

## SOLICITOR-CLIENT PRIVILEGE AND THE CROWN: WHEN IS A PRIVILEGE A PRIVILEGE?

Deborah MacNair<sup>1</sup>  
Ottawa

*This article explores the interaction between the roles of public sector practitioners and crucial legal notion of solicitor/client privilege. The author addresses the uncertainties and complexities in the law.*

*Cet article examine l'interaction entre les rôles des avocats du secteur public et la notion cruciale du secret professionnel entre l'avocat et son client. L'auteur fait état des incertitudes actuelles du droit et relève certaines questions complexes qui se doivent d'être réglées.*

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<sup>1</sup> Deborah MacNair, of the Department of Justice, Ottawa, Canada. The views in this paper are those of the author and are not to be attributed to the Department of Justice. *In memoriam* Chief General Counsel David Sagayias, Q.C.

### Introduction

There is ongoing spirited debate in the courts, from academics, and from legal practitioners on solicitor-client privilege.<sup>2</sup> This is a welcomed change as it is a subject which can easily be taken for granted and risk either lapsing into silent acceptance or suffering from benign neglect. By revisiting it from time to time, interest is once again sparked in reviewing, criticizing and debating concepts which go to the heart of their lawyers' relationship with clients, individual rights and the system of justice.

It is a principle which evokes discussions about high standards and knowing, silent glances among those who respect its origins. The recent angst about solicitor-client privilege has been fuelled in part by developments in the criminal law concerning abuse of process and the law of evidence; on the other hand, it has also been sustained by the need for pragmatism in civil litigation through the use of third parties to maintain and defend a case. Phrases such as "truth-seeking" and "truth and justice,"<sup>3</sup> which have an overarching moral quality attached to them, have gradually gained acceptance in the ordinary legal lingo again when evidentiary concerns are discussed. This may on occasion either obscure or challenge traditional thinking where, as is the case for solicitor-client privilege, it started as an established rule of evidence with substantive law overtones, and confidentiality is a fundamental principle at stake.<sup>4</sup>

And so it is that from relative obscurity that the concept of solicitor-client, as it applies to the federal Crown, has once again become topical as it applies to the federal Crown. Some would argue that the Crown has by tradition occupied a privileged position in many respects, such as: the right

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<sup>2</sup> Canadian Bar Association: 2001 News Releases, "The CBA and The Federation of Law Societies Decry Recent Threats to Lawyer-Client Confidentiality", online: The Canadian Bar Association: [http://www.cba.org/cba/news/2001\\_Releases](http://www.cba.org/cba/news/2001_Releases), (12 August 2001); "CBA Granted Leave to Intervene in *R. v. Fink*" [http://www.cba.org/cba/news/2001\\_Releases](http://www.cba.org/cba/news/2001_Releases), (18 September 2001); J.D. Wilson, "Privilege in Experts' Working Papers" (1997) 76 Can. Bar Rev. 346; G.D. Watson, Q.C. and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998) 77 Can. Bar Rev. 315; J.D. Wilson, "Privilege: Watson & Au (1998) 77 Can. Bar Rev. 346: REJOINDER: It's Elementary My Dear Watson" (1998) 77 Can. Bar Rev. 549; R.D. Manes, "More on Solicitor-Client Privilege: The Tug of War Continues (1999) 78 Can. Bar Rev. 534 [Ronald D. Maines].

<sup>3</sup> See (For an interesting perspective on the law of evidence in the criminal justice system) D.M. Paciocco, "Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof" (2001) 80 Can. Bar Rev. 433; *R. v. Michaud* (2000), 144 C.C.C. (3d) 62 (N.B.C.A.) at 71 per Drapeau J.; see also (comments of the majority on the right of the accused to make a full answer and defence) *R. v. Mills*, 1999 3 S.C.R. 668

<sup>4</sup> *Descôteaux v. Mierzwinski*, 1982 1 S.C.R. 860, *Solosky v. Canada*, 1980 1 S.C.R. 821 [Solosky] (cited as the leading cases for the evolution of solicitor-client privilege as a substantive rule as opposed to a rule of evidence.)

to bring civil suits,<sup>5</sup> the process before the courts,<sup>6</sup> and the exercise of the discretion of the Attorney General to proceed with criminal prosecutions.<sup>7</sup> Others would argue with equal force that, in fact, the situation is indeed the reverse — that inroads are being made into areas not previously challenged, and that several recent court decisions on solicitor-client privilege illustrate this. Of particular note in this latter respect are the cases on the status of third parties when they become privy to solicitor-client information and the exceptions to the release of information when abuse of process is alleged against the Crown in criminal cases.

Recent developments in the application of solicitor-client privilege are a useful reminder both of how the law remains a living — and continually changing instrument, and that well-established concepts should not be taken for granted. In the Crown context, any changes to the application of the privilege will inevitably have a profound impact on the administration of justice and the promotion of the public good. The sanctity of the solicitor-client relationship is pitted against what others refer to as the search for truth,<sup>8</sup> but in the glare of the public interest.

In this article I will review the recent developments on solicitor-client privilege in the Crown context at common law and by statute, attempting to articulate the general principles that affect the Crown in and outside of litigation. I begin, in Part I with a brief survey of the context within which the law on solicitor-client privilege that has evolved for government lawyers and which has led to the current situation. The various elements of the privilege — who is the client, the identification of the lawyer, confidentiality, and the nature of the solicitor-client relationship are canvassed as they apply to the Crown. Differences and similarities with the situation for the Crown in contrast to that for a private client or litigant,

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<sup>5</sup> *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 37-39 *Canada Evidence Act* see also *Rogers v. Secretary of State for the Home Department*. (There is a clear distinction made by the English courts between “privilege” and immunity” but the practice in Canada varies. *Rogers v. Secretary of State for the Home Department*, 1972 2 All E.R. 1057, at 1060 per Lord Reid. With respect to the expression “Crown privilege”, Lord Reid stated that “I think that the expression is wrong and may be misleading. There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before the court of justice all relevant evidence.”)

<sup>8</sup> R.D. Manes, *supra* note 2 at 534 see also (The debate on the sanctity of the privilege for private practitioners has been highlighted in the recent debate on the application of the *Proceeds of Crime (Money Laundering) And Terrorist Financing Act*, S.C. 2000, c. 17 to solicitor-client communications). *Law Society of British Columbia v. Canada (Attorney General)* (2001), 207 D.L.R. (4<sup>th</sup>) 705 (B.C.S.C.), aff’d. 160 C.C.C. (3d) 378, 207 D.L.R. (4<sup>th</sup>) 736 (B.C.C.A.).

including waiver, common privilege and the role of third parties are highlighted. Recent developments in criminal and civil law cases, including the use of privileged information to prove allegations of abuse of process and to establish a fiduciary duty are reviewed in Part II along with relevant federal statutes. In the Conclusion, Part III, I draw together some of the main challenges with which the Crown is now faced.

### *Part I — The context*

There are few legal concepts which have generated so much thought and discussion within the legal profession as the privilege which crystallizes once lawyer-client relationship has been engaged.<sup>9</sup>

The Crown is not immune from this discussion since it has long been accepted that government lawyers have a solicitor-client relationship with their client, the Crown.<sup>10</sup> It is acknowledged by at least one commentator that the Crown, too, can play by the common law rules.<sup>11</sup> Unfortunately, the determination of the extent to which, and the circumstances in which the privilege applies must be extrapolated from common law principles developed in other than a public sector context. While the scope and extent of the privilege may not always been clear, it is beyond doubt that the privilege applies whether it is a criminal or civil court proceeding and when solicitor work is undertaken. There is always an implicit overlay, however. A higher duty of fairness in applying the rules may attach in some circumstances, particularly in criminal proceedings where the Crown's lawyers are involved.<sup>12</sup>

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<sup>9</sup> *Descôteaux v. Mierzwinski*, *supra* note 4 per Lamer J. (solicitor-client privilege arises even before the retainer is established).

<sup>10</sup> See the discussion of the jurisprudence beginning at 10, *infra*. The recognized texts on evidence and solicitor-client privilege contain very few references to government lawyers although in-house counsel for corporations are included. See J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed., (Toronto: Butterworths, 1999) at 742; R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) [Manes and Silver] at 53-54.

<sup>11</sup> See P. Lordon, *Crown Law* (Toronto: Butterworths, 1991) [Paul Lordon] (one of the few sources of authority for the law as it relates to the Crown, indicates at p. 9 that "It is the duty of the Crown and all of its servants or agents to abide by and obey the law. This requires that components of government purporting to act on behalf of the Crown be able to point to some positive authority for their actions".)

<sup>12</sup> See *Everingham v. Ontario* (1992), 8 O.R. (3d) 121 (Ont. Ct. Div. Ct.) (the Court concluded, on an appeal from an order disqualifying a government lawyer from acting further in a matter, that while the government counsel should not continue to act, it was not correct to say that government counsel have a higher professional obligation to observe rules of professional conduct than do other counsel.)

*(a) What is the rule?*

Absent special provisions by statute which apply to the Crown,<sup>13</sup> the rule on solicitor-client privilege as stated by Mr. Justice Lamer in *Descôteaux v. Mierzwinski* has been accepted and followed:

In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the steps, and consequently even before the formal retainer is established.

There are certain exceptions to the principle of solicitor-client communications, however. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged, *inter alia*.

The fundamental right to communicate with one's legal adviser in confidence has given rise to a rule of evidence and a substantive rule.<sup>14</sup>

The relationship between a lawyer and client is unique and different but even more so in the government context. The principles that apply do not unfold in a vacuum in a "captured client" setting since the Crown is not an ordinary litigant, as is often the case in the private law firm environment. Rather, it is in a textured, institutional setting with public officials and third parties, often all with different interests. The closest analogy for the government lawyer in this context, therefore, is the in-house legal department of a corporation.

*(b) Who are the lawyers?*

Government<sup>15</sup> lawyers do not easily fit in the private sector model. Their work is varied,<sup>16</sup> the context in which they practise is different,<sup>17</sup> they

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<sup>13</sup> See, *infra*, at 5-6 for a discussion of lawyers employed by the Bureau of Pension Advocates in the Department of Veterans Affairs.

<sup>14</sup> *Supra* note 4 at 892-93.

<sup>15</sup> The concept of "government" is amorphous but is generally used synonymously with the "Crown" in this context. See Paul Lordon, *supra* note 11 at 5.

<sup>16</sup> As examples, government lawyers may work in litigation, policy and legislative drafting. They are to be distinguished from the lawyers who work with the legislative and judicial branches, including the Senate and the House of Commons, the Federal Court and the Supreme Court of Canada.

<sup>17</sup> In the case of Department of Justice lawyers, for example, they are governed by the Minister of Justice's mandate as set out in the *Department of Justice Act*, R.S.C. 1985,

do not all have the same employer,<sup>18</sup> and their role is often highly dependant on their operational context. As salaried employees, government lawyers are subject to fixed terms and conditions of employment. However, this does not mean that the basic elements of the solicitor-client relationship which form the basis of the privilege are different.

*c) What is the nature of the solicitor-client relationship?*

The difficulty of sorting out and applying the rules as they apply to the Crown in an institutional setting has not gone unnoticed by some commentators. Gavin MacKenzie, in his text *Lawyers and Ethics: Professional Responsibility and Discipline*, summarizes the dilemma succinctly:

[T]he issue of who is [their] client... perplexes government lawyers continually.

If we take as an example a staff lawyer employed by the Ministry of the Attorney General of a province, the possible answers to the question, who is my client? include at least the lawyer's immediate superior, the Deputy Attorney General, the Attorney General, the agencies or other ministries on whose behalf the lawyer appears before courts and tribunals, the government, and the public.

The question is important, and the lack of Canadian authority is surprising. From whom does the lawyer seek instructions? What should she do if the instructions she receives from two or more of these sources conflict? Does she have a duty to keep secret from some of those possible clients communications received in confidence from others? Who, if anyone, can consent to the lawyer representing more than one client in a representation that involves a possible conflict of interest?<sup>19</sup>

There are no easy answers to these questions and, in fact, the questions that Mr. MacKenzie pose, belie some of the complex decision-making required of government lawyers in their daily law practices. Few reported cases exist so government lawyers and others are left to extrapolate guidance from the general principles at common law or statute. Where government lawyers are concerned, it is generally presumed that a solicitor-client relationship exists and that the normal common law rules apply. Exceptions do exist. There are examples of lawyers within government who operate within a framework provided for by statute. In at least one case, for the pension needs of veterans or those related to veterans, the solicitor-client relationship is provided for expressly by statute. There is no doubt that in the case of those lawyers employed by the Bureau of Pension Advocates

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c. J-2 *Department of Justice Act*.

<sup>18</sup> Some organizations, such as the Royal Canadian Mounted Police and the Bank of Canada, are called "separate employers". As a general rule Treasury Board, as established under the *Financial Administration Act*, R.S.C. 1985, c. F-11, is the employer in the federal public service but there are some organizations which, because of their mandate, require a separate government structure to maintain their independence.

<sup>19</sup> (Toronto: Carswell, 1993) at 21-1, 21-2.

with the Department of Veterans Affairs, there is a solicitor-client relationship between the Bureau and the veterans and pensioners who ask them for assistance – the *Department of Veterans Affairs Act*<sup>20</sup> specifically provides for it. These lawyers are not employed by the Department of Justice and are members of a separate unionized law group within the federal public service. Subsections 6.2 (1) and (2) provide as follows:

6.2 (1) It is the duty of the Bureau, on request,

- (a) to assist applicants and pensioners in the preparation of applications for review or of appeals under the Veterans Review and Appeal Board Act; and
- (b) to arrange for applicants and pensioners to be represented by a pensions advocate at hearings on review or appeals under that Act.

(2) The relationship between the Bureau and a person requesting its assistance is that of solicitor and client, and the Bureau shall not be required in any proceedings before the Veterans Appeal and Review Board to disclose any information or material in its possession relating to any such person.

It is noteworthy that this provision does not distinguish between the various nomenclatures that are in current use to describe solicitor-client privilege, such as “solicitor-client privilege” or “litigation privilege”. Nor is it clear if the provision was intended to act as a complete code in order to replace any privileges which would exist at common law.

A second example occurs in section 47.1 of the *Royal Canadian Mounted Police Act*<sup>21</sup> where an RCMP member may be represented or assisted by another member in certain proceedings under the Act. Subsection 47.1 (2) goes on to provide as follows:

- (2) Where a member is represented or assisted by another member pursuant to subsection (1), communications passing in confidence between the two members in relation to the grievance, proceeding, representations or appeal are, for the purposes of this Act, privileged as if they were communications passing in professional confidence between the member and the member’s solicitor.

The expression “professional confidence” is not defined and no distinction is made between litigation privilege or solicitor-client privilege.

Both of these provisions leave open the question of what information can be protected under solicitor-client privilege but they try to recognize the solicitor-client relationship in unique circumstances. However, in the case of the RCMP, the expansive statutory provision seems to create a metaclass of advisors between whom professional confidences can be

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<sup>20</sup> R.S.C. 1985, c. V-1.

<sup>21</sup> R.S.C. 1985, c. R-10.

shared and which includes a lawyer, another member or the member.<sup>22</sup>

There is also the issue of the identity of the client in an institutional setting.

The identity of the client has been canvassed in several cases. For example, it is accepted that the institutional client is “tiered”. Responsibility for decision-making may be diffuse, structured and unstructured. Justice Reed, in *Attorney General of Canada (Minister of Industry, Trade and Commerce) v. Central Cartage Company*, conceptualized the Crown as a client in the following manner:

The client in its broadest sense is the executive branch of the government of Canada. At the apex is the Governor in Council including more particularly the Ministry of Industry, Trade and Commerce. Entities such as the Foreign Investment Review Agency and the Interdepartmental Committee on International Bridges are branches of the client.<sup>23</sup>

*(d) Can solicitor-client privilege be claimed in a government context?*

The courts have recognized that the Crown is not in a different position with its legal advisors than is a private client with respect to the application of solicitor-client privilege and which the Supreme Court of Canada recently confirmed in *R. v. Campbell*,<sup>24</sup> where legal advice was given by a Department of Justice lawyer to the RCMP. The Court had no difficulty in concluding that the scope and nature of the privilege were the same as for a lawyer and private client outside of government. The possibility and availability of waiver of the privilege by the RCMP was also recognized by the court.

Lord Denning’s comments in *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)* are accepted as the statement of the law:

Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only

<sup>22</sup> See Commissioner R.H. Simmonds, Canada, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue No. 42 (5 March 1986) at 42:7 (the intent was to preserve the traditional mechanisms of the Force in disciplinary matters).

<sup>23</sup> (1987), 10 F.T.R. 225 at 237.

<sup>24</sup> [1999 1 S.C.R. 565 per Mr. Justice Binnie at para. 600, p. 49 (QL) [Campbell].



difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges...I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.<sup>25</sup>

Courts in Australia have also supported this interpretation in a broad fashion to include all communications between a lawyer and a client whether or not litigation is anticipated. Their rationale is equally compelling:

No distinction can be drawn between a decision to grant a pension and a decision whether to defend a claim in tort or contract. The growing complexity of the legal framework within which government must be carried on renders the rationale of the privilege, as expressed in *Grant v. Downs*, increasingly compelling when applied to decision makers in the public sector.<sup>26</sup>

So what are the categories of communications that are protected from disclosure?

An analogy can be made to the cases that involve the role of in-house counsel. Mr. Justice Saunders went further than had courts in previous cases in *Mutual Life Co. of Canada v. Deputy Attorney General of Canada*<sup>27</sup> by describing different categories of communications prepared by in-house counsel for a large insurance company that he felt should fall under the privilege umbrella. The applicant, Mutual Life Assurance Company wanted the court to determine if solicitor-client privilege applied to certain documents which were the subject of a request for an audit by Revenue Canada (now the Canadian Customs and Revenue Agency) under section 232 of the *Income Tax Act*.<sup>28</sup> These categories followed the traditional lines drawn for the private practitioner, including working papers found in lawyers' files and communications for the purpose of formulating legal advice, with copies to other employees, notes by lawyers of advice given to officers of the company and legal research and draft documents described generally as "working papers of lawyers".

The Supreme Court of Canada has not always been unanimous in the need to review the issue of solicitor-client privilege in reaching the decision to refuse access to government information. In *Idziak v. Canada (Minister of Justice)*, for example, the Court refused to order disclosure of solicitor-client communications in the form of an internal memorandum to the

<sup>25</sup> 1972 2 All E.R. 353 (C.A.), per Lord Denning, M.R. at p. 376.

<sup>26</sup> *Waterford v. Commonwealth of Australia* (1987), 163 C.L.R. 54 at para. 6.

<sup>27</sup> (1988), 28 C.P.C. (2d) 101 (Ont. H.C.); see also *Methanex Corp. v. Canada (Department of Revenue)* 1996 A.J. No. 946 (Alta. Q.B.) [Methanex] (QL).

<sup>28</sup> R.S.C. 1985, c.1 (5th Supp.), as amended.

Minister of Justice under the *Extradition Act*.<sup>29</sup> The appellant wanted the Minister to exercise her discretion under section 25 of that legislation to refuse to surrender him to U.S. authorities. The Minister disagreed and signed the warrant for surrender. The appellant argued that by failing to disclose the internal memorandum to him the Minister of Justice violated the principles of *audi alteram partem*. The memorandum had been reviewed by Mr. Justice Doherty of the Supreme Court of Ontario, who had concluded it was protected by solicitor-client privilege. The document in question included a summary of the proceedings, a summary of Mr. Idziak's representations and a recommendation to the Minister. The majority of the Supreme Court of Canada agreed with Mr. Justice Doherty that solicitor-client privilege had been properly claimed. However, it is noteworthy that Mr. Justice Cory went on to describe the document in detail and he commented that the contents of the document were known to the appellant and as the *Charter* had not been violated: "very little need be said on this issue and what little will be said should be restricted in the application to the situation presented on this appeal."<sup>30</sup> Mr. Justice La Forest felt the Minister was engaged in making a policy decision and that it was not necessary to address the issue of the application of solicitor-client privilege.

Manes and Groskaufmanis present a compelling argument that, in some cases, the treatment of private and other lawyers is justified with respect to the application of solicitor-client privilege.<sup>31</sup> While referring to the role of in-house in corporations in putting forward their argument, the situation and context for government lawyers is often the same as it is for in-house counsel. In examining the rules that apply where in-house counsel, give both legal and non-legal advice, they argue that it is appropriate to isolate the work in terms of whether it was prepared as part of the lawyer, as opposed to a non-lawyer function, and then proceed to a second step. The second step would be to look at the nature of the communication and if the substantial purpose of it is to provide legal advice, the privilege applies.

It is the authors' contention that the "substantial purpose" test is a sound guideline to determine whether advice provided by in-house counsel amounts to legal advice and is privileged. However, the substantial purpose test should not be applied with the same vigour to solicitors in private practice. Rather, there should be a rebuttable presumption that all advice offered by a solicitor in private practice is privileged (subject, of course, to the requirement that the communication be made in confidence between a solicitor and a client with the purpose of seeking legal advice). The different standards reflect the

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<sup>29</sup> 1992 3 S.C.R. 631; R.S.C. 1985, c.E-23, s.25.

<sup>30</sup> *Ibid.* at p. 663, para. 65.

<sup>31</sup> Solicitor-Client Privilege: It's Your Business, Paper presented to conference sponsored by the Canadian Bar Association, Toronto, June 1, 1998 [unpublished].

different relationship between lawyers and their clients, and the client's expectations of lawyers in-house and of lawyer in private practice.

As already discussed, in-house counsel are expected to provide advice and guidance with respect to a company's business affairs as well as its legal dealings. In recognition of this dual role, many corporations have established bureaucratic safeguards to distinguish between in-house counsel qua lawyer and in-house counsel qua corporate officer. As well, in-house counsel can take steps (some of which are discussed below) to clarify the role they are assuming so that their legal advice and business advice can be distinguished. Given the ready opportunity to clarify legal and non-legal roles, in-house counsel should not be afforded a blanket assurance that their business advice or quasi-legal communications will not be subject to disclosure.

Private practitioners, however, do not have the same relationship with their clients and do not have the same ability to distinguish between their legal and non-legal roles. A client approaches a lawyer in private practice for a specific purpose: to obtain legal advice. In the context of receiving that legal advice, the client may well request and rely upon the lawyer's business acumen, but the primary purpose of the retainer remains the provision of legal advice. Other than cautioning the client that some advice is not legal in nature, there are no other obvious means by which a private practitioner can tease apart his or her role as legal advisor from his or her role as business, financial or investment advisor.<sup>32</sup>

There is no judicial authority offered in support of this theory; in fact, the few cases that exist suggest that professional standards for private practitioners and other counsel are the same. The paper was also written in 1998 and, now that multi-disciplinary partnerships are accepted and the practice of law continues to move closer to and in some respects remain indistinguishable from businesses, the justification for differing standards might not be as strong. I believe that private and government lawyers face the same issue of distinguishing between legal and non-legal advice. It is simply more likely in a government context for government counsel to face it in light of the nature of their work within a government bureaucracy. However, the same issue does exist for both and it is crucial for all practitioners to be able to make the distinction that applies *in their context*.

*(e) Is everything covered by solicitor-client privilege?*

The common law principles espoused in Wigmore<sup>33</sup> are an accepted part of the Crown law from which the cases have evolved.<sup>34</sup> Leaving litigation privilege aside for a moment, the privilege is founded on the

<sup>32</sup> *Ibid.* at pp. 23-24.

<sup>33</sup> J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 8, by J. T. McNaughton (Boston: Little, Brown, 1961), 2291 at p. 545.

<sup>34</sup> *Campbell, supra* note 24 at 603 per Mr. Justice Binnie (he refers to the position on this issue in the United States and confirms, with reference to the *Restatement (Third) of the Law Governing Lawyers* 124 (Proposed Final Draft No. 1, 1996), that government lawyers do fulfill the conditions set out by Wigmore).

elements of the giving of legal advice, in confidence, between a solicitor and a client, and non-disclosure except with the consent of the client.

Unique considerations apply in the Crown context. Mr. Justice Binnie commented in *R. v. Campbell*<sup>35</sup> that the Minister of Justice, in her capacity of the Attorney General of Canada, must be governed by legislation such as the *Department of Justice Act*<sup>36</sup> which sets out her mandate in broad terms. In this respect, a Minister or a government official acting for that Minister is not an ordinary client.

On the other hand, there are similarities between the application of the principles of solicitor-client privilege in the private and public sector contexts. In private practice there are instances where a client may consult a lawyer about business matters, and while this is regulated by the law societies to encourage lawyers to stick to their main mandate of providing legal advice, it also means solicitor-client privilege may not apply. A case on point is *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*.<sup>37</sup> The Bank's Legal Department maintained a general file where precedents were kept on the subject of comfort letters. The defendant Peat Marwick Thorne Inc., had provided comfort letters to the plaintiff Bank and the Bank relied on them in approving a loan. In a subsequent civil action in which the comfort letters were at issue the defendant sought access to the Legal Department's general legal file. The court ordered the production of certain documents in the file and did not accept the plaintiff's claim to solicitor-client privilege. While accepting the general principle that in-house counsel in the private sector could make claims based on solicitor-client privilege, the court refused to apply it here. Not only had the documents in the file been widely distributed, there was no notation of confidentiality on the documents and the nature of the documents (e.g. circular) suggested that neither solicitor-client nor litigation privilege applied.

The same principle applies with equal force to the work products and communications of government lawyers. Aside from the application of the *Access to Information Act*<sup>38</sup> and the *Privacy Act*,<sup>39</sup> which impose a separate system for disclosure by government officials including lawyers, the courts have noted that not all work undertaken by government lawyers is subject to solicitor-client privilege. Again, in *R. v. Campbell*, Mr. Justice Binnie noted this distinction:

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do

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<sup>35</sup> *Ibid.* at p. 603, para. 51.

<sup>36</sup> R.S.C. 1985, c. J-2, ss. 4, 5.

<sup>37</sup> (1997) 32 O.R. (3d) 575 (Ont. Ct. (Gen. Div.) [Toronto-Dominion Bank]).

<sup>38</sup> R.S.C. 1985, c. A-1 *Access Act*

<sup>39</sup> R.S.C. 1985, c. P-21 *Privacy Act*

have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on department know-how. Advice given on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations.<sup>40</sup>

The courts have had occasion in recent times to further explore the disclosure obligations of the Crown in criminal law cases. In *R. v. Trang*<sup>41</sup> the Alberta Queen's Bench looked at three issues: 1) whether litigation privilege, or work product, is a subset of solicitor-client privilege; 2) if it extends to police work product; and 3) if the sharing of legal advice given by Crown prosecutors to one member of a police force, with another member of the police force, defeats the privilege. The Court concluded without much hesitation, that the government lawyer's "work product" was a subset of solicitor-client privilege, and therefore subject to non-disclosure, and also that it also included police work product produced for a criminal trial. The Court further concluded that solicitor-client privilege continues to apply where legal advice is passed on, provided that the members of the police forces are involved in a joint investigation and prosecution.

However, while government lawyers may make claims for solicitor client privilege, the case of *Husky Oil Operations Ltd. v. MacKimmie Matthews*<sup>42</sup> involving an in-house counsel should be noted if the claim is made while the lawyer is acting in a different capacity while employed with a corporation. The defendants tried to compel production of information in a plaintiffs' action for solicitor's negligence. The plaintiffs maintained that, due to the negligence of a solicitor in drafting a renewal clause in an oil and gas contract, the solicitor should be liable for negligence. The defendants wanted copies of a legal opinion prepared by their in-house counsel six years before the action had begun, legal opinions on strategies, without prejudice communications and an opinion prepared by a "landman" who was a non-practising lawyer. The Alberta Court of Queen's Bench did not allow disclosure of the first three documents but agreed that the opinion prepared by the "landman" should be disclosed. Although this individual was lawyer, he was not hired to provide legal advice.

This approach is supported by the case of *Re Ontario Securities Commission and Greymac Credit Corp., Re Ontario Securities Commission and Prousky*<sup>43</sup> where the Divisional Court refused to accept

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<sup>40</sup> *Supra* note 24 at 601(QL).

<sup>41</sup> 168 C.C.C. (3d) 145 (Alta. Q.B.).

<sup>42</sup> 1999 A.J. No. 604 (Alta. Q.B.) (QL).

<sup>43</sup> (1983), 41 O.R. (2d) 328 (H.C.J., Div. Ct.).

the argument that the president of a company who is also a lawyer could assert solicitor-client privilege for information acquired by him as an employee or agent of the company.

The danger, in the context of government lawyering is that one size will be taken to fit all. Lawyers have different roles and some do not fit the standard stereotype of the private sector lawyer. General common law principles may therefore, on occasion, be difficult to apply. Any determination on the application of the privilege may have to be geared to the specific public interest context in which the request for disclosure is made. A case on point is the appearance of government lawyers before parliamentary committees. By tradition, a distinction is made between the information disclosed by a Minister and by public servants. Custom and practice dictate that only Ministers speak to government policy; public servants can state facts or provide explanations. When public sector lawyers appear before parliamentary committees it is often difficult to distinguish between facts and information that are subject to solicitor-client privilege on the one hand, and information that any public servant would disclose on the other.

Solicitor-client privilege has been the subject of recent debate in the House of Commons. The status of legislative counsel in providing legal services to Members of Parliament has also been discussed recently by the Standing Committee on Procedure and House Affairs.<sup>44</sup> In one submission it was argued that parliamentary privilege was sufficient to protect the confidentiality of information exchanged between private members and members of the Parliamentary Counsel's drafting unit without relying on solicitor-client privilege. Another expert indicated that solicitor-client privilege would cover the drafting of amendments and Bills.<sup>45</sup> The Committee had before it the issue of the status of legal advice to the House of Commons and its Members the status of drafts of Bills prepared by lawyers acting in their capacity as legislative counsel. The Board of Internal Economy, on behalf of the House of Commons employs lawyers as legislative counsel. While the Committee focussed on the application of parliamentary privilege as "an even higher legal basis" than solicitor-client privilege, the Committee members canvassed who should have access to the documents prepared by legislative counsel. Particular concern was expressed about amendments as they require a more collaborative process than does the drafting of Private Members' Bills and Motions. It is expected that the debate will continue as the Committee resolved the immediate problem by recommending the implementation of best practices and guidelines.

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<sup>44</sup> Canada, House of Commons, Standing Committee on Procedure and House Affairs, Minutes of Proceedings, on-line: Canada's Parliament <http://www.parl.gc.ca/InfoComDoc/36/2/HAFF/Studies/Reports/HAFF-034-e.htm> thirty- fourth report (June, 2000).

<sup>45</sup> *Ibid.* (testimony of Diane Davidson).

(f) *What about legal agents?*

The Department of Justice's workforce is not limited to salaried lawyers who are appointed by virtue of the *Public Service Employment Act*.<sup>46</sup> Legal agents, who are private sector lawyers appointed as ad hoc or standing legal agents, also provide legal services on behalf of the Attorney General of Canada. The use of private practitioners is not unique to the public sector as corporations also retain law firms. The Attorney General has the discretion to retain legal agents in both civil and criminal matters to act on his behalf. Therefore the principles of solicitor-client privilege continue to apply whether or not the work is completed by a salaried government lawyer or a legal agent.

The common law position which aptly summarizes the state of the law in the private sector for the application of solicitor-client principles to legal agents was quoted with approval in *Methanex Corp. v. Canada (Department of National Revenue)*,<sup>47</sup> is found in *Susan Hosiery Ltd. v. Minister of National Revenue*:

In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal advisor must be able to communicate quite freely without the inhibiting influence that would exist if what they said could be used in evidence against them so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not to convey their thoughts to each other but so as not to be capable of being misconstrued by others. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing.<sup>48</sup>

As an example of this application in the *Methanex* case,<sup>49</sup> Revenue Canada had requested documents from the company but the documents were under the control of the law firm of McCarthy Tétrault. McCarthy Tétrault had provided legal advice to Methanex Corporation on a transaction between various parties where many of the documents were prepared by accountants. The court noted that solicitor-client privilege could be claimed even though the lawyers were "outside solicitors engaged to provide legal advice on matters on which McCarthy Tétrault were not qualified to advise." Again, it is accepted at common law that solicitor-client privilege can still be claimed if the lawyer is other than a full-time salaried lawyer of the Department of Justice. The Federal Court gave a great deal of latitude

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<sup>46</sup> R.S.C. 1985, c. P-33.

<sup>47</sup> *Supra* note 27.

<sup>48</sup> (1969), 69 D.T.C. 5278 at 5281.

<sup>49</sup> *Supra* note 27.

in the interpretation of “government lawyer” in *Attorney General of Canada v. Central Cartage Company*:

...Also included, of course, would be anyone hired on contract to provide legal advice or services or someone doing so voluntarily even though such person might not officially be a member of the Department of Justice.<sup>50</sup>

This permissive approach takes into account the operational requirements of a government environment, which may differ from the private sector.

(g) *How can the privilege be waived by the Crown?*

Waiver applies for the same reasons as for any client; it remains a privilege of the client. The interesting question in the public sector context is always by whom can the privilege be waived and how (i.e. expressly or by implication)?

As noted earlier, Mr. Justice Binnie concluded in *R. v. Campbell*<sup>51</sup> that counsel for the RCMP had waived the privilege when they used the testimony of the RCMP officer in making their argument in the factum.

The exchange of a letter containing legal advice between government officials who worked for different departments did not amount to a waiver in *Halifax Shipyard Ltd. v. Canada (Minister of Public Works and Government Services)*.<sup>52</sup> It also did not matter that the lawyer was a member of the Office of the Judge Advocate General at the Department of National Defence.

Unique circumstances apply to the application of the privilege in the government context. Statutes often contain provisions requiring disclosure and it is accepted that there is no implied waiver where forced disclosure occurs.<sup>53</sup>

An interesting issue is whether waiver can be maintained if solicitor-client advice is given to a reporter. Mr. Justice Ground concluded not in a recent case involving the City Solicitor of Toronto and a report prepared for City Council with information on certain tax sale proceedings, settlement offers, and negotiations with the parties.<sup>54</sup> Certain reporters obtained copies of the reports but it could not be established if they were leaked or were distributed inadvertently. The reports were also appended to an affidavit of a Councillor which had been filed in a legal proceeding.

<sup>50</sup> *Supra* note 23 at 257.

<sup>51</sup> *Supra* note 24.

<sup>52</sup> (1986) F.T.R. 222 (T.D.).

<sup>53</sup> *Stevens v. Prime Minister of Canada* (1997) 144 D.L.R. (4th) 553 (F.C.T.D.) [Stevens].

<sup>54</sup> *Elliott et al. v. City of Toronto et al.* (2001) 54 O.R. (3d) 472 (Sup. Ct.).



The Court felt that solicitor-client privilege could be claimed and that one Councillor was not in a position to waive privilege on behalf of the whole Council. In fact the Councillor was subject to the confidentiality provisions of the *Municipal Freedom of Information and Protection of Privacy Act*,<sup>55</sup> a fact which was drawn to her attention in the covering pages to the Reports given to her.

Interesting developments have occurred in the United States where high profile public relations firms are hired to assist with a litigation strategy. A claim was made to protect solicitor-client information from disclosure on the basis that it was used in preparation for trial. U.S. District Court Judge Rakoff decided recently in *Calvin Klein TradeMark Trust v. Wachner*<sup>56</sup> that public relations advice, even if prepared in anticipation of litigation, is not subject to solicitor-client privilege. This is relevant to the public sector context where communications by the Minister or government officials occurs often in the context of litigation. This case is food for thought if consultants, rather than government spokespersons are used in the process. It could be argued that in-house public relations advice is in no better position than if it were handled by an outside firm. The issue has yet to be addressed in the public sector context in Canada.

Another issue which frequently arises is whether the production of one document in a file operates as a waiver for all documents in a file on the same matter. The Court answered this question in the negative in *Transamerica Life Insurance Company v. Canada Life Assurance Company et al.*, and indicated that “[i]t must be shown that without the additional documents, the document produced is somehow misleading”...<sup>57</sup>

*(h) Do the exceptions to the privilege apply to the Crown?*

There are recognized exceptions to the application of solicitor-client privilege. Mr. Justice Dickson’s summary of them in *Solosky v. The Queen* is quoted often as a leading authority:

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential privilege will not attach, *O’Shea v. Woods*, [1891] p. 286 at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic

<sup>55</sup> R.S.O. 1990, c. 56.

<sup>56</sup> 198 F.R.D. 53 (S.D.N.Y. 2000).

<sup>57</sup> (1995), 27 O.R. (3d) 291 (Ont. Gen. Div.) at 307 [Transamerica Life Insurance Company of Canada].

case is *R. v. Cox and Railton*, [(1884), 14 Q.B.D. 153]) in which Stephen J. had this to say (p. 167): “A communication of a criminal purpose does not ‘come in the ordinary scope of professional employment’.”<sup>58</sup>

Justice Binnie also confirmed in *R. v. Campbell*<sup>59</sup> that the exceptions applied in the Crown context.

The Federal Court of Appeal reviewed the issue of the application of exceptions in the case of *Stevens v. Canada (Prime Minister)*.<sup>60</sup> In this case the applicant, the Honourable Sinclair M. Stevens, had been the subject of a commission of inquiry looking into conflict of interest allegations. Subsequently, he applied to the Privy Council Office under the *Access Act* for lawyers’ billing accounts and supporting documents of Counsel to the Commission. The Court upheld the government’s decision to withhold the narrative portion of the accounts as information protected by solicitor-client privilege. The Court noted that the government, as a client, was more prepared than a private sector client in similar circumstances to waive the privilege. However, the court also noted that a lawyer’s billing accounts fell within section 23 of the *Act* and that the government had exercised its discretion properly in not disclosing the accounts in their entirety.

*(i) Confidentiality is important*

In a government setting the distribution of material is governed by a complex set of rules, some of which are drawn from the relevant security policies and legislation, and some of which relate to the sheer size of government institutions and the hierarchical reporting relationships. When lawyers prepare legal advice it is reasonably, foreseeable that the advice will need to be seen by more than one person.

Cases on this issue are sparse and usually the discussion on confidentiality has been limited to exchanges of documents between government departments.<sup>61</sup> As is the case for a private client, it is anticipated that the courts would look to similar evidence, including the institutional measures in place to protect against the wide distribution of documents, the classification of the documents, and their storage. In *Toronto-Dominion Bank*<sup>62</sup> the court examined this type of criteria in the case of the a file assembled by in-house counsel of a Legal Department and one would expect the considerations to be similar in the Crown context.

It is not clear to what extent a law firm or lawyer must go to protect the confidentiality of the information they obtain in the context of a solicitor-client relationship. A lawyer from the law firm Berrymans Lace Mawer in

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<sup>58</sup> *Supra* note 4 at 835-36.

<sup>59</sup> *Supra* note 24.

<sup>60</sup> *Supra* note 53.

<sup>61</sup> *Weiler v. Canada (Department of Justice)* (1991), 37 C.P.R. (3d) 1 (F.C.T.D.).

<sup>62</sup> *Supra* note 37 at 6.

Great Britain waxed fondly on an unsubstantiated allegation in a recent lawsuit that someone involved in the suit claimed garbage bins at certain law offices had been searched and documents removed.<sup>63</sup> Mr. Hamilton sued Mr. Al Fayed for libel but was unsuccessful. Counsel for Mr. Hamilton maintained the documents were taken from dustbins behind their counsel's chambers, that they were related to the action, and that they had been sold to Mr. Fayed's legal team.<sup>64</sup> Mr. Hamilton was successful in his bid to adduce further evidence but all other applications, including his objection to costs, were dismissed. The impact of the theft on solicitor-client privilege did not have to be addressed directly by the court.<sup>65</sup>

Justice Binnie hinted in *R. v. Campbell* that the rules were the same for government lawyers:

At the same time, if the legal advice were intentionally disclosed outside the RCMP, even to a department or agency of the federal government, such disclosure might waive the confidentiality, depending on the usual rules governing disclosure to third parties by a client of communications from its solicitor.<sup>66</sup>

In any case, government lawyers and officials must respect the rules related to the confidentiality of government-held information,<sup>67</sup> which is a duty over and above that of the confidentiality of solicitor-client information. The fact that the information must be treated on a confidential basis in accordance with the government's *Security Policy*<sup>68</sup> may be evidence of the nature of the confidential relationship between the parties and their expectations, but it is not conclusive. Moreover, the purpose of the intra-government disclosure needs to be taken into consideration.

*(j) Are rules for joint interests the same and does common interest privilege apply?*

There are no Canadian cases in which the issue of joint clients is canvassed where the Crown's interest is at stake. This is an important issue

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<sup>63</sup> P. Lewis, "What a load of rubbish", [http://www.blm.com/newa/articles/what\\_a\\_load\\_of\\_rubbish.htm](http://www.blm.com/newa/articles/what_a_load_of_rubbish.htm) (November 1999) [on file with the authors].

<sup>64</sup> *Hamilton v. Al Fayed* 2000 E.W.J. No. 6960 (C.A., Civil Div.).

<sup>65</sup> But see *A.G. Ontario v. Gowling & Henderson* (1984), 47 O.R. (2d) 449 (Ont. H.C.J.) (the Attorney General of Ontario was successful in applying for an injunction when solicitors for the defendants were in possession of confidential Cabinet documents. Solicitors for the defendants were not allowed to rely on solicitor-client privilege to shield the documents from return to the plaintiff).

<sup>66</sup> *Supra* note 24 at 612, para. 68.

<sup>67</sup> See the *Public Service Employment Act*, *supra* note 46, Schedule III, (containing the Oath or Solemn Affirmation of Office and Secrecy sworn or affirmed by federal public servants).

<sup>68</sup> [http://publiservice.tbs-sct.gc.ca/pubs\\_pol/gospubs/TBM\\_12A/siglist\\_e.html](http://publiservice.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_12A/siglist_e.html).

for government lawyers due to the ongoing relationships with provincial and territorial governments, particularly in trade litigation where Canada and a province may collaborate together on a position based on the principle in treaty law in which Canada represents the nation where breaches of international law are alleged, and where private interests are “stake- holders”.

Manes and Silver, leading authorities on solicitor-client privilege, state the general rule as follows:

Where parties share a solicitor, communications between either of them and the solicitor, in the solicitor’s joint capacity, are not privileged by one of the parties against the other. However, the intention of confidentiality is not necessarily destroyed when two parties share solicitors, have a common interest, and obtain each other’s solicitor-client communications. This has been called a “common interest privilege”, and is applicable by the parties only to the outside world, and not between or amongst themselves.<sup>69</sup>

There could be a significant breakdown in the flow of communications between the various levels of government if the courts concluded that this privilege did not apply in the government context. Not only are there constant exchanges on the development and implementation of government legislation, there are also shared interests in the pursuit of litigation. This is important in a government setting where the lawyer must make a determination whether they represent the employee as a member of the institution. In some cases the interests are not shared.<sup>70</sup>

The inclusion of specific provisions in the *Access Act* for an exemption to the release of confidential communications between officials of the federal Crown and the provincial and territorial governments is evidence that Parliament, at the time, afforded some importance to the confidentiality of these exchanges and the importance of them.

*(k) What about third parties?*

As the complexity of governing has increased, and the size of government has become an issue, the conduct of business has changed somewhat in recent years. It is common for the government to use consultants to obtain business or strategic advice and, as a result, it is foreseeable that these individuals will be present at meetings where legal advisors are present.

Again, while Canadian judicial authority is absent, Manes and Silver offer the following advice:

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<sup>69</sup> R.D. Manes and M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 65.

<sup>70</sup> *Alberta (Treasury Branches) v. Leahy* (1999), 254 263 (Q.B.).

Where an outside expert assisting the client or lawyer is present at a meeting in which legal advice is sought, the communications will be privileged.

A frequent dilemma faced especially by corporate counsel is the presence of outside experts, (e.g., accountants, auditors, various in-house employees, etc.) at a meeting with the client (e.g., a board of directors) in which legal advice is given. Many solicitors will ask themselves the question, “Do I need to ask somebody to leave the meeting?” If the purpose of the third party presence is to assist the client or the lawyer, communications made at the meeting (including the minutes of the meeting) are privileged.”<sup>71</sup>

As a result, government counsel have to be aware that some communications involving third parties will not fall under the umbrella protection of solicitor-client privilege.

### *Part II — Are there situations unique to the Crown?*

Much of Crown law involves the interpretation and application of statutes, policies, rules and directives. This leads to situations where the disclosure of information is mandatory or where there are competing demands and objectives. Parliamentary rules and procedures and their interface with the statutes, custom and practice of the Executive is an example which will be canvassed below.

The constitutional context presents an interesting dilemma.

The executive is separate from the judiciary and Parliament — this remains a fundamental precept on which relations and interactions between each of these branches is built. For example, a Department of Justice lawyer cannot provide legal advice to a Member of Parliament or a judge. In fact, both the courts and Parliament have their own “in-house” counsel.

However, when the interests conflict, as is the case when a parliamentary committee requires disclosure of information from government departments, the legal advisors are faced with interesting choices; there can be dire consequences for failure to respond properly. While a committee does not have the power to enforce by imposing contempt, the House of Commons does.<sup>72</sup>

In some cases the exchange of information unfolds in the normal course of events. It is an accepted custom for legislative drafters who prepare draft legislation and who are lawyers, to appear before parliamentary committees. The rationale for their appearance is that they can provide factual information as background in the preparation of the Bill in order to facilitate the understanding by members of the provisions of the Bill. A dichotomy, which supports the comments of Mr. Justice Binnie in

<sup>71</sup> *Supra* note 10 at 61-62.

<sup>72</sup> Privy Council Office, “*Notes on the Responsibilities of Public Servants in Relation to Parliamentary Committees*” (December 1990), online: Privy Council Office <http://www.pco-bcp.gc.ca/pco-notes>.

*R. v. Campbell*,<sup>73</sup> can be maintained between the government lawyer in their dual roles as lawyers and policy advisors.

As a general rule, the Crown does not provide solicitor-client information to Parliament or its committees and does not waive the privilege. This is in order to protect the well-understood role of the legal advisor within government and to maintain the demarcation between the government and Parliament. Of course, the Crown may not disclose other types of information such as Cabinet confidences, and any lawyer appearing before a parliamentary committee must to be familiar with the different categories of government information that are subject to confidentiality.

There is a general convention on disclosure aptly stated in *Beauchesne*,<sup>74</sup> which was never formally adopted by the House of Commons but was tabled by the Government of the day in 1973 as a Notice of Motion for the Production of Papers. It contains a list of exceptions to disclosure and one of them covers solicitor-client information:

Legal opinions or advice provided for the use of the government.<sup>75</sup>

*Beauchesne* states the general rule as follows,

A committee cannot require an officer of a department of the government to produce any paper which, according to the rules and practice of the House, it is not useful for the House itself to insist upon being laid before it. If considerations of public policy can be urged against a motion for papers it is either withdrawn or otherwise dealt with according to the judgment of the House.<sup>76</sup>

and further advocates the possibility that the general principles tabled by the Government in 1973 are now part of the accepted parliamentary practice:

Any determination of what constitutes “confidential documents” is not a matter for the speaker to determine. It is up to the government to determine whether any “letters, papers, and studies” are of a confidential nature when deciding how to respond to a Notice of Motion for the Production of Papers.<sup>77</sup>

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<sup>73</sup> *Supra* note 24 per Binnie J.

<sup>74</sup> A. Fraser, W. Dawson & J. Holtby, *Beauchesne's Parliamentary Rules & Forms*, 6<sup>th</sup> ed., (Toronto: Carswell, 1989) [*Beauchesne*] at paras. 830-832.

<sup>75</sup> Canada, *House of Commons Debates*, #3 (15 March 1973) at 2288.

<sup>76</sup> *Supra* note 74 at para. 849.

<sup>77</sup> *Ibid.*, para. 447. The Office of Law Clerk and Parliamentary Counsel also refers to this document in the “Presentation to the Standing committee on Privileges and Elections on the Powers of Parliamentary Committees to send for Documents” (March, 1991).

Still, the matter is far from settled and authorities are divided on the matter. Beauchesne indicates that a witness is bound to answer all questions and cannot be “excused, for example...because the matter was a privileged communication such as that between a solicitor and a client...,”<sup>78</sup> which is a view that May supports in *Parliamentary Practice*.<sup>79</sup> In contrast, Bourinot argues in *Parliamentary Procedure*, that “[a]s a rule the opinions of the law officers of the Crown are held to be “private communications” when given for the guidance of ministers, and may be properly refused by government.”<sup>80</sup>

If all else fails, procedures can be put in place to protect the information. First, a committee can sit in camera while the information is being discussed; second, the information can be given only to the Chair of the Committee to restrict its distribution; and third, severance of certain portions can be done and a restriction on publication of the committee’s proceedings can occur.

(a) *Income Tax Act*<sup>81</sup>

Section 232 of the *Income Tax Act* includes a procedure for claiming solicitor-client privilege when the Minister responsible for the Canadian Customs and Revenue Agency intends to inspect, examine or seize documents under sections 231.1, 231.2 and 231.3 of the same. There are several statutes which establish a procedure for claiming solicitor-client privilege where investigation and seizure occur. Section 232 seems to be procedural and the *Act* is silent on its application to the Crown as client. A similar procedure is found in the *Competition Act*.<sup>82</sup>

Section 488.1 of the *Criminal Code*<sup>83</sup> creates a mandatory procedure for asserting and litigating the privilege when the seizure of documents in a lawyer’s possession is about to occur. The Supreme Court of Canada has

<sup>78</sup> *Ibid.*

<sup>79</sup> 20<sup>th</sup> ed., (London: Butterworths, 1983) at 746.

<sup>80</sup> 79 J.G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4<sup>th</sup> ed. by T.B. Flint, (Toronto: Canada Law Book, 1916) at 250.

<sup>81</sup> R.S.C. 1985 (5<sup>th</sup> Supp.), c.1, as amended *Income Tax Act*.

<sup>82</sup> R.S.C. 1985, c. C-34.

<sup>83</sup> R.S.C. 1985, c. C-46, as amended hereinafter the *Criminal Code*. Note, in particular, subsections (2)(3):

(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(a) seize the document and place it in a package and suitably seal and identify the package; and

reviewed this provision recently and has declared it to be unconstitutional.<sup>84</sup> The Court concluded that there were not enough protections for the safeguarding of the privilege, that were sufficiently serious to amount to an unreasonable search and seizure for purposes of section 8 of the *Charter*. The court held that it was fatal to the scheme that solicitor-client privilege could be breached, without the knowledge or consent of the client. In replacing the scheme, the Court set out guidelines a road map for the future until legislation is enacted.

The definition of solicitor-client privilege is very broad:

Solicitor-Client Privilege means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.<sup>85</sup>

Section 241, a blanket prohibition on disclosure, provides food for thought. Lawyers who work in a legal services unit at the Canadian Customs and Revenue Agency are in a very difficult position with respect to their legal advisory role. Conflicting duties could arise were they forced to disclose solicitor-client information which they were prohibited from disclosing under the general confidentiality provision in section 241. There are exceptions to the general prohibition, but the application of this section could give rise to an interesting ethical dilemma.

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- (b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.
  - (3) Where a document has been seized and placed in custody under subsection (2), the attorney General or the client or the lawyer on behalf of the client, may
    - (a) within fourteen days from the day the document was so placed in custody, apply, on two days notice of motion to all other persons entitled to make application, to a judge for an order
      - (i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and
      - (ii) requiring the custodian to produce the document to the judge at that time and place;
    - (b) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and
    - (c) if he has proceeded as authorized by paragraph (b), apply, at the appointed time and place, for an order determining the quest

<sup>84</sup> *Lavallée, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink* 2002 SCC 61 (QL).

<sup>85</sup> *Income Tax Act*, *supra* note 81, s. 232(1).



(b) *The Auditor General Act*

The Auditor General's role within government is well known and stated in Section 5 of the *Auditor General Acts*:

The Auditor General is the auditor of the accounts of Canada, including those relating to the Consolidated Revenue Fund and as such shall make such examinations and inquiries as he considers necessary to enable him to report as required by this Act.<sup>86</sup>

In the course of conducting an audit the Auditor General may require access to legal opinions. The *Act* is silent on the matter and there is no definitive case law on the issue. In *Professional Institute of the Public Service of Canada (PIPS) v. Director of the Canadian Museum of Nature*,<sup>87</sup> the Federal Court had before it the question of access to a forensic audit prepared by Peat Marwick and Thorne, who were hired to review allegations set out in a published report prepared by PIPS. The union wanted access to the document because the museum had undertaken cutbacks and several employees had been laid off.

The Auditor General was given access to the report in the course of his work. The Museum refused access to the report under section 23 of the *Access Act*, which is the exemption for solicitor-client privilege. Mr. Justice Noel agreed with counsel for the Crown that the report was covered by solicitor-client privilege but then went on to conclude that the Crown had waived the privilege. To arrive at the decision that the privilege applied he took into account the fact that the dominant purpose of the preparation of the report was to support a potential claim of defamation against those who had written the report. The Department of Justice and the lawyer for the museum had been involved in the decision to recommend the preparation of the report.

On the aspect of waiver, Mr. Justice Noel concluded that the Crown had waived any privilege by providing the report to the Auditor General, because the Auditor General is a third party as auditor of the museum. There was no evidence that the Auditor General had used any statutory powers to obtain the report, or that he was prepared to do so, and there was also no clear evidence he had the power to do so.

This case is not necessarily consistent with earlier case law to the effect that the government's sphere of activity falling under the solicitor-client umbrella can be very broad.

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<sup>86</sup> R.S.C. 1985, c. A-17, as amended, s.5.

<sup>87</sup> *The Professional Institute of the Public Service of Canada (PIPSC) v. Director of the Canadian Museum of Nature*, 1995 3 F.C. 643 (T.D.).

(c) *The fiduciary duty – a new exception?*

There has been some case law on the question of the juxtaposition of the Crown's fiduciary duty to aboriginal peoples and the claim of solicitor-client privilege.

An action was brought by certain bands against the federal Crown in *Buffalo v. Canada*<sup>88</sup> for breach of trust and other equitable obligations owed to them with respect to the management of resources, during which the bands filed a motion for production of documents including legal opinions. The Crown objected to the disclosure. The motions judge ordered disclosure of all documents except those covered by advice in relation to the litigation. The bands argued that the fiduciary relationship between the Crown and aboriginal people effectively suspended the ordinary rules for solicitor-client privilege since the Crown was a trustee. The Federal Court of Appeal disagreed with the motions court judge and refused to accept the band's argument that the law and practices for private trusts applied in their entirety to the Crown. The Court amended the original order for disclosure to include "documents...initiated for the dominant purpose of the conduct of the litigation" instead of "arising from solicitor-client communications constituting advice with reference to this litigation."<sup>89</sup> The Court also refused to order production by the Crown of documents for which they claimed legal advice privilege (i.e. other than litigation privilege).

Further issues were discussed in *Samson Indian Nation and Band v. Canada*,<sup>90</sup> since the parties were unable to agree on an interpretation of this decision. The court ordered disclosure of certain documents where the legal advice was sought in relation to the administration of specific assets. In contrast to the first decision, the Court accepted the band's argument that there was a joint interest between the Crown and the bands which was similar to that of a beneficiary of a private trust. However, there was no general presumption in favour of disclosure of all legal advice tendered by the Crown.

The Crown appealed the second decision and the bands cross-appealed but both were dismissed. The Court did accept that the Crown could claim solicitor-client privilege for documents where other joint interests were at stake but accepted the previous ruling.

The Court reached the opposite result in another decision, *Begetikong Anishnabe v. Canada (Minister of Indian Affairs and Northern Development)*.<sup>91</sup> In this case a band was unsuccessful in its attempt to

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<sup>88</sup> [1995] 3 C.N.L.R. 18 (F.C.A.).

<sup>89</sup> *Ibid.* per McGuigan and Décory JJ.A. quoting the motions judge.

<sup>90</sup> 1997 F.C.J. No. 1449 (F.C.A.); 1997 F.C.J. No. 1328 (F.C.A.); 1997 F.C.J. No. 165 (F.C.A.); (2001) FCT 764 (QL); (2001) FCT 765 (QL).

<sup>91</sup> 138 F.T.R. 109 (F.C.T.D.), *aff'd*, 1998 F.C.J. No. 1346 (F.C.A.) (QL); (1997), 138 F.T.R. 109 (F.C.T.D.).

obtain disclosure of a certified copy of a legal opinion prepared by a Department of Justice lawyer for the Minister in regard to the band's statement of claim under the *Land Claims Policy*. The 1986 *Policy* stated that the Minister of Indian and Northern Affairs would seek the advice of the Minister of Justice upon receipt of a claim. As a result, the band argued that the policy did not intend for the opinion to be confidential because of the reference in the *Policy*, that the Minister had waived any privilege by disclosing the substance of the advice in a reply to the band, and finally, that the fiduciary relationship between the Crown and the band created a legitimate expectation favouring of disclosure.

On the issue of confidentiality, the Court looked at the classification of the document, the Minister's position throughout that the document was confidential and the sealing of the document to protect its confidentiality.

With respect to waiver the Court said it did not matter that in the Minister's reply he said he had received advice from the Minister of Justice. This reference did not operate as a waiver on the part of the Crown. The Court also rejected the argument with respect to the special fiduciary relationship.

This decision was affirmed on appeal to the Federal Court of Appeal. Mr. Justice Décaré accepted the reasoning in *Samson v. Indian Nation Band v. Canada*<sup>92</sup> but concluded that there was no expressed or implied waiver present. He also noted that the existence of solicitor-client privilege was dependent on the circumstances of each case.

In summary, this remains a highly volatile, unpredictable area of the law which will vary on the facts of each case.

#### (d) *Access Act*

The Crown and its lawyers face unique disclosure requirements, some of which could not possibly have been foreseen when the *Access Act* and the *Privacy Act* became effective on July 1, 1983.

Section 23 of the *Access Act* provides as follows:

The head of a government institution may refuse to disclose any record requested under this act that contains information that is subject to solicitor-client privilege.<sup>93</sup>

Section 27 of the *Privacy Act* also provides:<sup>94</sup>

The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is subject to solicitor-client privilege.

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<sup>92</sup> *Supra* note 76.

<sup>93</sup> *Supra* note 38.

<sup>94</sup> *Supra* note 39.

It is easy to assume that the exemption covers the broader definition of solicitor-client privilege and includes both legal advice privilege and litigation privilege.<sup>95</sup> Otherwise the Crown, as a party in court, could be placed at a disadvantage in court proceedings and, in the context of legal advice on other matters, client officials could be hesitant to share information candidly with their lawyers.

The approach to interpreting the legislation was brought before the courts in cases including *Stevens v. Canada*. In general, these cases confirm that, first, the head of the institution must decide if the information is subject to solicitor-client privilege; then, as a second step, a decision must be made if the information ought to be disclosed. The *Stevens* case also suggests that the government is under no higher duty to exercise its discretion.<sup>96</sup>

There is also provision for severing, which leads to a consideration of the issue of waiver.

How does the head of the institution exercise their discretion? The Federal Court of Appeal has stated that the test is as follows:

...section 49 [of the ATIA] clothes the court with jurisdiction to determine whether the head of the institution is authorized to refuse disclosure. The discretion given to the institutional head is not unfettered. It must be exercised in accordance with recognized legal principles. It must also be used in a manner which is in accord with the conferring statute.<sup>97</sup>

As a practical matter, this could unfold since there was no discussion by the court as to how the exercise of discretion would affect waiver of the privilege and how. Questions could arise such as: Is it necessary to obtain the consent of the Clerk of the Privy Council? The Deputy Minister of Justice? Or both? What criteria would be used by these decision-makers in order to make the determination about release? It is unlikely these issues will be brought before the Canadian courts in the near future as, to a large extent, they remain issues of internal governance and administration. An Australian case does contain a discussion about the ability of a government institution to sever and disclose part of a text. Upon examination of section 22 of the *Freedom of Information Act 1982* Justices Mason and Wilson felt that the test was to determine if pages could stand on their own and which should not be exempted.<sup>98</sup> This makes sense because one document might

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<sup>95</sup> See generally *Blank v. Minister of the Environment*, [2000] F.C.J. No. 1147 (F.C.T.D.) (QL).

<sup>96</sup> *Stevens v. Canada* (Commissioner, Commission of Inquiry) 1998 4 F.C. 125 (F.C.A.).

<sup>97</sup> *Rubin v. Canada (Canada Mortgage and Housing Corporation)*, 1989 1 F.C. 265 (C.A.) at 273 para. 20.

<sup>98</sup> *Waterford v. The Commonwealth of Australia*, (1987) 163 C.L.R. 54.

canvas entirely different subjects, a separate heading for policy advice or contain innocuous information of an administrative nature.

However, in considering severance you have to be careful about avoiding claims that you have somehow waived the privilege. The Federal Court of Appeal supported a more global review of the circumstances in the determination of whether a partial disclosure would result in waiver of the whole document in *Sinclair Stevens v. Prime Minister of Canada (PCO)*. Mr. Justice Rothstein noted that:

In my opinion, the approach of Finch, J. in *Lowry* is appropriate for the purposes of determining whether, in the context of the Access to Information Act, privilege with respect to documents that have been disclosed in part has been waived in whole. While it cannot be ruled out that in some circumstances questions of misleading and unfairness might arise under the Access to Information Act, I would think that such issues would arise infrequently because of an oversight by the Information Commissioner and by the Court.

*(e) The Canada Evidence Act*

It is arguable that objections to disclosure of legal advice to litigants may be made under section 37 of the *Canada Evidence Act*.<sup>99</sup>

Sections 37(1) and (2) provide as follows:

37(1) A Minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

37(2) subject to sections 38 and 39, where an objection to the disclosure information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.<sup>100</sup>

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<sup>99</sup> See discussion above at 43. Note that there have been amendments to the *Canada Evidence Act* as a result of the *Anti-Terrorism Act*, S.C. 2001, c.41. The application of section 37 is subject to section 38, which provides for notice to the Attorney General where a participant in a proceeding is required to disclose “information that the participant believes is sensitive information or potentially injurious information” (defined in section 38). Subsection 38(6) states that section 38 does not apply where “the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding.” It is unclear how this new provision will be interpreted, which means the existing cases are still relevant.

<sup>100</sup> *Supra* note 53 at 568.

The section replaced an earlier public interest immunity provision, section 41 of the *Federal Court Act*.<sup>101</sup>

In *Re Regina and Gray et al.*<sup>102</sup> the British Columbia Court of Appeal dealt with the right of the RCMP to withhold legal advice provided by a Department of Justice lawyer to the officer in charge of an RCMP drug investigation under section 37 of the *Canada Evidence Act*. The Court disapproved of a blanket exemption for all of the documents exchanged between the government lawyer and the RCMP officer but allowed the Crown's appeal in part by accepting that certain information might qualify for exemption from disclosure.

The matter is far from settled, as was demonstrated in *Canada (Attorney General) v. Sander*.<sup>103</sup> Claims for public interest immunity and solicitor-client privilege are two distinct doctrines at law.

The Crown objected to the disclosure of certain documents in a case involving charges against the accused under the *Income Tax Act*. Legal advice had been provided by the Department of Justice to Revenue Canada investigators, and the Department of Justice objected to its disclosure by filing a certificate under the *Canada Evidence Act*. The accused maintained that he was entitled to the documents as part of pre-trial disclosure required under the principles established in *R. v. Stinchcombe*.<sup>104</sup> The trial judge recognized the Crown's right to claim solicitor-client privilege at common law but held that the accused had the right to make a full answer and defence. Section 231.3 of the *Income Tax Act* had been declared inconsistent with sections 7 and 8 of the *Charter* and the Federal Court of Appeal had ordered the return of documents seized under that provision. Subsequently, the Crown did not return the documents but obtained a warrant under section 487 which authorized the re-seizure of the documents. The trial judge concluded that the accused had the right to determine whether the subsequent seizure was constitutional but also to look at the considerations behind the decision-making of the investigators and their legal advisors.

The Court looked at a Certificate filed by Mr. James D. Bissell, Q.C. on behalf of the Department of Justice in which he claimed solicitor-client privilege for the documents. The issue, as framed by the Court of Appeal, was as follows:

With respect to the first question, the issue which must be decided is whether, when properly construed, the words "a specified public interest" in s.37 of the Canada Evidence act can include a claim of solicitor-client privilege over that class of communications passing between servants of the state qua clients and servants of the

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<sup>101</sup> R.S.C. 1970 (2<sup>nd</sup> Supp.), c. 10.

<sup>102</sup> (1993), 79 C.C.C. (3d) 332 (B.C.C.A.).

<sup>103</sup> (1994) 114 D.L.R. (4th) 455 (B.C.C.A.) [Sander].

<sup>104</sup> 1991 3 S.C.R. 326.

state qua legal advisors, which is distinct from the common law claim of solicitor-client privilege ruled upon in this case by the trial judge.<sup>105</sup>

The Court concluded that the Crown could not advance a claim of a “specified public interest” under the *Canada Evidence Act* for the communications containing the legal advice:

Under the common law a claim of public interest immunity is asserted by the executive on behalf of the public interest. The claim does not belong to a private part nor to any witness. It applies whether or not the crown is a party to the action in which it was raised. Even if it is not raised by the Crown the court is bound to apply the immunity if disclosure would be against the public interest. Leaving aside modern day concerns for the interest which the public has seeing in justice being done between litigating parties, as described in *Conway v. Rimmer*, and present-day Charter considerations, whether the claim succeeds depends on the content or the character of the information in question, and not on the circumstances of its creation.

Solicitor-client privilege, on the other hand, is the private, “fundamental civil and legal right” of the client: *Solosky v. Canada*, 1980 1 S.C.R. 821 at 843. It exists to ensure the full and frank disclosure by the client to the solicitor of all information required to enable the latter to give informed advice to the former in connection with ongoing or pending litigation. It is said to exist for the protection of the client, and to be essential to the effective operation of the legal system: J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 636. Leaving aside the crime or fraud exception, and present-day Charter considerations, whether a claim of solicitor-client privilege prevails in respect of a particular communication depends upon the nature of the relationship between the parties and the purpose for which the communication was made – i.e., upon the circumstances of its creation, and not upon its content or character.<sup>106</sup>

The law remains unresolved. Mr. Justice MacFarlane, in allowing the appeal against the Crown, was of the view that section 37 could still be used to grant public interest immunity for legal communications and where a claim for solicitor-client privilege might not succeed at common law. Ultimately the accused’s request for a stay was allowed and the Court attributed the delay to the Crown’s misconception of the law,<sup>107</sup> which resulted in a delay of the prosecution of some 40 months.

*(f) Developments in criminal law*

The stakes are high in the application of principles for the claim of solicitor-client privilege in criminal litigation. Short of calling the lawyer and clients as witnesses, the courts are now prepared to order disclosure of solicitor-client privilege under certain circumstances. Implied or express

<sup>105</sup> Sander, *supra* note 98 at para. XLIV.

<sup>106</sup> *Ibid.* at paras LVI-LVII.

<sup>107</sup> *Ibid.* generally.

waiver, which leaves an opening for the courts to conclude that information normally privileged, must now be disclosed.

Recent cases would suggest that the privilege is still a live issue before the courts.

In some cases the Crown will not oppose the introduction by the accused's counsel of documents subject to solicitor-client privilege. In *R. v. Murray* the accused's lawyer was facing a charge of obstruction of justice and made an application for a court ruling on the matter. Mr. Justice Gravely noted that:

This case is unique in that both the Crown and defence positions turn on relationships and communications between solicitor and client. It would, in my view, be a practical impossibility to attempt in the interests of conserving Mr. Bernardo's solicitor-client privilege to try and control the evidence defence counsel wishes to adduce in this area, or how he goes about his duty of defending Mr. Murray. If I were to do so, I would run the serious risk of damaging Mr. Murray's right to full answer and defence. Bearing in mind the minimal practical value left in Mr. Bernardo's privacy right, I am satisfied to accept Mr. Cooper's assurance that he will intrude on that right only to the extent necessary to defend his client.<sup>108</sup>

*R. v. Campbell*<sup>109</sup> will no doubt cause considerable debate and re-thinking of the application of traditional solicitor-client principles in the criminal litigation context. The reflections and commentary offered by Manes accurately describes the tension at common law:

The history of solicitor-client privilege reflects a tug-of-war between the protection of the confidentiality and sanctity of the solicitor and client relationship on one side, and the quest for truth on the other.<sup>110</sup>

A recent case, *R. v. Castro, Stinchcombe and Ferretti*<sup>111</sup> illustrates this tension. As was the case in *R. v. Campbell*,<sup>112</sup> the accused claimed that the release of legal opinions prepared by a Department of Justice lawyer for RCMP officers would support his case that abuse of process had occurred, and that only a stay of proceedings could be issued. The British Columbia Court of Appeal accepted this argument and ordered a new trial.

The appellants were convicted of drug offences on the basis of evidence collected from a reverse sting operation called, Project Eye Spy. The Crown objected to disclosure, claiming solicitor-client privilege for legal opinions which had been prepared on the legality of certain

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<sup>108</sup> (2000) 48 O.R. (3d) 437 (Sup. Ct. Justice) at para. 17.

<sup>109</sup> *Supra* note 24.

<sup>110</sup> *Supra* note 2 at 534.

<sup>111</sup> (2001) 157 C.C.C. (3d) 255 (B.C.C.A.) [Castro].

<sup>112</sup> *Supra* note 24.



investigative techniques. Writing on behalf of the Court, Mr. Justice Donald acknowledged that this case was different from that in *R. v. Campbell*<sup>113</sup> in that the illegal transactions had been between the police and the accused. In this case the alleged illegal activities had occurred with third parties whose actions then led to the accused.

However, the Court found support for their conclusion in *R. v. Creswell*<sup>114</sup> and *R. v. Desabrais*.<sup>115</sup> The Court of Appeal overruled the trial judge on the basis that it was not necessary for an accused to prove the RCMP had waived the privilege; it was enough that the accused needed to make a full answer and defence in their application for a stay. On the issue of disclosure it was sufficient that the legal opinions “had an influence on the establishment of Project Eye Spy.”<sup>116</sup> Mr. Justice Donald rejected the Crown’s argument that solicitor-client privilege can only be suspended where an accused’s innocence is at stake. The Crown maintained that all the elements of the offence had been established in the case at bar and therefore solicitor-client privilege could still be invoked based on the recent Supreme Court ruling in *R. v. McClure*.<sup>117</sup> In *McClure* the Supreme Court established an “innocence-at-stake” exception to documents protected by solicitor-client privilege where an accused has to make full answer and defence.

In ordering the disclosure of legal opinions the Court went on to set out a specific procedure to be followed:

Rather than undertake the procedure in *Leipert*, the trial judge ordered disclosure of the legal opinions. She did so in error. The confidential communications between the police and their solicitors must be protected as much as possible. Only communications which are necessary as proof of the fact in issue are subject to disclosure. *The trial judge ought to have examined the opinions in light of the circumstances of the case before her, made a decision as to whether the opinions should be released, and if required, edited the opinions to reveal only as much information as was necessary to allow proof of innocence.*<sup>118</sup>

As a result, different procedures are now in place for the review of information in order to protect the confidentiality of the information for both government and solicitor-client purposes.

<sup>113</sup> *Ibid.*

<sup>114</sup> (2000), 149 C.C.C. (3d) 286 (B.C.C.A.) [Creswell].

<sup>115</sup> (2000), 149 C.C.C. (3d) 305 (B.C.C.A.).

<sup>116</sup> Castro, *supra* note 106 at para. 35.

<sup>117</sup> 2001 1 S.C.R. 445. (The Supreme Court refused to support the motion’s judge order to disclosure solicitor-client protected documents in the subsequent case of *R. v. Brown*, 2002 SCC 32, declaring that *McClure* applications should be rare and the test applied stringently).

<sup>118</sup> Creswell, *supra* note 109 at para 60.

(g) *Statutory Confidentiality*

A provision for confidentiality in a statute cannot defeat an order for disclosure. In *Transamerica Life Insurance Company of Canada v. The Canada Life Assurance Company et al.*<sup>119</sup> Mr. Justice Sharpe of the Ontario Court (General Division) ruled that the confidentiality provisions of the *Office of the Superintendent of Financial Institutions Act*<sup>120</sup> must yield to a court order for disclosure. The Court chose to follow the four point test set out in *Slavutych v. Baker*,<sup>121</sup> following a claim by the Attorney General of Canada for public interest immunity under section 37 of the *Canada Evidence Act*. As a result, the Office of the Superintendent of Financial Institutions had to produce documents in response to a motion for production.

The conflict between a statutory duty of confidentiality and the common law duty to disclose is difficult for the government lawyer to disclose. In some cases, such as the *Privacy Act*, there is provision for an exception to the general rule for privacy where the public servant is served with a subpoena or warrant.<sup>122</sup> In other cases, the statute is silent and the issue of the release of solicitor-client privilege becomes a legal quandary for the lawyers to resolve.

*Part III — Conclusion*

While the Crown accepts, acknowledges and relies on the concept of solicitor-client privilege, there are differences between its application in criminal law and other areas. Where the courts perceive stakes to be higher, as seems to be the situation where there are allegations of abuse of process by Crown prosecutors, the courts will fashion a response and order disclosure.

This leaves open the question of whether the Crown can proceed with certainty in the ongoing debate between ensuring fairness in the administration of justice and recognizing the Crown as a client with all the privileges that attach to its relationships with its legal advisors. If the number of exceptions to the general rule is encouraged, as is the case when a fiduciary duty crystallizes or conduct of a prosecutor has been called into question, the rule on solicitor-client privilege may be diluted over time or raise further evidentiary concerns about the propriety of actions of government lawyers and others.

Public sector practitioners face many unique institutional challenges. In providing advice to the client, the Crown, they must adhere to statutes

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<sup>119</sup> *Supra* note 57.

<sup>120</sup> R.S.C. 1985, c.18 (3<sup>rd</sup> Supp.).

<sup>121</sup> 1976 1 S.C.R. 254.

<sup>122</sup> *Privacy Act*, *supra* note 39, S.8.

such as the *Access Act*, which have as their main purpose the disclosure of information to the public. When resisting disclosure of solicitor-client information they face a challenge in extrapolating the principles they should apply in the circumstances from the common law. In other cases, public sector counsel must often appear before parliamentary committees or release information to the Auditor General in the face of implied competing interests. These include accountability for the expenditure of public funds, which are often not at issue for the private practitioner. Lastly, in the criminal context, a Crown prosecutor, may face scrutiny of legal advice provided to the police based on the court's interpretation of the fairness of the process and the conduct of the Crown while acting in the public interest.

Given the complexity of the role of the Crown in society, and the evolving role of the public practitioner, it is doubtful this uncertainty can be resolved in the short term. However, it is important for the Crown to continue to protect solicitor-client privilege as there is a continued need to recognize the importance of it in conducting the business of government.