Recent Developments in the Canadian Law of Solicitor-Client Privilege

A recent British Columbia case has again raised the issue of the solicitor-client privilege. In stating that a "warrant can be quashed when it seizes documents which are plainly subject to the solicitor-client privilege"[1] Bull J.A. has provided judicial approval for a natural extension of the boundaries of the privilege, thus continuing a tradition which began 200 years ago. As well, Mr Justice Bull has rendered obsolete a statement in the most recent text book on Canadian criminal evidence to the effect that the solicitor-client privilege "must be raised at trial; it cannot be dealt with, for example, on a motion to quash a search warrant".[2] To understand the importance of *Re B.X. Development Inc. and the Queen*[2a] in Canadian law and the degree to which it represents a logical extension of the law requires an appreciation of the history of the solicitor-client privilege.

The Anglo-Canadian approach to the solicitor-client privilege

The solicitor-client privilege is the oldest privilege governing confidential communications in English law. It was initially invoked during the reign of Elizabeth I, when the courts first began to compel reluctant witnesses to testify.[3] At that time the privilege was based on a philosophy of honour; the English solicitor was subject to an oath of professional secrecy and his honour precluded him from testifying. During the eighteenth century the privilege remained but its foundation in honour was gradually replaced by a philosophy which stressed the need to provide the client with freedom from apprehension when consulting his lawyer. The two philosophies, the honour-based and the client-based, were often in

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[1] *Re B.X. Development Inc. and the Queen* (1977) 31 C.C.C. (2d) 14, 17 (B.C.C.A.).

[2] McWilliams, *Canadian Criminal Evidence* (1974), 579.

[2a] *Supra*, note 1.

[3] Wigmore, *Evidence in Trials at Common Law* (1961), vol.8, McNaughton (ed.), 542, s.2290. According to Wigmore the privilege was judicially recognized as early as *Berd* v. *Lovelace* [1577] Cary 62, (1577) 21 E.R. 33 (Ch.) and *Dennis* v. *Codrington* [1580] Cary 100, (1580) 21 E.R. 53 (Ch.).

conflict and the inconsistencies produced contradictory jurisprudence, thus hindering the development of the rules.[4]

Over the years, the English and Canadian courts have worked out a definition of the solicitor-client privilege:

> 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.[5]

This definition is both accurate and stable. It has been many years since a Canadian court has attempted to add a new type of solicitor-client communication to the list. Four hundred years of jurisprudence have culminated in a workable and satisfactory definition of privilege.

However, in contrast to the privilege itself, the timing of the privilege has undergone a gradual but perceptible change. Originally, under the honour-based theory of privilege, solicitors were exempted from testifying about communications received from clients only from the beginning of the litigation in connection with which the communication was made and for its purposes only.[6] When the philosophical basis of the privilege changed, the temporal scope of the privilege began to expand. First, communications made during previous litigation were protected under the privilege.[7] Next, a communication was exempted from disclosure if it was made in contemplation of future litigation; this exemption was later extended to any controversy whether with litigious potential or not.[8] Next, communications made during any consultation for legal advice, irrespective of its litigious or controversial nature were considered privileged.[9] Finally, the solicitor-client privilege was applied to information obtained upon discovery.[10] Inevitably, the

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[4] Wigmore, *ibid.*, is relied upon for the early history of the privilege. He states at p.544: "Probably in no rule of evidence having so early an origin were so many points still unsettled until the middle of the 1800's."

[5] McWilliams, *supra*, note 2, 575-76.

[6] See Wigmore, *supra*, note 3, 544: "The point of honour would protect him thus far."

[7] *Du Barré* v. *Livette* [1791] Peake 108, 170 E.R. 96; cited in Wigmore, *supra*, note 3, 545, n.11.

[8] An earlier edition of Wigmore (3d ed. (1940), vol.8, s.2319) cites *Woolley* v. *North London Ry* (1869) L.R. 4 C.P. 602, as authority. This reference was deleted in the 1961 edition, *supra*, note 3, and the statement is made without judicial authority.

[9] *Minet* v. *Morgan* (1873) L.R. 8 Ch.361 (C.A.).

[10] *Wheeler* v. *Le Marchant* (1881) 17 Ch.D. 675. Although no distinction was originally made between discovery and trial in invoking the privilege, the later cases have differentiated between the two, and while some cases, notably

next step in the extension of the privilege would seem to be the protection from seizure of *all* documents of a privileged nature. However, until recently this seemed impermissible. The state of the law was summed up by Osler J. in *R.* v. *Colvin*:

> [T]he rule is a rule of evidence, not a rule of property ... . The only way, as I see it, in which the privilege can be asserted is by way of objection to the introduction of any allegedly privileged material in evidence at the appropriate time.[11]

This restrictive application of the privilege is accepted by McWilliams but not without criticism. "[O]bviously, this is a serious defect", he lamented.[12]

By 1975, the idea of the solicitor-client privilege taking precedence over legislative seizure provisions had begun to receive qualified judicial support. In *Re Director of Investigation and Research and Shell,*[13] the Director, under the *Combines Investigation Act,*[14] had the power to enter premises and to examine and copy documents when he believed that evidence could be found. Relying on a previously disregarded British Columbia Supreme Court decision,[15] a unanimous Federal Court of Appeal found that this statutory power did not override the common law solicitor-client privilege.

However, with regard to search warrants under the *Criminal Code,*[16] the general rule has been that since the solicitor-client privilege is a rule of evidence, rather than one of property, the confiscated property can be prevented from being entered into evidence, but cannot be exempted from seizure. In this light, *Re Borden and Elliot and the Queen,*[17] *Delzotto* v. *International Chemalloy Corporation,*[18] and *Re B.X. Development Inc. and the Queen*[19] have had a significant impact upon the solicitor-client privilege in Canada.

Strass v. *Goldsack* (1976) 58 D.L.R. (3d) 397 (Alta C.A.), have rejected the inclusion of pre-trial discovery information as confidential it is doubted whether this case can stand as strong authority. On this point see the comment by Lederman in (1976) 54 Can.Bar Rev. 422.

[11] [1970] 3 O.R. 612, 617 (H.C.).

[12] *Supra,* note 2.

[13] (1975) 22 C.C.C. (2d) 70 (F.C.C.A.).

[14] R.S.C. 1970, c.C-23, s.10(1).

[15] *Re Director of Investigation and Research and Canada Safeway* (1972) 26 D.L.R. (3d) 745, [1972] 3 W.W.R. 547.

[16] R.S.C. 1970, c.C-34.

[17] (1977) 30 C.C.C. (2d) 345 (Ont.C.A.), *sub nom Regina* v. *Froats* (1977) 36 C.R.N.S. 334.

[18] (1977) 36 C.R.N.S. 322 (Ont.H.C.).

[19] *Supra,* note 1.

Re Borden and Elliot and the Queen

In this case, one Mr Froats was charged with defrauding Life Investors Ltd of more than two million dollars. Based on information collected by the Ontario Securities Commission, a warrant was issued to search the offices of Froats' solicitors, the Toronto law firm of Borden and Elliot. Pleading the solicitor-client privilege, the firm applied to the court to have the search warrant quashed.

Southey J. of the Ontario High Court[20] granted the application and quashed the warrant. His extensive analysis of the privilege focused on two aspects: its scope and its timing. As to the scope of the privilege, the Crown contended that the documents were not privileged because they related to communications having for their purposes the facilitation of a crime. Southey J., citing *Re Director of Investigation and Research and Shell*,[21] recognized this as a legitimate restriction on any claim of solicitor-client privilege:

> Any conspiracy between a solicitor and some other person to commit a crime and any use of a solicitor-and-client relationship to cloak relevant evidence or facts from discovery falls completely outside the principle of confidentiality protected by the law.[22]

To Southey J., however, the onus was on the Crown to show reasonable grounds for believing that a fraud had been committed. If the Crown could not satisfy this burden, the Court was not entitled to disregard the attorney-client privilege. Vague and ambiguous statements were not sufficient; there had to be an intelligible and specific allegation of fraud.[23] Thus the communications were privileged. The Court recognized that if a non-privileged communication of the client could be separated from a privileged one, it would be admissible. Again, however, the Crown had failed to offer sufficient proof.

Southey J. next undertook a thorough examination of the conflict between the solicitor-client privilege and the search warrant. Proceeding with a textual analysis of section 443 of the *Criminal Code*, he found that a search warrant can only be issued when the justice has "reasonable grounds to believe [that the document sought] will afford *evidence*"[24] of the offence charged. Since any document protected by the solicitor-client privilege can *not* be admitted as evidence at trial, there can be no "reasonable grounds to believe" that

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[20] (1977) 30 C.C.C. (2d) 337.
[21] *Supra*, note 13, 80.
[22] *Supra*, note 20, 343, quoting Jackett C.J., *supra*, note 13, 80.
[23] *Supra*, note 20, 342.
[24] R.S.C. 1970, c.C-34, s.443 (emphasis added).

the documents would be evidence. The justice would thus have no grounds upon which to issue a warrant for such documents. Southey J. cited *Re Steel and the Queen*[25] to support this analysis and distinguished *R.* v. *Colvin*[26] by dismissing the comments of Osler J. as *obiter dicta.*

To strengthen his argument, Southey J. noted that the courts have held that search warrants issued under other federal statutes do *not* override the solicitor- client privilege. In *Re Director of Investigation and Research and Shell,*[27] Jackett C.J. stated that the solicitor-client privilege is not restricted to preventing evidence from being produced in court or upon discovery. In the opinion of the Chief Justice of the Federal Court, the privilege exists as part of a more fundamental principle — the privilege of such documents from disclosure. Thurlow J., concurring, added that the "confidential character of such communications ... comes into existence at the time when the communications are made [and] ... the right to have the communications protected must ... be capable of being asserted on any later occasion".[28] Southey J. approved of this reasoning and found it,

> ... even more compelling ... in the case of a search warrant .... If the privilege could not be invoked to prevent the seizure and examination of documents under a search warrant, the Crown would be free in any case to seize and examine the files and brief of defense counsel in a criminal prosecution .... Such a result, in my view, would be absurd.[29]

The Crown unsuccessfully appealed the decision. Arnup J.A., in rendering the judgment of the Court of Appeal,[30] upheld the lower court's decision to quash the search warrant. He found that the information put before the Justice to obtain such a warrant did not sufficiently link the alleged fraud with the documents of the solicitors.[31]

While Arnup J.A. disassociated himself from the views expressed by Southey J. he conceded, in *obiter,* that the question of which is to prevail, the privilege or the warrant, is a difficult one, particularly when authorities are "required to investigate matters of corporate fraud of ever-increasing complexity".[32] However, Arnup

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[25] (1974) 21 C.C.C. (2d) 278 (Ont.Prov.Ct).
[26] *Supra,* note 11.
[27] *Supra,* note 13.
[28] *Ibid.,* 80.
[29] *Supra,* note 20, 342.
[30] *Supra,* note 17.
[31] *Ibid.,* 347.
[32] *Ibid.,* 348.

J.A. felt that the *Criminal Code* should provide the justice with some direction concerning the limitations upon his power to grant a warrant, especially where the warrant conflicts with claims of solicitor-client privilege. Similarly, the solicitor whose privilege is violated should have a more effective remedy to prevent the search. It is not the court's task to settle the dispute but rather the legislator's, since " the Court's function must be limited to dealing with each individual case as it arises".[33]

Delzotto v. International Chemalloy Corporation

Two weeks after the Ontario High Court decision in *Re Borden and Elliot* but before the Court of Appeal had dealt with the case, a similar dispute arose in the Ontario Supreme Court. The applicant, Clarkson Co. Ltd, having been appointed inspector of the International Chemalloy Corporation (I.C.C.) under section 186 of *The Business Corporations Act*[34] of Ontario, demanded that I.C.C. produce "all accounts and records" for examination. I.C.C. protested that some of the material was exempt from production under the solicitor-client privilege.

Following *Re Director of Investigation and Research and Shell,* Osler J. acknowledged the existence of a solicitor-client privilege overriding the search provisions of *The Business Corporations Act.* However, without even referring to Southey J.'s decision in *Re Borden and Elliott* which dismissed *R.* v. *Colvin,* Osler J. made a surprising admission:

> In *Regina* v. *Colvin; Ex parte Merrick* ... I expressed the opinion in an obiter dictum that the rule of privilege under discussion was a rule of evidence to be applied only at the time material was tendered or demanded for evidentiary use. I *am persuaded ... that such a view was erroneous.*[35]

By disapproving of his previous statement which had prevented any extension of the privilege, Osler J. left the law in an interesting state. He confirmed the subordination of legislative search provisions to the common law solicitor-client privilege but by its strict *ratio,* his judgment did not extend to a search warrant issued under the *Criminal Code.* A search warrant issued under the *Criminal Code* still awaited judicial consideration.

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[33] *Ibid.*
[34] R.S.O. 1970, c.53.
[35] *Supra,* note 18, 325 (emphasis added).

Re B.X. Development Incorporated and the Queen

Re Borden and Elliot was still before the courts in Ontario when the same question regarding the solicitor-client privilege arose in British Columbia. In *Re B.X. Development Inc.*,[36] an R.C.M.P. officer swore an information before a justice of the peace to obtain search warrants against several defendants. The information stated, *inter alia*, that certain documents situated in the office of a firm of solicitors would provide evidence of conspiracy, stock "churning" and theft. The information contained a summarized list of the evidence and, on the strength of this, warrants were issued by the justice pursuant to the *Criminal Code*.[37] A large quantity of documents was seized and removed from the solicitors' offices. The appellants attacked the validity of the warrants, alleging, *inter alia*, that some of these documents were protected from seizure.

In the Supreme Court of British Columbia, Verchere J. refused to quash the search warrants, relying on the language of Osler J. in *R.* v. *Colvin*, and claiming that the privilege could be asserted only at trial rather than at the time of seizure.[37a] In the British Columbia Court of Appeal, Bull J.A. acknowledged the increasing tendency of the courts to extend the temporal boundaries of the privilege to include the seizure of documents. After calling attention to the two combines investigation cases,[38] and to *Re Borden and Elliot* (at the time unreported), Bull J.A. continued:

> I think it is fair to say that those cases ... did not accept Osler, J.'s view ... . They are, in my view, authority for the proposition that ... a warrant can be quashed when it seizes documents which are plainly subject to the solicitor-client privilege.[39]

A clearer rejection of the *R.* v. *Colvin* doctrine could not be sought.

However, on a closer examination of the facts, Mr Justice Bull concluded that the documents in question were not within the scope of the solicitor-client privilege.[40] His comments are thus confined to *obiter* and their weight as authority is subsequently decreased. Nevertheless, in making that statement Mr Justice Bull became the first Canadian court of appeal judge to recognize that the solicitor-client privilege overrides the search warrant provisions of the *Criminal Code*.

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[36] *Supra*, note 1.
[37] R.S.C. 1970, c.C-34, s.443.
[37a] Unreported but see, *supra*, note 1, 17.
[38] *Re Director of Investigation and Shell, supra*, note 13 and *Re Director of Investigation and Research and Canada Safeway, supra*, note 15.
[39] *Supra*, note 1, 17.
[40] *Ibid.*

Thus, Mr Justice Bull's statement represents a decisive and inevitable step. As this comment has shown, the solicitor-client privilege has been gradually extended since its inception in the sixteenth century. However, until recently, the privilege did not extend to the quashing of a search warrant. This "defect"[41] in the state of the law has been gradually remedied. First, search warrant provisions under other statutes were seen as subordinate to the privilege. Next, a lower court acknowledged the defect, and a judge disapproved of a statement of his own which was formerly relied upon as authority. Finally, a court of appeal recognized the need to extend the privilege beyond the mere bounds of trial and discovery. After *Re B.X. Development Inc.*, one may expect a search warrant to be quashed where its proposed use conflicts with the solicitor-client privilege.

Robert A. Kasting*

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[41] McWilliams, *supra*, note 2.

* LL.B. (McGill); articling student with Clark, Wilson & Co., Vancouver, British Columbia (1977-78).