

The Application of Solicitor-Client Privilege to Government Records

by JAMES M. WHALEN*

Solicitor-client privilege is a principle which evolved from English common law during the Elizabethan period. It was formally recognized in the courts as early as 1577.¹ Canadian courts have defined solicitor-client privilege as follows:

Communications by a person to his solicitor or counsel in his professional capacity ... are privileged and ... neither the solicitor nor the client can be compelled to disclose the content of such communications where they were intended to be confidential.²

The privilege extends to communications "related to seeking, formulating, or giving legal advice and all papers and materials prepared by or obtained for the solicitor's brief for litigation, whether existing or contemplated."³ It also includes information obtained by the solicitor from third parties. The privilege covers: for example, written opinions of experts who have performed tests or offered professional opinions, statements taken from witnesses, and reports prepared by investigators when such material has been obtained by the solicitor for the purposes of preparing and processing his client's case.⁴

The impetus for formalization of the commitment to confidentiality came from the legal profession. Its members considered the principle of confidentiality to be essential for the preservation of a relationship of trust and confidence which is necessary if effective consultation and legal assistance are to be rendered to its clients. This principle is jealously guarded by the governing bodies of the legal profession; for example, it is clearly enunciated in the rules of conduct of the Law Society of Upper Canada:

* The introduction to this article is based on "Lawyer's Private Papers: Defining Acquisition Policy," by Doug Whyte, which was prepared for the Archives Course at the Public Archives of Canada, 1981. I would like to express my thanks to the following people for their assistance in preparing this paper: Murray Rankin, Graham Parker, and Robert Hayward.

1 R.A. Kastings, "Recent Developments in the Canadian Law of Solicitor-Client Privilege," *McGill Law Journal*, 24 (1978), p. 115.

2 *Ibid.*, p. 116.

3 B. McLachlin, "Confidential Communications and the Law of Privilege," *U.B.C. Law Review*, 11, no. 2 (1977), p. 275.

4 Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, (Toronto, 1980), vol. 2, pp. 339-40.

The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client, and he should not divulge any such information unless he is expressly or impliedly authorized by his client and required by law to do so.⁵

Other professions have introduced similar regulations into their own codes of ethics, but only the legal profession has had its rule formally recognized by the courts.⁶ Legitimate concern about the security of information passing between solicitor and client has evolved into a policy of confidentiality that closes information forever. So concerned were some members of the legal profession about the possible weakening of the privilege that they have even rejected exemption for the profession's own Standards Committee when conducting internal investigations into solicitor competence.⁷

The main purpose of the privilege is to protect the client by ensuring that confidential information communicated between the parties cannot be used as evidence in court proceedings. Accordingly, a client can waive the privilege should he wish to disclose the nature of the communication he has had with his lawyer. Government and the courts can also rescind the privilege, but this usually requires special legislation or a national emergency. Archives faithfully striving to fulfil their mandates are thus confronted with this inflexible principle established by the legal profession. At the present time, many archives have in their holdings legal records of government institutions or the private papers of lawyers and judges containing case files and other documents governed by solicitor-client privilege. Private manuscript material involving solicitor-client privilege raises unique problems which must be the topic of another paper. The discussion here will be confined to federal government records involving communications between government institutions and their solicitors in matters of government business.

The Minister of Justice is charged by statute with giving legal advice on the rights and liabilities of the Crown to the various departments of the Government of Canada, to Crown corporations, and to various related agencies. Such legal advice provided by the Department of Justice in response to requests is usually submitted in written form and includes advice about the interpretation of statutes for the administration of which the department in question is responsible as well as advice concerning legal relations between the department and members of the public, including everything from the preparation and interpretation of contracts and regulations to claims regarding accidents and other legal proceedings by or against the department involved.⁸

5 Catherine Shepard and Peter Oliver, "The Osgoode Society, the Archivist and the Writing of Legal History in Ontario," *Law Society of Upper Canada Gazette* 14, no. 2 (June 1980), p. 199.

6 It is important to note that, unlike the Canadian and British experience, the courts in the United States do not uphold the right of their government to withhold all information that is subject to the common law principle of solicitor-client privilege. A brief discussion of this point appears later in this paper.

7 W.H. Hurlburt, "Incompetent Service and Professional Responsibility," *Alberta Law Review*, 18, no. 2 (1980), p. 158.

8 Canada, Department of Justice, *Memorandum on the Legal Branch of the Department of Justice* (Ottawa, 1960), pp. 8-9.

It is as law officers of the Crown, therefore, that lawyers working in the Department of Justice, or as legal advisors to other government departments on behalf of the Department of Justice, perform these legal functions. The Department of Justice maintains that written legal opinions and communications conducted on behalf of the Crown by its lawyers, as solicitors, and government departments, as its clients, are covered by the principle of solicitor-client privilege. Accordingly, such professional legal advice is the property of the client and is permanently protected from disclosure unless the client consents to its release — unless, of course, the records are restricted for some other reason. The Department of Justice stated its position several years ago:

It should be clear to everyone that information provided to this Department by client departments and agencies seeking professional advice is covered by the solicitor-client privilege that attaches to communications between a solicitor and his client. Therefore, inquiries about any such information should as a matter of course, be referred to the client department or agency concerned. Similarly, legal opinions given by this Department are to be regarded as the property of the client departments and the question of whether or not they should be communicated to any person is a matter to be decided by the client departments.⁹

The principle of solicitor-client privilege, to which law officers of the Department of Justice have adhered over the years, has been responsible for the inaccessibility of many of valuable government records for research purposes. This can be illustrated by the example of the Central Registry series of the Department of Justice. The Central Registry series, often referred to as the "JR" or Justice Registry series, is the main registry series covering all matters dealt with by the Department in its relationship with other government departments, Crown agencies, and the general public. It is arranged numerically on an annual basis and runs to several hundred files per year. The first part of the series covers the period from 1859 to 1934; the second part commences in 1935 when the Department began to employ an entirely different numbering system. As for the disposition of the "JR" files, some files are missing and cannot be traced, others have been transferred to the Public Archives and are contained in Record Group 13, and, finally, a large number of files have been retained by the Department of Justice. Those Department of Justice files in the custody of the Public Archives of Canada are open to researchers without restriction, but the files still in the hands of the Department continue to be exempted from disclosure under solicitor-client confidentiality and are not ordinarily made available to the public for research purposes. The Department of Justice has also transferred to the Archives the indexes and registers which serve as a finding aid for the "JR" files for the period up to the year 1934, as well as the letterbooks which cover the same period.

The practical use of the Central Registry series of the Department of Justice can be better understood by the following example. A person doing research on the

⁹ Public Archives of Canada, Federal Archives Division (hereafter PAC-FED), Registry file 8134-JUS. R. Tassé, Deputy Minister of Justice, to Legal Personnel, Department of Justice, 21 March 1978.

subject of Indian lands at the Public Archives would naturally consult the records of the Department of Indian and Northern Affairs, and its many predecessors. The researcher might also, however, be interested in the Central Registry series of the Department of Justice because the Department of Indian and Northern Affairs is one of its important clients. Here he would expect to find legal opinions, memoranda citing precedents, correspondence and other documents relating to land claims, hunting and fishing rights, the status of non-treaty Indians, rights concerning lands within Indian reservations, and legislation affecting Indians. He would quickly discover, however, that only a portion of the files have been transferred to the Public Archives. Generally speaking, files containing information provided to the Department of Justice by departments seeking professional advice and legal opinions are still in the custody of the Department of Justice, and a researcher must apply there for permission to examine them. Many researchers, however, do not bother to apply for permission, but those who do are often not allowed to examine the desired file, or may only be permitted to see a portion of it. All is not in vain, however, for the letterbooks at the Public Archives contain letterpress copies of correspondence sent out by the Deputy Minister of Justice which relate directly to correspondence included in the "JR" files. They contain, for example, legal opinions, recommended courses of action, and evidence on which legal advice has been rendered by Department of Justice lawyers to its client departments. In many instances, correspondence in these letterbooks can be used without reference to the corresponding "JR" file. This being the case, it is not imperative for researchers to examine the appropriate "JR" file, even though it might be of some benefit to do so.¹⁰

The apparent argument for permanent retention of a large number of the "JR" files by the Department of Justice is that they are still needed for operational purposes. The Department claims, with some justification, that constant reference is made to previous opinions and other information in the files by the Department's legal officers searching for precedents in order to furnish legal opinions concerning current government legal problems.¹¹ Over the years the Public Archives has pointed out to the Department the importance of the "JR" files and has urged them to transfer the rest of them (at least up to the year 1934) to its custody. But to date all attempts in this regard have failed.¹²

It must be emphasized that some of the "JR" files at the Department of Justice date from the year 1859. Surely there comes a time when the records are no longer needed for operational purposes and the content of at least some of them is no longer of a confidential nature. For example, on a recent visit to the Department, I glanced at the jacket of a file still in its possession on the subject of fees to be paid to the Sheriff of the Court of Quarter Sessions in 1859. It is difficult to see how the Department could justify keeping this file for operational purposes. Furthermore, if a researcher wanted to see this file, it would have to be reviewed under the *Access to*

10 Theoretically, all records of the Department of Justice involving the principle of solicitor-client privilege are still in its custody because all material is reviewed by the Department, for the purpose of access screening, prior to its transfer to the Public Archives.

11 PAC-FED, file 8134-JUS, Public Records Division to Dr. W.I. Smith, 17 March 1976.

12 *Ibid.*, file 8130-JUS.

Information and Privacy Acts in order to determine if access should be permitted to it or not, since it is a legal opinion file which could fall under the solicitor-client privilege exemption of the acts.

The Department of Justice is not the only Department which creates files for which solicitor-client privilege exists. Virtually every department of the Government of Canada has its own legal advisor. Usually he is an employee of the Department of Justice. Consequently, legal files are found throughout the government. However, the Department of Justice, being the main body in the government responsible for rendering legal advice, tends to create more files of this nature than any other department.

In justifying solicitor-client privilege, the Department of Justice maintains that the function its legal advisors perform in relation to the Crown is similar to that which lawyers in private or commercial practice perform with respect to their clients. Like lawyers in private or commercial practice, lawyers working for the Department of Justice must conduct themselves in accordance with the traditions and principles of the legal profession.¹³ This view is shared by the legal profession in some other countries. In Great Britain, for example, Lord Denning, M.R., recently held as follows:

Many barristers and solicitors are employed as legal advisors, for the whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case, these legal advisors do legal work for their employer and for no one else.... They are regarded by the law in every respect in the same position as those who practise on their own account.... They must uphold the same standards of honour and of 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.*¹⁴

Likewise, in Australia, in the case of *Glenister v. Dillon* [1976] V.R. 550, it was held: "Vis-à-vis the Crown, the Crown Solicitor is in the same position as a barrister and solicitor in private practice is to his client."

It is difficult for archivists to understand or accept the legal role of law officers of the Crown in these terms. Acceptance of this point of view is to deny that the records created by law officers of the Crown in a matter of government business are public records. The Dominion Archivist, Dr. W.I. Smith, pointed out to a Parliamentary Committee in 1976 that "if a lawyer in the department has given advice to a government department, ... this is not privileged information in the sense of a private lawyer dealing with his client, I think there is a different type of relationship."¹⁵

13 Canada, Department of Justice, *Memorandum on the Legal Branch of the Department of Justice*, pp. 4, 13.

14 *Alfred Crompton Amusement Machines, Ltd. v. Commissioners of Customs and Excise (No. 2)* [1972] 2 All E.R. 353 at 376. This position was accepted by two other courts and not disputed in the House of Lords: [1973] 2 All E.R. 1169.

15 Canada, Parliament, *Minutes of Proceedings and Evidence of the Standing Joint Committee on Regulations and Other Statutory Instruments Respecting Bill C-225*, Dr. W.I. Smith, Dominion Archivist, witness, 16 March 1976.

As already seen, the principle of solicitor-client privilege, and its application to records of the Department of Justice, has been most effective in closing off a large portion of these records to historical research. It is possible that this situation will persist because government institutions may withhold "information that is subject to solicitor-client privilege" under both the *Access to Information Act* (section 23) and the *Privacy Act* (section 27). Since this is a "class exemption," the government may refuse access to records by merely demonstrating that they fall into a class of documents for which solicitor-client privilege exists. In such a case, no "injury test" may be applied. According to government policy, this regulation should be used when the disclosure of information could "circumvent the normal process of discovery in cases presently before the courts; or prejudice the government's legal position in present or future litigation or negotiation; or impede the ability of government institutions to communicate fully and frankly with their legal advisors."¹⁶ It is further pointed out that government institutions should consult their legal advisors prior to invoking solicitor-client privilege in order to determine if the information is in fact privileged, and also before disclosing such information in order to ascertain if the disclosure could injure the government's legal procedures or positions.¹⁷

In investigating complaints concerning refusal by government institutions to disclose records requested under the *Access to Information* and *Privacy Acts* on the grounds of solicitor-client privilege, it is hoped that the Information Commissioner's decision will not be based on a class exemption alone, but on the purposes for which the privilege being asserted exists. These are, according to Wigmore and the Supreme Court of Canada:

the communications must originate in a confidence that they will not be disclosed; this element of *confidence* must be essential to the full and satisfactory maintenance of the relation between the parties; the relation must be one which in the opinion of the community ought to be sedulously fostered; the injury that would inure to the relation by the disclosure of the communications must be *greater than* the benefit, thereby gained from the correct disposal of litigation.¹⁸

Based on these criteria, it might be possible for the Information Commissioner to recommend against claiming the exemption and an appeal to the Federal Court could result in the head of an institution being required to release the information.

Draft legislation or statutes in effect in Australia, the United States, and in the provinces of New Brunswick, Nova Scotia, and Ontario have similar features to the Canadian law regarding the non-disclosure of information that is subject to solicitor-client privilege. There are, however, variations and differing emphases in the exemption clauses. The Nova Scotia *Freedom of Information Act*, for example, exempts information which "would be likely to disclose legal opinions or advice provided to a department by a law officer of the Crown, or privileged communications

¹⁶ Canada, Treasury Board, *Administrative Policy Manual*, Chapter 410, "Interim Policy Guide: Access to Information and Privacy Acts," pp. 87-88.

¹⁷ *Ibid.*

¹⁸ *Slavutych v. Baker et al.* (1975) 55 D.L.R. (3d) 224 (Supreme Court of Canada) at p. 228 per Judge Spence.

between a barrister and client in a matter of department business; the New Brunswick *Right to Information Act* has a similar provision. Unlike Canada, the United States *Freedom of Information Act* does not contain a specific exemption to legal opinions or legal advice provided for the use of government. The United States courts have restricted the privilege mainly to court cases in which the government is a party. The courts have interpreted one of the exemptions to include some aspect of the work prepared by lawyers for the government. Specifically, documents prepared by a lawyer revealing the theory of his case or litigation strategy are not disclosed. The courts have made it clear, however, that the privilege is limited to documents prepared in anticipation of particular legislation or on the basis of some claim likely to lead to litigation.¹⁹ A similar provision concerning documents "privileged from production in pending or likely legal proceedings to which the government is or may be party" is included in both the Australian Freedom of Information Bill, 1978, and in the proposed legislation recommended for the Province of Ontario. The theory behind this clause is that premature disclosure of information would probably have an adverse effect on the preparation of the Crown's own case and assist the other side in preparing for adversarial proceedings. The Ontario recommendations state that material prepared for the purpose of preparing and presenting the government's case should not, however, remain exempt forever. For example, statements from witnesses, reports prepared by investigators, and other third party information could normally become available to the public upon completion of the litigation.²⁰

It is hoped that such information in federal government records would also be released as a matter of course. Yet it seems unlikely that many federal government records exempted because of solicitor-client privilege will be disclosed under the new access legislation. As already indicated, the principle of solicitor-client privilege is subject to a class exemption and the government may withhold access to the records by proving that they fall into a class of documents for which solicitor-client privilege exists. This restriction should be changed so that these records can be judged by an "injury test," as well as "a class test," by which it could be determined whether or not the information which is involved actually might be injurious to some government function. Furthermore, it is obvious that the sensitivity of exempted records declines with the passage of time. But at present, the exemption on records for which solicitor-client privilege exists may well be perpetual. This also should be changed and a time limit placed on the withholding of such information.

19 *Coastal State Gas Corp. v. Department of Energy* 617 F.2nd 854 at 864-866 (D.C. Circuit, 1980).

20 Ontario, *Public Government for Private People*, vol. 2, pp. 339-41.