Update on Solicitor Client Privilege: Issues for In-House Lawyers

Jennifer A. Smout, Solicitor[i]
The Corporation of the City of London
September, 2011

Notes and update to the paper and presentation by Jennifer A. Smout to the International Municipal Lawyers Association October 2010

Further Reading:

Adam Dodek, *Solicitor-Client Privilege in Canada Challenges for the 21st Century,* Discussion Paper for the Canadian Bar Association February 2011 http://www.cba.org/CBA/activities/pdf/Dodek-English.pdf

- paper discusses the need to review the state of solicitor-client privilege in Canada in light of development internationally and at home. "In an increasingly globalized legal world, the time is ripe to identify issues for the Privilege in Canada and begin to start to think about how they should be addressed."
- Canadian jurisprudence on solicitor-client privilege does not provide an adequate framework for addressing the multitude of issues that currently exist and that are likely to arise regarding the Privilege.
- The Canadian approach to the Privilege is in many ways at odds with how the Privilege is treated in other common law jurisdictions.
- See Part V pages 30-36 for a discussion on solicitor-client privilege in specific contexts including the corporate context, the public sector and administrative law and open government.

Canadian Bar Association *Frequently Asked Questions About Solicitor-Client Privilege and Confidentiality,* Canadian Bar Association November 2010 http://www.cba.org/cba/activities/code/privilege.aspx

- published by the Ethic and Professional Responsibility Committee of the CBA as part of a series of guidelines to supplement the CBA Code of Professional Conduct.

The Honourable Michel Bastarache, *Privilege and the Public Lawyer,* Heenan Blaikie Privilege and the In-House Lawyer" Ethical and Practical Dimensions, May 4, 2011
http://hbprofessionaldevelopment.com/cpdtoronto/materials/2011-05-04_CPD_Material.pdf

- briefing note that contains an examination of the practical issues that government lawyers face including the obligation to maintain solicitor-client privilege and the ethical implications of these issues in the public in-house counsel context.

Paul Paton, *The Future of Privilege the Debate Heats up Again,* In-House Counsel Summer 2011.

- review of the Akzo Nobel case and a brief mention of the Professor Dodek's writings on privilege in Canada and his conclusion that the privilege should not apply to when the client is an organization.

Leo Singer, *A Question of Privilege* Canadian The National June 2011, Canadian Bar Association

- contains a short discussion of Professor Dodek's writings on a rights based notion of solicitor client-privilege and whether the privilege should apply to corporations.

Akzo Nobel Chemicals, Ltd. and Akcros Chemicals Ltd. v. Commission

- decision of the European Court of Justice, September 14, 2010.
- Competition investigation by the European Commission's competition regulators of Akzo Nobel.
- issue was whether documents seized by investigators which included email communications between a corporate executive and the corporate in-house counsel were privileged.
- the court rejected the claim for privilege and emphasized the in-house lawyer's "economic dependence" and "close ties" with the employer which results in a lack of independence:

  "*an in-house counsel does not have the benefit of professional independence comparable to that of outside counsel*,"
  "*(the in-house lawyer) occupies a the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence*."

- the applicable law set the independence of the lawyer one of two conditions for a legal opinion to be kept confidential with the second being that the communication with the lawyer must be related to the exercise of the client's right of defence.
- scope of the case is limited to investigations by the European Commission under European competition law but some suggest that it poses problems for European corporate counsel generally because it suggests that in-house lawyers are not independent under EU professional standards.

[i] I express my opinions in this paper and not those of The Corporation of the City of London