



*Effective Date: July 30, 2010*

# Instructions Governing Solicitor-Client Privilege and the Confidentiality of Legal Advice at the Immigration and Refugee Board of Canada

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1. Application
  2. Background
    - 2.1 Summary of the Principles of Solicitor-Client Privilege
    - 2.2 Role of IRB Legal Services
    - 2.3 Role of the Chairperson of the IRB
    - 2.4 IRB's Approach to the Confidentiality of Legal Advice
  3. Instructions
    - 3.1 Legal Advice to Members
    - 3.2 Legal Advice to Staff
    - 3.3 Waiver of Solicitor-Client Privilege
  4. Enquiries
  5. Approval
- 

## 1. Application

These Instructions are issued by the Chairperson of the Immigration and Refugee Board of Canada (IRB or the Board) and are effective July 30, 2010.

They deal with the issue of “solicitor-client privilege” and describe the IRB’s approach to maintaining the confidentiality of the legal advice that it receives from IRB Legal Services. The Instructions apply to the disclosure of legal advice, both within the Board and outside the Board.

## 2. Background

### 2.1 Summary of the Principles of Solicitor-Client Privilege

“Solicitor-client privilege” — which is sometimes also called the “legal advice privilege” or the “legal professional privilege” — describes the privilege that a client has of keeping legal advice secret. The client may choose to waive the

privilege and permit the disclosure of the legal advice. The lawyer, however, has an ethical obligation not to disclose the legal advice, unless the client has consented to the disclosure.

In *Pritchard v. Ontario (Human Rights Commission)*,<sup>1</sup> the Supreme Court of Canada summarized the applicable principles:

- The criteria required to establish solicitor-client privilege are: a communication between solicitor and client; which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.
- The scope of the privilege does not extend to communications: where legal advice is not sought or offered; where it is not intended to be confidential; or that have the purpose of furthering unlawful conduct.
- Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship.
- Though at one time “solicitor-client privilege” was restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not.
- Solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. This privilege is fundamental to the justice system in Canada. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.
- Solicitor-client privilege applies when government lawyers provide legal advice to their client, a government agency. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.
- Solicitor-client privilege will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is “in-house” does not remove the privilege, or change its nature.

## **2.2 Role of IRB Legal Services**

The role of IRB Legal Services is that of “corporate counsel” to the Board. The client of IRB Legal Services is the IRB. Legal Services provides advice to members and staff to assist them in performing their duties under the *Immigration and Refugee Protection Act (IRPA)*<sup>2</sup> or under various other statutes

relating to the operation of government, such as the *Public Service Employment Act*, the *Financial Administration Act*, and the *Official Languages Act*. The legal advice is provided to the members and staff in their official capacity, not in their personal capacity.

Legal advisors employed at the IRB are members in good standing of a provincial bar association. As such, they have an ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.<sup>3</sup>

### **2.3 Role of the Chairperson of the IRB**

Under *IRPA*, the Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson has supervision over and direction of the work and staff of the Board. The Chairperson is given the power to delegate the Chairperson's powers under *IRPA*.<sup>4</sup>

The *Access to Information Act (ATIA)* provides that the head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.<sup>5</sup>

The *Privacy Act (PA)* contains a similar provision regarding the disclosure of any personal information that is subject to solicitor-client privilege.<sup>6</sup>

Therefore, with respect to the legal advice provided to the IRB, it is clear from the *ATIA*, the *PA*, and *IRPA*, that the Chairperson, or a person to whom the Chairperson has delegated this power, has the authority to decide whether to refuse disclosure on the ground of solicitor-client privilege.

### **2.4 IRB's Approach to the Confidentiality of Legal Advice**

From the beginning of the IRB in 1989, the Board has taken the position that communications between the Board's legal advisors and the rest of the Board are the property of the Board and are not to be disclosed outside the Board unless an executive decision to waive the legal privilege has been made.

While "solicitor-client privilege" protects legal advice from IRB Legal Services from being disclosed to anyone *outside* of the IRB, it is open to the Board to develop a policy with respect to disclosure *within* the Board.

The Board's mission is "... to resolve immigration and refugee cases efficiently, fairly and in accordance with the law." With that mission statement in mind, the Chairperson wishes to encourage members to consult freely with the legal

advisors whenever the members believe it to be necessary or advisable to obtain legal advice. As a result, in addition to the fact that communications between individual members and Legal Services are covered by solicitor-client privilege for the purposes of disclosure *outside* the Board, the following Instructions provide that, even *within* the Board, the communications between individual members in their decision making role and Legal Services are to be treated as confidential.

With respect to advice to staff, the communications with Legal Services will continue not to be treated as confidential within the Board, but these communications are still covered by solicitor-client privilege and must not be disclosed outside the Board without proper authorization.

### **3. Instructions**

These Instructions will apply to disclosure of legal advice from IRB Legal Services.

#### **3.1 Legal Advice to Members**

**Where an IRB member seeks legal advice regarding that member's work at the Board as a decision maker, including the conduct of a hearing or draft reasons for decision, the IRB will treat that legal advice as a confidential communication between the individual member and IRB Legal Services. In other words, IRB Legal Services will not disclose to IRB management the communication between the member and Legal Services, including the fact that the member sought legal advice.**

**However, in consideration of the Board's overall interests, that expectation of confidentiality is subject to an exception for a serious breach of the *Code of Conduct for Members of the Immigration and Refugee Board of Canada*.<sup>7</sup>**

**Also, training of new members is a special situation, in which legal advice is not treated as confidential within the Board, in order to permit Legal Services to advise managers of the member's future professional development needs. Legal advisors work with new members as part of a team which may be composed of a professional development advisor, an experienced member acting as mentor, and the new member's manager.**

### **3.2 Legal Advice to Staff**

Where IRB staff seek legal advice regarding any matter, Legal Services will not disclose that legal advice *outside* the IRB without authorization, as the principles of solicitor-client privilege apply; however, Legal Services will not treat that legal advice as a confidential communication *within* the IRB and may disclose that legal advice to IRB management.

### **3.3 Waiver of Solicitor-Client Privilege**

Only the Chairperson, or a person to whom the Chairperson has delegated this authority, has the authority to waive solicitor-client privilege and permit disclosure of the legal advice to the IRB to which the privilege applies.

It is a good practice for IRB Legal Services to be consulted before any decision is made whether to waive solicitor-client privilege. Legal Services would then be able to advise whether there would be any risk of adverse consequences, for example, whether the disclosure may adversely affect the Board in any pending or contemplated litigation.

## **4. Enquiries**

For information contact:

Senior General Counsel  
Legal Services  
Immigration and Refugee Board of Canada  
Canada Building (Minto Place)  
344 Slater Street, 11th Floor  
Ottawa, Ontario K1A 0K1  
Fax: (613) 947-2607

## **5. Approval**

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[signed by] Brian Goodman

Chairperson

July 30, 2010

## Endnotes

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<sup>1</sup> 2004 SCC 31 (Online: <http://scc.lexum.umontreal.ca/en/2004/2004scc31/2004scc31.html>).

<sup>2</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended.

<sup>3</sup> See, for example, the model *Code of Professional Conduct*, Canadian Bar Association, revised edition 2009, chapter IV, “Confidential Information”. Similar provisions are found in the provincial codes: Alta. 7-S.0.P, 7-R.1; B.C. 5(1); N.B. 5-R; N.S. 5; Ont. 2.03(1); Que. 3.06.01, 3.06.02.

<sup>4</sup> *IRPA*, ss. 159(1)(a) and (2).

<sup>5</sup> *Access to Information Act*, R.S.C., 1985, c. A-1, states: “23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.”

<sup>6</sup> *Privacy Act*, R.S.C., 1985, c. P-21, states: “27. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is subject to solicitor-client privilege.”

<sup>7</sup> The *Code of Conduct for Members of the Immigration and Refugee Board of Canada*, June 1, 2008, is available at the following link on the IRB website: <http://www.irb-cisr.gc.ca/Eng/brdcom/empl/memcom/Pages/code.aspx>