YOUR PRACTICE

Although Canadian courts have traditionally been strong defenders of privilege, ongoing vigilance is required to ensure against subtle but persistent threats. The Law Society and the Federation of Law Societies of Canada both have long histories of intervening in cases to protect solicitor-client privilege.

Most recently, the Federation of Law Societies, with the support of the Law Society, successfully intervened at the Supreme Court of Canada in the case of the Privacy Commissioner of Canada v. Blood Tribe Department of Health.

The case involved a dismissed employee of the Blood Tribe Department of Health who requested access to her personal employee file as she suspected her employer had collected inaccurate information and used it to discredit her.

When the request was denied, the employee filed a complaint with the Privacy Commissioner. All records were provided to the Commissioner except for those over which the employer claimed solicitor-client privilege. The Commissioner then ordered production of the privileged documents pursuant to s. 12 of the Personal Information Protection and Electronic Documents Act ("PIPEDA"). Section 12 grants the Commissioner power to compel the production of any records “in the same manner and to the same extent as a superior court of record.”

The employer applied for judicial review of the Commissioner’s decision and the case made its way to the Supreme Court where the Federation requested intervener status.

The Privacy Commissioner asserted that the ‘court-like’ powers granted to it by PIPEDA gave it the right to review documents over which solicitor-client privilege is claimed to determine whether the claim is justified.

The Federation disagreed, seeing the Commissioner’s request as an encroachment on privilege and arguing that the case must be considered from the client’s perspective. This position is summarized in the Federation’s factum:

The Federation challenges the assertion of the Appellant that adjudication of a claim of privilege is not an infringement upon the privilege. Client confidence is the underlying basis of the privilege, and infringement must be measured through the eyes of the client. To a client, compelled disclosure to an adjudicator, even if not disclosed further, still constitutes an infringement on privacy.

A key point in the case was differentiating the Commissioner’s function from that of a court. The Federation argued that although

Recent Federation interventions on solicitor-client privilege at the Supreme Court


The work of the Federation in defence of solicitor-client privilege is possible thanks to the generous donation of time and resources by members of the legal profession from across Canada.
One of the Law Society’s most important responsibilities is to respond to complaints about lawyers and paralegals. Our complaints process is principled and balanced to ensure fairness to all parties – while at all times protecting the public interest.

The Law Society reviews and considers every complaint received; however, we do not investigate every complaint. Very few complaints lead to public disciplinary proceedings. The majority of complaints are closed or resolved at intake or by our Complaints Resolution department.

Early resolution of complaints
Many of the complaints the Law Society receives involve communication issues between lawyers and their clients or another lawyer. These cases can often be resolved at an early stage.

In appropriate cases, the Law Society will contact the lawyer on receipt of a complaint to explore the opportunity for early resolution. Early resolution can assist in repairing relationships with the client and is generally less expensive and time-consuming than the more formal responses required in an investigation.

Duty to respond
Regardless of the severity of the complaint or the apparent merits of the complaint, lawyers have a duty to respond promptly to all communications from the Law Society. Prompt response may also help with an early resolution. The obligation to respond to our investigators includes providing information that is confidential and/or covered by solicitor-client privilege. Disclosure to the Law Society does not constitute a waiver of solicitor-client privilege. Subject to the exceptions in the Law Society Act, we will not disclose information gathered in an investigation.

More information available on the Law Society website
Most lawyers are very concerned when they learn they are the subject of a complaint. The Law Society has recently prepared a detailed information sheet about our complaints process to help lawyers understand the process and their responsibilities. The information sheet is available at www.lsuc.on.ca under the Lawyer Regulation tab.