The Constitutionalization of Solicitor-Client Privilege

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I. INTRODUCTION

Solicitor-client privilege has been part of the common law for over 400 years, yet it has undergone its most profound transformation in just the last two Supreme Court terms. In 2001, the Court declared the privilege to be a principle of fundamental justice protected under section 7 of the Canadian Charter of Rights and Freedoms,¹ and in 2002 added that a client also has a reasonable expectation of privacy in communications with a lawyer that is guaranteed under section 8.²

This paper traces the constitutionalization of the privilege, from its origins in the law of evidence, to its status as a substantive principle and a fundamental civil and legal right, to its most recent elevation to a constitutionally guaranteed right under the Charter. We also discuss some of the important implications flowing from constitutionalization. These include the potentially significant impact of the privilege’s new status in the civil context, and whether the civil bar should now be poised for a “full answer and defence” exception to the privilege similar to that already recognized in the criminal context. We also consider whether other legal privileges have similarly been constitutionalized,

focussing on the established litigation privilege protecting a lawyer’s brief from disclosure in the litigation process. Finally, we assess the impact of constitutionalization on the law of waiver of privilege.

II. HOW SOLICITOR-CLIENT PRIVILEGE WAS CONSTITUTIONALIZED

1. Solosky and Descôtéaux: Laying the Groundwork

The modern Canadian law of solicitor-client privilege dates from the Supreme Court’s 1979 ruling in Solosky v. The Queen, which considered whether the privilege prevented prison authorities from opening an inmate’s correspondence with his lawyer. Justice Dickson (as he then was) for the Court stated that solicitor-client privilege “has long been recognized as fundamental to the due administration of justice.” He traced the history of the privilege to the 16th century with its origins in the “oath and honour” of a lawyer to closely guard the secrets of his client, but noted that it originally operated only as an exemption from testimonial compulsion. In other words, solicitor-client privilege was at first just a rule of evidence, preventing a lawyer from testifying about communications with his or her client.

Justice Dickson noted how the privilege was gradually extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally to any consultation for legal advice, whether litigious or not. He identified its rationale as being the complexity of the law and the need to permit a client to speak candidly with his or her lawyer to defend their interests, without fear that the privileged communication would later be disclosed without the client’s consent.

Justice Dickson observed that recent case law had “taken the traditional doctrine of privilege and placed it on a new plane.” It was “no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court-room.” Recent decisions had “shifted the time at which the privilege can be asserted.” But Dickson J. nevertheless stopped short of recognizing the privilege as a rule of property, ruling that the inmate could not invoke the evidentiary privilege because the prison authorities did not purport to introduce his correspondence with his

4 Id., at 833 (emphasis added). Justice Estey (at 842-43) concurred with Dickson J. but added brief concurring comments.
5 Id., at 834.
6 Id., at 834-35.
solicitor into evidence in any legal proceeding. Thus, while the rule of evidence was now applied more flexibly, it still required some nexus with a legal proceeding.

While the inmate could not invoke the evidentiary privilege, Dickson J. concluded that a broader, substantive principle of privilege could be invoked. He described this principle as based in the nature of solicitor-client privilege as a “fundamental civil and legal right” and on the “right to privacy in solicitor-client correspondence,” saying this:

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one’s legal advisor is a fundamental civil and legal right, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law. [...] The right to privacy in solicitor-client correspondence has not been expressly taken away by the language of the Regulations and the Directive.

Justice Dickson stated that while the public interest in maintaining the safety and security of the institution trumped the inmate’s solicitor-client privilege, the interference with that privilege was to be “no greater than is essential to the maintenance of security and the rehabilitation of the inmate.” He therefore set out guidelines for how the prison authorities could examine the inmate’s mail in order to intrude on the privilege as little as possible, noting that, where examined mail contained nothing in breach of security, the prison authorities would be “under a duty at law to maintain the confidentiality of the communication.”

Less than three years after Solosky, the Court in Descôteaux v. Mierzwinski confirmed that solicitor-client privilege had indeed evolved from an evidentiary to a substantive rule. At issue was whether the police could be lawfully authorized by a search warrant to search a legal aid bureau and seize the form...
filled out by a legal aid applicant, for the purpose of showing that the applicant had lied about his financial means.\textsuperscript{12}

Justice Lamer (as he then was) for the Court affirmed Solosky’s statement that the right to communicate in confidence with one’s legal advisor was a “fundamental civil and legal right,” which he characterized as “a personal and extra-patrimonial right which follows a citizen throughout his dealings with others.”\textsuperscript{13} He noted that in Solosky, Dickson J. had applied a standard that had nothing to do with the privilege as a rule of evidence, since there was never any question of testimony before a court or tribunal. Instead he had applied a substantive rule without actually formulating it. Justice Lamer noted that the substantive rule was based on the “fundamental right of a lawyer’s client to have his communications kept confidential.” He formulated the substantive rule that Dickson J. had applied as follows:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client’s consent.

2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person’s right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under para. 2 and enabling legislation referred to in para. 3 must be interpreted restrictively.\textsuperscript{14}

Justice Lamer’s formulation remains the basic common law framework for assessing claims of solicitor-client privilege. In the next 20 years, there were nevertheless several other Supreme Court rulings touching upon the privilege, establishing that it may be set aside to determine the validity of a trust

\textsuperscript{12} In the result, the Court found that these communications were not privileged as they fell within a recognized “criminal communications” exception to the privilege that excludes communications that are criminal in themselves or made with a view to obtaining legal advice to facilitate the commission of a crime (\textit{id.}, at 892-94).

\textsuperscript{13} \textit{id.}, at 871. Justice Lamer stated that the substantive rule of privilege was based on “the need to protect the fundamental right of a lawyer’s client to have his communications kept confidential” (at 888).

\textsuperscript{14} \textit{id.}, at 875.
agreement after the death of the settlor;¹⁵ drawing the distinction between solicitor-client privilege as a class privilege and case-by-case privileges;¹⁶ and recognizing that the privilege could be overridden to permit an accused to make full answer and defence to a criminal charge.¹⁷ Important as these rulings are, they ultimately remain rooted in a common law paradigm, falling short of a constitutional basis rooted in the Charter. This is essentially where the law remained until 1999.

Some inkling of the future could nevertheless have been gleaned as early as 1992 from the first edition of Sopinka, Lederman and Bryant, The Law of Evidence in Canada, where solicitor-client privilege was identified as being implicit in the right of an accused to instruct counsel under section 10(b) of the Charter and part of the principles of fundamental justice under section 7. As these authors presciently observed:

It has been held that if the solicitor-client privilege is to be abrogated by legislation, it must be done in clear and unambiguous terms. However, s. 10(b) of the Charter may put the protection of the solicitor-client privilege which is implicit in any right of an accused to instruct counsel completely beyond the reach of Parliament or the provincial legislatures. The privilege may also be part of the guarantee against deprivation of liberty or security of the person except in accordance with fundamental justice as set out in s. 7 of the Charter and thus may be immune from any legislation that would have the effect of undermining it.¹⁸


In 1999 the Court took an important step towards constitutionalizing solicitor-client privilege in *Smith v. Jones*.¹⁹ At issue was whether the privilege

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¹⁸ John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada (Butterworths, 1st ed. 1992), at 672 (footnotes omitted).

could be set aside in the interests of public safety, in this case, to protect the public from a sex offender who had pleaded guilty to aggravated sexual assault on a prostitute and had confided to a psychiatrist his plans to kill many more. The accused’s counsel had referred him to the psychiatrist for a forensic assessment, anticipating that it might assist in defending the charge or in sentencing submissions. The accused’s counsel had advised him that the consultation with the psychiatrist would be solicitor-client privileged. During the consultation the accused confessed to the crime and explained that he had intended to kill the prostitute, and that he planned to seek out similar victims in the future. The psychiatrist informed the accused’s counsel of his opinion that the accused was a dangerous individual who would, more likely than not, commit similar offences unless he received treatment. After the accused pleaded guilty, the psychiatrist called the accused’s counsel to inquire about the proceedings, and was advised that the sentencing judge would not be told about his concerns. Shortly thereafter, the psychiatrist commenced an action seeking permission to be released from his duties of confidentiality.20

Justice Cory for the majority ruled that solicitor-client privilege could be set aside in the interests of public safety, but only where the facts raised real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm. He cautioned that disclosure should be limited to information necessary to protect public safety.21

Justice Cory variously described the privilege as “fundamentally important to our judicial system,”22 “both integral and extremely important to the functioning of the legal system,”23 a “principle of fundamental importance to the administration of justice,”24 with “deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to

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20 Id., at paras. 36-43.
21 Id., at para. 85. Justice Cory viewed Solosky as implicitly based on the public safety exception to the privilege (paras. 56-57), even though this ground was not expressly articulated by Dickson J. Importantly, Cory J. identified other recognized exceptions as including the right to make full answer and defence to a criminal charge (innocence of the accused) (pars. 52-54) and communications that are criminal in themselves (para. 55). He also stated that the class of possible exceptions to the privilege is not closed and “may be expanded in the future, for example, to protect national security” (para. 53).
22 Id., at para. 45.
23 Id., at para. 46.
24 Id., at para. 50.
criminal charges.”

He also stated that “the right to privacy in a solicitor-client relationship is so fundamentally important that only a compelling public interest may justify setting aside solicitor-client privilege.”

Despite these hortatory comments flirting with a constitutional basis for the privilege in both the principles of fundamental justice and the right to privacy, Cory J. refrained from expressly articulating such a basis.

Justice Major, in dissent, was less coy. He expressly recognized the constitutional character of the privilege in the criminal context, saying this:

In the criminal context principles embodied in the rules of privilege have gained constitutional protection by virtue of the enshrinement of the right to full answer and defence, the right to counsel, the right against self-incrimination and the presumption of innocence in ss. 7, 10(b), 11(c) and 11(d) of the Canadian Charter of Rights and Freedoms.

Importantly, Major J. added that the constitutional principles underlying the privilege would also inform its extension to other circumstances, such as to communications with third party experts retained by counsel in preparing a defence, and underscored the importance of categorical protection of the privilege. He stated as follows:

Each of these rights support the extension of privilege to communications between clients and experts retained by their counsel for the purpose of preparing a defence. Together, they demonstrate the reasons for denying any use of solicitor-client communications against an accused in any legal proceeding. To deny the protection of solicitor-client privilege to the confidential communications of the accused to those intimately involved in the preparation of his defence would frustrate these rights. For these reasons, the communications between an accused and his counsel, made in furtherance of his or her defence, are accorded the highest level of protection and confidentiality.

In short, for Major J. the Constitution itself provided a principled basis for extending the privilege and determining its scope.

While Major J. accepted that a public safety exception should exist, endorsing Cory J.’s “clear, serious and imminent” danger test for disclosure, he concluded that any disclosure should exclude self-incriminating evidence. He stated that failing to shield self-incriminating communications could have the chilling effect of discouraging counsel from referring clients in need of treatment to professionals for help. He said that “society will suffer by

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25 Id., at para. 46.
26 Id., at para. 74.
27 Id., at para. 7. Chief Justice Lamer and Binnie J. concurred with Major J.
28 Id., at para. 8.
imposing a disincentive for patients and criminally accused persons to speak frankly with counsel and medical experts retained on their behalf.”

In order to address this concern, Major J. suggested that the scope of disclosure should be as narrow as possible and guided by an accused’s right to consult counsel without fear of assisting in his own prosecution. As he put it:

… solicitor-client privilege is a fundamental common law right of Canadians. That right must be interpreted in light of the Charter which provides for the right of an accused to counsel. Anytime such a fundamental right is eroded the principal [sic] of minimal impairment must be observed.

Accordingly, Major J. concluded that the psychiatrist should not be allowed to disclose any communications from the accused relating to the circumstances of the offence, but would be allowed to give his opinion and diagnosis of the danger posed by the accused.

3. Campbell and Shirose: Garden-variety Common Law Waiver

Less than a month after rendering Smith v. Jones, the Court released R. v. Campbell and R. v. Shirose,

[dealing with the law of waiver of privilege. The case involved a “reverse-sting” operation by the RCMP in which they posed as drug dealers and sold a large quantity of hashish to senior personnel in a drug trafficking organization. The purchasers were duly convicted of various drug offences, but before sentencing sought to stay the proceedings on the basis of police illegality, arguing that the “reverse-sting” was an abuse of process. The Crown responded that the police had acted in good faith by relying on the legal advice of the Department of Justice. Rather naturally, the accused then sought disclosure of this legal advice to test the Crown’s allegations. The Crown refused, invoking the RCMP’s solicitor-client privilege. The question for the Supreme Court was whether the RCMP had waived its privilege by putting in issue its state of mind, namely, its alleged good faith reliance on legal advice.

Justice Binnie for the Court rejected the view that merely by launching their stay application the accused were entitled to disclosure under a “full answer and defence” exception to the privilege.

He also accepted that, where a client seeks legal advice to facilitate the commission of a crime, the established

29 Id., at para. 22.
30 Id., at para. 28.
31 Id., at para. 34.
33 Id., at para. 65. Justice Binnie nevertheless left open the possibility that “in the absence of waiver, full answer and defence considerations may themselves operate to compel the disclosure of solicitor-client privilege of communications in an abuse of process proceeding” (para. 66).
“future crimes and fraud” exception to the privilege potentially applies to destroy the privilege. But Binnie J. did not need to resolve this issue, since he found that the RCMP had waived any privilege by making a live issue of the legal advice it had received from the Department of Justice. As a result, he ordered the Department’s “bottom line advice” disclosed in order to “confirm or otherwise the truth of what the courts were advised about the legal opinions provided by the Department of Justice.”

It is curious that while Campbell and Shirose was released so soon after Smith v. Jones, where the constitutionalization of the privilege was first discussed, the Court chose not to engage in the brewing debate about whether privilege was protected under the Charter. Indeed, in Campbell and Shirose Binnie J. described solicitor-client privilege in rather prosaic terms, stating as follows:

The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, call for professional expertise. Access to justice is compromised where legal advice is unavailable.

As we discuss further below, it is an open question whether the Court’s discussion of waiver in Campbell and Shirose, on a garden-variety, common law basis, survives the constitutionalization of the privilege, or whether a more exacting standard for waiver should now be employed.

34 Id., at paras. 55-63. Interestingly, Binnie J. hinted (at para. 58) that the “future crimes” exception would also apply to a “future tort,” such that the privilege would be lost where the client seeks legal advice for an activity the client knows is a crime or a tort (citing “The Future Crime or Tort Exception to Communications Privileges” (1964) 77 Harv. L. Rev. 730, at 730-31). See also Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed. (1999), §14.58, at 737, who agree that “[t]here is no reason why this exception [furtherance of unlawful conduct] to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortious conduct which may or may not become the subject of criminal proceedings” (emphasis added) (footnotes omitted). For a recent, expansive view of the “unlawful conduct” exception to the privilege, see Goldman, Sachs & Co. v. Sessions, [1999] B.C.J. No. 2815, at para. 16 (S.C.), per K.J. Smith J. (“unlawful conduct’ has a broader meaning than simply conduct that is prohibited by criminal law. It includes breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty. Breaches of contract and civil duties are ‘unlawful’ because, although they are not prohibited by any enactment, they cause injury to the legal rights of other citizens and give rise to legal remedies. They are therefore contrary to law”).

35 Id., at paras. 73-74.

36 Id., at para. 49.

Solicitor-client privilege crossed the Rubicon into constitutional territory in *R. v. McClure*,37 which formally declared it to be a principle of fundamental justice protected under section 7 of the Charter. The central question before the Court was whether the privilege should yield to an accused’s right to make full answer and defence to a criminal charge, and if so, under what circumstances. This issue arose after McClure, a librarian and schoolteacher, was charged with sexual offences against several former students. After learning of his arrest, another former student retained a lawyer and gave a statement to the police alleging various sexual offences by McClure, resulting in more charges against him. This former student then commenced a civil suit against both McClure and the school board. In the course of his criminal case, McClure sought production of the student’s civil litigation file in the suit against him. His stated purpose in seeking these materials was to determine the nature of the allegations first made by the student to his solicitor and to assess the extent of the student’s motive to fabricate or exaggerate the incidents of abuse.38

Justice Major for the Court reiterated many of the traditional mantra concerning the fundamental importance of solicitor-client privilege,39 tracing its evolution from a rule of evidence to its status as a fundamental and substantive rule of law.40 He noted that the privilege “commands a unique status within the legal system,” one that “stretches beyond the parties and is integral to the workings of the legal system itself.” Justice Major stressed the privilege’s “distinctive status within the justice system,” stating that “[t]he solicitor-client relationship is part of that system, not ancillary to it.”41 Given this unique status as a cornerstone of the justice system, Major J. confirmed that the privilege must be as close to absolute as possible and may be waived only by the client.42

The unique challenge posed by this case, Major J. noted, was how to reconcile the almost-absolute privilege with the accused’s Charter right to make

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38 Id., at paras. 6-8.
39 Variously describing it as “fundamental to the justice system in Canada” and crucial to “the integrity of the administration of justice” (Id., at para. 2), “integral to our system of justice” (at para. 4).
40 Id., at paras. 17-25.
41 Id., at para. 31, citing Lamer C.J.’s comments in Gruenke, supra, note 16, at 289, that solicitor-client privilege is “essential to the effective operation of the legal system” and is “inextricably linked with the justice system.”
42 Id., at paras. 35, 37.
full answer and defence. He stated the problem before the Court with beguiling matter-of-factness in this way:

Solicitor-client privilege and the right to make full answer and defence are principles of fundamental justice. The right of an accused to full answer and defence is personal to him or her and engages the right to life, liberty, security of the person and the right of the innocent not to be convicted. Solicitor-client privilege while personal is also broader and is important to the administration of justice as a whole. It exists whether or not there is the immediacy of a trial or of a client seeking advice.

The importance of both of these rights means that neither can always prevail. In some limited circumstances, the solicitor-client privilege may yield to allow an accused to make full answer and defence. What are those circumstances?43

Justice Major’s almost casual statement of the problem contains within it a striking conclusion: solicitor-client privilege is now a principle of fundamental justice, on a par with the Charter right to make full answer and defence, and indeed, with all other Charter rights. Thus the privilege was constitutionalized, entirely without fanfare, its obviousness hardly meriting commentary.

Having elevated the privilege into the rarefied atmosphere of constitutional principle, Major J. went on to adopt a two-stage “innocence at stake” test, allowing the privilege to be infringed “only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction.”44 But Major J. cautioned that, before this test is even considered, the accused must establish that the information sought in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt about his guilt in any other way. Once this is shown, at the first stage of the innocence at stake test the accused seeking production of a solicitor-client communication must provide some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to his guilt.45 If the accused passes this first hurdle, Major J. explained that the trial judge must then examine the solicitor-client file to determine whether, in fact, there is a communication that is likely to raise a reasonable doubt as to the accused’s guilt.46

43 Id., at paras. 41-42 (emphasis added).
44 Id., at para. 47.
45 Justice Major stated that, under stage 1, the trial judge must ask: “Is there some evidentiary basis for the claim that a solicitor-client communication exists that could raise a reasonable doubt about the guilt of the accused?” (id., at para. 52).
46 Justice Major stated that, under stage 2, the trial judge must ask: “Is there something in the solicitor-client communication that is likely to raise a reasonable doubt about the accused’s guilt?” (id., at para. 57). He cautioned that simply providing evidence that advances ancillary attacks on the
5. **Brown: Some Refinements on McClure**

A year after *McClure*, the Court confirmed the status of the privilege as a principle of fundamental justice in *R. v. Brown*, which again considered when solicitor-client privilege should yield to permit an accused to make full answer and defence to a criminal charge. In this case, an accused charged with murder sought to access another individual’s alleged confession to his lawyers that he, rather than the accused, had committed the murder. The individual had allegedly told his girlfriend of his confession, and she in turn had told the police.

At first instance, the accused applied for and was granted an order compelling disclosure of the files, documents and notes relating to the individual’s communications with his lawyers concerning the alleged confession to the murder. In the Supreme Court, Major J. for the majority ruled that the disclosure order was premature, as the accused had neither shown that the privileged information was unavailable from another source nor demonstrated that the information was necessary to raise a reasonable doubt. He also found that there were indications that any privilege had been waived when the individual told his girlfriend about his confession to his lawyers, and this issue should have been determined before any privilege was set aside.

Justice Major also stated that in those cases where an individual’s solicitor-client privilege is set aside because an accused’s innocence is at stake, the privilege holder must be protected by the residual protection against self-incrimination contained in section 7 of the Charter.

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Crown’s case, such as impugning the credibility of a Crown witness, or by providing evidence that suggests that some Crown evidence was obtained unconstitutionally, will very seldom be sufficient to meet this requirement.


48 *Id.*, at para. 5. Justice Major also provided guidance on the appropriate timing for bringing a *McClure* application, stating that it is preferable to delay such an application until the end of the Crown’s case as the Court would then be in a better position to assess the Crown’s case, and determine whether the accused’s innocence is in fact at stake (para. 52). He also stated that a *McClure* application is not a “one shot” affair, and may be brought at different times during the trial if defence counsel believes that an accused’s innocence is at stake (at para. 54).

49 *Id.*, at para. 94. As Major J. explained, the privilege-holder is not an accused, and so cannot claim the right not to testify against himself under s. 11(c) of the Charter, and may not be a witness able to claim the privilege against self-incrimination afforded by s. 13 of the Charter (at para. 90). As a result, the broader principles of fundamental justice and the residual protection against self-incrimination under s. 7 would potentially apply (at para. 90).
In the course of his ruling, Major J. confirmed the new constitutional footing for the privilege, stating that it is a “fundamental tenet of our legal system,” and “fundamental to Canada’s justice system and will yield only in rare circumstances.” But as in McClure, he found that where the privilege and innocence clash, the privilege must yield as minimally as necessary to permit the accused to raise a reasonable doubt as to his guilt. As Major J. put it in Brown:

While it is impossible to place either right higher on a hierarchy […] Canadians’ abhorrence at the possibility of a faulty conviction tips the balance slightly in favour of innocence at stake over solicitor-client privilege.

While a balancing of rights is a commonplace in the law, what is important here is that this is a constitutional balance, with the privilege on one side and innocence (full answer and defence) on the other.

6. Lavallee: The Privilege Protected by the Right to Privacy

The privilege passed another important constitutional milestone in Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, where the Court accepted that the privilege is protected under section 8 of the Charter as part of a client’s fundamental right to privacy. Lavallee is particularly important because it is the first time the privilege has been used to strike down legislation: in this case, section 488.1 of the Criminal Code, which set out the procedure for determining a claim of solicitor-client privilege over documents seized from a lawyer’s office under a warrant.

In essence, section 488.1 required material seized under a search warrant from a lawyer’s office to be sealed at the time of the search, permitted the solicitor to apply within strict time limits for a determination that the material was privileged, and with the court’s permission permitted the Crown to
examine the seized material to assist in determining whether the material was privileged.

Justice Arbour for the majority traced the historical development of the privilege from a rule of evidence to a substantive principle to a principle of fundamental justice. She noted that the privilege acquires an additional dimension in the criminal context, where the individual faces the state and is entitled to the full protection of the privilege.\textsuperscript{55} Fundamental justice provides that any information protected by the privilege is out of reach of the state, unless the client consents. As she put it:

It is critical to emphasize here that all information protected by the solicitor-client is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.\textsuperscript{56}

Justice Arbour also found that a client has a reasonable expectation of privacy in privileged information in the possession of his or her lawyer, declaring this to be an expectation of privacy of the highest order protected under section 8 of the Charter. She stated as follows:

A client has a reasonable expectation of privacy in all documents in the possession of his or her lawyer, which constitute information that the lawyer is ethically required to keep confidential, and an expectation of privacy of the highest order when such documents are protected by the solicitor-client privilege.\textsuperscript{57}

Thus, the privilege was now protected under both sections 7 and 8 of the Charter. While both provisions were invoked to challenge section 488.1, Arbour J. relied exclusively on section 8, reasoning that if the legislation resulted in an unreasonable search and seizure contrary to section 8, it would also violate the principles of fundamental justice under section 7.\textsuperscript{58}

While traditional section 8 analysis requires the court to balance the needs of law enforcement with an individual’s privacy interests,\textsuperscript{59} Arbour J. found this

\textsuperscript{55} Id., at para. 23: “in the context of a criminal investigation, the privilege acquires an additional dimension. The individual privilege holder is facing the state as a ‘singular antagonist’ and for that reason requires an arsenal of constitutionally guaranteed rights […] It is particularly when a person is the target of a criminal investigation that the need for the full protection of the privilege is activated.”

\textsuperscript{56} Id., at para. 24.

\textsuperscript{57} Id., at para. 24. See also at para. 21.

\textsuperscript{58} Id., at para. 35.

\textsuperscript{59} Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at 159-60, per Dickson J. (as he then was).
analysis to be inappropriate where solicitor-client privilege is at stake. She stated that “the privilege favours not only the privacy interests of the potential accused, but also the interests of a fair, just and efficient law enforcement process. In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it.” Justice Arbour therefore adopted a modified section 8 approach imposing more stringent norms to protect a client’s privacy interests. Under this approach, which Arbour J. found was supported by the Court’s prior jurisprudence, any legislation interfering with solicitor-client privilege “more than is absolutely necessary” would violate section 8.

Justice Arbour found that section 488.1 more than minimally impaired the privilege. She found that the fatal feature of the legislation was that it allowed for the potential breach of the privilege without the client’s knowledge or consent, as a result of absence or inaction of the solicitor in asserting the privilege on behalf of the client following the seizure. The privilege could thus be breached without the client’s express and informed authorization, and indeed, even without the client having an opportunity to be heard. She stated that the legislation shifted onto counsel the burden of ensuring protection of the constitutionally guaranteed privilege, entirely failing to address directly the rights of the privilege holder to ensure adequate protection of his or her rights. Since the right of the state to access this information is, in law, conditional on the consent of the privilege holder, Arbour J. found that all efforts to notify that person (or possibly an appropriate surrogate such as the Law Society) must be in place in order for the legislation to conform with section 8 of the Charter.

Justice Arbour identified another fatal flaw in the legislation as being the absence of judicial discretion to prohibit the Crown’s entitlement to the seized material where no claim of privilege is asserted within the timelines under the legislation. She stated that “reasonableness dictates that courts must retain a discretion to decide whether materials seized in a lawyer’s office should remain inaccessible to the state as privileged information.” She also found another unjustifiable impairment of the privilege in the court’s discretion to permit the Attorney General to inspect the seized documents to assist the court assessing the claim of privilege. She found that any benefit from having the Attorney General doing so was greatly outweighed by the risk of disclosing privileged information to the state in the conduct of a criminal investigation.

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60 Supra, note 2, at para. 36.
61 Id.
62 Id., at para. 39.
63 Id., at paras. 40-42.
64 Id., at para. 43.
65 Id., at para. 44.
Having found that section 488.1 more than minimally impaired the privilege contrary to section 8 of the Charter, Arbour J. observed that the Crown had not sought to justify the infringement under section 1. In any event, she noted that it would be “difficult to conceive” how such an infringement could survive the minimal impairment branch of the *Oakes* test.\(^{66}\) In our view, this is perhaps an understatement. By definition, legislation that violates section 8 for failing to minimally impair the privilege cannot be said to minimally impair the privilege under section 1. Thus, it would seem that any violation of solicitor-client privilege under the Court’s modified section 8 framework will fail section 1 as well.

With respect to remedy, Arbour J. stated that the question of seizure of materials from a lawyer’s office raised several procedural options that were best left to Parliament to consider. She therefore struck down section 488.1, rather than employing remedial techniques such as severance or reading in. In the interim, however, Arbour J. set out 10 general principles to govern law office searches until Parliament decides, if it sees fit, to re-enact legislation on this issue.

Justice Arbour concluded by summarizing the status and role of the privilege to the administration of justice in these terms:

Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public’s confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.\(^{67}\)

Justice LeBel dissented.\(^{68}\) He agreed with Arbour J.’s conclusion that the legislation violated section 8 for allowing the Attorney General to view the privileged material to assist the court in assessing a claim of privilege — and thus accepted that the privilege is protected under section 8 of the Charter, a point on which the Court was therefore unanimous. However, LeBel J. disagreed with the other constitutional shortcomings Arbour J. had identified. Most importantly, in his view the legislation had to be interpreted having regard to a lawyer’s ethical obligation to protect a client’s privilege, and in this light provided sufficient protection for the privilege. Any other conclusion, in LeBel

\(^{66}\) *Id.*, at para. 46.

\(^{67}\) *Id.*, at para. 49.

\(^{68}\) L’Heureux-Dubé and Gonthier JJ. concurred with LeBel J.
J.’s view, would result in “[a] finding of unconstitutionality based on the assumption that lawyers will not perform their duties with diligence and competence.” It would, he stated, “require Parliament to build safeguards into criminal legislation itself against negligence, inattention, slowness in action and sloppiness in management and organization.”

An important implication of the Court’s unanimous finding that solicitor-client privilege is protected under section 8 of the Charter is that the privilege has finally been recognized as a rule of property. Early cases had eschewed describing the privilege as a rule of property in finding that the privilege was only a rule of evidence, and so operated only where privileged communications were sought to be introduced into evidence in a legal proceeding. But including the privilege as a component of informational privacy under section 8 means that the privilege is indeed now a rule of property. In prior section 8 cases, the Court has repeatedly affirmed that informational privacy “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain […] as he sees fit.” Similarly, the privilege expresses the client’s fundamental right to privacy over his or her information, namely, the client’s confidential communications with his or her lawyer. Privileged information is therefore in a fundamental way the property of the client, for him or her to communicate or retain as he or she sees fit.

7. Things to Come: Maranda — Is There Privilege Over Lawyers’ Fees?

The Supreme Court considered yet another privilege case in May 2003, when it heard argument in Maranda v. Corporal Normand Leblanc, on appeal from the Quebec Court of Appeal. Maranda concerns another challenge to a search against a lawyer’s office under section 488.1 of the Criminal Code, though in this case there was no challenge to section 488.1 itself. The Court of Appeal’s ruling was released before the Supreme Court had rendered Lavallee. An important question will therefore be how Lavallee impacts on this case. Maranda raised three principal questions.

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69 Id., at para. 63.
70 Id., at para. 64.
71 See, e.g., R. v. Colvin, ex parte Merrick (1970), 1 C.C.C. (2d) 8, at 13 (Ont. H.C.), per Osler J. (“the rule is a rule of evidence, not a rule of property”), discussed by Arbour J. in Lavallee, supra, note 2, at para. 12.
73 Leave to appeal granted May 16, 2002. The Quebec Court of Appeal’s decision is reported as R. v. Charron (2001), 161 C.C.C. (3d) 64.
First, should a warrant be quashed where the search and seizure was not limited to items that could solely be obtained on the premises of the law office? Proulx J.A. for the Court of Appeal answered this question in the negative, finding that while it would be preferable to restrict a search and seizure of a lawyer’s office to what is strictly necessary, this is not an absolute requirement. In this case, Proulx J.A. found there was a link between the documents that could only be found at the lawyer’s premises and other documents, and so the whole of the search was permitted.\footnote{Id., at para. 25.}

Since section 488.1 of the \textit{Criminal Code} is no longer of any force or effect as a result of \textit{Lavallee}, one can expect that the seizure itself should be found to have been unauthorized by law. But it could also be asked whether Proulx J.A.’s decision measures up to the principles established by Arbour J. for a warrant against a lawyer’s office. In our view, it does not. In particular, Proulx J.A.’s ruling fails to meet the second and third principles identified by Arbour J., namely, the requirements that the issuing justice must be satisfied that there exists “no other reasonable alternative to the search,” coupled with the requirement that the issuing justice “must be rigorously demanding so as to afford maximum protection of solicitor-client confidentiality.”\footnote{Supra, note 2, at para. 49.} In our view, respect for these principles requires that the warrant be limited strictly to information that is unavailable elsewhere than at the lawyer’s office.

Second, is the presence of the client’s lawyer required when executing the warrant, or is it sufficient to require a representative of the Bar to attend? Proulx J.A. found that the latter would suffice, since this would ensure that a claim of privilege would be asserted, resulting in the automatic sealing of the seized documents. He found that this procedure went well beyond what was provided for in section 488.1.\footnote{Supra, note 2, at paras. 37-42.} Again, in our view this conclusion fails to measure up to the standards imposed in \textit{Lavallee}. Justice Arbour stated that the first line of protection for the client’s privilege is the client and his or her lawyer. She found that only if they cannot be contacted should a Bar representative be permitted to oversee the sealing and seizure of the documents.\footnote{Supra, note 2, at para. 49: “Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. \textit{Where the lawyer or the client cannot be contact- ed}, a representative of the Bar should be allowed to oversee the sealing and seizure of documents” (emphasis added).}

Finally, does the amount of a lawyer’s fees and disbursements constitute a privileged communication? This information was sought in this case because the accused, who was charged with drug trafficking, had reported income in the
tens of thousands of dollars, yet had assets in the millions of dollars. It was hoped this evidence would show that the accused was in possession of the proceeds of crime. Justice Proulx ruled that a lawyer’s fees and disbursements are not per se privileged. He said that much depends on the context. Justice Proulx found that the fact of payment is not inherently a client communication, though the narrative portion of the bill of account could well be privileged, as it could disclose the nature and substance of the privileged communication. In our view, this conclusion is clearly correct. In the civil context, bills of account are routinely disclosed to the court in seeking costs. While the narrative portion of the account is often excised or edited in order to protect privilege, the quantum of payment itself would rarely be considered to be a privileged communication. There are nevertheless circumstances where even the fact of retainer, and thus the bill of account itself, could be privileged, such as where a client retains a lawyer on a confidential basis. In our view, therefore, Proulx J.A.’s rejection of a per se rule in favour of a contextual approach is consistent with the Court’s ruling in Lavallee.

III. SOME IMPLICATIONS OF SOLICITOR-CLIENT PRIVILEGE AS A CONSTITUTIONAL PRINCIPLE

Lately the status of solicitor-client privilege as a constitutional principle protected under the Charter has been much discussed in assessing the constraints this imposes on state action. This issue has arisen in the constitutional challenges to the federal government’s recent money-laundering legislation, which tried to impose reporting obligations on lawyers when confronted with suspicious financial transactions by their clients, as well as in the Law Society of Upper Canada’s proposed new rule of professional conduct dealing with a lawyer’s obligations when confronted with property relevant to a crime or offence. These are important and difficult issues, but they are not our

78 Supra, note 73, at paras. 80, 84, 94-95.
79 This is similar to circumstances where the name of a client may itself be privileged: see Lavallee, supra, note 2, at para. 28.
80 Justice Proulx also concluded, in the alternative, that the bills were not privileged under the crimes exception (supra, note 73, at paras. 101-107). In our view, this is also likely correct, given the Court’s ruling in Campbell and Shirose, supra, note 32.
82 See Law Society of Upper Canada, Special Committee on Lawyers’ Duties with Respect to Property Relevant to a Crime or Offence (Report to Convocation), March 21, 2002.
focus. Instead, we consider some less-discussed implications from the Supreme Court’s recent rulings, focusing on: (a) whether the privilege’s new status as a constitutional principle will have any impact on the civil bar; (b) whether there is any scope for a full answer and defence exception to the privilege in the civil context; (c) whether the constitutionalization of solicitor-client privilege is likely to extend to litigation privilege; and (d) whether the rules of waiver of privilege will need to be reconsidered having regard to the ordinarily high threshold for waiver of a constitutional right.

1. The Constitutional Principles in the Civil Context

Each of the recent cases considering solicitor-client privilege as a constitutional principle has arisen in the criminal context. The question naturally arises whether this status will have any significant implications for the civil bar. The exceptional public safety and innocence at stake grounds for setting aside privilege have little immediate relevance, one might think, to the more pedestrian circumstances in which the privilege arises in the civil context.\footnote{These include claims of privilege in affidavits of documents, to resist production of expert reports, and claims of waiver, whether voluntary, inadvertently or by implication. See, for example, W. Augustus Richardson “The Privilege Against Production: Are the Walls of Jericho Falling?” (1986), 10 C.P.C. (2d) 294; E. Dolden, “Waiver of Privilege: The Triumph of Candour Over Confidentiality” (1990), 36 C.P.C. (2d) 56.}

But a narrow reading of the recent cases as limited to the criminal context would in our view be mistaken. To begin with, while both \textit{McClure} and \textit{Brown} were criminal cases, in neither case was production of privileged information sought by the state. In both cases it was sought by a private party against another private party. Most tellingly, in \textit{McClure} the privilege-holder whose privilege was weighed against McClure’s right to make full answer and defence was not an accused in a criminal case, but was rather a civil litigant who claimed damages against McClure and the school board for sexually assaulting him, and what was sought was production of his civil litigation file. The Supreme Court held that the privilege over the civil file was protected by the principles of fundamental justice. As a result, it is clear that the constitutionally protected privilege can relate to communications in a civil suit. Similarly, in \textit{Brown} the privilege-holder who had allegedly confessed to the crime to his lawyers and to his girlfriend was not the accused, and production was sought not by the state but by the accused, a private party. Lastly, in \textit{Lavallee} Arbour J. justified the constitutional character of the privilege as based on its “central role to the administration of justice in an adversarial system.”\footnote{\textit{Lavallee, supra}, note 2, at para. 49.}

\section*{References}

\footnotetext[1]{These include claims of privilege in affidavits of documents, to resist production of expert reports, and claims of waiver, whether voluntary, inadvertently or by implication. See, for example, W. Augustus Richardson “The Privilege Against Production: Are the Walls of Jericho Falling?” (1986), 10 C.P.C. (2d) 294; E. Dolden, “Waiver of Privilege: The Triumph of Candour Over Confidentiality” (1990), 36 C.P.C. (2d) 56.}

\section*{Notes}

\footnotetext[2]{\textit{Lavallee, supra}, note 2, at para. 49.}
privilege has a correspondingly central role in the civil process which similarly forms part of the adversarial system, one would expect the same rationale to extend to the status of the privilege in the civil context.

In short, privileged communications are protected by the principles of fundamental justice under the Charter (or the values therein) even if they are made in a civil suit, and even if sought by a private party rather than the state.

These conclusions raise further questions concerning the source of the state action required to engage the Charter, and whether they involve departure from the established rules that the Charter does not apply directly either to the common law or to court orders. In our view, no state action is required: a constitutionalized privilege principle in the civil context can be rationalized under the Supreme Court’s well-established doctrine that the common law must be developed in accordance with Charter values. As Professor Hogg has noted:

... the exclusion of the common law from Charter review is not particularly significant. When the Charter does not apply directly, it will apply indirectly, and, despite some differences in the way s. 1 justification is assessed, the indirect application is much the same as in its effect as the direct application.

Indeed, Major J.’s dissenting reasons in Smith v. Jones had expressly invoked Charter values in finding that any infringement of the privilege in the name of public safety would have to respect the privilege holder’s right to counsel and the principle of minimal impairment.

Thus, the constitutional character of the privilege must be considered even in civil litigation. The privilege is a principle of fundamental justice and part of the fundamental right to privacy. Where the state seeks disclosure of privileged communications, the Charter applies directly to protect against disclosure. Where disclosure is sought by a private party, the privilege applies at common law, appropriately fortified by Charter values under sections 7 and 8.

86 Dolphin Delivery, id., at 598-600, per McIntyre J.
87 Pepsi-Cola Beverages (West) Ltd., supra, note 85, at paras. 18-20, per McLachlin C.J. and LeBel J.; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at paras. 96-98, per Cory J.
89 Supra, note 19, at para. 28.
2. A “Full Answer and Defence” Exception to the Privilege in the Civil Context

As an exclusionary rule of evidence, solicitor-client privilege excludes from the court’s consideration privileged information even though it may be highly relevant, probative and trustworthy. This exclusion is justified by the overriding societal interest in protecting the confidential relationship between solicitor and client.\(^{90}\) *McClure* established an exception to this, permitting truth-finding (avoiding a wrongful conviction) to trump the privilege where an accused’s innocence is at stake. Since innocence cannot be at stake in the civil context, one wonders whether truth-finding in civil cases can ever trump the privilege.

In our view, there is a reasonable basis to believe that it can: a *McClure*-like exception may exist even in the civil context. Support for this view comes, most recently, from the Court’s 2002 ruling in *Sierra Club of Canada v. Canada (Minister of Finance)*,\(^{91}\) which held that the right to make full answer and defence operates as a constitutional value in the civil context in the form of a civil litigant’s right to present its case and its right to a fair trial.

*Sierra Club* brought into question the circumstances in which a court should grant a confidentiality order in the civil context, in this case, to protect confidential documents of Atomic Energy of Canada Limited relating to an ongoing environmental assessment by Chinese authorities of the sites for two CANDU nuclear reactors purchased by China. AECL sought to rely on the documents to defend against allegations that the federal government had breached the *Canadian Environmental Assessment Act*\(^{92}\) by providing financial assistance to China for the sale of the reactors without undergoing an environmental assessment. The Court found that a restricted confidentiality order permitting only the court, the parties and their counsel to see the confidential documents struck the right balance between the constitutional principle of open courts and AECL’s need to protect its commercial interests.

In balancing the rights and interests of the parties, Iacobucci J. for the Court considered AECL’s commercial interests, but also gave great weight to its right to make “full answer and defence” to the allegations in the case, which he equated to its right “to present its case” and to its “right to a fair trial.” He

\(^{90}\) Gruenke, *supra*, note 16, at 286, *per* Lamer C.J.; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 19, *per* McLachlin J. (as she then was); John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999), at §14.1, at 713 (“the exclusionary rule of privilege […] is based on social values, external to the trial process. Although such evidence is relevant, probative and trustworthy, and would thus advance the just resolution of disputes, it is excluded because of overriding social interests”) (footnotes omitted).


\(^{92}\) S.C. 1992, c. 37.
stated that while this is not a Charter right, it is nevertheless a “fundamental principle of justice.” As Iacobucci J. put it:

As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant’s capacity to make full answer and defence, or, expressed more generally, the appellant’s right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a Charter right, the right to a fair trial generally can be viewed as a fundamental principle of justice: M. (A.) v. Ryan, [1997] 1 S.C.R. 157, at para. 84, per L’Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.93

Thus, in the civil context, full answer and defence operates as a fundamental principle of justice, guaranteeing a civil litigant’s right to present its case and its right to a fair trial. This is exactly the same as the constitutional principle that the Court in McClure said could trump solicitor-client privilege in some (albeit rare) cases. In principle, one would therefore expect a similar McClure-like rule to operate in the civil context. The circumstances where privilege would yield might well be even rarer in the civil context, where liberty is not in issue. But if McClure is founded on the subordination of the privilege to truth-finding in some cases, then surely the same subordination should hold true in the civil context in “some cases.”

Further support for this view can be found in M. (A.) v. Ryan,94 which involved disclosure of therapeutic counselling records in a civil suit brought by a patient against her former psychiatrist who had sexually assaulted her. While in Sierra Club Iacobucci J. had cited from L’Heureux-Dubé J.’s dissenting reasons in Ryan, the majority reasons of McLachlin J. (as she then was) support the view that the right to make full answer and defence may trump a privilege in a civil case, though she cautioned that the disclosure threshold may be higher in a civil than in a criminal case. McLachlin J. said this:

Just as justice requires that the accused in a criminal case be permitted to answer the Crown’s case, so justice requires that a defendant in a civil suit be permitted to answer the plaintiff’s case. In deciding whether he or she is entitled to production

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of confidential documents, this requirement must be balanced against the privacy interest of the complainant. This said, the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant’s interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant’s interest in production.95

The above framework for a full answer and defence exception to the privilege in the civil context moved from the theoretical to the practical in the Federal Court, Trial Division’s recent decision in *Baltruveit v. Canada (Attorney General)*.96 In that case, Gibson J. relied on the full answer and defence exception developed in the criminal context to require the Canadian Human Rights Commission to disclose to a complainant the substance of a legal opinion it had relied on in refusing to refer a complaint of discrimination to the Canadian Human Rights Tribunal. The Court noted that “while what is at issue here is not full answer and defence to a criminal charge, it is not without parallel features: it is the opportunity for the applicant to make full answer in a context where his allegation of infringement of his fundamental human rights might be […] irrevocably determined against him.”97

Thus, it seems clear that some form of full answer and defence exception to the privilege will apply in the civil context. The scope of this exception remains to be determined by future cases. The challenge will be to keep it tightly constrained, as disclosure of relevant evidence can often be justified by the need to make full answer and defence or the right of a litigant to present its case. A broadly applied exception risks emasculating the privilege and undermining its constitutional status, rendering its constitutionalization a pyrrhic victory indeed.

95 *Id.*, at para. 36. See also *Lac d’Amiante du Québec v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, *per* LeBel J., holding that Quebec law recognizes an implied rule of confidentiality at an examination for discovery (similar to the deemed undertaking rule at common law). In the course of his reasons, LeBel J. stated that “in an area such as the public nature of trials, the fundamental constitutional principles in the *Canadian Charter of Rights and Freedoms* also come into play where applicable in a private judicial proceeding” (at para. 40).


97 *Id.*, at para. 32.
3. Application to Litigation (Work Product) Privilege

Another important issue that is likely to land in the courts before long is whether the constitutionalization of the privilege extends from solicitor-client (or legal advice) privilege to litigation privilege, that is, the privilege over materials and information created with the dominant purpose of preparing for litigation.

While the fundamental differences between the solicitor-client and litigation privilege have received appellate scrutiny of late,\(^9\) one of the clearest explanations of these differences remains Sharpe J.A.’s article “Claiming Privilege in the Discovery Process,” written prior to his judicial appointment, where he explained as follows:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege

aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).\textsuperscript{99}

Particularly significant for present purposes is the role of confidentiality in solicitor-client privilege and litigation privilege: confidentiality of the communication is essential for the former but not for the latter.\textsuperscript{100} This raises the issue of whether litigation privilege can be justified under or embodied in the principles of section 8 of the Charter, as protected by the client’s constitutional right to privacy. In our view, litigation privilege is also protected by section 8 or the values therein, but the justification is slightly different. The privacy right engaged is not the right to privacy over a confidential communication between lawyer and client, but rather the right to privacy over the lawyer’s brief or work-product, the need for a zone of privacy for the lawyer’s trial preparation as a fundamental part of the adversary process.\textsuperscript{101} This is still the client’s privacy right, exercised by the client’s agent — the advocate — and like the solicitor-client privilege can be waived only by the client. But its purpose is to facilitate the litigation process rather than to protect the client’s confidential relationship with his or her lawyer.

The role of litigation privilege as a cornerstone of the adversary process also provides its justification as a principle of fundamental justice. The lawyer’s protected zone of privacy is essential for trial preparation and a basic tenet of


the adversary process. It therefore qualifies as a principle of fundamental justice under section 7 of the Charter.\(^{102}\)

Support for this view can be found in Major J.’s dissenting reasons in *Smith v. Jones*. Justice Major articulated the constitutional principles underlying solicitor-client privilege and then suggested that these principles “support the extension of privilege to communications between clients and experts retained by their counsel for the purpose of preparing a defence.” Justice Major later confirmed that the privilege should be extended to communications for the purpose of trial preparation, seemingly bringing litigation privilege within the scope of the constitutional principle he had articulated. He stated as follows:

> To deny the protection of solicitor-client privilege to the confidential communications of the accused to those intimately involved in the preparation of his defence would frustrate these rights. For these reasons, the communications between an accused and his counsel, made in furtherance of his or her defence, are accorded the highest level of confidentiality.\(^{104}\)

While these comments do refer to the confidentiality of communications between lawyer and client, the repeated references to defence preparation suggest that Major J. viewed this feature as equally important, such that litigation privilege is also constitutionally protected or at least informed by these constitutional values. Indeed, at least one appellate judge has accepted this reading of Major J.’s reasons.\(^{105}\)

Thus, in our view it will not be long before the reasons underlying the constitutionalization of solicitor-client privilege under sections 7 and 8 of the Charter are extended to constitutionalize litigation privilege as well.

4. Constitutionalization of Waiver of Privilege

Just as the law of solicitor-client privilege has been constitutionalized, so too, in our view, has the law of waiver of privilege. If, as is clear, the privilege

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\(^{102}\) *Reference re s. 94(2) of the Motor Vehicle Act (B.C.),* [1985] 2 S.C.R. 486, at 512-13, *per* Lamer J. (as he then was); *R. v. Ruzic*, [2001] 1 S.C.R. 687, at para. 28, *per* LeBel J.

\(^{103}\) *Smith v. Jones*, *supra*, note 19, at para. 8 (emphasis added).

\(^{104}\) *Id.* (emphasis added).

\(^{105}\) *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321, at 355 (C.A.), *per* Doherty J.A., dissenting in the result, noting that “[w]hile Major J. spoke in terms of client-solicitor privilege, he in fact limited his observations to circumstances in which litigation privilege would apply.” Justice Doherty went on to say that “[i]t is unclear whether Major J. used the phrase ‘solicitor-client’ privilege […] in a way that conflates client-solicitor privilege with litigation privilege […] there is considerable confusion with respect to terminology in this area of the law.” We are grateful to Adam Dodek for bringing this passage from Doherty J.A.’s reasons to our attention.
has become a constitutional right (or Charter value), then questions of waiver of privilege are now questions about waiver of constitutional rights. As such, the law of waiver of privilege is informed by the Court’s jurisprudence on the very high threshold required for waiver of constitutionally guaranteed Charter rights.

(a) The Standard for Waiver of a Charter Right

The Court will find a Charter right is waived only if the waiver is “clear and unequivocal,” and made with full knowledge of the rights waived and the effect that waiver will have on those rights. Professor Don Stuart has noted that “[w]hen the Supreme Court has characterized the issue as one of waiver, it has repeatedly demonstrated its reluctance to find that there has been a waiver of a Charter right.” Thus, one would similarly expect the Court to strain to avoid a finding of waiver when what is at issue is waiver of the fundamental right to solicitor-client privilege.

Currently, questions of waiver of privilege are not consistently approached on this basis. However, it can be expected that the constitutionalization of the privilege will have the effect of making it that much harder to establish waiver in particular cases. In both civil and criminal cases, disputes over waiver of privilege often involve inadvertent disclosure of privileged materials or waiver by implication (i.e., by conduct). Historically the law in this area has been murky and has long presented a trap for the unwary. The constitutionalization of privilege offers the hope of greater clarity in this area of the law, through a re-examination of the traditional doctrines in light of constitutional principles.

(b) Inadvertent Disclosure

The traditional position at common law used to be that accidental disclosure resulted in a permanent destruction of the privilege. This position was gradually repudiated by Canadian courts, which accepted that inadvertent

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106 See, e.g., Clarkson v. The Queen, [1986] 1 S.C.R. 383, at 394, per Wilson J. (waiver of the right to counsel); R. v. Lee, [1989] 2 S.C.R. 1384, at 1411, per Wilson J. (waiver of the right to jury trial); R. v. Morin, [1992] 1 S.C.R. 771, at 790, per Sopinka J. (waiver of delay under the right to be tried within a reasonable time in s. 11(b)).


108 Calcraft v. Guest, [1898] 1 Q.B. 759 (C.A.) (while originals of inadvertently disclosed privileged documents may remain privileged, copies made from the originals are not privileged and may be introduced into evidence); see John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada, 2nd ed. (1999), at §§14.115-14.116, at 764.
disclosure would not waive privilege. But some courts have held that even where privileged information is inadvertently disclosed, such that confidentiality is lost, it may be possible to introduce that information into evidence if what is being sought to be proved from the information is important to the outcome of the case and there is no reasonable alternative form of evidence that can serve that purpose.

A constitutionalized waiver doctrine would clearly reject inadvertent disclosure as sufficing to destroy the privilege. Inadvertent disclosure would not overcome the “clear and unequivocal” standard established by the Supreme Court in other contexts. Indeed, Arbour J.’s observation in Lavallee that even “accidental” infringements of the privilege would “erode the public’s confidence in the administration of justice” should signal that accidental waiver will effectively cease to exist under Canadian law.

But the further question of whether accidentally disclosed privileged information can ever be introduced in court, if important to the outcome of the case and there is no reasonable alternative form of evidence that can serve the same purpose, remains very much alive. This exception would apply both in the criminal and the civil contexts. In criminal cases, the operative test would be the highly demanding McClure “innocence at stake” approach. In the civil context, if there is indeed a full answer and defence exception to the privilege, then the standard for introducing this evidence would similarly be modified to take account of the privilege’s constitutional character, to insist that the privileged information is “essential” to make full answer and defence, such as by preserving the right to a fair trial. This is a higher standard than one of mere “importance” to the outcome of the case. The infringement of the privilege should also meet the minimal impairment test, such that the privileged information is unavailable from any other source. This is similarly a standard higher than one that insists only on no “reasonable” alternatives.

(c) Waiver by Implication

Similar considerations would apply to the doctrine of waiver of privilege by implication. Waiver by implication occurs where, in the absence of an express intention to waive the privilege, a party is taken to have done so by its conduct, such as where that party has taken positions which would make it inconsistent

109 See, e.g., Elliott v. Toronto (City) (2001), 54 O.R. (3d) 472, at para. 10 (Sup. Ct.), per
Ground J.; John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in
Helper J.A.
111 Supra, note 2, at paras. 25, 49.
to maintain the privilege. The test used to rationalize the implied waiver cases has typically been “fairness,” in that it is viewed as being “unfair” to permit one party to take certain positions and then to invoke privilege when the other party seeks information in order to respond.

_Campbell and Shirose_, discussed above, is a recent example of waiver by implication. There it will be recalled that the Court held that the RCMP had put in issue the Attorney General’s legal advice by alleging good faith reliance on that advice in defence to an abuse of process motion claiming police illegality. Justice Binnie found that the RCMP had put in issue its state of mind, and so the defence was entitled to get to the bottom of the legal advice the RCMP had received.

It will be recalled that Binnie J. did not rely upon constitutional considerations in discussing either the privilege or the circumstances in which it is waived. It is in this sense that it was referred to as a “garden-variety” waiver case. But it is open to question whether Binnie J.’s approach would meet the more exacting standards of a constitutionalized waiver doctrine. Could it be said that the RCMP had “clearly and unequivocally” waived its privilege, and done so with full knowledge of the rights it waived and the effect that waiver would have on those rights? Surely at most the Court held that disclosure of the Department of Justice’s opinion should be ordered because the RCMP had impliedly waived privilege by putting in issue its state of mind. The Court did not go so far as to make any findings as to the RCMP’s actual knowledge of its rights, or as to its actual knowledge of the effect of waiver on those rights.

Put another way, implied waiver provides a _constructive knowledge_ standard for waiver. Waiver is deemed or implied as a matter of fairness given positions taken by the privilege holder. By contrast, constitutional waiver insists upon a _subjective knowledge_ standard for waiver. Waiver is found only if the privilege holder is shown to have clearly and unequivocally waived its rights, with full knowledge of the rights waived and the consequences that this would have on those rights.

Given the differences in these standards, the common law of implied waiver of solicitor-client privilege will probably have to be re-examined and brought in line with the requirements of the Charter. In sum, the constitutional character of the privilege will likely raise the bar on when it can be taken as having been waived. Waiver should be found in only the clearest cases, where a party can be shown to have been aware of its rights and have had full knowledge of the

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113 Id.
consequences of waiving them. In our view, the vaguer “fairness” test will likely not provide a sufficiently precise constitutional standard.

IV. CONCLUSION

The Supreme Court’s recent constitutionalization of solicitor-client privilege marks a watershed in the privilege’s long history. The Court’s rulings are obviously vastly important in themselves, but they are just as or more important for what they portend. Every lawyer confronted with questions of privilege — and every lawyer is — must now have a firm grip on the law of the Charter. Anything less risks compromising the now even more fundamental relationship between lawyer and client.
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