MANAGEMENT COUNSEL
Employment and Labour Law Update

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Think Twice Before You Ask AI for Legal Advice ~ *Your Communication May Not Be Protected By Privilege*

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As AI tools like ChatGPT and Copilot become part of everyday work, many people (clients and lawyers) may instinctively turn to them for a quick answer, including to a legal question.

STOP!

Apart from the fact AI tools often get it **wrong**, it's absolutely critical to understand that, unlike a confidential communication between a client and lawyer which is protected by solicitor-client privilege, a chat with AI is not protected by privilege and may be fair game for disclosure in a legal proceeding. This means you should never share sensitive, confidential or incriminating details you wouldn't want to be made public or to fall into the hands of a third party.

To date, no Canadian reported decision has considered how using AI for legal advice impacts privilege. However, we expect a Canadian court's analysis to be similar to a recent American decision in which the court decided that communication with a public AI chatbot was not protected by privilege and, further, by uploading an already privileged document or communication into the public AI chatbot, that privilege may be waived.

What happened in the American case?

Heppner, a financial services executive, was charged with fraud. He retained legal counsel but also used the AI chatbot, Claude, to research legal questions related to his case. He gave Claude information he learned from his lawyers, asked Claude questions, and then sent copies of those discussions to his lawyers. The FBI later seized copies of these printed documents from Heppner's home.[1]

Heppner asserted attorney-client privilege (solicitor-client privilege in Canada), and a judge ruled the seized documents were neither privileged nor protected.

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Solicitor-client privilege

Solicitor-client privilege has existed for centuries in common law countries such as Canada and the United States. To establish a communication is privileged, a person must show it was:

- between a lawyer and a client;
- for the purpose of seeking or giving legal advice; and
- intended to be confidential.

The American court found the AI generated documents failed this test because:

1. **No lawyer was involved.** Claude AI was not a lawyer, and as such it could not form a solicitor-client relationship.
2. **Claude could not give legal advice.** Not only was Claude not a lawyer, but its disclaimer explicitly stated Claude could not give legal advice. Sharing the AI output with a lawyer, after the fact, could not retroactively make it privileged.
3. **The use of Claude was not confidential.** Aside from the fact Claude was not bound by a duty of confidentiality, as would be a lawyer, there could be no reasonable expectation of confidentiality when chatting with a public AI chatbot. Moreover, Claude's policy expressly stated that user prompts and outputs may be disclosed to "governmental regulatory authorities" and used to train the AI model. Indeed, the sharing of information inputted into it, is precisely how AI tools learn.

Litigation privilege

In addition to solicitor-client privilege, in Canada, we also have "litigation privilege," which protects a document created for "the dominant purpose of litigation." This is a broader protection than the American "work product doctrine," which requires attorney direction to create the document. The American court found work product doctrine did not apply because an attorney was not involved in making the documents. It remains to be seen how a Canadian court might treat litigation privilege in a similar circumstance, though there is still the issue of there being no reasonable expectation of confidentiality when using public AI.

Waiver of privilege

Even when privilege exists, a party may waive privilege, inadvertently, if it does not keep privileged communications and documents confidential. The American judge found when Heppner gave privileged communications and documents to Claude, Heppner waived privilege over any attorney-client privilege that may have existed. This is likely to be the case in Canada, at least with respect to public AI.

What this means for you right now

Can communication with an AI chatbot be considered privileged communication? No. An AI chatbot is not a lawyer.

Can one lose privilege over communications or documents if one inputs them into an AI chatbot? Yes. This may result in a waiver of privilege, especially with a public AI tool.

If one disables history on the AI chatbot, does that make it safe for use? No. Disabling history may reduce the risk but prompts and chats are still retained and used by the software.

What about the use of a private AI chatbot that keeps communications confidential? These tools may improve security but they cannot establish legal privilege.

What can we do to protect our organization?

Consider the following best practices:

- Create, update, and enforce a robust AI policy that:
  - clearly sets out the dos and don'ts of AI use
  - expressly addresses the risks related to privilege and waiver
  - sets out the ramifications for a breach of the policy.
- Train (and retrain) any member of the organization with access to privileged or confidential information.
- If you wish to use AI for legal research, consider only using it for generic prompts (do not input facts or confidential information).
- Think very carefully before allowing **any** legal advice you receive (if you are a client) or give (if you are a lawyer) to be inputted into AI or transcribed using AI.[2]

Need help? We're happy to assist you navigate this new technological frontier.

[1] *United States v Heppner* 1:25-cr-00503-JSR ECF No. 27 (filed February 17, 2026).

[2] See our August 5, 2025 article, *Think before hitting 'transcribe'.*

DID YOU KNOW?

According to Statistics Canada, after rising to about 40% in April 2020, the percentage of Canadians working most of their hours from home declined to 17.4% in 2025. By contrast, pre-COVID-19 pandemic, only 7% of Canadians worked most of the time from home.

For assistance addressing work from home related issues in your workplace, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com

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Employer Not Required to Provide "Preferred" Accommodation in Workers' Compensation Claim

When a workplace injury happens, the accommodation process can quickly turn into a tug-of-war. Employers work hard to identify an accommodation that meets both the operational needs of the organization, and the physical needs of the worker. On the other hand, most workers seek the accommodation that suits them best.

The question we are often asked by clients is, "does the employer have to give the worker exactly what they want?" The answer is, "no."

In a recent case, argued by Sherrard Kuzz LLP, the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") agreed with an employer that following a worker's injury, the employer was **not required to provide the worker's preferred accommodation** so long as a reasonable and safe, medically-supportive alternative was available.[1] As a result, the WSIAT found the worker was not entitled to ongoing Loss of Earnings ("LOE") benefits because he declined suitable work.

What happened?

The worker was a truck driver with a long-standing permanent back impairment caused by a 2006 workplace injury with a previous employer. Despite the injury, he worked full-time for his new employer from 2015 to 2021. In February 2021, he suffered a minor lower-back strain after driving over a pothole on the employer's property. The Workplace Safety and Insurance Board ("WSIB") accepted the worker's claim as a minor, acute injury.

In an effort to accommodate the worker, the employer offered a graduated return to work in the worker's regular truck-driving position, with medical restrictions including shorter driving intervals, regular breaks, and reduced hours during the transition period.

The worker refused to return to work unless he was assigned a bunk (sleeper) truck, which allowed him to lie down during breaks. In response, and to further accommodate the worker, the employer assigned him a day cab, consistent with its operational model for local drivers. The worker insisted the day cab exacerbated his back injury and was unsafe and unsuitable. He refused to return.

WSIAT decision

In rejecting the worker's claim, the WSIAT accepted the following facts:

- Although the worker's doctors supported the worker's request for a bunk truck, it was on the basis of the worker's own views and not an objective opinion within the doctors' areas of expertise.
- Objective testing showed that while the day cab had somewhat higher vibration than the bunk truck, neither posed a health risk to the worker.
- The functional capacity evaluation included lying down during breaks as an *option* to reduce the worker's back strain, but it was not the only option. The worker could also walk or change positions.
- The employer had legitimate, operational reasons for assigning day cabs to local drivers, including cost and maneuverability.

Based on these facts, the WSIAT concluded the employer's offer of modified work was safe, medically appropriate, productive, and consistent with the worker's functional abilities.

Had the worker accepted the modified work offered, his pre-injury earnings would have been fully restored when he returned to full time work on August 2, 2021. Since the worker did not return on this date, his entitlement to LOE benefits ceased as of August 2, 2021.

Lessons learned for employers

This decision reinforces several important principles:

A structured, evidence-based process remains the best way to meet statutory obligations and maintain effective and efficient operations.

Objective information is critical. In this decision, the WSIAT relied on independent functional assessments and objective vibration testing, which confirmed the worker could safely operate the employer's equipment.

Operational realities may legitimately inform an employer's accommodation plan, provided any decision is made in good faith and grounded in reliable evidence. In this case, this included fleet logistics, maneuverability, and cost.

An employer's duty is to provide reasonable accommodation that is safe, medically supported, and consistent with operational requirements – ***not to provide the worker's preferred accommodation.*** If more than one accommodation option satisfies the medical evidence, the employer may select the option that best aligns with its legitimate business needs.

Communication and documentation are key. An employer should be able to demonstrate a clear chronology and good-faith efforts to accommodate. To this end, keep a detailed record of any offer made, medical information received, and the worker's response(s).

To learn more and for assistance, contact Sherrard Kuzz LLP.

[1] *Decision No. 960/25.*

MANAGEMENT COUNSEL

Please join us at our next HReview Seminar:

HReview
Seminar Series

Preventing and Responding to a Workplace Sexual Harassment Complaint ~ *Practical Guidance for Employers*

According to a 2020 Statistics Canada survey, 47% of women and 31% of men reported being the subject of some form of harassment or sexual assault in the workplace. Workers aged 15 to 24 reported the highest rates, with more than half of women reporting the incident involved a co-worker (including a boss) and 13% reporting a client or customer.

Moral of this story… even the most diligent employer is not insulated from the actions of a rogue or unchecked employee, senior officer, client or customer. Join us as we discuss:

1. Employee Legal Obligations

- What is (and is not) "harassment" under human rights and health and safety legislation?
- What must be included in a workplace harassment and violence policy and program?
- Risks of non-compliance: human rights damages, OHSA order, civil liability, reputational harm

2. Prevention Strategies

- Recognizing high risk environments and situations
- Employee and supervisor training
- How to address virtual or off-duty harassment
- Progressive discipline

3. Responding to a Complaint

- Reporting mechanisms and employer responsibilities
- Maintaining confidentiality and avoiding retaliation
- When and how to investigate
- Internal vs. external investigator considerations

4. Corrective Action and Remedial Measures

- Post-investigation discipline
- Returning parties to the workplace

DATE: **Wednesday, June 3, 2026: 9:00 a.m. – 10:30 a.m. EST**
WEBINAR: **Via Zoom** (registrants will receive a Zoom link the day before the webinar)
COST: Complimentary
REGISTER: **By Monday, May 25, 2026 here**

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