Solicitor-Client Privilege Interventions

BACKGROUND

- Since 2002, the CBA has intervened in several appeals, mostly at the Supreme Court of Canada, to defend the integrity of solicitor-client privilege in the different contexts of those cases:
  - *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,* [2002] 3 SCR 209, 2002 SCC 61 (CanLII)
  - *Maranda v. Richer*, [2003] 3 SCR 193, 2003 SCC 67 (CanLII)
  - *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 SCR 456, 2004 SCC 18 (CanLII)
  - *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36 (CanLII)
  - *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 SCR 574, 2008 SCC 44 (CanLII)
  - *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII)
  - *FLSC v. AG Canada* (proceeds of crime) (see separate note)
  - *Canada (National Revenue) v. Thompson*, [2016] 1 SCR 381, 2016 SCC 21 (CanLII)
  - *Canada (*Attorney *General) v. Chambre des notaires du Québec*, [2016] 1 SCR 336, 2016 SCC 20 (CanLII)
  - *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53 (CanLII)
  - *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521 (CanLII)
  - *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51 (CanLII).

Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, [2002] 3 SCR 209, 2002 SCC 61 (CanLII)

- *Criminal Code* section 488.1 provided that when an officer seized a document in a lawyer's possession, the lawyer must immediately claim solicitor-client privilege, and name the client for whom it is claimed. If that was not done, the officer was free to examine and use the seized material. If a lawyer immediately claimed privilege, the material was to be sealed. To preserve the privilege, the lawyer must apply within 14 days for a judicial determination, the hearing to be held within a further 21 days. If these requirements were not met, the material was released to the authorities for their use, without notice.

- Three cases were appealed to the Supreme Court of Canada challenging the constitutionality of section 488.1. The CBA was granted leave to intervene in *R. v. Fink.* James L. Lebo, Q.C., of McCarthy Tétrault in Calgary, represented the CBA *pro bono*.

- SCC *s*truck down section 488.1, saying it amounted to unreasonable search and seizure. The Court emphasized that solicitor-client privilege can only be waived by the client. It outlined ten principles to guide Parliament in drafting any new law.

- The Federation of Law Societies struck a working group to develop a protocol on law office searches, to be used in negotiations with federal, provincial and territorial attorneys-general. The CBA Criminal Justice Section commented on the draft protocol in November 2004.

- Justice Canada issued a consultation document in October 2005 on policy options responding to the SCC decision. The FLSC working group expressed concerns that the consultation document did not build in its draft protocol. The next Government put the project on hold. To date, Parliament has not legislated to replace s. 488.1.

- Law Society of Upper Canada issued Guidelines for Law Office Searches in September 2011. See note on Proceeds of Crime.

Maranda v. Richer, [2003] 3 SCR 193, 2003 SCC 67 (CanLII)

- Police, conducting a proceeds of crime investigation, obtained a warrant to search a suspect's lawyer's office for information about the legal fees and expenses incurred in defending him.

- The Supreme Court considered five questions:
  - Is the amount of the fees paid by a client to counsel to defend him in a criminal case information protected by solicitor-client privilege?
  - May the fact that a person has paid a fee to counsel to defend against a criminal charge be used as evidence by the prosecution to prove a charge of receiving proceeds of crime?
  - Does the issuing judge exceed his jurisdiction by authorizing a search warrant without proof that there is no alternative to the search?
  - Does the issuing judge exceed his jurisdiction by failing to include as a condition for the issuance of the warrant that counsel be given fair opportunity to be present during the search?
  - Did the Court of Appeal err by ruling that the crime exception applied to the facts?

- The CBA was represented *pro bono* by Denis Jacques, of Grondin Poudrier Bernier in Québec. The CBA argued that the amount and form of payment of a lawyer's fees is subject to solicitor-client privilege. If the police can access confidential information between lawyer and client, then clients may be dissuaded from seeking legal advice, or from disclosing the full information necessary to obtain proper advice.

- SCC reiterated principles it stated in the trilogy of cases including *Fink*. Eight of the nine justices held that solicitor-client privilege applies to information about fees and disbursements. LeBel, J said, "The confidentiality of the solicitor-client relationship is essential to the functioning of the criminal justice system and to the protection of the constitutional rights of accused persons. It is important that lawyers, who are bound by stringent ethical rules, not have their offices turned into archives for the use of the prosecution."

Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc., [2004] 1 SCR 456, 2004 SCC 18 (CanLII)

- This case considered the extent of the doctrine of professional secrecy applied to Quebec lawyers. Municipal authorities had cancelled a complex construction project. During examination for discovery, the contractor sought access to reports prepared by lawyers for the municipal authorities, as well as documentation available to counsel and information about drafting the resolutions to cancel the contracts. Both trial and appellant judges allowed access to most of the information requested. When the case got to the SCC, few of the initial requests were in play. The SCC noted that at this point the contractor was "not seeking information on opinions provided by the appellant's lawyers, billing information, draft resolutions prepared for the Régie or other subjects of a similar nature." However, the Court noted that the concept of professional secrecy had mixed origins in French civil law, English common law and Quebec legislation and this mixed heritage contributed to semantic and conceptual problems, particularly in civil as distinct from criminal law contexts.

- The CBA was represented *pro bono* by Denis Jacques of Grondin Poudrier Bernier in Québec. The CBA argued that professional secrecy for lawyers has a unique dimension, to secure the integrity of the justice system. Subject to the narrow exceptions already established, the CBA argued that all communication by a lawyer to a client in the execution of the lawyer's mandate is covered by solicitor-client confidentiality.

- SCC reaffirmed importance of solicitor-client privilege in protecting client interests and ensuring the smooth operation of the legal system, but stated that not every aspect of the lawyer and client relationship is necessarily confidential. Scope of protection depends on nature of the duties and services rendered by the lawyer. A court may need to take a close look at the relationship between the parties, including the nature and context of the professional services rendered.

Celanese Canada Inc. v. Murray Demolition Corp., [2006] 2 S.C.R. 189, 2006 SCC 36 (CanLII)

- Considered test for removing a law firm from acting for a client when the law firm inadvertently comes into possession of electronic documents protected by solicitor-client privilege of the opposing side. The context was the execution of an Anton Piller order in intellectual property litigation.

- The CBA was represented *pro bono* by Mahmud Jamal and Derek Leschinsky of Osler, Hoskin & Harcourt LLP in Toronto. The CBA presented its view on the appropriate balance between the competing rights (solicitor-client privilege versus right to counsel of choice) as a matter of legal principle. CBA also advocated a procedure to execute Anton Piller orders to reduce the likelihood of opposing counsel seeing privileged materials.

- SCC affirmed that "the protection of solicitor-client privilege is a matter of high importance" and supported CBA's assertion that disqualification of counsel was not automatically necessary to address the violation of privilege. However, counsel who gain access to another party's confidential documents must take steps to uphold the solicitor-client privilege. Court confirmed an obligation to return the privileged information and to advise to what extent it was reviewed.

- The Court referred to the CBA recommendation that, in forging an appropriate balance between solicitor-client privilege and the right to counsel of choice, the task "is to determine whether the integrity of the justice system, viewed objectively, requires removal of counsel to address the violation of privilege, or whether a less drastic remedy would be effective".

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] 2 SCR 574, 2008 SCC 44 (CanLII)

- Addressed whether the Privacy Commissioner of Canada could compel the production of documents when a claim of solicitor-client privilege is asserted in the context of an investigation under the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

- The CBA was represented *pro bono* by Mahmud Jamal and Craig Lockwood of Osler, Hoskin & Harcourt LLP in Toronto. The CBA argued that review of documents by the Privacy Commissioner for the purposes of assessing a privilege claim was a breach of privilege, that PIPEDA did not authorize the Commissioner to do so either expressly or by necessary implication, and that disclosure was not absolutely necessary to the legislative scheme. The CBA further noted that it was incorrect to characterize the case as involving a balancing of rights (disclosure of personal information vs. solicitor-client privilege), noting that this approach had already been rejected by the Court.

- SCC dismissed the appeal. The decision reiterates strong statements on solicitor-client privilege: "Solicitor-client privilege is fundamental to the proper functioning of our legal system. […] Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality 'as close to absolute as possible' […]. It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised."

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR 815, 2010 SCC 23 (CanLII)

- At issue was whether the government had a constitutional duty, under s. 2(b) of the *Charter*, to disclose records on public interest grounds, despite the Ontario *Freedom of Information and Protection of Privacy Act* exempting from disclosure records covered by solicitor-client privilege.

- The CBA was represented *pro bono* by Mahmud Jamal and Karim Renno of Osler, Hoskin & Harcourt LLP in Toronto. The CBA argued that the government has no constitutional duty to abrogate its own solicitor-client privilege, nor any duty to enact legislation for this purpose. CBA submitted that the solicitor-client privilege of government should be sedulously fostered because it promotes the public interest by enhancing application of the law and maintaining the rule of law over public administration. Waiving its privilege by providing for a public interest override is a policy choice that is open to government, but is not required by the Constitution.

- SCC held that the absence of a public interest override for privileged (or law enforcement-related) documents is not unconstitutional, and the privilege already contains a consideration of the public interest. The decision contains several statements about the near absolute character of solicitor-client privilege.

Canada (National Revenue) v. Thompson, [2016] 1 SCR 381, 2016 SCC 21 (CanLII)

- The Supreme Court considered whether lawyers' accounting records are excluded from the definition of solicitor-client privilege in the *Income Tax Act*, even if those records would otherwise be privileged at common law.

- Duncan Thompson, an Alberta lawyer, refused to provide the Canada Revenue Agency with accounts receivable records requested under s. 232(1) of the *Income Tax Act,* because the records contained clients' names and were privileged. S. 232(1) states that "an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be [a privileged] communication".

- The Federal Court concluded that s. 232(1) deems the accounting records of a lawyer not to be privileged communications, even if privileged at common law. The Court also found that client names are only privileged where the client's identity is critical to the essence of the solicitor-client communication.

- The Federal Court of Appeal reversed the ruling in part and held that, to the extent lawyers' accounting records contain privileged information, they are protected from disclosure under the *Income Tax Act*. However, as a general rule, accounting records constitute evidence of a transaction, not a privileged communication. The records were not "statements of account" which might reveal the history of the file, but just statements of fact. The Federal Court did not verify whether the client names were privileged.

- Both the Federal Court and Federal Court of Appeal dismissed arguments challenging the constitutionality of s. 232(1) in statutorily limiting the scope of solicitor-client privilege. The Minister of National Revenue argued that Parliament intended for the *Income Tax Act* to override solicitor-client privilege in connection with lawyer accounting records.

- The CBA was granted leave to intervene at the SCC. CBA *pro bono* counsel were Mahmud Jamal, Pooja Samtani and David Rankin of Osler, Hoskin & Harcourt LLP in Toronto.

- The CBA argued that:
  - s. 232(1) of the *Income Tax* Act maintains the common law definition of "solicitor-client privilege" and does not restrict its scope;

- clients' names and financial means indicated in administrative records can be privileged if that is information the client had to provide to obtain legal advice, and the amount of fees charged is presumptively privileged information;
- s. 232(1) is merely a codification of the common law principle that solicitor-client privilege does not extend to communications where legal advice is not sought or offered – accounting records may or may not contain privileged information, but if they do, that information is protected from disclosure;
- statutory encroachment onto solicitor-client privilege must be clear and explicit and interpreted restrictively;
- the exception in s. 232(1) does not address the scenario in which accounting records contain privileged information; and
- any ambiguity must be resolved in favour of protecting the near absolute character of solicitor-client privilege as recognized under s. 7 of the *Charter.*

- In June 2016, the Supreme Court allowed the appeal, stating that solicitor-client privilege is a principle of fundamental justice and "an intrusion … must be permitted only if doing so is absolutely necessary to achieve the ends of the enabling legislation." The Court emphasized that the privilege belongs to the client, and any court considering requests for access to presumptively privileged information must facilitate the client's right to assert privilege and participate in related proceedings.

- This decision should be read together with *AG Canada v. Chambre des notaires du Québec* (see below)

*Canada (*Attorney *General) v. Chambre des notaires du Québec*, [2016] 1 SCR 336, 2016 SCC 20 (CanLII)

- An appeal to the Supreme Court of Canada from a Quebec CA decision that s. 232(1) of the *Income Tax Act* (and related compliance provisions) contravenes s. 8 of the *Canadian Charter* in that it fails to safeguard the professional secrecy of legal advisers (akin to solicitor-client privilege in Quebec). The issues are parallel those in *MNR v. Thompson* with the added s. 8 argument that was not part of the *Thompson* appeal.

- The federal government said the *Income Tax Act* gives it access to records protected by the professional secrecy of legal advisors. The Quebec Court of Appeal said some provisions infringe s. 8 of the Charter.

- The CBA was granted leave to intervene by the Supreme Court. Mahmud Jamal, Alexandre Fallon and David Rankin of Osler, Hoskin & Harcourt LLP in Toronto acted as counsel on a *pro bono* basis.

- The CBA argued that:
  - The statutory definition of "solicitor-client privilege" in s. 232(1) incorporates the immunity from disclosure under provincial law (under the common law of solicitor-client privilege or the principles of professional secrecy of legal advisors in Quebec) that applies to communications between legal advisors and their clients, together with any records disclosing those communications. The Income Tax Act does not abrogate this privilege and, therefore, does not breach the Charter.
  - If the Court finds that the Income Tax Act does, in fact, abrogate solicitor-client privilege over a class of "accounting records," then this abrogation breaches s. 8 of the Charter.
  - The scheme created by ss. 232(1) and 231.7 breaches s. 8 of the Charter because it does not provide adequate procedural safeguards to protect communications with legal advisors.

- In June 2016, the Court dismissed the appeal. The Court held that "Professional secrecy must remain as close to absolute as possible, and it is generally seen as a fundamental and substantive rule of law." In that context, the Court found that ss. 231.2(1) and 231.7 and the accounting records exception in s. 232(1) did not minimally impair the right to professional secrecy and were unconstitutional and invalid insofar as they applied to lawyers and notaries.

Alberta (Information and Privacy Commissioner) v. University of Calgary, [2016] 2 SCR 555, 2016 SCC 53 (CanLII)

- At issue was whether the Commissioner had authority to assess the validity of a privilege claim over records held by the University. The CBA intervened, represented pro bono by Michele Hollins and Jason Wilkins of Dunphy Best Blocksom LLP and James Lebo of McLennan Ross LLP, all of Calgary. The CBA argued that the language of the *Alberta Freedom of Information and Privacy Act* is too general to authorize the Commissioner to compel the production of records subject to solicitor-client privilege. The CBA further argued that the Commissioner had conflicting statutory obligations and that assessment of privilege claims should be made by an independent court.

- The SCC dismissed the appeal. The Court stated that "To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so." The Court ruled that the legislation did not meet this standard. The Court said that even where there is intent, the legislation should include safeguards to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right of solicitor-client privilege or addresses whether disclosure of solicitor-client privileged documents constitutes a waiver of privilege with respect to any other person.

Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52, [2016] 2 S.C.R. 521 (CanLII)

- While investigating an insurance claims adjuster, the Chambre de l'assurance de dommages (professional regulatory body in Quebec) asked the insurer for a copy of an entire claim file. The insurer held back certain documents, claiming solicitor-client and litigation privilege. The regulator conceded the application of solicitor-client privilege, but argued that the statutory obligation to provide "any … document" related to the activities of an adjuster under investigation overrode the claim of litigation privilege. The Quebec Superior Court and Court of Appeal held that litigation privilege could not be pierced absent express statutory language.

- The CBA intervened at the SCC, represented *pro bono* by Mahmud Jamal, Alexandre Fallon and David Rankin of Osler, Hoskin & Harcourt LLP in Montreal. The CBA argued that clear and express statutory language is required before a regulator can pierce litigation privilege.

- The SCC dismissed the appeal. The Court stated that solicitor-client and litigation privilege are distinct. While litigation privilege is less absolute than solicitor-client privilege, it is still fundamental to the functioning of our legal system and cannot be abrogated without clear, explicit and unequivocal statutory language.

Iggillis Holdings Inc. v. Canada (National Revenue), 2018 FCA 51 (CanLII)

- This case raises issues of common interest privilege. The CBA intervened at the Federal Court of Appeal. Mark Tonkovich, Jacques Bernier and Stephanie Dewey from Baker & Mackenzie LLP represented the CBA *pro bono*. The appeal was heard in October 2017.

- The CBA argued that law firms retained by separate clients but working together to effectively advise all transacting parties might actually be engaged in a limited-scope joint retainer. The CBA also emphasized that no legal advice is less protected by privilege, and no regulator has a preferred status in challenging privilege claims over advice relevant to its jurisdiction.

- In its March 2018 decision, the FCA determined that "solicitor-client privilege is not waived when an opinion by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to

his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions." The SCC refused leave to appeal in October 2018.

Franck Yvan Tayo Tompouba v. His Majesty the King, SCC File no. 40332

- This case engages language rights and solicitor-client privilege. Tayo Tompouba was charged with sexual assault. At first appearance, he was not advised of his right to apply for a trial in French, despite the court's obligation to inform him of that right under *Criminal Code* s. 530(3). He was convicted following a trial in English. The BCCA acknowledged that not advising him of his right was an error, but applied the curative proviso to dismiss the appeal. It held that s. 530(3) is a procedural right, not a substantive one.

- Leave to appeal to the SCC was granted in January 2023. The CBA was granted leave to intervene in June 2023. The CBA will propose how to protect an accused person's language rights in criminal proceedings without intruding on solicitor-client privilege. The appeal is scheduled for October 2023. Michael Feder, Connor Bildfell and Lindsay Frame of McCarthy Tétrault LLP act for the CBA on a pro bono basis.

Federation of Law Societies of Canada v AG Canada, BCSC File no. S236280

- This case is a constitutional challenge to 2023 amendments to the *Income Tax Act* on notifiable and reportable transactions, that require legal counsel to report confidential information about their client's activities to the Canada Revenue Agency (CRA). The FLSC filed an application in the British Columbia Supreme Court in September 2023, challenging the constitutionality of the application of recent amendments to the mandatory reporting obligations to members of the legal profession. The application seeks to exempt legal counsel from the obligation of taxpayers, promoters, and advisors, including legal counsel, to provide details to the CRA of transactions that may constitute tax avoidance, on the grounds that they infringe on sections 7 and 8 of the *Charter*. The Federation is arguing that they undermine the legal advisor's duty to advocate for the client's cause.

- The FLSC was granted permanent injunctive relief in November 2023, to exempt legal professionals from the operation of ss. 237.3 and 237.4 of the ITA until the constitutional challenge is determined on the merits.

- The CBA obtained leave to appeal to intervene at the BC Supreme Court. Mike Feder and Patrick Williams of McCarthy Tétrault act for the CBA on a *pro bono* basis.

NEXT STEPS

- CBA Advocacy staff will monitor developments relating to solicitor-client and litigation privilege.

- Ethics Subcommittee and Policy Committee will consider CBA interventions in future appeals with implications for the privilege. See also separate note on Proceeds of Crime (Money Laundering) Act.