

Attorney-Client Privilege

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Privileged Communications

Solicitor-client privilege is the legal protection given at common law to communications between lawyers and their clients. Since the privilege belongs to the client and not the lawyer, only the client can waive it.

As a result, lawyers have a legal and professional obligation to refuse to make disclosure of privileged communications, except where the client has waived the privilege; or unless the lawyer is compelled to do so, by a court of competent jurisdiction.

This protection from disclosure assures that client can be absolutely candid with their lawyer without any fear that what is communicated between them will subsequently be used for another purpose, except with their prior consent.

The privilege between solicitor and client is a fundamental right; without it, the legal system could not function: *Smith v. Jones* (1999), 132 C.C.C. (3d) 225, (S.C.C.) per Cory J. at p. 239 who said, "it is the highest privilege recognized by the courts."

Accountant Privilege?

Generally this protection has not been extended to accountants, either in Canada: *Baron et al. v. The Queen*, [1990] 1 C.T.C. 84 (F.C.T.D.) aff'd [1991] 1 C.T.C. 125 (F.C.A.); or, in the U.S.: *United States v. Arthur Young et al.*, (1984) 465 U.S. 805 (S.C.)

If an accountant is acting as an agent for a lawyer, to facilitate the delivery of legal advice then their work produce may be privileged: *In re Goodman & Carr et al.* [No. 1], [1968] C.T.C. 484 (Ont. S.C.); and *Southern Railway of British Columbia Ltd., et al. v. Canada (Deputy Minister Of National Revenue)*, [1991] C.T.C. 432 (B.C.S.C.)

The criteria for determining whether to extend the privilege to accountants were set by the Exchequer Court of Canada: *Susan Hosiery v. M.N.R.*, [1969] C.T.C. 353.

Limited Or Absolute?

In England solicitor-client privilege has been found to be absolute. It was deemed too crucial to the administration of justice to interfere with: *R. v. Derby Magistrates' Court*, [1995] 4 All E.R. 526.

In the U.S.A. attorney-client communications will generally be found to be privileged if the four criteria of the Wigmore test have been met: J. H. Wigmore, *Evidence in Trials at Common Law*, Vol. 8. (McNaughton Revision) Boston: Little, Brown & Co., 1961.

In Canada the privilege is not absolute, although its exceptions are narrow: preventing a risk to public safety (*Smith v. Jones*, above); preventing a risk to prison security (*Solosky v. The Queen*, [1980] 1 S.C.R. 821); where the communication itself is a crime (*Descoteaux v. Mierzewski*, [1982] 1 S.C.R. 860); or where the accused can show their innocence is at stake (*R. v. Leipert*, [1997] 1 S.C.R. 281).

Although courts may override solicitor-client privilege: *R. v. Dunbar and Logan*, (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), an override will not be automatic even where the accused needs the information to make full answer and defence: *R. v. Mills*, (1999), 139 C.C.C. (3d) 321 at p. 364 per McLachlin J.

A court will weigh the principles of fundamental justice, as well as, the provisions of the *Charter* before permitting the privilege to be set aside.

The Supreme Court of Canada has established a flexible, two-part test to balance the competing interests of an accused's need to make full answer and defence, and the inviolability of solicitor-client privilege: *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)

Privilege And Income Tax Act

Although Parliament recognizes the existence and application of solicitor-client privilege, it has incorporated into the *Income Tax Act* ("ITA") a statutory exclusion for the "accounting records" of a lawyer. That means that lawyer's journals, vouchers and cheques will not be protected from disclosure as privileged (§232(1) ITA), because of that restrictive definition.

Parliament has also provided that the procedures for the claiming of privilege over documents to be seized or examined is only applicable if those documents were in the possession of a lawyer at the material time: §232(3) and (3.1) ITA; *In re Sandwell Ltd.*, [1969] C.T.C. 617.

Should a seizure be made under §232(3) or (3.1) ITA then the taxpayer, or their lawyer, has only fourteen (14) days to make an application to a court for a hearing to confirm the existence of the privilege (§232(4) ITA). If an application is not made within that time a judge may order the documents delivered to CRA: §232(6) ITA.

One cautionary note for CRA is that §488.1 in the *Criminal Code* ("CC"), a provision similar to §232 ITA, has been held to be unconstitutional under §8 of the *Charter*. The Supreme Court of Canada found that the statutory procedures infringed the Court's discretion in handling claims for solicitor-client privilege: *Lavallee, et al. v. Canada (Attorney General)*, [2002] 3 S.C.R. 209.

Comments made by Arbour, J. in *Lavallee* (at §21) suggest that §232 may also be unconstitutional because it mirrors §488.1 CC.

Privilege And The Canada Revenue Agency

CRA has its own ideas about what is, or isn't, properly the subject of a privilege claim by a lawyer.

For example, CRA publishes internally a guide for handling Privilege Claims during the execution of search warrants. Their document R350 E (99) recites, in part:

"(3) *In spite of recent legal challenges, the following should be noted in respect to solicitor-client privilege: a. It is clear that the onus is on either the lawyer or the client to show that a solicitor-client relationship was in place so that solicitor-client privilege applies. b... the limits of solicitor-client privilege may not be fully understood by all members of the legal profession. Some lawyers confuse the principle of confidentiality with the rule of privilege*" : pp. 1 – 2. [Emphasis added]

With this verbiage CRA gives the impression that CRA considers itself to be a better arbiter of privilege than are the lawyers who are professionally obligated to protect it.

Is CRA's interpretation of the law of privilege correct? In this writer's opinion – no – and for the following reasons:

- i. it is not appropriate for CRA to counsel its officers conducting searches of law offices to ignore the law (*i.e.* , "*in spite of recent legal challenges*");
- ii. no search warrant can be issued with regard to documents that are known to be protected by solicitor-client privilege: *Lavalle*, above, §49.1;
- iii. it is the obligation of CRA's affiant to meet certain criteria and satisfy a justice of the same, before such a search can be authorized (*Ibid.* , §49.2 to .4; and §487 CC);
- iv. although legal counsel ought to claim the solicitor-client privilege as a duty to their client, a failure to do so will not make a privileged communication admissible: *Bell v. Smith*, [1968] S.C.R. 664 (S.C.C.);
- v. §488.1(8) CC reads, "*No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2)*"; and

§232(12) ITA reads, "*No officer shall inspect, examine or seize a document in the possession of a lawyer without giving the lawyer a reasonable opportunity of making a claim under this section*".

In other words before CRA's officers are to do anything they need to ensure that the taxpayer's lawyer, or a member of the Law Society of the province, is present to protect the privilege interests in the material being searched.

Thus, the onus is on the searching officer to first ensure that the lawyer has a reasonable opportunity to make a claim; they assume that because no claim was made no privilege exists. CRA is also bound by the law: *Ludmer v. Canada*, [1995] 2 F.C. 3 (F.C.A.), Chevalier D.J. *per curiam* at p. 17;

- vi. Solicitor-client privilege may be raised in any circumstance where the privileged communication is likely to be disclosed without the client's consent: *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860;
- vii. Once a claim has been made under §488.1(2) CC (*cf.* , §232(3) or (3.1) ITA) the legislation defines the procedure for sealing and bringing an application before a judge to determine whether the seized/sealed materials are privileged §488.1(2) (*cf.* , §232(4) ITA).

The empowering legislation gives no authority to CRA officers to override the rights of lawyers to claim privilege or to otherwise abrogate the privilege itself.

In counselling its officers to do both CRA seems to be violating its legislative mandate, the prevailing case law, as well as, §8 of the *Charter*;

viii. CRA apparently still regards privilege as an evidentiary issue, but solicitor-client privilege has become a rule of substantive law: *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860;

Lavallee, Rackel & Heintz v. Canada (Attorney General) et al. , [2002] 3 S.C.R. 209;

ix. Notwithstanding CRA lack of deference to the courts, it is the Courts and not CRA, which establishes the proper interpretation of the law: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875 per Lamer, J.; and

x. Any communications between solicitors and their clients which are intended to be confidential are afforded some protection: *Greenough v. Gaskell* (1833), 39 E. R. 618; *Solosky*, above; *Smith v. Jones*, above.

There is no justification in the ITA or in the case law, to permit CRA, or its officers, to usurp the decision making authority of the judiciary: *Descôteaux v. Mierzwinski*, above, at p. 891.

Properly Construed

According to Parliament it is the responsibility of the judiciary – not CRA – to decide whether a particular document is, or is not, subject to solicitor-client privilege: §232(4) ITA and §488.1(4) CC.

Arbour, J. in *Lavallee* (§20) stated that, "...*solicitor-client privilege must only be impaired if necessary and, even then, minimally.*"

In applying *Lavallee* principles the definition of 'law office' should be extended to "*any place where privileged documents may reasonably be expected to be located*": *Festing v. Canada (Attorney General)*, (2003), 223 D.L.R. (4th) 448 (B.C.C.A) at §30.

Policy Considerations

It is difficult to reconcile the Crown's paramount obligation to uphold the integrity of the justice system, with such a restrictive interpretation of solicitor-client privilege as is found in R350 E (99), above: *Lavallee*, §§ 21, 22 and *Charter* §§7 & 8.

Privilege is an integral part of the administration of justice and legal counsel for taxpayers who have had privileged materials seized, or examined, will have to exercise eternal vigilance to ensure that their clients' *Charter* rights have not been violated.

It remains to be seen whether CRA's position vis-à-vis solicitor-client privilege will improve, but until such time as it does, taxpayers will have to rely on the courts. Staff Writer

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