S E R V I N G C A N A D I A N S

DEPARTMENT OF JUSTICE

Questions of Privilege.

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1. Concept of privilege.

- The concept of privilege has two fundamental aspects.

- Privilege operates primarily as an evidentiary exclusionary rule within a particular piece of litigation, allowing a witness to refuse to answer certain questions, or a party to refuse to disclose certain documents, in a variety of evidence-gathering contexts.

- Privilege also provides a basis for refusing to produce, or disclose, documentation to third parties, in a litigation or some other context.

2. Solicitor-client privilege.

- The rationale for the existence of solicitor-client privilege is that, in its absence, clients would be unlikely to reveal all to counsel, and the effectiveness of counsel is predicated upon he/she having access to all relevant information.

2. Solicitor-client privilege.

- There are three basic requirements for the existence of solicitor-client privilege:

  1. The communication must be between solicitor and client.

  2. The communication must have been intended to be, and remain, confidential.

  3. The communication must be associated with the seeking, forming, or giving, of *legal* advice. While the concept of *communication* has been interpreted broadly, the privilege won't protect advice given by counsel on matters outside the law.

2. Solicitor-client privilege.

- In *R. v. Campbell*, [1999] 1 SCR 565, the SCC resolved any ambiguity as to whether solicitor-client privilege is applicable to the government sphere. It is [par.49].

- However, its application in the public-law world poses some unique difficulties. For example, in the modern government context, it can often be difficult to determine whether certain entities are part of the singular Government *client*. If information is shared with an entity that is not part of Government, it creates the risk that the privilege has been waived .

3. How is SCP different from litigation privilege?

- Litigation privilege had long been treated by many as a species of solicitor-client privilege. However, in *Blank v. Canada*, 2006 SCC 39, the SCC clarified that litigation privilege is a distinct form of privilege. The privileges have a different scope, purpose, and rationale:

  "In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences." [par. 33]

3. How is SCP different from litigation privilege?

- The thrust of litigation privilege is to create a zone of privacy around preparation for the conduct of litigation, with the goal being to facilitate an efficient adversarial process. The thinking is that parties would be loathe to fully prepare their case prior to the commencement of the litigation if they were at risk of having to share the fruits of that preparation with the opposition.

- Litigation privilege is applicable to communications/ information if the *dominant* purpose for the making of the communication, or creation of the information, was ongoing, or anticipated, litigation.

3. How is SCP different from litigation privilege?

- Solicitor-client privilege is permanent, and survives the termination of the relationship.

- However, in *Blank*, the SCC held that, given its purpose, the protection granted by litigation privilege will expire upon the conclusion of the underlying litigation, unless it can be demonstrated that a *related* proceeding remains pending – either a proceeding that involves the same or related parties and stems from the same cause of action, or a proceeding that raises common issues and shares the same purpose. Once the litigation is over, there is no longer a need to maintain the adversarial protection.

3. How is SCP different from litigation privilege?

- Solicitor-client privilege can extend to certain third-party communications, principally where the third party facilitates communication between the solicitor and client. The function of the third party must be essential to the existence, or operation, of the solicitor-client relationship. Solicitor-client privilege is intended to allow lawyer and client to communicate in confidence. It is not intended to protect a lawyer's ability to gather third-party information that he/she thinks will be useful in advising the client.

- In contrast, litigation privilege provides more clear-cut protection of counsel's communication with third parties, in that the dominant purpose for the communication must simply be the furtherance of litigation.

3. How is SCP different from litigation privilege?

- Finally, given the exalted status that is increasingly being assigned to solicitor-client privilege, litigation privilege is clearly the privilege of the two that is more likely to be displaced by the courts.

4. International trends.

- In the UK, the Court of Appeal has called into question the scope and application of solicitor-client privilege.

  ***Three Rivers District Council* v. *Governor and Company of the Bank of England (No. 5)*, [2003] QB 1556**

- In the United States, the privilege, especially in the corporate context, has been under attack in the wake of Enron – The Department of Justice has used a "carrot and stick" approach to obtain waiver of the privilege.

4. International trends.

- In the European Union, the European Court of First Instance has ruled that to be privileged advice must emanate from independent legal advisors. Therefore, in-house legal advice is not privileged.

  ***Akzo Nobel Chemicals and Akcros Chemicals* v. *Commission*, 17 September 2007, CFI, T-125/03, T-253/03).**

- In Australia, there has been some push to limit the scope of solicitor-client privilege, especially in the context of federal investigations and Royal Commissions.

4. International trends.

- Much of the case law has developed in the context of advice offered by in-house counsel. A number of questions have been raised about the application and scope of solicitor-client privilege in light of corporate wrongdoing.

- In a climate of increased accountability, the role and appropriateness of solicitor-client privilege in a government context has similarly been at issue.

- In the U.S., there is a mixed practice among states with regard to applying legal-advice privilege in the government context. Often loses out to freedom of information legislation.

5. Recent SCC treatment of SCP.

- Against this international backdrop, the Canadian jurisprudence has taken a starkly different path.

- The SCC has dealt with solicitor-client privilege in a number of cases in recent years. The privilege has evolved from being thought of as simply a rule of evidence to a substantive rule of law. More recently, its import and pre-eminence has been firmly established.

- Much of this case law has arisen in the context of access/privacy legislation, and/or litigation, where third parties are trying to breach the privilege.

5. Recent SCC treatment of SCP.

- Starting with *Solosky* and *Descôteaux,* the SCC recognized that solicitor-client privilege is not just a rule of evidence. It is a substantive rule of law.

  ***Solosky* v. *The Queen*, [1980], 1 S.C.R. 821**

  ***Descôteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860**

- In *Lavallee,* the SCC emphasized the import of the nature of the privilege, stating that it is fundamental to the Canadian legal system.

  ***Lavallee* v. *Canada, (Attorney General)*, [2002] 3 S.C.R. 209**

5. Recent SCC treatment of SCP.

- The SCC has gone to great pains to emphasize the near absolute character of the privilege:

  …solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis (par. 36).
  ***Lavallee* v. *Canada, (Attorney General)*, [2002] 3 S.C.R. 209**

- In *Goodis,* Justice Rothstein held that an order of production that seeks to infringe solicitor-client privilege must be made only when it is "absolutely necessary" to achieve the ends of the enabling legislation. The standard is as "restrictive a test as may be formulated short of an absolute prohibition in every case."
  ***Goodis* v. *Ontario*, 2006 SCC 31**

5. Recent SCC treatment of SCP.

Pritchard v. *OHRC*, 2004 SCC 31

- Solicitor-client privilege should be jealously guarded, and should be set aside "only in the most unusual circumstances."
- "Common interest exception" does not apply to a statutory decision-maker, as an administrative tribunal does not share an interest with the parties before it.
- Legislation purporting to limit, or deny, solicitor-client privilege must be interpreted restrictively. Solicitor-client privilege cannot be abrogated by inference.

5. Recent SCC treatment of SCP.

- In *Blank* v. *Canada (Minister of Justice)*, 2006 SCC 39, the SCC characterized the confidential relationship between solicitor and client as a necessary and essential condition of the effective administration of justice.

- In *Canada v. Blood Tribe Department of Health*, 2008 SCC 44, the SCC recently reiterated that solicitor-client privilege is fundamental to the functioning of the legal system, is as close to absolute as possible, and that legislative language that could allow incursions on the privilege must be interpreted restrictively.

6. *Canada v. Blood Tribe Department of Health.*

- In this matter, an employee of the respondent was terminated. The employer had obtained legal advice in relation to the termination, which advice was ultimately housed in the employee's personnel file.

- Post-termination, the employee sought access to her personnel file, but was refused, so she filed a complaint with the federal Privacy Commissioner, pursuant to PIPEDA.

6. *Canada v. Blood Tribe Department of Health.*

- The Blood Tribe eventually provided the Privacy Commissioner with all documentation from the file, other than that in respect of which it claimed solicitor-client privilege. In response, the Privacy Commissioner ordered the production of the privileged material, pursuant to subsection 12(1)(a) of PIPEDA.

- Subsection 12(1)(a) provides that the Commissioner may "… compel [persons] to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, *in the same manner and to the same extent as a superior court of record*."

6. *Canada v. Blood Tribe Department of Health.*

- However, the SCC ultimately concluded that the Privacy Commissioner lacks the jurisdiction to require production of material for the purpose of assessing a claim of solicitor-client privilege.

- As noted, this decision exalts the sanctity of solicitor-client privilege within our modern system of justice. Guided by that foundational presumption, Justice Binnie held that subsection 12(1)(a) is no more than a general production provision, and that such a provision is not sufficiently specific to grant the power to compel production for the purpose of assessing a claim of solicitor-client privilege.

6. *Canada v. Blood Tribe Department of Health.*

- Justice Binnie rejected any policy- or practicality-based arguments that the Privacy Commissioner should possess the power to vitiate solicitor-client privilege, reasoning that it is not necessary for the Privacy Commissioner to resolve privilege claims, in that mechanisms exist through which such questions can be referred to the Federal Court.

- There is, however, no consideration of how expeditiously such processes may actually work in practice, nor of the appetite of supervisory courts to routinely make these determinations at first instance.

6. *Canada v. Blood Tribe Department of Health.*

- There is no doubt that this decision represents a new high-water mark with respect to the importance that the SCC has attached to solicitor-client privilege.

- At a minimum, the decision stands for the proposition that explicit, and specific, language will be required to statutorily empower at least certain administrative decision-makers with the capacity to compel the production of material for the purpose of assessing a claim of solicitor-client privilege.

6. *Canada v. Blood Tribe Department of Health.*

- Accordingly, this decision has obvious potential to prevent at least certain administrative decision-makers from ascertaining claims of solicitor-client privilege.

- The decision also has implications where waiver arguments are resisted on the basis that a disclosure of material cannot be characterized as voluntary because the third party with whom the information was shared possessed the statutory power to compel the production of the material. Such a position is undercut if the third party's powers of compulsion do not extend to material with respect to which an assertion of SCP has been made.

6. *Canada v. Blood Tribe Department of Health.*

Questions?

- Does the SCC's reasoning apply to litigation privilege?
- To which administrative decision-makers does the reasoning apply?
- How specific does statutory language need to be?

7. Post-*Blood Tribe* jurisprudence.

Walden v. Canada, [2008] CHRD No. 35

- The CHRC declined to apply the *Blood Tribe* reasoning in a context where litigation privilege had been asserted in relation to documents.
- The SCC has affirmed that use of the phrase "solicitor-client privilege" in the federal *Privacy Act* and *Access to Information Act* encompasses both privileges.
- However, the SCC's decisive determinations that the privileges are distinct, and serve different purposes, renders the argument that the same level of legislative specificity may not be required to overcome litigation privilege persuasive.

7. Post-*Blood Tribe* jurisprudence.

***Proplus Construction*, [2008] OLRD No. 4940**
***Quadrini v. CRA et al.*, 2009 PSLRB 104**

- Both bodies declined to apply the *Blood Tribe* reasoning, distinguishing self based on status as a quasi-judicial tribunal. The PC is an investigator, not an adjudicator.
- Par. 20 – The PC is an administrative investigator, not an adjudicator.
- Par. 22 – A court's power to review privileged documents derives from its power to adjudicate disputed claims over legal rights.
- Par. 23 – The PC may become adverse in interest to the party whose documents she wants to access.

7. Post-*Blood Tribe* jurisprudence.

To the contrary:

- No explicit recognition in *Blood Tribe* that adjudicative administrative bodies are to be treated differently.
- No matter how many judicial characteristics a tribunal may be granted, it remains administrative in nature. This differentiation creates corresponding limitations on the types of powers the tribunal may exercise.
- Par. 2 – The role of determining whether solicitor-client privilege is properly claimed is reserved to the courts.
- The comparator used by the SCC throughout its analysis is the courts.

7. Post-*Blood Tribe* jurisprudence.

LSS v. Merchant, 2008 SKCA 128

- 63(1) – Every member… shall comply with a demand… to produce any of the member's records or other property that… reasonably believes are required for the purposes of an investigation pursuant to this Act.
- The SCA reasoned that the meaning of the provision must be considered in the context of a statute designed to facilitate regulation of the legal profession.
- Given the statutory context, when used in reference to the professional activities of a lawyer, "records" must necessarily include privileged material.
- *Blood Tribe* - Par. 26 – It cannot be said that in all statutory uses of the language used in PIPEDA, Parliament intended to abrogate SCP.

7. Post-*Blood Tribe* jurisprudence.

To the contrary:

- The SCC has consistently emphasized that solicitor-client privilege cannot be abrogated by inference. Open-textured language governing production of documents is to be read as *not* to include solicitor-client documents.

- In *Blood Tribe*, the SCC essentially gave no weight to arguments based on the context and scheme of PIPEDA. This is particularly striking given that statutory interpretation efforts are typically to be conducted contextually.

7. Post-*Blood Tribe* jurisprudence.

- Subsection 34(2) of the *Privacy Act* was identified in *Blood Tribe* – "Notwithstanding any other Act of Parliament or any privilege under the law of evidence…"

- Despite acknowledging that this language is stronger than that within PIPEDA, it may be telling that the SCC was expressly non-committal on the ultimate strength of this language and it meaning, identifying that a proper interpretation must await a case in which it is squarely raised.

7. Post-*Blood Tribe* jurisprudence.

- Aspects of the *Blood Tribe* reasons suggest that it is primarily the province of the courts to ascertain claims of solicitor-client privilege. This raises the spectre that the SCC may still be considering the question of whether it is even open to a legislature to statutorily grant the power to abrogate the privilege, at least in certain contexts.

- In *Pritchard*, the SCC mused that whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise on this appeal (par. 34).

8. Concluding thoughts.

- How specific will statutory language need to be?
- Will a different approach be applied to administrative adjudicators?
- Might a different approach be applicable in discrete situations where there is a basis for concern about an assertion of SCP (*Blood Tribe* pars. 16-17, and 31)?