure can, and should, in certain circumstances attract privilege. Whether those discussions took place within the same week of the exhaustion of the grievance procedure, or at the doorstep of the commencement of the arbitration hearing, if the parties entered into without prejudice settlement discussions those discussions should be protected from being disclosed at arbitration. ...
>
> *The importance of facilitating and encouraging settlement discussions between litigious, or potentially litigious, parties has been judicially recognized by the acceptance of the concept of "settlement privilege". There is no reason that concept should not apply in an arbitral setting.*
>
> ... *"Settlement privilege" should not be viewed as simply an expansion of the privilege associated with grievance procedure discussions but rather as a distinct form of privilege*. The appropriate framework of analysis to be adopted is whether the required elements associated with that form of privilege exist and not whether the discussions in question can be viewed as being so close in proximity to grievance procedure discussions that they should be seen as falling under that privilege. ... (at paras. 20-22; emphasis added)

The Arbitrator further stated that:

> ... [I]t would be nonsensical to accept that all grievance procedure discussions should be shielded from disclosure, in furtherance of the goal of encouraging and facilitating settlement discussions, then to conclude that discussions that are clearly designed to resolve a litigious dispute should not be similarly protected simply because those discussions took place outside the formal grievance procedure. ... (at para. 24)

Arbitrator Sheehan also recognized an exception to settlement privilege, namely circumstances in which there is a dispute as to the existence of a settlement, and a party is trying to enforce the settlement (para. 36).

The case before Arbitrator Sheehan addressed the union's claim that in dismissing the grievor, the employer had breached its duty to accommodate her disability. The union sought to rely on a memorandum of agreement that the employer and the grievor had reached, prior to the filing of the grievance, to resolve issues respecting the grievor's accommodation. The union had not been involved in the negotiation of the memorandum of agreement.

The Arbitrator concluded that the required elements for the existence of settlement privilege had been met. The second and third factors were clearly met as the memorandum of agreement contained a statement that it was "without prejudice," and the purpose of the memorandum of agreement was to try to settle a dispute between the parties respecting the accommodation of the grievor. The Arbitrator also held that the requirement that a litigious dispute be in existence or within contemplation, was met, although the memorandum of agreement was created prior to the filing of the grievance. The grievance was in contemplation of the parties, because it was filed shortly after the memorandum of agreement was presented. In addition, the memorandum of agreement expressly stated that the union would not file a grievance.

6. Solicitor-Client Privilege/Legal Advice Privilege

Solicitor-client privilege, also known as legal advice privilege, provides a further ground upon which a union may be able to protect its documents and information from an employer's disclosure requests, or attempts to elicit testimony during cross examination.

a. The Rule and Rationale

Solicitor-client privilege is a form of *prima facie* or class privilege that applies to confidential communications between a lawyer and his or her client in the course of obtaining and giving legal advice, whether or not litigation is involved:

> Not all communications between a lawyer and her client are privileged. In order for the communication to be privileged, it must arise from communication between a lawyer and the client where the latter seeks lawful legal advice. Wigmore, *supra*, sets out a statement of the broad rule, at p. 554:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.
>
> *R. v. McClure*, [2001] 1 S.C.R. 445, S.C.J. No. 13, at para. 36 citing J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 8. Revised by John T. McNaughton (Boston: Little, Brown, 1961)

The rationale for solicitor-client privilege includes protecting the ability of individuals and organizations to obtain full legal advice, as well as the effective administration of justice.

> ... The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
>
> *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, S.C.J. No. 39 at para. 26

Due to the importance of solicitor-client privilege to society, it is almost absolute, and has only a very few narrowly defined exceptions: *R. v. McClure* at paras. 34-35.

As noted in the Wigmore definition of solicitor-client privilege, the privilege applies permanently to the communications, unless waived. Since the privilege is for the benefit of the client, it may only be waived by the client: *R. v. McClure* at para. 37.

b. The Labour Relations Context

Labour arbitrators and labour relations boards have applied solicitor-client privilege to protect the following communications:

- communications between a union and its legal counsel for the obtaining and provision of legal advice; and
- correspondence between a union's legal counsel and a grievor in preparation for an arbitration hearing.

Labour relations decision makers have also applied the concept of waiver to disentitle a union from the protection of solicitor-client privilege when the union defended itself in an unfair labour practice complaint by alleging that it relied upon a legal opinion.

In *Windsor (City)*, [2008] O.L.R.D. No. 130, the Ontario Labour Relations Board rejected an employer's request for disclosure of a new union's documents in the context of a certification application. The union had filed a copy of the minutes of its founding meeting, along with its application for certification. At the employer's request, the Board ordered the union to disclose the notes of the meeting taken by the union's officers. When the employer realized that those notes were less detailed than the minutes the union had filed, the employer sought disclosure of all documents related to the preparation of the minutes by the union's legal counsel, who had attended the meeting.

The Ontario Labour Relations Board held that advice given by the union's legal counsel as to the preparation of the minutes was subject to solicitor-client privilege. The fact that the legal counsel may have provided all or a portion of the facts to be included in the minutes was irrelevant. In order for the legal counsel to give advice, he or she had to be aware of the facts, and it did not matter if the legal counsel learned the facts from information provided by the client, or because of the legal counsel's direct knowledge of the same facts. In addition, solicitor-client privilege attached to any draft minutes the union sent to its legal counsel for review.

In *Toronto Transit Commission* (2004), 131 L.A.C. (4th) 398, [2004] O.L.A.A. No. 948 ("*Toronto Transit Commission #2*"), Arbitrator Tacon considered an employer's request for disclosure of the grievor's letter to the union's legal counsel in the context of a dismissal grievance. The grievor had been dismissed for allegedly sexually harassing a co-worker. During the cross examination of the co-worker, the union indicated that the grievor did not contest her allegation that he had followed her home on two occasions. However, following her testimony, the grievor changed his position. During the grievor's direct evidence, he explained why he had changed his position, and indicated that he had also sent a letter to the union's counsel explaining the reasons. The employer sought disclosure of the letter.

Arbitrator Tacon denied the employer's request, holding that the letter was subject to solicitor-client privilege. He held that the four conditions of the Wigmore Test were met. The letter had originated in confidence, as the union's legal counsel had requested the grievor to write it. Confidentiality was essential to the maintenance of the relationship between the parties, as it was necessary for the legal counsel and the grievor to be able to communicate freely in advancing the grievance, "without the spectre of disclosure" to the employer's counsel (para. 36). Further, the relationship was to be sedulously fostered as arbitration is the statutory process for resolving disputes regarding the terms of a collective agreement. Finally, disclosure of the communications would weaken the efficacy of the arbitration process.

In finding that solicitor-client privilege applied, Arbitrator Tacon stated that while the union was the client, and had carriage of the grievance, the grievor was the person on whose behalf the union advanced the grievance. Arbitrator Tacon held that 'the "triangulation" on the union side—of counsel, union representatives and grievor—is unique and should be accommodated within the doctrine of solicitor-client privilege' (para. 39).

Arbitrator Tacon also held that the grievor's inadvertent reference to the letter during his direct examination did not constitute waiver of solicitor-client privilege. There was no basis upon which to conclude that the grievor was aware of any privilege, or that he voluntarily intended to waive it (para. 41). Further, given the unique position of the grievor's position in the arbitration process, waiver would only be found in the clearest of circumstances (para. 46).

The Ontario Labour Relations Board also considered the issue of solicitor-client privilege in *Beachville Lime Ltd.* (2001), 77 C.L.R.B.R. (2d) 62, [2001] O.L.R.D. No. 4180. In that case, a union filed an unfair labour practice complaint against the employer and another union regarding the merging of seniority lists following the amalgamation of two businesses. The respondent union alleged that it had acted in good faith and that it had relied upon legal opinions in determining its position respecting the

merger. The complainant union sought disclosure of the respondent union's legal opinions. The respondent union agreed to disclose some of the legal opinions it had obtained, but objected to disclosure of advice regarding strategies for negotiation with the employer and the complainant union respecting the seniority list issue. The parties agreed that solicitor-client privilege applied, but the complainant union alleged that the respondent union had waived the privilege. The Ontario Labour Relations Board agreed. It held that by defending against the complaint by alleging that it relied on legal advice in the course of developing its positions respecting the seniority issue, the respondent union had by implication waived solicitor-client privilege regarding not only the seniority issue, but all advice respecting options, strategies and tactics to resolve the seniority issue (para. 17).

While the context of that case was an unfair labour practice complaint brought by a union against another union, its reasoning would be equally applicable if a union relied upon a legal opinion as a defence to an unfair labour practice brought by an employer.

7. Litigation Privilege

Another ground upon which a union may be able to protect its documents from disclosure to an employer during legal proceedings is litigation privilege.

a. The Rule and Rationale

Litigation privilege protects documents that are prepared for the purpose of litigation from disclosure to an opposing party in the course of legal proceedings. Its application is determined on a document-by-document basis: *Dos Santos* at para. 44.

The litigation privilege rule provides that a document will be privileged and excluded from disclosure when:

- litigation was in reasonable prospect, at the time the document was produced; and
- the dominant purpose of the author in producing the document, or of the person or authority under whose direction the document was produced, was to use the document to obtain legal advice, or to conduct or aid in the conduct of litigation.

> *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254, [1991] B.C.J. No. 3614 at p. 7 (C.A.), citing *Grant v. Downs* (1976), 135 C.L.R. 674 at p. 677 (Aust. H.C.)

The requirement that litigation be in reasonable prospect will be met "when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it": *Hamalainen* at p. 8.

In the determining whether a document meets the dominant purpose requirement, the courts distinguish between documents created during the early investigation of a claim, and documents created in preparation of litigation:

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case. (*Hamalainen*, at pps. 8-9)

The Supreme Court of Canada described the rationale for litigation privilege as follows in *Blank*:

> Litigation privilege ... is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. (at para. 27)

Thus, for litigation privilege to apply, the documents do not have to be prepared by a lawyer, or at the request of a lawyer. They may be prepared by, or at the request of, a party to the dispute.

Since the purpose of litigation privilege is to create a '"zone of privacy" in relation to pending or apprehended litigation', the privilege ends upon the completion of the litigation that gave rise to it: *Blank* at paras. 34 and 36-37. However, if the same parties are engaged in "closely related proceedings" that arise out of the same or a related cause of action as the original proceeding, the privilege may continue: *Blank* at paras. 36 and 38-39.

b. The Labour Relations Context

Labour arbitrators and labour relations boards have held that a grievance constitutes litigation for the purposes of litigation privilege, and have applied the privilege in some of the cases before them.

As litigation privilege is decided on a document-by-document basis, it is not possible to list categories of union documents that will in all cases be protected by the privilege. Whether or not a particular document will be protected depends on the specific facts of each case. That said, however, labour relations decision makers have held that litigation privilege protected the following types of union documents, in the specific circumstances before them:

- notes of a private conversation between a union representative and a grievor;
- letters from a union's legal counsel to a medical expert seeking an expert report, where the expert did not rely on the letters in preparing the report that was entered into evidence;
- expert reports prepared at the request of union legal counsel, where the union decides not to enter the report into evidence;
- a tape recording of a conversation between a union representative and manager, created by the union representative without the manager's knowledge;
- a letter written by a grievor to the union's legal counsel, at the request of the legal counsel; and
- email correspondence between a union representative and a grievor respecting a grievance.

Documents which arbitrators and labour relations boards have held not to be protected by litigation privilege in the specific circumstances before them have included:

- notes taken by a union representative took during the employer's discipline investigation interviews of the grievor and employee witnesses;
- notes taken by a union representative assigned by the union to conduct an independent investigation of allegations against an employee;
- notes taken by a grievor of her meetings with managers respecting the accommodation of her disability; and
- notes taken by union representatives of a conversation with a union member who at the time was a potential grievor, but in respect of whom no grievance was filed.

In *Cuddy Food Products* (1997), 63 L.A.C. (4th) 365, [1997] O.L.A.A. No. 220, Arbitrator Snow considered an employer's mid-hearing request for the union's notes of interviews of employees respecting the allegations against the grievor, for which he was suspended. The documents sought included notes of a private conversation between the grievor and a union representative, the union's notes of the employer's interviews of the grievor and other employees, and interview notes of a representative that the union assigned to conduct an independent investigation of the allegations. The union claimed litigation privilege in respect of all of the documents.

Arbitrator Snow held that some of the documents were protected by litigation privilege and some were not. He held that most of the documents were prepared at a time that litigation was pending, since the grievor was a chief shop steward and was contemplating filing a grievance when the allegations of wrongdoing were first made against him. Notes of a private conversation between a union representative and the grievor were protected by litigation privilege, as was a document the union representative prepared summarizing the conversation. The notes that a union representative took during the employer's interviews of the grievor and employee witnesses were not covered by litigation privilege, as the dominant purpose of those documents was not to further a grievance. The Union representative had attended the meeting as a witness, as required by the collective agreement. Nor were the notes of the union representative assigned to conduct an independent investigation protected by litigation privilege. There was no evidence that the purpose of the investigation was to assist the union to advance the grievance.

In *Canada Post*, Arbitrator Blasina also held that litigation privilege did not attach to the union's notes of a discipline investigation meeting attended by the employer, the grievor, and a union representative. The meeting was a fact finding endeavour that could lead to a recommendation of discipline. However, as no discipline had yet been imposed, the union representative did not take the notes in anticipation of a grievance.

In *Bell Canada* (1998), 76 L.A.C. (4th) 234, [1998] C.L.A.D. No. 628, Arbitrator Frumkin held that two letters from the union's lawyer to a medical expert seeking an expert report were subject to litigation privilege. The grievance addressed whether the employer had grounds to terminate the grievor's employment when she refused its offer to accommodate her disability. As a result of cross examination of the grievor, and the production of personal notes she had used to refresh her memory prior to testifying, the employer became aware that the union's lawyer had written to the expert requesting the report, and that following the issuance of the report, the lawyer had written to the expert again. The employer's lawyer sought production of the two letters to the expert. The union objected on the basis of litigation privilege.

In denying the employer's request, Arbitrator Frumkin noted that the expert report did not rely on or refer to the union lawyer's letters in any way, and that the grievor did not review the letters, or rely on them, to prepare for her testimony. Furthermore, the expert report was not modified following the expert's receipt of the second letter. The Arbitrator also held that the fact that the union had entered the expert report into evidence did not waive litigation privilege in respect of the lawyer's two letters to the expert. Entering the report into evidence would only waive the privilege in respect of the report, and any other documents that the expert had relied upon in preparing the report. The expert had not relied on the union lawyer's letters.

Arbitrator Swan in *W. Ralston (Canada) Inc.* (2002), 103 L.A.C. (4th) 279, [2002] O.L.A.A. No. 56 ("*W. Ralston #2*") held that litigation privilege applied to an expert report prepared by an ergonomist at the behest of the union's legal counsel. That case involved issues of disability and accommodation. During the hearing, the parties had agreed to adjourn the hearing to enable the union to seek an ergonomist's report. The union understood the agreement to have been that the union would seek and pay for the report, and determine whether or not to use the report in the hearing. However, the employer had understood that while the union was going to seek the report, the parties would share the cost of the report, and the ergonomist would report to both of them. The union decided not to enter the report into evidence.

Arbitrator Swan held that the parties had not been *ad idem* respecting the disclosure of the expert report. He also held that since the union had commissioned the report during the hearing, and for the sole purpose of the arbitration hearing, litigation privilege applied. The Arbitrator also rejected the employer's argument that there was an exception to litigation privilege for disability and accommodation cases, which were better resolved through the cooperation of the parties.

In *Wal-Mart Canada Corp.* (2002), C.L.R.B.R. (2d) 289, [2002] B.C.L.R.B.D. No. 360, the BC Labour Relations Board held that litigation privilege attached to a tape recording of a telephone conversation between a union representative and a manager for the employer, that had been created by the union representative without the manager's knowledge. The case involved unfair labour practice complaints filed by the union against the employer. After the employer had announced that the manager was to be transferred from the store, the manager spoke with the union representative and showed him an employer "hit list" which indicated that the employer planned to dismiss the union representative and another employee. When the manager's daughter requested the union representative not to mention her father or the "hit list" during the hearing, the union representative taped the telephone conversation in issue, in which the manager reconfirmed the existence of the "hit list." The union representative revealed the existence of the tape in cross examination. The employer then requested production of the tape.

The BC Labour Relations Board held that litigation privilege applied. The union representative was in the shoes of an "investigator" respecting the preparation of the case for hearing. At the time of the taped telephone conversation, the unfair labour practice complaint had already been filed, and the hearing dates were set. The union representative's conduct was clearly done in anticipation of the tape being potentially used in the hearing. The Board inferred that the union representative was afraid that the manager might deny the conversations and the hit list, and that the union representative created the tape for use by the union's legal counsel in event that the manager did so.

Further, the union had not waived privilege over the tape, as it had not relied on the tape in its evidence. The fact that the employer had uncovered the existence of the tape during cross-examination did not create waiver on the part of the union.

While the tape was subject to litigation privilege, the telephone conversation recorded could properly be the subject of cross-examination. The Board also held that if the union representative listened to the tape to refresh his memory in giving evidence, the union would have to disclose the tape to the employer.

In *Toronto Transit Commission #2*, Arbitrator Tacon held that litigation privilege applied to a letter that the grievor had written to the union's legal counsel explaining his mid-hearing change of position respecting the allegations of sexual harassment against him (para. 38). The union's legal counsel had requested the grievor to write the letter. As discussed earlier, the Arbitrator also held that privilege was not waived when the grievor referred to the letter in direct examination (paras. 46-47).

In *Centre for Addiction and Mental Health*, Arbitrator Nairn held that email communications between the grievor and his union representatives respecting a grievance that was pending, but that was not presently before her, were subject to litigation privilege. Their communications respecting the grievor's return to work after an investigator's report were in anticipation of and for the primary purpose of litigation. The Arbitrator also held that it would be "counterintuitive" for material that meets the test for litigation privilege in another matter to be producible in a second proceeding while the first remained pending (para. 30). The parties in the two proceedings were the same, as were the allegations of inappropriate accommodation and discrimination/harassment.

In *Ontario Public Service Employees Union* v. *Ontario (Ministry of Labour) (Fenech Grievance)* (2008), 174 L.A.C. (4th) 220, [2008] O.G.S.B.A. No. 108, the Ontario Grievance Settlement Board held that a grievor's notes of her conversations with managers subsequent to the filing of a grievance respecting the employer's failure to accommodate her disability, were not protected by litigation privilege. The Board held that as the notes merely recorded events as they occurred, they were not prepared for the

dominant purpose of litigation, even though a grievance had already been filed (para. 10). The Board stated that if the grievor had used the information in her notes to create an analysis or report to be used in preparing for litigation, those documents would be protected by litigation privilege (para. 12). While this case regards a grievor's documents, it's reasoning would be applicable to a union representative's notes of conversations with managers respecting a grievor's accommodation issues, assuming those conversations did not take place during the grievance procedure and were not in an effort to settle a grievance.

The Ontario Labour Relations Board, in *Scott Environmental Group Ltd.*, held that litigation privilege did not protect a union representative's notes of a conversation with a union member whose employment had been terminated, but who was offered re-employment by the employer if he could get other union members to vote against the union. The dominant purpose of taking those notes was not in relation to the matters before the Board (an unfair labour practice complaint and a decertification application). The purpose of the notes was to lay the ground work for a discharge grievance. However, the union member did not file a grievance in respect of his dismissal, and the union did not file an unfair labour practice in respect of the dismissal. The litigation before the Board was not the same or related litigation, to the anticipated litigation for which the notes were taken. The parties were different, as the decertification application had been initiated by another employee, with no interest in the union member's dismissal. The issues were also completely different. Whatever litigation privilege might have existed had expired.

C. Policy Exclusion: Probative Value v. Prejudicial Effect

1. Rule and Rationale

Another basis upon which a union can object to disclosure of its documents and communications to an employer is the probative value v. prejudicial effect exclusion.

An arbitrator may decide that even though a document or communication is not privileged, he or she will not admit it into evidence. Section 92(1)(b) of the BC *Labour Relations Code*, R.S.B.C. 1996, c. 244 gives an arbitrator discretion to "receive and accept" (or reject) evidence, whether or not that evidence is admissible in a court of law. Some arbitrators have rejected evidence due to the substantial negative labour relations impact that would be caused by disclosure as compared to the nominal probative value of the evidence. We have labeled this ground of exclusion as the probative value v. prejudicial effect exclusion.

To determine whether the probative value v. prejudicial effect exclusion should be applied, an arbitrator must "weigh the probative value" of the document or communication in issue, against "any prejudicial effect" disclosure would cause to the party opposing disclosure: *Cariboo College*, [1982] 1 Can. L.R.B.R. 445, B.C.L.R.B.D. No. 3.

The probative value v. prejudicial effect exclusion is a separate and distinct ground from confidential relationship privilege: *Cariboo College*.

2. Protection of a Union's Labour Relations Strategies

Arbitrators have applied the probative value v. prejudicial effect exclusion to protect a union's internal communications and documents respecting its labour relations strategies from disclosure to employers. In particular, documents and communications respecting a union's strategies for potential and existing grievances, and for collective bargaining, can be protected by this ground of exclusion.

a. Strategies for Potential and Existing Grievances

Arbitrators have held that employer communications respecting strategies for potential and existing grievances would not be disclosed to the union, or were to be excluded from evidence, on the basis of the probative value v. prejudicial effect exclusion. While the decisions address the exclusion of employer documents and communications, arguably the same principles would apply in respect of a union's internal discussions of its strategies for potential and existing grievances.

In *British Columbia (Ministry of Transportation and Highways)*, the union had received internal communications between the employer's managers and human resources personnel in a "surreptitious manner" (para. 7). They had been delivered to the union by an unknown person in a brown paper bag. The documents were memorandums explaining how the manager made a decision not to promote the grievor. The union attempted to use the documents to cross examine the employer's witness. Arbitrator Larson held that the internal communications were to be excluded from evidence based on confidential relationship privilege, and denied the union's request for additional documents of the same nature. The Arbitrator also referred to the finding of the Labour Relations Board in *Cariboo College* that "evidence should be rejected if the admission of it would have a deleterious impact on labour relations" in support of his decision (para. 28).

Arbitrator Bird in *British Columbia (Lowrey Grievances)* (1992), 28 L.A.C. (4th) 237, [1992] B.C.C.A.A.A. No. 377, granted the union's pre-hearing request for disclosure of documents respecting the employer's investigation of the grievor, and its decision to suspend him and then subsequently dismiss him. However, the Arbitrator ordered that documents and parts of documents containing advice from the employer's human resources personnel to the employer's managers, and labour relations strategy, were to be withheld.

One of the employer's arguments was that the prejudicial effect of disclosing the documents outweighed the probative value of the documents. In respect of the latter argument, the employer's concern was that disclosure would have a chilling effect, so that in the future, its decision makers would have difficulty in obtaining information and candid advice.

Arbitrator Bird agreed that the employer "must have an area of confidentiality so that the [e]mployer's decision-makers can receive full and candid advice on the conduct of arbitral litigation" (para. 37). The Arbitrator sought to balance the grievor's and the public's interest in a fair hearing, with the employer's need for candid advice. In doing so, Arbitrator Bird distinguished factual reports and information from advice on existing and anticipated grievances, and made the orders noted above.

Arbitrator Swan, in *Canada Post Corp.* (1992), 27 L.A.C. (4th) 178, [1992] C.L.A.D. No. 33, issued a preliminary decision respecting document production in a case regarding a union's policy grievance on technological change issues. During the hearing, the union sought production of internal corporate documents that were used by the employer's executive committee in making decisions about the technological change. The employer objected on the ground of the confidential relationship privilege, and the probative value v. prejudicial effect exclusion.

Arbitrator Swan held that the documents were not protected by confidential relationship privilege. He ordered that the documents be produced. However, based on the probative value v. prejudicial effect exclusion, he exempted the portions of the document respecting the employer's labour relations strategy from the order. The Arbitrator held that in his view there was:

> ... it is not just communications on the front lines, as it were, which ought to be protected in this way; there is also, depending upon the circumstances, a valid reason for invoking the balancing test inherent in the prejudicial versus probative consideration in relation to labour relations policy development. ... (at para. 22)

b. Collective Bargaining Strategies

A union can also object to an employer's request for disclosure of its internal documents containing discussion of its collective bargaining strategies, based on the probative value v. prejudicial effect exclusion. In some cases, arbitrators have held that although minutes of a union's meetings were relevant to the issues before them, the portions of the minutes respecting the union's collective bargaining strategies would be exempted from a disclosure order.

Arbitrator Hope's decision in *British Columbia School District No. 59 (Peace River South)* (1996), 57 L.A.C. (4th) 273, [1996] B.C.C.A.A.A. No. 643 dealt with a preliminary issue respecting document production. The grievance involved the union's claim that the employer had improperly made deductions from the salaries of teachers who took leaves of absence to attend meetings of the union's decision making bodies. During the pre-hearing stage of the grievance, the employer sought production of the agenda for the meetings, minutes of the meetings, and copies of any documents that were distributed to participants at the meetings. The employer excluded from its request any documents, or portions of documents, that contained information regarding the union's collective bargaining strategies, proposals or positions. The union objected to the employer's request arguing that "disclosure of the documents would have an adverse labour relations effect" (para. 11), as the parties were engaged in collective bargaining.

Arbitrator Hope determined that the documents were relevant to the issues in dispute between the parties, and that the documents did not meet a strict reading of the Wigmore Test. He held however, that "public policy favour[ed] extending an exclusion by reason of confidentiality to private documents generated by a union with respect to collective bargaining initiatives" (para. 33). He noted that in any event, the employer did not seek such documents. In ordering the documents be produced, Arbitrator Hope held that the union could edit the documents to exclude any reference to its collective bargaining positions (para. 34).

In *Canadian Broadcasting Corp.*, [1998] C.L.A.D. No. 301, Arbitrator Bendel heard a grievance alleging that the employer had failed to properly consult with the union in reaching its decision to contract out bargaining unit work. During the course of the proceedings, the union sought disclosure of reports and documents prepared for the employer by consultants regarding the ways in which the employer could improve its efficiency, and minutes of meetings of the employer's board of directors. The employer objected to the union's request, on the basis that the documents contained discussions and recommendations respecting its collective bargaining strategy.

Arbitrator Bendel held that even if the documents sought were arguably relevant, he nonetheless had jurisdiction to deny disclosure where the documents' "probative value [was] likely to be minimal and compliance with the subpoena [was] likely to be unduly prejudicial" (para. 43). The Arbitrator rejected the union's request for disclosure of the documents. Both the consultants' reports and documents, and the minutes of the meetings of the employer's board of directors contained sensitive internal matters, including the employer's bargaining strategies (paras. 45-46).

Although the *CBC* decision regards an employer's bargaining strategies, its reasoning would be equally applicable to documents recording a union's bargaining strategies.

D. The Application of PIPA

The provisions of *PIPA* do not afford a union any additional grounds upon which to deny an employer access to its internal documents and communications, in legal proceedings. According to s. 3(4) of the Act:

> This Act does not limit the information available by law to a party to a proceeding.

III. Protecting a Union's Documents and Communications from Disclosure to Union Members

In addition to document requests from employers, and attempts by employers to call evidence respecting the internal operations of a union during arbitration and Labour Relations Board matters, a union may also face similar requests from union members who have commenced complaints against the union before the Labour Relations Board. The requests for information may also be made pursuant to *PIPA*, independently of any legal action against the union. Just as there are grounds for objecting to an employer's requests, there are also grounds upon which a union can refuse to disclose its documents and communications to its members.

A. Protecting Documents During Union Member Complaints Against A Union

During a legal proceeding by a union member against a union, the union is not required to disclose any legal advice it obtained in respect of union members' issues with the employer. However, there are documents which a union member is entitled to request and rely on at the hearing of his or her complaint.

1. A Union's Private Communication's with its Lawyers are Protected

Generally, a union is entitled to claim solicitor-client privilege in respect of its communications with its legal counsel. This means that, unless the union waives that privilege, union members are not entitled to copies of documents recording those communications, including legal opinions, nor are they entitled to call evidence in cross examination respecting those communications during a hearing of their complaints against the union.

A union will often seek to rely of the content of a legal opinion that it obtained regarding the merits of advancing the complainant's grievance to arbitration, in responding to a complaint that it has breached its duty of fair representation. In order for the Labour Relations Board to take the content of the legal opinion into account, the union must waive its solicitor-client privilege over the legal opinion, and provide a copy of it to the complainant: *David Dorris*, 1993 B.C.L.R.B.D. No. 123 at p. 2, BCLRB B101/93.

In *Stadnyk*, [2000] B.C.L.R.B.D. No. 488, B.C.L.R.B. No. B488/2000, a union member alleged that the union had breached its duty of fair representation in handling her termination grievance. The union included a copy of a legal opinion with its written submission to the Labour Relations Board. The union did not copy the complainant or the employer, but advised that it was prepared to do so if the Board ordered that the opinion letter remain confidential and that all copies of it in the possession of the employer and the complainant be destroyed at the conclusion of the matter. As the employer and the complainant did not agree to those conditions, the Board did not consider the content of the opinion letter in deciding the case (para. 3). However, the Board did consider the fact that the union had obtained a legal opinion, in deciding that the union had not breached its duty of fair representation (para. 25).

The Board also held that a union's decision not to share with a grievor a legal opinion respecting the merits of the grievor's case against the employer, does not constitute a breach of the duty of fair representation (para. 22). However, the Board noted that sharing a legal opinion with the member, may have "assisted matters."

In *Community Therapy Services Inc.*, [2012] M.L.B.D. No. 7, the Manitoba Labour Board considered the issue of solicitor-client privilege in the context of a duty of fair representation complaint. The particular issue before the Board was the complainant's attempt to enter into evidence communications made during meetings between the union's representatives, the union's legal counsel, and the complainant, and communications during meetings between the union's counsel and the complainant in the absence of the union's representatives.

The Manitoba Labour Board rejected the complainant's argument that he was a "client" of the lawyer hired by the union in respect of his grievance, and could therefore waive solicitor-client privilege in respect of the communications. The Board held that the solicitor-client relationship was between the union and its lawyer. The complainant was not the lawyer's client, and could not waive the solicitor-client privilege (para. 15). The Manitoba Labour Board gave the following rationale for its decision:

> ... In duty of fair representation cases, ... it is the union which has carriage of a grievance ... [A] legal opinion furnished *to the union* that proceeding with a case would be detrimental to the best interests of the union (even if it means abandoning a grievance on behalf of an individual grievor over his/her objection) is consistent with the fact that counsel for the union is only subject to instructions from the union in the final analysis. To find otherwise would mean that any employee who is individually affected by a grievance or other proceeding would be entitled to give instructions to counsel, notwithstanding the views taken by the bargaining agent. ... Further, the Board has long recognized that a legal opinion furnished by a union's counsel is a "... potent defence" to an unfair labour practice proceeding brought by an individual employee ... (at para. 16)

Although the Manitoba Labour Board held that the complainant could not waive the union's solicitor-client privilege, it nonetheless held that the privilege did not apply as between the union and the complainant in respect of the communications at issue, as will be discussed below.

The Ontario Labour Relations Board also held that a duty of fair representation complainant was entitled to disclosure of a union's communications with its legal counsel in *United Steelworkers of America Local 14045*, [1994] O.L.R.D. No. 1908, as the union had waived its solicitor-client privilege through the testimony of its representatives, and by attaching a legal opinion it had obtained to its written submissions (para. 13).

2. Communications that Must be Disclosed

In the adjudication of a duty of fair representation complaint against a union, the union may be compelled to disclose the following types of documents and communications:

- the union's advice to the complainant in respect of the complainant's grievance; and
- communications at meetings between the union's legal counsel and the complainant, regardless of whether union representatives are present during the meeting.

While a union member complainant may be entitled to disclosure of documents and to call evidence respecting those communications, he or she will not be permitted to enter into evidence surreptitious tape recordings of such communications.

a. Union Advice to a Grievor

As we discussed above in respect of confidential relationship privilege, a union's advice to a grievor in respect of his or her grievance is privileged, and an employer may not call evidence in that regard during the hearing of a grievance. However, that privilege can be waived by the grievor.

To advance a duty of fair representation complaint against a union, a union member will often waive privilege in respect of the union's advice to him or her. In that case, a union would not be able to prevent the union member from calling evidence on that topic during a hearing of the complaint. The union member would also likely be able to obtain an order for disclosure of the union's documents recording its advice to him or her.

b. Communications between the Grievor and the Union's Legal Counsel

Canadian labour relations boards have held that, in duty of fair representation complaints, a union member complainant is entitled to access information respecting any communications that occurred between him or her and the union's legal counsel during prior grievance proceedings.

In *Community Therapy Services*, the Manitoba Labour Relations Board held that the union could not invoke solicitor-client privilege against the grievor/complainant in respect of communications by its legal counsel during meetings attended by the union's representatives, and the grievor/complainant, or communications during meetings attended by the grievor/complainant with the legal counsel in the absence of the union's representatives. The grievor/complainant was entitled to call evidence respecting those communications during his duty of fair representation complaint against the union.

The Board noted that normally the presence of an "unnecessary third party" during a meeting between a solicitor and client would waive solicitor-client privilege in respect of that meeting as against the outside world (para. 18). However, the Board held that the doctrine of "common interest," as defined by the Supreme Court of Canada in *Pritchard* v. *Ontario Human Rights Commission*, [2004] 1 S.C.R. 809, S.C.J. No. 16, applied such that solicitor-client privilege was generally maintained even though the complainant was present during the conversations. The Board cited the following definition of the common interest doctrine from *Pritchard*:

> "The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication ... (our emphasis) (at para. 20; emphasis in original)

The Board held that the common interest doctrine would apply to dealings between a grievor, the union and the union's legal counsel, such that the communications were privileged against the outside world (para. 21). However, the Board held that the doctrine did not prevent the grievor/complainant from calling evidence of the communications with the union's legal counsel to which he was privy (para. 27).

c. Exception: Surreptitious Tape Recordings

Although a union member complainant may be entitled to access documents and call evidence respecting his or her communications with union representatives, and/or the union's legal counsel, he or she will likely be barred from entering into evidence surreptitious tape recordings of such communications. Labour relations boards in various provinces have held such tape recordings to be inadmissible.

In *Miletich*, [1984] B.C.L.R.B.D. No. 467, B.C.L.R.B. No. 398/84, the BC Labour Relations Board rejected the request of a duty of fair representation complainant to enter into evidence tape recordings of conversations between him and the union's representatives. One of the reasons the Board gave for denying the complainant's request was the board's concern about the negative labour relations impact of such a ruling:

> ... It is our opinion that to allow the production of these tapes would be to interfere with, rather than to promote, proper relations between a union and its bargaining unit members. The ramifications are more far reaching than that however, as the Employer has pointed out. It is our opinion that there is a large possibility that if tapes are entered into evidence in the future, that, at any time parties are in dispute

> there is a possibility that conversations would be taped only to be brought up later in sensitive moments, effectively destroying any opportunity for settlement. The majority of this Panel is concerned that to allow the tapes into evidence would be to encourage parties in every dispute, to distrust each other, to disrupt their desire for resolution and to prolong proceedings at the Labour Relations Board by interminable delays due to the necessity to adjudicate each and every application for admission of taped conversations into evidence. (at para. 32)

The Board's second reason for ruling the tape recording inadmissible was that it was concerned that it lacked the expertise to determine the authenticity and reliability of the tape recordings (para. 33).

The Manitoba Labour Board in *Community Therapy Services Inc.* also ruled that tape recordings surreptitiously made by the complainant of conversations and/or meetings with the union's legal counsel were inadmissible (para. 8). In reaching that conclusion the Manitoba Labour Board relied on the reasoning of the BC Labour Relations Board in *Michael Miletich*.

B. Responding to PIPA Requests by Union Members

On occasion, a union will be faced with requests for information from a union member pursuant to *PIPA*. There are grounds under that Act upon which a union may be able to deny the union member access to the requested information.

Section 23(1) of that *PIPA* gives an individual the ability to request the information about him or her in the control of a union:

> 23(1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:
>
> (a) the individual's personal information under the control of the organization;
>
> (b) information about the ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;
>
> (c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.

The union member's request to access his or her personal information must be in writing, and must contain sufficient detail to enable the union with reasonable effort to identify the union member and the personal information being sought (s. 27). If a union member's initial request is not specific enough, a union may ask him or her to clarify the request.

A union must make a reasonable effort to assist the union member, and to respond to his or her request as accurately and completely as reasonably possible (s. 28).

A union that receives a *PIPA* request from one of its members, must respond to the request within thirty days (s. 29), although "days" as defined in *PIPA* do not include Saturdays or holidays. If the union refuses access to all or part of the personal information sought by the union member, it must advise the union member of the reasons for the refusal and the section of *PIPA* upon which the refusal is based, as well as the name, title, and contact information for the officer or employee of the union that can answer the union members questions (s. 30).

A union is entitled to charge a union member a "minimal fee" for access to his or her personal information (s. 32(2)). If the union plans to charge a fee, it must first give the union member a written estimate of the fee before responding to the request.

Although *PIPA* grants a union member access to his or her personal information held by a union, it also includes the following grounds, among others, upon which a union is entitled to deny the union member's *PIPA* request:

- the information is protected by "solicitor-client privilege," which has been interpreted to mean both solicitor-client (legal advice) privilege and litigation privilege (s. 23(3)(a));
- the disclosure of the information would reveal confidential commercial information that if disclosed, could, in the opinion of a reasonable person, harm the competitive position of the organization (s. 23(3)(b));
- the information was collected for the purpose of an investigation, and the investigation and associated legal proceedings and appeals are not yet complete (s. 23(3)(c));
- the information was collected or created by a mediator or arbitrator in the conduct of a mediation or arbitration for which he or she was appointed to act, under a collective agreement (s. 23(3)(e)(i));
- the disclosure can reasonably be expected to threaten the safety or physical or mental health of an individual other than the individual who made the request (s. 23(4)(a));
- the disclosure can reasonably be expected to cause immediate or grave harm to the safety or to the physical or mental health of the individual who made the request (s. 23(4)(b));
- the disclosure would reveal personal information about another individual (s. 23(4)(c)); and
- the disclosure would reveal the identity of an individual who has provided personal information about another individual, and the individual providing the personal information does not consent to disclosure of his or her identity (s. 23(4)(d)).

The BC Information and Privacy Commissioner (the "Commissioner") has considered at least two cases involving a union member's request for information held by his or her union. In *Order P06-02; Victory Square Law Office*, [2006] B.C.I.P.C.D. No. 28, a union member who had been the subject of a grievance respecting complaints that other union members had lodged against him, sought disclosure of his personal information from the union and its legal counsel after the grievance was settled.

The Commissioner upheld the decisions by the union and its legal counsel to deny the union member's request for information pursuant to s. 23(3)(a) (solicitor-client privilege and litigation privilege), s. 23(3)(e)(i) (mediation-arbitration exemption), s. 23(4)(a) (reasonable expectation of threats to the safety, physical, or mental health of a third party), s. 23(4)(c) (disclosure would reveal third party personal information), and s. 23(4)(d) (disclosure would reveal the identity of a person who has provided person information about another individual).

In respect of the s. 23(3)(a) (solicitor-client privilege) exception, the Commissioner held that grievance arbitration proceedings under a collective agreement constituted litigation for the purposes of litigation privilege (para. 37). A number of documents in the files of the union and its legal counsel were protected by litigation privilege and solicitor-client privilege (para. 40). The legal counsel had received from the union documentary evidence in support of the grievance, and had interviewed various individuals (para. 30). The Commissioner also held that the litigation privilege had not ended, as the arbitration had been adjourned for as long as the settlement agreement was in effect (para. 40).

In addition, the Commissioner held that some of the documents sought by the union member were covered by the mediation-arbitration exception to disclosure in s. 23(3)(e) of *PIPA*. Documents that the union identified as "handwritten notes" of mediation, did not have to be disclosed, as the notes recorded information submitted during mediation. A fax cover sheet with a written message from the mediator to the union and the employer did not have to be disclosed either. It did not contain the personal information of the applicant, and in any event it was covered by s. 23(3)(e).

In finding that s. 23(4)(a) applied to some of the documents, the Commissioner noted that there was some evidence of ill-will by the union member towards the complainants in the grievance, and that

there was a rational connection between the disclosure of the information and the threat that the complainants would suffer serious mental distress or anguish.

In *Order P10-02; Canadian Union of Public Employees, Local 1004*, [2010] B.C.I.P.C.D. 10, the Commissioner again considered an application by a union member for disclosure of a union's documents. The union member had been a grievor in a grievance which the union lost in 2005. The union did not apply to the Labour Relations Board for review of the arbitrator's decision. After a delay of a number of years, the union member subsequently applied to the union for access to information related to the grievance. The union denied his request on the grounds that the information sought was not "personal information," and that s. 23(3)(a) and (c) of *PIPA* applied.

The Commissioner upheld the union's decision not to disclose some of the information on the ground that it was not personal information. He held that portions of documents relating to the interpretation of the collective agreement, the union's strategy, and ideas or arguments to be advanced at arbitration, were not the union member's personal information (para. 12). The Commissioner also held that a number of documents, including a legal opinion, a statement of facts and request for a legal opinion, and other handwritten notes were protected by solicitor-client (legal advice) privilege.

Other documents consisting of a statement of facts, notes of the arbitration proceedings, notes of meetings at which the applicant was present, and notes of grievance meetings were not protected by solicitor-client (legal advice) privilege. The documents were factual in nature and did not disclose the seeking, formulating or giving of legal advice (para. 26). The fact that some of the documents had subsequently been sent to the union's legal counsel did not make them privileged (para. 25). While those documents were created for the dominant purpose of litigation (grievance arbitration), the litigation privilege had ended, as the grievance arbitration had ended "long ago" (para. 30). The union could not extend the privilege to a potential duty of fair representation proceeding which would be between different parties (the union member and the union, as opposed to the union and the employer). Further, there was no evidence the union member intended to file a duty of fair representation complaint, or that the Labour Relations Board would hear such a complaint "years after the fact" (para. 31).

The Commissioner also rejected the union's argument that s. 23(3)(c) (information collected for the purpose of an investigation exemption) applied. First, the personal information of the union member that the union collected in processing the grievance was collected with the union member's consent. Second, even assuming that the processing of the grievance was an investigation, it could not be said that the investigations, and associated proceedings and appeals had not been completed.

IV. Conclusion

When a union receives requests to access its documents and communications, either from employers or union member complainants during legal proceedings, it should carefully consider whether there are grounds upon which it may oppose the requests. Arguments that may potentially apply to the document or communication in issue include claims that the information is not relevant to the proceedings, is protected by one of the many forms of privilege, or must be excluded for labour relations policy reasons. In addition, *PIPA* provides numerous bases upon which a union may deny a union member's request to access information under that Act.