

The Constitutionalization of Attorney-Client Privilege In Canada

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In this era of enhanced regulatory oversight, the protective shield of the attorney-client privilege has been shrinking.

U.S. and Canadian regulators alike have, for some time now, increasingly targeted privileged communications in discharging their regulatory mandates. As a result, organizations frequently face the dilemma of whether to assert privilege and fight the regulator, or waive privilege in exchange for leniency.

While both the U.S. and Canadian law of privilege derive from 16th century English law, recently Canadian law has evolved in important and distinctive ways.

Within the last decade the Supreme Court of Canada (SCC) has decided a slew of cases dealing with the attorney-client privilege – rendering more decisions in the last 10 years than in the previous 125. Like its U.S. counterpart, the SCC largely chooses its own docket, taking only cases that it wants to hear based on a national importance standard. This in itself signifies that the SCC has viewed privilege as a pivotal issue of this era.

More important than the sheer volume of cases decided is what the SCC actually said. To the surprise of many, the SCC proceeded to constitutionalize the privilege under Canada's *Charter of Rights and Freedoms*, initially as part of accused's procedural rights in criminal cases, and then as part of the broad constitutional protection of privacy. As a result, in Canada state action that unduly encroaches upon the privilege now risks being held unconstitutional.

Not surprisingly, the constitutionalization of the privilege has had profound implications for criminal and regulatory enforcement in Canada. In short order, the SCC struck down provisions of Canada's *Criminal Code* that established a procedure for executing search warrants against a lawyer's office, because they insufficiently protected the client's fundamental right to privacy over privileged communications. The Court has also stipulated that any exceptions to the privilege should be narrowly tailored and must meet an exacting absolute necessity test, even where fundamental competing interests are at stake such as public safety, national security or an accused's innocence. Further, the Court has warned that waiver of privilege will be found only where a client provides informed consent – thereby all but eliminating the possibility of loss of privilege through inadvertent disclosure.

It was not long before the constitutionalized privilege doctrine began to influence civil, corporate and commercial litigation, even where state action was otherwise absent. The SCC has decreed that even in civil cases the attorney-client privilege must be jealously guarded and its protection is a matter of "high importance". For example, in a recent civil case the Court went so far as to remove Canadian litigation counsel from acting, *as well as their instructing U.S. counsel*, because they came into possession of their adversary's privileged information through the execution of an *Anton Piller* order (a form of judicially-authorized private search warrant). The decision has only heightened need for lawyers to handle privileged information with sensitivity and care—or risk removal.

Lower courts have recently entered the fray by creatively adapting privilege rules to address modern corporate imperatives. For example, to deal with the new challenge of corporate auditors demanding access to privileged information, Canadian courts have avoided the predominant U.S. approach which holds that disclosure to auditors waives privilege, by creating a "limited waiver" rule that allows auditors access to privileged information without waiver as against other third parties. Similarly, courts have allowed parties to share privileged information in the context of mergers and acquisitions without waiver, reasoning that full disclosure in the context of commercial transactions promotes the public interest. In short, a robust "common interest transactional privilege" has been recognized.

In the years ahead U.S. and Canadian lawyers will no doubt continue to face many of the same regulatory challenges. In Canada, at least, the constitutionalized attorney-client privilege will continue to keep such communications beyond the reach of regulators.

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