

Solicitor-Client Privilege — Challenges for the 21st Century

BACKGROUND

- In a series of cases over the past three decades, the Supreme Court of Canada has greatly strengthened solicitor-client privilege, elevating it from a limited evidentiary privilege into a quasi-constitutional right to communicate in confidence with one's lawyer that can be invoked in any circumstances.
- However, the Court's jurisprudence does not provide an adequate framework for addressing several issues regarding the privilege. Moreover, the Canadian approach is in many ways at odds with how the privilege is treated in other common law jurisdictions.
- In this context, CBA engaged Professor Adam Dodek to prepare a discussion paper on the current state of Solicitor-Client Privilege in Canada.

CURRENT STATUS

- CBA published Professor Dodek's paper, entitled *Solicitor-Client Privilege in Canada: Challenges for the 21st Century* in February 2011.
- In addition to an environmental scan of the state of solicitor-client privilege law and practice in Canada, the US, the UK, Australia, New Zealand and Europe, the paper identifies and assesses issues that have implications or potential implications for Canadian lawyers and the legal profession. These include issues for corporate counsel and public sector lawyers, as well as the tension between privilege and open government.
- The paper identifies issues likely to arise as other professionals (such as paralegals, tax accountants, patent agents or immigration consultants) seek a class privilege. It addresses the difficulties for lawyers to oppose that extension on principled grounds and proposes future action for the CBA on behalf of the profession.
- The Ethics Committee sponsored a debate entitled "Who's Privilege Is It?" at the Council meeting in Halifax in August 2011, highlighting issues raised by the discussion paper.
- "Who's Privilege Is It?" is posted on CBA.org as a free professional development program for CBA members.

NEXT STEPS

- The CBA Ethics Committee will review the discussion paper and suggest how it should inform future action for CBA.