

Toronto Memorandum

To: CAFII
Re: Credit Card Balance Protection Insurance Special Project (the “**Project**”) – Overview and process for preservation of legal privilege
Date: March 22, 2019

Privileged and Confidential

BACKGROUND

This memorandum is to provide a concise summary of key aspects of legal privilege relevant to the Project, and to recommend information sharing protocols and best practices for the preservation of legal privilege, with particular reference to the sharing of confidential documents and information with a business consultancy firm (the “**Consultant**”), and potentially with other third party experts deemed necessary for the completion of the Project.

LEGAL PRIVILEGE

(i) Solicitor-Client Privilege

- Solicitor-client privilege (“**SCP**”) protects from disclosure all confidential communications between a lawyer and client for the purpose of obtaining legal advice.
- SCP applies only to legal advice – not business communications – and does not cloak with privilege facts that have an independent existence (e.g., business data).
- Provided it is not waived, the protection is permanent and prevents disclosure to the whole world, subject to very narrow exceptions. SCP belongs to the client and can only be waived by or through the client’s informed consent.
- In certain circumstances, SCP has been extended to include communications with and from third parties on the basis that the third party performs a function integral to the lawyer-client relationship, or has a common interest in the legal advice or completion of a commercial transaction. The integral function exception can apply to communications and circumstances where the third party employs expertise in assembling information *provided by the client* and in explaining that information to the lawyer.
- Whenever confidential information is communicated to a non-lawyer third party, there is a risk that it will be found not to be protected by SCP. That risk increases with the number of people privy to the confidential communication. For this reason, in such cases it is important to indicate clearly that each potentially sensitive communication is for the purpose of obtaining legal advice, is intended to be maintained as confidential, and legal privilege is not waived.

(ii) Litigation Privilege

- Litigation privilege protects communications and documents made for the dominant purpose of use in aid of actual or anticipated litigation. It is not necessary for litigation actually to be commenced, only that it is reasonably possible.

- Litigation privilege can protect a much broader range of information than SCP, including non-confidential communications and documents, communications with third parties, and communications that do not involve seeking or giving legal advice (provided the communication is made for the dominant purpose of the anticipated litigation). However, litigation privilege only applies in respect of the litigation adversary and terminates with the end of the litigation.

PROCESS FLOW AND BEST PRACTICES

The following practices can help CAFII and its members preserve legal privilege and protect the confidentiality of documents and information in respect of dealings with Stikeman Elliott LLP (the “**Law Firm**”), the Consultant, other third party expert consultants, and generally.

CAFFI and its members should:

- enter into a Common Interest Privilege and Joint Defence Agreement (“**CIP Agreement**”) of the nature a draft of which has been provided to CAFII;
- mark all documents pertaining to the Project that contain confidential information as “Privileged and Confidential” and “Prepared for the purpose of obtaining legal advice”;
- restrict dissemination of confidential information and documents on a need-to-know basis;
 - each CAFII member should consider implementing an ethical wall so as to confine the sharing of information in respect of the Project to a limited team.

With respect to dealings between CAFII, its members and the Consultant or other third party expert consultant:

- where the third party’s function is limited to gathering of information **from outside sources** and passing the information on to the Law Firm in order that the Law Firm may advise CAFII, there is an increased risk that this is **not** protected by SCP;
- by contrast, where the third party’s function is to assemble information **obtained from CAFII and its members** and to interpret it into a form that can be understood by the Law Firm, then SCP is more likely to apply;
 - accordingly, the second function above should be conducted by an ethically-walled “team” within the Consultant, or by a separate third party expert consultant.
- Aligning the third party consulting services with the provision of legal advice as closely as possible is the best way to ensure that privilege extends to documents generated by the third party. Thus,
 - the engagement letter for the Consultant or other third party expert should be between the Law Firm and the Consultant/third party, and should be carefully reviewed by the Law Firm;
 - the Consultant/third party should agree to **[be bound by/join]** the CIP Agreement;
 - to the extent possible, communications should flow as follows:
 - Consultant/third party ↔ Law Firm ↔ CAFII;

- but it is understood that direct communications between the Consultant/third party and CAFII members will be necessary for the benchmarking component of the Project, and may be necessary at other times.
- reports, drafts, and working documents of the Consultant/third party should all be marked “Privileged and Confidential” and “This report is prepared at the request of [name], [position], for the purpose of providing legal advice.”
- Consultants and other experts who regularly testify in litigation often have standard practices respecting saving over drafts, rather than retaining earlier drafts that are potentially producible; ensure any Consultant’s document-retention practices are compatible with the risk of disclosure in any potential litigation.

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