PRIVILEGE — SOLICITOR AND CLIENT — WHETHER APPLICABLE TO POWERS OF SEARCH AND SEIZURE

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Can solicitor-client privilege be effectively invoked against persons acting under a statutory power of search and seizure to deny them access to documents subject to the privilege? Surprisingly, it is not possible to give a definitive answer to this question. Legal principle and public policy appear to compel different conclusions, and judicial pronouncements have succeeded only in casting more doubt on the matter. The most recent case to consider the controversy is also the least helpful; in *Re Borden & Elliott and The Queen,*[1] the Ontario Court of Appeal was given an opportunity to resolve the issue. Instead, Arnup, J.A., delivering the oral judgment of the court, said:

> We do not think it appropriate for us to do so. The need for considering possible legislation is abundantly apparent from cases such as the present, but the Court's function must be limited to dealing with each individual case as it arises.[2]

With the greatest respect, it is suggested that the Ontario Court of Appeal erred in choosing not to seize the opportunity to clarify an issue of such obvious importance to the legal profession and to those that it represents.

The Crown's argument is that since solicitor-client privilege is simply a rule of evidence, it can be claimed only in judicial proceedings and so is not available against powers of search and seizure. Certainly, there is a duty upon a lawyer not to disclose under any circumstances confidential communications made to him by a client. However, this is an ethical duty that goes far beyond the scope of the rule of solicitor-client privilege. This distinction has been recognized by the Canadian Bar Association's *Code of Professional Conduct* which, in the commentary following the basic rule against the disclosure of confidential information, states:

> This ethical rule must be distinguished from the evidentiary rule of solicitor and client privilege with respect to oral or documentary communications passing between the client and his lawyer. The ethical rule is wider and applies without regard to the nature or source

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1. *Re Borden & Elliott and The Queen* (1975), 30 C.C.C. (2d) 337 (Ont. C.A.)(hereinafter referred to as *Re Borden & Elliott*).
2. *Id.*, at 348.

of the information or the fact that others may share the knowledge.[3]

The legal privilege has been applied only in judicial proceedings, and not at the investigative stage. Sopinka and Lederman describe the use of privilege as follows:

> The protection of privilege may be sought by a litigant or a witness either at trial, or at an earlier interlocutory state [sic]. A witness may decline to reveal certain information or to produce a document that is requested at trial. Similarly, at an examination for discovery, a party may refuse to answer questions on the ground of privilege, and, for the same reason, decline to disclose pertinent documents.[4]

The limited scope of solicitor-client privilege is made clear in *Parry-Jones* v. *Law Society and Others.*[5] Here, the Law Society, acting under rules made pursuant to statutory authority[6], required a solicitor to produce various books of account for their inspection; the solicitor argued unsuccessfully that the documents in question were privileged from production. To quote Lord Denning, M.R.:

> We all know that, as between solicitor and client, there are two privileges. The first is the privilege relating to legal proceedings, commonly called legal professional privilege. A solicitor must not produce or disclose in any legal proceedings any of the communications between himself and his client without the client's consent. The second privilege arises out of the confidence subsisting between solicitor and client similar to the confidence which applies between doctor and patient, banker and customer, accountant and client, and the like. The law implies a term into the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause . . . [7]

Diplock, L.J. agreed:

> . . . [P]rivilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, materials which would otherwise be admissible in evidence. What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client. Such a duty exists not only between solicitor and client, but, for example, between banker and customer, doctor and patient and accountant and client. Such a duty of confidence is subject to, and overridden by, the duty of any party to that contract to comply with the law of the land. If it is the duty of such a party to a contract, whether at common law or under statute, to disclose in defined circumstances confidential information, then he must do so . . . [8]

3. Canadian Bar Association, *Code of Professional Conduct* (1974) 12.
4. John Sopinka & Sidney N. Lederman, *The Law of Evidence in Civil Cases* (1974) 156. For a similar British statement, see The Council of The Law Society, *A Guide to the Professional Conduct of Solicitors* (1974) 44: "It has been established as a principle of public policy that confidential communications made to a solicitor by his client and received by the client from the solicitor for the purpose of legal advice and assistance are the subject of privilege and will be protected from disclosure *in the course of legal proceedings either during discovery or in court.*" (emphasis added).
5. *Parry-Jones* v. *Law Society & Others*, [1969] 1 Ch. 1 (C.A.).
6. The Solicitors Act, 1957, 5 & 6 Eliz. 2, c. 27, s. 29 (U.K.).
7. *Supra* n. 5, at 6-7.
8. *Supra* n. 5, at 9.

Osler, J. similarly concluded in *R.* v. *Colvin, Ex parte Merrick et al.*[9] that solicitor-client privilege is available only in judicial proceedings. This case dealt with an application for an order to quash a search warrant issued under what is now . 443(1) of the *Criminal Code*[10] that was directed against the premises of a firm of solicitors. While the application was granted on other grounds, Osler, J. added that the fact that the warrant purported to authorize the seizure of documents that might be subject to a solicitor-client privilege was not a valid ground for quashing it:

> ... [I]t must be remembered that the 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.
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> ... [T]he privilege itself must, as I have stated, be confined to the evidentiary use of the material claimed to be protected.[11]

Although Osler, J. cited no authority in support, it is submitted that his statement is fully in accordance with legal principle: solicitor-client privilege cannot be invoked to prevent access to otherwise-privileged documents to persons acting under powers of search and seizure.

However, it is important to consider the consequences of such a conclusion. If solicitor-client privilege is available only in judicial proceedings as is suggested, then, of course, the privilege cannot be asserted at the investigative stage. As a result, investigators acting under a power of search and seizure can take away and examine any documents that might ultimately be subject to the privilege. Having done so, they can successfully tender these documents as evidence at trial. The Supreme Court has stated that a court will not question how that evidence was obtained: *R.* v. *Wray.*[12] An attempt to assert at trial the privilege to which the documents were supposedly entitled will fail. There can be no solicitor-client privilege without an element of confidentiality between the two parties to the relationship. There is no confidentiality (and, thus, no privilege at trial) if the communications were intercepted by a party outside of the relationship. This was the result in *R.* v. *Kanester*[13] where the Supreme Court, adopting the dissenting judgment of Maclean, J.A. in the British Columbia Court of Appeal, decided that no privilege applied to a communication from a client to his lawyer that had come into the possession of a reporter. Similarly, documents lose their confidentiality (as well as their

9. *R.* v. *Colvin, Ex parte Merrick et al.*, [1970] 3 O.R. 612 (H.C.)(hereinafter referred to as *Ex p. Merrick*).
10. *Criminal Code*, R.S.C. 1970, c. C-34, s. 443(1).
11. *Supra* n. 9, at 617.
12. *R.* v. *Wray*, [1971] S.C.R. 272.
13. *R.* v. *Kanester* (1966), 57 W.W.R. 576 (S.C.C.), aff'ing (1966), 55 W.W.R. 705 (B.C.C.A.) *per* Maclean, J.A.

privilege at trial) if investigators have gained possession of and examined them. This was the result in *Rolka* v. *M.N.R.*[14], where a lawyer voluntarily handed over to investigators acting under a power of search and seizure under the *Income Tax Act*[15] documents that would likely have been eligible for solicitor-client privilege; the documents were held to be admissible at trial. Thus, a decision that solicitor-client privilege is not available at the investigative stage means that it will also not be available in any subsequent judicial proceedings for those documents seized. By permitting investigators access to documents, legal principle nullifies solicitor-client privilege at trial, a result that few will argue is in accordance with public policy.[16]

As a result, the more recent cases have refused to follow *Ex p. Merrick* and have instead held that solicitor-client privilege *is* effective against a power of search and seizure. In *Re Director of Investigation and Research and Canada Safeway Ltd.*[17], agents acting under the authority of a certificate issued by a member of the Restrictive Trade Practices Commission attempted to examine and seize or copy all of the records of Canada Safeway Ltd., including any communications with its solicitors.[18] Having been refused access, the agents sought an order under s. 10(5) of the *Combines Investigation Act* directing a police officer to secure for the agents admission to the premises in question. Munroe, J. denied the application, saying:

> . . . [S]. 10 of the *Combines Investigation Act* does not either in express terms or by reasonable implication exclude the doctrine of solicitor-client privilege. That doctrine is not to be infringed, much less destroyed, unless the clear wording and intent of s. 10 requires such construction.[19]

However, this statement makes the assumption that the statute

14. *Rolka* v. *M.N.R.*, [1963] Ex. C.R. 138.
15. *Income Tax Act*, R.S.C. 1952, c. 148, s. 126; now *Income Tax Act*, R.S.C. 1952, c. 148 (as am. S.C. 1970-71-72, c. 63), s. 231.
16. This result has been avoided statutorily for the "protection of privacy" part of the *Criminal Code*, s. 178. 16(5): "Any information obtained by an interception that, but for the interception would have been privileged, remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.". The *Income Tax Act*, R.S.C. 1952, c. 148 (as am. S.C. 1970-71-72, c. 63) also contains protection for solicitor-client privilege. Section 232 provides that, where an officer is about to examine or seize a document and the lawyer claims that a named client has a solicitor-client privilege in respect of the document, it is to be placed in a sealed package for examination by a judge; those documents which the judge decides are in fact subject to the privilege are returned to the lawyer; those which are not so subject are delivered to the investigating officer (the scheme is not without its critics though; see, for example, Martin H. Freedman, "Solicitor-Client Privilege under the Income Tax Act" (1969), 12 Can. Bar J. 93). Compare these attempts to protect the privilege with a Manitoba provision in The Corporations Act, S.M. 1976, c. 40 (C255), s. 229, which provides in the context of what is almost certainly a non-judicial proceeding; "Nothing in this Part shall be construed to affect the privilege that exists in respect of a solicitor and his client." If it is true that solicitor-client privilege has no application in non-judicial proceedings, then this section is apparently without effect. It purports to leave unaffected a privilege that would not be available in the proceeding anyway.
17. *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 (B.C.S.C.)(hereinafter referred to as the *Canada Safeway* case).
18. The power to do so is found in the *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 10(1).
19. *Supra* n. 17, at 748.

is purporting to oust a privilege that would ordinarily be applicable; this simply begs the very question of whether solicitor-client privilege is applicable in a non-judicial context. More importantly, Munroe, J. said:

> ... [S]ince illegally obtained evidence is not for that reason inadmissible, the respondent is right in claiming the privilege at this time ...[20]

This reveals the true reason for the decision: a desire to protect the documents at the investigative stage so that the privilege will remain intact at any subsequent trial. The respondent, Canada Safeway Ltd., also argued, *inter alia*, that, since the statute authorized the seizure of 'evidence' only, this should be interpreted to refer to 'evidence that would be admissible in a judicial proceeding', so as to prevent government agents from engaging in fishing expeditions through solicitors' records. it is not clear whether this argument was accepted by Munroe, J. and so forms a part of his reasons for judgment. However, it is submitted that the suggested interpretation of the word 'evidence' in the statute is unwarranted. The language of the *Combines Investigation Act* clearly indicates that Parliament intended to confer a very broad power of investigation; it is difficult to believe that Parliament also intended to limit the effectiveness of this power by forcing it to comply with court rules of evidence. As well, the concept of admissibility is hardly inherent in the word 'evidence'. Evidence is simply a form of proof that tends to establish or disprove a proposition of fact; that some such evidence may not be acceptable to a court of law does not alter its ability to do so. This is especially true in the case of solicitor-client privilege, where the exclusion from judicial proceedings is for the purpose of protecting the particular relationship, and not to exclude information that is presumed to be unreliable (such as hearsay).[21]

The next case to consider the question, *Re Director of Investigation and Research and Shell Canada Ltd.*,[22] arose out of similar facts. Application was made under s. 10(5) of the *Combines Investigation Act* for police assistance in the execution of a search of all documents in the possession of Shell Canada Ltd., including some that would ordinarily be privileged. The application was refused by Hughes, J., who believed himself to be bound by the decision in the *Canada Safeway* case.[23] As a result, an application was made to the Federal Court

20. *Ibid.*
21. Besides, not all statutes restrict what may be seized to 'evidence'. e.g. The Retail Sales Tax Act, R.S.M. 1970, c. R150, S. 17(4) simply allows for the seizure under a search warrant of any "... tangible personal property, books of account, records and documents."
22. *Re Director of Investigation and Research and Shell Canada Ltd.*, [1975] F.C. 184 (C.A.)(hereinafter referred to as the *Shell Canada* case).
23. Sub nom. *R.* v. *Shell Canada Ltd.* (1974), 17 C.P.R. (2d) 287 (Ont. H.C.).

of Appeal to set aside the decision of Hughes, J.[24] After quoting virtually *in toto* the relevant portions of the *Ex p. Merrick* and *Canada Safeway* cases, this application was also refused. Jackett, C.J. delivered the main judgment, Thurlow, J. agreed with him and added his own comments, and Ryan, Pratte, and Urie, J.J. concurred with both. Once again, there are statements indicative of a belief that solicitor-client privilege would ordinarily be applicable to such an investigative proceeding. Thurlow, J. says that

> . . . [I]t was not intended that subsection 10(1) should be so broadly interpreted as to override and nullify so fundamental a right as that to the confidentiality of communications between a client and his solicitor of the kind which are recognized as being privileged.[25]

He then goes on to make the following comment:

> ... [T]he confidential character of such communications ... comes into existence at the time when the communications are made. As the right to protection for the confidence, commonly referred to as legal professional privilege, is not dependent on there being litigation in progress or even in contemplation at the time the communications take place, it seems to me that the right to have the communications protected must also arise at that time and be capable of being asserted on any later occasion when the confidence may be in jeopardy at the hands of anyone purporting to exercise the authority of the law.[26]

While such a rule might well result in a greater efficacy for the privilege, it is submitted that the assertion of Thurlow, J. that privilege attaches upon the communication coming into existence is entirely without authority. Privilege does not attach to a communication because of the confidential circumstances under which it was made; it attaches because of the use which is intended to be made of the communication; the tendering of it in a judicial proceeding.

On the other hand, Jackett, C.J. acknowledged that the privilege has hitherto been available only in judicial proceedings. He simply argued that the privilege ought to be extended:

> In my view, ... this privilege is a mere manifestation of a fundamental principle upon which our judicial system is based, which principle would be breached just as clearly, and with equal injury to our judicial system, by the compulsory form of pre-prosecution discovery envisaged by the *Combines Investigation Act* as it would be by evidence in Court or by judicial discovery.[27]

He also pointed out that the particular statute calls for the publication of summaries of evidence put before the Commis-

24. The application was made pursuant to the *Federal Court Act*, R.S.C. 1970, 2nd Supp., c. 10, s. 28.
25. *Supra* n. 22, at 195.
26. *Ibid.*
27. *Id.*, at 194.

sion, thus further negating the purpose of the privilege.

In *Re Presswood et al. and International Chemalloy Corp.*,[28] Osler, J. was given the opportunity to reconsider the comments he made in obiter dictum in *Ex p. Merrick*. Here, an inspector appointed pursuant to the Ontario Business Corporations Act[29] purported to exercise the authority given to him by s. 186(3) to demand the production of all of the accounts and records of a corporation. The company and its solicitor claimed solicitor-client privilege in respect of certain communications between them, and this claim was upheld by Osler, J. In doing so, Osler, J. repudiated the decision that he had reached in *Ex p. Merrick* and stated that he has been persuaded by the *Shell Canada* case that his earlier view was incorrect.

In *Re Borden & Elliott*, agents sought to examine certain entries in the trust account of a firm of solicitors, as well as all related correspondence and documents, in the course of an investigation of an alleged violation of the *Criminal Code* by a client of the firm. The solicitors applied for an order quashing the search warrant, on the basis of the documents' solicitor-client privilege. To facilitate this, the Crown arranged for the documents in dispute to be placed in a sealed envelope and undertook to return the envelope unopened should the order be granted. Nonetheless, the Crown opposed the application and argued that solicitor-client privilege can be invoked only to prevent the admission of the documents at trial. Southey, J. of the Ontario High Court rejected this contention and quashed the search warrant but, in doing so, the learned judge broke no new ground, relying on the *Shell Canada* decision and on the usual policy considerations:

> 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 a defence counsel in a criminal prosecution. It would be small comfort indeed to the accused and his counsel that his only protection in such a case was to prevent the introduction into evidence of the documents that had been seized and examined.[30]

Southey, J. also dealt with two other arguments put forward by the parties. The applicants suggested that, since only documents that will afford evidence may be seized, documents eligible for the solicitor-client privilege may not be taken, as they would not be admissible at trial as evidence; *Re Steel and The Queen*[31] was cited in support of this argument. However, as

28. *Re Presswood et al. and International Chemalloy Corp.* (1975), 11 O.R. (2d) 164 (H.C.).
29. The Business Corporations Act, R.S.O. 1970, c. 53, s. 186.
30. *Supra* n. 1, at 343.
31. *Re Steel and The Queen* (1974) 6 O.R. (2d) 644 (Prov. Ct. Crim. Div.).

in the *Canada Safeway* case, the argument is apparently not a ground of decision; Southey, J. simply recites it without comment. The Crown argued that, in any event, the documents were not privileged because they related to communications having the facilitation of crime as their purpose; it was held that the information upon which the search warrant was issued was too vague and ambiguous to justify such a conclusion.

The Crown appealed from the order of Southey, J., setting the stage for what could have been an authoritative pronouncement on the confused area of solicitor-client privilege and powers of search and seizure. Instead, the Ontario Court of Appeal delivered a judgment that can only be described as a major disappointment. Arnup, J.A., who spoke for the Court, certainly understood the great importance of the question raised by the case and the doubt surrounding it. Nonetheless, he took the view that the matter is one to be decided by the legislature, and not by the judiciary; in particular, he referred to the scheme in operation under the *Income Tax Act*. The most that can be said for the judgment is that it does recognize that there may be policy reasons that would justify giving effect to a search warrant:

> We are told that the authorities are now required to investigate matters of corporate fraud of ever-increasing complexity. In some of these cases records of lawyers who are in no way privy to the fraud may disclose links in the chain of events, which links are essential in the presentation of the facts of the entire transaction. The authorities therefore believe they need to see and, if necessary, take possession of the relevant records of the lawyer.[32]

However, Arnup, J.A. does not indicate how sympathetic he might be to such arguments. He rests his judgment on a very traditional ground for quashing search warrants:

> . . . [W]e are all of the opinion that the information on the basis of which the warrant was issued does not set out a factual link between the alleged fraud and the trust account of the solicitors.[33]

This apparently means that the information did not contain sufficient details to demonstrate that proof of the crime alleged would be found in the solicitors' records. Arnup, J.A. provides no reasons at all for reaching this conclusion, though. He does say that "[w]e are not to be taken as having passed any opinion whatever upon the *other* views expressed by Southey, J. . . . "[34] [emphasis added], suggesting that he is affirming one of the views of Southey, J. without commenting upon the others.

32. *Supra* n. 1, at 348.
33. *Supra* n. 1, at 347.
34. *Supra* n. 1, at 347.

However, one would search in vain for such a ground of decision in the judgment of Southey, J. The result is a decision that is of little assistance, even on its own particular facts.

Faced with these inconclusive cases, what should the prudent solicitor do if he is asked to comply with a power of search and seizure and turn over documents containing confidential communications to or from his client? If the lawyer grants access to the documents, he effectively destroys any privilege that his client might have claimed at trial. If the court was then to decide that the privilege applies only in judicial proceedings, the lawyer would be vindicated; he would have given up the documents when he had no lawful excuse for refusing to do so. However, the trend of the authorities clearly favours the proposition that solicitor-client privilege can be asserted against a power of search and seizure. Thus, the lawyer might well be liable to his client and perhaps to professional discipline because he would have given up his client's privilege when he could have and should have refused access. As a result, it is suggested that, in the absence of a more authoritative judicial statement, the prudent solicitor would be wiser to refuse access to documents that might be privileged, even though he might conceivably find himself in breach of the law. At least his client's interests will have been adequately protected.

The lawyer acting on behalf of a statutorily-empowered investigative or prosecutorial unit is also in an unenviable position. If he insists on full compliance with a search warrant or other power of search and seizure and the court decides that solicitor-client privilege was available, he might be subject to professional discipline for attempting to induce a breach of privilege. The comments of Spence, J. of the Supreme Court in *Bell* v. *Smith* may be analogous:

> Because the solicitor owes to his . . . client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived . . . . Also, because it is improper to induce a breach of duty, I have serious doubts about the propriety of putting to a solicitor questions that involve the disclosure of confidential information without first bringing in evidence of a proper waiver.[35]

Obviously, the cases in this area leave the law in a most unsatisfactory state. However, it is suggested that the principles that should govern the question are clear: Solicitor-client privilege is a rule of evidence, available only in judicial proceedings, and so cannot be invoked against powers of search and seizure. Nonetheless, because of an antipathy to such a

35. *Bell* v. *Smith*, [1968] S.C.R. 664, at 671.

result, the Canadian courts have refused to apply the legal principle, relying isntead on vague generalities about the importance of solicitor-client privilege; the refusal of the Ontario Court of Appeal in *Re Borden & Elliott* to even discuss the matter would seem to be even less constructive. Certainly, the privilege is important; what the cases have failed to consider though is that, as the law now stands, the privilege is simply not applicable. If the courts wish to alter this, they must come to grips with the decisions in *Parry-Jones* v. *Law Society* and *Ex p. Merrick*; consideration should also be given to the effect of the Supreme Court judgments in *R.* v. *Kanester* and *R.* v. *Wray*. Unless and until that occurs, it is submitted that the Canadian courts must refuse to give effect to solicitor-client privilege in the face of the exercise of statutory powers of search and seizure.