A question of privilege

Solicitor-client privilege is considered hallowed ground in Canada. So why the concern that it’s being eroded?

By Leo Singer

In 2001, shortly after the spectacular collapse of the U.S. energy giant Enron, a lawyer walked into an airport bar and struck up a conversation with the woman sitting next to him. He asked what she did for a living, and she shyly confided that she was a sex toy saleswoman. ‘And what do you do?’ she asked.

He told her that he worked at Enron. She replied, “Aren’t you ashamed when you tell people that?”

After Enron’s meteoric descent from a blue-chip success story to a penny stock, an army of lawyers found themselves unemployed and indelibly tainted by the scandal, amid accusations that in-house counsel stood idly by whilst company executives perpetrated fraud on
It was suggested that after their employer refused to heed their advice, Enron counsel should have notified the authorities. Of course, it’s not as easy as that. This goes against the oldest and most treasured pillars of the common-law legal system: the ethical duty of confidentiality, and the solicitor-client privilege.

In Canada, privilege is hallowed ground, a centuries-old cornerstone of legal process, and most lawyers share a strong conviction that a fair and effective justice system depends on it. We all have right to counsel — and we also have a right to avoid self-incrimination. In order for both of those rights to be exercised freely and effectively, we need to be assured that any legal communication with our lawyer is secret — secrecy that is protected by law, a guarantee that those conversations, letters and e-mails will not end up as evidence. It gives us the confidence that we can engage in full and frank disclosure with our lawyers, in order for them to represent us effectively.

The Canadian Bar Association has reiterated the value of privilege in various submissions to the Supreme Court of Canada over the last decade or so. One submission called it “the sacred foundation upon which the law, fundamental liberties and business in the modern world have flourished for centuries.” The court uses simpler language, but the argument remains the same. In R v. Brown, the court described privilege as “a principle of fundamental justice.” In R v. McClure, privilege “must be as close to absolute as possible to ensure public confidence and retain relevance.” One year later, in Lavallee, Rackel and Heintz v. Canada (A.G.), privilege had become “a civil right of supreme importance in Canadian law.”

In the beginning, privilege was a simple rule of evidence. Now, it has been elevated by the Supreme Court into a constitutional right that overrides most other legal or ethical considerations. “It’s often described as ‘sacred’ or ‘inviolable.’ These are very common phrases,” says Canadian legal theorist Adam Dodek. “For the legal profession, the solicitor-client privilege is sort of like the mother’s milk of the independence of the Bar and the legal profession.”

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a massive scale, devised billion-dollar accounting loopholes, and enriched themselves with insider trading. Louisiana Congressman Billy Tauzin, an inquisitor with a flare for publicity, gave them a solid dressing down at the ensuing Congressional hearings:

“Some of the people . . . who could have prevented the crash are sitting before us today. They could have acted before matters got out of hand....The attorneys are the people others rely on to make sure matters are OK, are legal, are not going to put a company at undue risk. They’re the adult supervision.”

of evidence. Now, it has been elevated by the Supreme Court into a constitutional right that overrides most other legal or ethical considerations. “It’s often described as ‘sacred’ or ‘inviolate.’ These are very common phrases,” says Canadian legal theorist Adam Dodek. “For the legal profession, the solicitor-client privilege is sort of like the mother’s milk of the independence of the Bar and the legal profession.” And yet the legal establishment is concerned that privilege is being eroded. Why?

Despite the Supreme Court’s talk of absolutism, there have always been exceptions and exclusions. The limits of some exclusions, however, are unclear, leaving room to
trespass, or any other action that would be grounds for a civil case?

On this point, case law in Canada becomes a little murky. Take the 2007 case of *Dublin v. Montessori Jewish Day School of Toronto*, in which the plaintiff, Dr. Dublin, the former principal of the school, sued the school for unfair dismissal, alleging that the action was undertaken with malice, dishonesty and subterfuge. This accusation relied in part on an e-mail, inadvertently disclosed by the defendants during the litigation. The e-mail was sent from the chairperson of the board of directors of the school to her legal counsel, in the months before Dr. Dublin was dismissed. The contents of the e-mail were not revealed, but the presiding judge, Justice Perell, read it, and concluded that it could be interpreted that the board of directors intended to inflict “emotional harm” on Dr. Dublin and his family.

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expand the doctrine in ways that might ultimately defeat part of its purpose. For example, consider the ‘Crime-Fraud’ exclusion whereby privilege does not apply if a lawyer helps his client commit a crime. Communications made in furtherance of a future crime or a fraud are not considered to be part of a professional legal relationship; thus they are not covered by privilege, whether a lawyer is helping the client to commit accounting fraud, or evade capture by the authorities, or hide the shotgun that he used to murder his spouse. The exclusion applies if the client is knowingly pursuing a criminal purpose, (but it does not apply if the client simply wants to inquire as to the legal wrongs or rights of a particular course of action.)

The exclusion covers criminal and fraudulent schemes. But what if a client is intentionally planning to infringe the rights of another, or to knowingly engage in negligence, libel, trespass, or any other action that would be grounds for a civil case?

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Une question de privilège

Au Canada le secret professionnel est sacro-saint. Mais faut-il s’inquiéter de son érosion?


Après la chute vertigineuse d’Enron, une armée d’avocats se sont retrouvés sans emploi et éclaboussés par le scandale alors qu’on accusait les conseillers juridiques de l’entreprise de s’être croisés les bras pendant que les dirigeants d’Enron perpétraient une des fraudes les plus massives de l’histoire. Un représentant de la Louisiane au Congrès américain, Billy Tauzin, les a vertement réprimandés, affirmant qu’ils auraient dû agir, qu’ils étaient responsables de s’assurer que les affaires étaient conduites dans la légalité.

À la suite de l’expérience d’Enron, l’American Bar Association a modifié ses règles de déontologie pour permettre aux avocats de dénoncer leur client si celui-ci a l’intention de commettre un crime ou une fraude dont il est raisonnablement certain qu’elle causera un préjudice financier grave à des tiers. Ils ne sont pas obligés de dénoncer ce client, mais ils le peuvent. Ils doivent exercer leur jugement. Cette nouvelle règle pourrait toucher les conseillers juridiques d’entreprises canadiennes quand un conflit juridique les amène aux États-Unis, mais elle ne s’applique pas quand ils exercent le droit au Canada.

Au Canada, le secret professionnel est sacro-saint. Il a même été élevé au rang de droit quasi constitutionnel par la Cour suprême. Le citoyen canadien a le droit aux services d’un avocat et le droit d’éviter l’auto-incrimination. Pour que ces deux droits existent, il doit pouvoir s’assurer que toute communication juridique avec son avocat demeure secrète, que ses conversations, lettres et courriels ne deviendront pas des preuves à un éventuel procès. Cette protection permet des discussions franches entre client et avocat et assure une représentation plus efficace.

L’Association du Barreau canadien a réaffirmé la valeur du secret professionnel dans plusieurs interventions devant la Cour suprême du Canada au cours de la dernière décennie, estimant qu’il constitue une pierre d’assise du droit, des libertés fondamentales et du commerce dans le monde contemporain. Dans l’affaire Brown, en 2002, la Cour suprême a affirmé que le secret professionnel relève « des grands principes de justice fondamentale ». Dans McLure, elle précise que « le secret professionnel de l’avocat doit être aussi absolu que possible pour assurer la confiance du public et demeurer pertinent ».

Il ne s’agit pas cependant d’un droit absolu. Il y a toujours eu des exceptions. Il existe par exemple l’exception en cas de crime ou de fraude. Le secret ne s’applique pas si un avocat aide son client à commettre un crime. L’avocat n’a pas le droit d’aider son client à commettre une fraude comptable, à s’évader des autorités ou à cacher l’arme à feu utilisée lors d’un crime. Mais qu’arrive-t-il si l’avocat sait que son client entendent violer les droits d’un tiers, sans s’y engager lui-même? Ici, les eaux sont plus troubles. Quoi qu’il en soit, Malcolm Mercer, responsable des affaires juridiques du cabinet McCarthy Tétrault et vice-président du Comité de déontologie et de responsabilité professionnelle de l’ABC, s’inquiète de la portée croissante de l’exception en cas de crime ou de fraude.

« Dès qu’on allègue que l’acte futur était illégal, le secret professionnel disparait, dit-il. Et vous courez à une dérive dangereuse qui peut mener au point où il n’y a plus de secret professionnel pour les actes futurs. Et cela va à l’encontre de l’une des raisons pour lesquelles vous avez le secret professionnel, c’est-à-dire de pouvoir obtenir des conseils sur le caractère licite ou illicite d’actes futurs. » La Cour suprême n’a pas encore clarifié ce concept, mais la portée d’une autre exception est actuellement examinée à la loupe.

Si un client entre dans votre cabinet et annonce son intention d’assassiner son conjoint, et que vous croyez ses intentions sincères, vous avez le droit d’en informer les autorités pour prévenir le meurtre. On appelle cela « l’exception relative à la sécurité publique ». La prévention de blessures graves ou de la mort a préséance sur toute autre considération. Cette exception est consignée au code de déontologie professionnelle.

Cette exception est actuellement définie de façon restrictive. Il faut percevoir « une menace claire, grave et imméniante » à la vie ou à la santé d’une personne pour violer le secret professionnel. L’intention n’est pas d’incriminer le client, mais de protéger la santé ou la vie de tiers. Mais qu’arrive-t-il si un client a l’intention d’infiler un grave préjudice financier à un tiers? En vertu des règles de déontologie canadiennes, le conseiller juridique d’entreprise n’a pas le droit d’informer une personne à l’extérieur de l’entreprise — même s’il est témoin d’activités illégales ou frauduleuses.

La nouvelle règle américaine ne s’applique pas ici. Pour le théoricien juridique canadien Adam Dodek, cela est regrettable. Il trouve même que la règle américaine ne va pas assez loin. En 2010, il a proposé que le secret professionnel se limite aux personnes physiques et ne s’applique pas aux personnes morales. La réaction a été froide au Canada. Pour M’ Dodek, le secret professionnel est un droit de la personne, lié à la dignité, la vie privée et l’autonomie. Une entreprise, affirme-t-il, n’a pas besoin de tels droits et ne les mérite pas. Il croit que la notion de secret professionnel devrait être clarifiée et codifiée. La plupart des avocats et avocates d’ici semblent, pour le moment, hésitants.

Inflicting emotional harm is not a crime; but it can be construed as an “unlawful act.” Thus Justice Perell argued that privilege should not apply when the client may have been in furtherance of ‘tortuous conduct:’ and the e-mail was admitted into evidence. He himself admitted his conclusions were contentious.

Malcolm Mercer, general counsel to McCarthy Tétrault and vice-chair of the CBA ethics and professional responsibility committee, is concerned about increasing the scope of the crime-fraud exclusion. “As soon as one alleges that the future act was legally improper — legally unlawful — then privilege disappears,” he says. “And you end up with a very strong slippery slope to there being no privilege with respect to future acts. Which defeats one of the reasons you have privilege, which is so that people can go and get advice about the propriety or impropriety of their future acts.”
The Supreme Court has not yet had the opportunity to draw the line on “legally improper” or “tortuous” actions. Meanwhile, the scope of another exception is under scrutiny.

If a client walks into your office and announces his intention to murder his spouse, and if you believe his intentions are sincere, you are entitled to inform the authorities in order to prevent the killing. This is the ‘public safety exception,’ one of the major exceptions to privilege, based on the (commonsensical) view that the prevention of serious injury or death takes precedence over all other considerations.

The exception is mirrored in the code of professional ethics. So not only can the conversation be used as evidence in a future court case, lawyers are released from confidentiality, and thus are allowed to blow the whistle to prevent the murder from taking place.

At present, the exception is narrowly defined. There needs to be a “clear, serious, and imminent threat” to a person’s life or health, and only that information necessary to prevent the injury should be revealed: the point is to prevent the injury, not incriminate your client. But what if a client is threatening to inflict a serious financial harm — should counsel remain mute? Was Billy Tauzin right when he said the Enron lawyers “could have acted before matters got out of hand?”

In Canada, according to the rules of professional ethics, counsel is not allowed to inform anyone outside of the company — even if they are witness to illegal or fraudulent activities. Paul Paton, chair of the CBA ethics committee and a law professor at the University of the Pacific McGeorge School of Law, believes that is an untenable situation. “Certainly one of the lessons of Enron and

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Alice Woolley
University of Calgary

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other corporate scandals of that period was that significant harm could be caused not in the traditional concept alone of physical or bodily harm,” he says, “but also in terms of harms to the public in other ways.”

The Enron experience led directly to a new approach for the American Bar Association. Rule 1.6 of their Rules of Professional Conduct allows lawyers to blow the whistle in order to prevent their client from committing a crime or fraud “that is reasonably certain to result in substantial injury to the financial interests or property of another.” Paton argues “the rule will offer better corporate compliance, as well as ensuring that the balance is better struck between responsibilities to advocate zealously on behalf of clients, and the interests of the public.” (He emphasizes that Rule 1.6 is not a mandatory provision; it’s a ‘may’, not a ‘must.’ Individual lawyers can exercise judgment on whether or not to disclose the information.)

The new rule may affect Canadian corporate lawyers who end up doing battle in U.S. courts — so far, Canada remains insulated from the change. Mercer wants to keep it that way. He points out that “future economic harm is inherent in much of what lawyers properly do and privilege properly protects in a market economy. Ordinary lawful competition commonly results in future financial harm.”

But Dodek emphasizes that the present situation puts the lawyer in a very difficult position. “At the least, this is an anomaly,” he says. “At worst, it makes the lawyer complicit in the financial wrongdoing.”

Redefining privilege?

Dodek thinks the U.S. has not gone far enough. In 2010, he published a paper entitled Reconceiving Solicitor-Client Privilege. The reaction from the Canadian legal community was chilly (“the sound of one hand clapping,” as Dodek describes it). In the paper, he suggested that privilege should be granted to individuals, but not to corporations.

It sounds radical, but the European Union has already taken a step in this direction. The Akzo Nobel decision in the Court of Justice of the European Union lifts the veil of privilege entirely from communications between corporations and their in-house counsel. The court concluded that in-house counsel are essentially employees of the company, and can no longer be seen as professional and independent legal advisers. As the decision notes, “an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.”

Merce would be happy to see more clarity for the role of in-house counsel, and the ethical conundrums they face, but believes the European decision is fundamentally wrong. “Firstly, I think in-house counsel do act independently and give independent legal advice.” And secondly, he believes they should be required to be independent. “Allowing them just to be servants of their master is to diminish the rule of law.”

Dodek’s arguments are based on the reframing of privilege as a basic human right — a right grounded in the notion of an individual’s rights to dignity, privacy and autonomy. The implications of this are profound. A corporation, he argues, does not need or deserve these rights. There is no reason to grant a constitutional protection for a corporation’s legal activity, when it so often conflicts with other interests and legal priorities.

Alice Woolley, a law professor at University of Calgary, and the author of Understanding Lawyers’ Ethics in Canada, agrees that corporations and organizations have no inherent “dignity” to protect, but Dodek’s argument “ignores the fact that our legal system as a whole permits corporations to act as persons in relation to the law — that is, entitled to pursue a conception of the good within what the law permits, requires or provides.” And, as such, corporations should also be entitled to confidentiality. “I personally have some reservations about the substance of our corporate law,” she says, “and the legal privileges we give to corporations, but were those to be remedied it would be through the system of corporate law, not through cutting away the doctrine of privilege.”

A rights-based notion of solicitor-client privilege would also imply that governments and other public organizations are excluded. Arguably, this is an appealing prospect looking through the prism of democracy and transparency. In the U.S., state governments routinely waive privilege and make their legal advice freely accessible. In Canada, the situation is somewhat different.

For example, in 2009 and 2010, Parliament repeatedly asked the Canadian government to release documents concerning the transfer of Afghan detainees from the Canadian Forces to the Afghan authorities. Despite invoking parliamentary privilege, the government refused to release the uncensored documents. Eventually all parties, except the NDP, settled on a compromise; but they all agreed that any documents or communications protected under solicitor-client privilege should remain secret. In this case, parliamentary privilege came off second-best, and accountability suffered as a result.

And yet Paton believes the decision to waive privilege is essentially a political one. He says every lawyer is aware that a client can at some future date waive it, but “forcing that waiver is another prospect entirely, and would require much more fulsome debate.”

Canadian lawyers may find themselves struggling to adapt to the shifting sands of privilege, and the related rules of professional ethics. In foreign jurisdictions they need to appreciate the extent to which privilege is more strongly protected in Canada than elsewhere.

There will be no easy resolution to these questions of how far the exceptions and exclusion should reach. The Supreme Court may steadfastly protect the traditional concept of privilege in Canada. But the current form that it takes, and its long history, does not provide a legal or ethical justification for keeping it that way, and increasingly Canada may find itself out of step with the rest of the world.

Adam Dodek believes that privilege ought to be clarified and codified, a route already taken by other countries, including New Zealand and Australia: “I would like to see a serious law reform initiative,” he says, “in the way that different provincial and federal law commission overhauled the [Canada] Evidence Act in the 1970s.”

But most lawyers remain reluctant to accept the possibility of reform. As Malcolm Mercer says, “I think the Supreme Court of Canada has taken the very strongly principled view that the privilege is fundamental — and that it’s a slippery slope when you start having these sorts of debates.”

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