Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1714

Appeal PA-980253-1

Liquor Control Board of Ontario

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant made a 17-part request under the Freedom of Information and Protection of Privacy Act (the Act) to the Liquor Control Board of Ontario (the LCBO). The request was for access to records relating to a search warrant execution and charges of unlawfully selling and keeping for sale wine contrary to the Liquor Licence Act for the period of January 1 to December 31, 1997.

The LCBO identified 52 records as responsive to the request. The LCBO denied access to these records under the following sections of the Act

- law enforcement - section 14
- third party information - section 17
- solicitor-client privilege - section 19

The LCBO also indicated that no records were found with respect to parts 1, 3, 5, 9, 13, 15, 16 and 17 of the request.

The appellant appealed the LCBO's decision.

During mediation of the appeal, the appellant withdrew parts 1-5, 7-10 and 12-17 of his request. The appellant also sought access to correspondence, memos, etc. between the LCBO and the office of the Attorney General referable to the prosecution of the appellant, and the LCBO agreed to deal with this request as part of the existing appeal.

I sent a Notice of Inquiry to the LCBO, the appellant and one party whose interests could be affected by the outcome of this appeal (the affected party). Representations were received from the LCBO only.

RECORDS:

The records at issue in this appeal consist of correspondence, notes and fax transmittal sheets, as well as records relating to the appellant's previous convictions. As a consequence of the appellant narrowing the scope of his appeal, only Records 1, 2, 4, 6, 7, 12-30, 32, 37, 38, 42-44, 46, 47 and 49-52 are at issue. The LCBO confirmed during the Inquiry that Records 9 and 10 have been disclosed to the appellant and are, therefore, no longer at issue. The LCBO also indicated in its representations that it has withdrawn its reliance on section 14, and the application of this section is no longer at issue.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The LCBO claims that section 19 applies to all of the records at issue in this appeal. Section 19 consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

(b) the communication must be of a confidential nature, **and**

(c) the communication must be between a client (or his agent) and a legal advisor, **and**

(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Scope of Branches 1 and 2 determined with reference to the common law

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
>
> [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order –729).

Communications by LCBO to its solicitor

The LCBO submits that Records 1, 4 and 23 are communications between it and the lawyer it retained to handle the prosecution of the appellant. Record 1 is the retainer agreement between the LCBO and its counsel. This is a confidential communication made between a solicitor and its client for the purpose of retaining the solicitor and as such is subject to solicitor-client privilege (R.D. Manes and M. Silver, Solicitor-Client Privilege in Canadian Law (Markham, Ont.: Butterworths, 1993), p. 47; Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at 100 (Fed. C.A.)).

Record 4 seeks advice on actions which could be taken against the appellant. This record is, therefore, a confidential communication for the purpose of seeking legal advice and as such is also subject to solicitor-client privilege.

Record 23 is a cover sheet providing the solicitor with copies of legal documents served on LCBO employees in the context of ongoing litigation in respect of which the solicitor was representing the LCBO's interests. In my view, this record is a confidential communication between a solicitor and his client for the purpose of seeking or formulating legal advice.

In addition, Record 49 is a quote from a transportation service provided in connection with settlement discussions with the appellant involving the return of the liquid seized under the search warrant following the

guilty plea and conviction of the appellant. The quote is accompanied by a fax cover sheet evidencing its transmission from the LCBO to its counsel. The LCBO claims that this record is subject to privilege by virtue of the original use of the information, specifically the return of property pursuant to settlement agreement with the appellant, but submits that it is also privileged by virtue of the pending civil litigation between the LCBO and the appellant. The appellant has commenced civil proceedings against the LCBO in which it is alleged that the LCBO's failure to properly store such liquid damaged it. The LCBO is defending these proceedings, which are currently at the discovery stage. In my view, this record part of the continuum of confidential communications with respect to this matter, as the information was passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that legal advice may be given.
Accordingly, I find that Records 1, 4, 23 and 49 are all exempt under section 19 of the Act.

Communications by the solicitor to the LCBO

Record 37 submits documentation for the LCBO's use, and Record 51 requests instructions in respect of a specific issue. Records 6, 12, 16, 27, 32, 38, 42 - 44, 46, 47, 50 and 52 either report on legal services provided or provide legal advice to the LCBO. I find that, overall, these records are part of the continuum of confidential communications with respect to this matter, as the information was passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that legal advice may be given. I find that the reasoning in Balabel v. Air India is clearly applicable to the information contained in these records.

Records 2, 13 and 20 are accounts submitted by the solicitor, and Records 14 and 15 are clarifications of that account by the LCBO and the solicitor.

In my view, the Federal Court of Appeal's recent decision in Stevens v. Canada (Privy Council) (1998), 161 D.L.R. (4th) 85 (F.C.A.) has persuasive value in the context of the Information and Privacy Commissioner's decisions relating to lawyer's bills of account and solicitor-client privilege. In that case, the requester and appellant had sought access to billings, cheque requisitions and authorizations for certain named counsel who provided services to the Commission of Inquiry headed by Mr. Justice Parker. The Commission of Inquiry had investigated and reported on allegations that Mr. Stevens had a conflict of interest during his tenure as a minister in the Mulroney cabinet.

The Privy Council Office disclosed approximately 336 pages of accounts, receipts and related documents. The accounts normally showed the name of the lawyer providing services, the dates on which services were being rendered, the time spent each day, and disbursements. Billed amounts were disclosed. However the narrative portions on 73 pages, describing the services, were withheld as being subject to privilege. This decision was upheld on appeal by the Information Commissioner, whose decision was upheld by the Federal Court, Trial Division on judicial review.

The decision of the Federal Court of Appeal contains a detailed analysis of the cases on privilege and legal invoices. Prior to Stevens, there appeared to be confusion regarding the privilege that attached to lawyers' bills of account and other kinds of lawyers' accounting records. This confusion has arisen from the apparent

contradiction between Mutual Life Assurance Co. of Canada v. Deputy Attorney General of Canada, 84 D.T.C. 6177 (Ont. H.C.) and other cases. In Mutual Life, the Court stated (as quoted at page 103 of Stevens):

> The privilege attaches not only to communications made by the client but obviously to communications made by the solicitor to the client as well and generally speaking covers all communications relating to the obtaining of legal advice. That general rule in my view would cover a statement of account.

The cases that appear to disagree with this view arise from the exclusion from privilege of "acts of counsel" or "mere facts" (as referred to at page 97 of Stevens). Based on this exclusion, things like a lawyer's trust account ledger have been found not to be privileged (e.g. Re Ontario Securities Commission and Greymac Credit Corp. (1983), 41 O.R. (2d) 328, 146 D.L.R. (3d) 73 (Div. Ct.)). This same exclusion, and the resulting confusion in the law, was the basis for previous Information and Privacy Commissioner orders which found that lawyers' bills, or parts of them, are not privileged and therefore not exempt under section 19 (Orders P-624, M-274, P-676).

The Court in Stevens indicates that it thinks the confusion regarding the status of lawyers' bills of account is resolvable (at page 102):

> In modern Canadian jurisprudence, the law is not entirely clear. There is authority that appears to go both ways. A number of authorities have expressly found that solicitor's accounts are privileged, while others seem to disagree. Nevertheless, in my view, bills of account are privileged, but lawyers' trust accounts and other accounting records are not so privileged. What has been considered as two conflicting lines of authority can be reconciled.

After citing several decisions to the effect that lawyers' bills of account are privileged in their entirety, the Court proceeds to distinguish them from cases dealing with "facts" and/or "acts of counsel" as reflected in trust ledgers, etc. The Court concludes (at page 106) that:

> ... the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely that it is only communications which are protected. The acts of counsel or mere statements or fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.
>
> Where a lawyer is involved in the dealings of his or her client, like the disposition of funds held in trust for the client, as in Greymac, or the execution of an agreement for the purchase and sale of property, the existence or contents of these acts are not protected. The lawyer, in the situation, is not in the process of giving advice to the client, but is more like a witness to an objective state of affairs.

> This explains the apparent conflict between the reasons of Southey J. in Greymac and Mutual Life Assurance Co. of Canada. In the former case the trust account was determined not to be protected by the privilege, while the solicitor's accounts in the latter case were held to be privileged. The statement of account is privileged because it is integral to the seeking, formulating and giving of legal advice. The trust account ledger is not protected because it relates to acts done by counsel.

Later (at pages 107-8), the Court describes the privilege applicable to legal bills of account as a "blanket" privilege:

> In the case at bar, though the appellant contends that the information which he seeks relates only to acts of counsel and therefore should not be privileged, I am satisfied that the narrative portions of the bills of account are indeed communications. This is not analogous to a situation where a lawyer sells a piece of property for the client or otherwise acts on the client's behalf. The research of a subject or the writing of an opinion or any other matter of that type is directly related to the giving of advice. Despite the fact that the appellant is content to have the specific topic of research remain privileged, those other portions of the bills of account still constitute communications for the purpose of obtaining legal advice. In those circumstances the lawyer is not merely a witness to an objective state of affairs, but is in the process of forming a legal opinion. This is true whether the lawyer is conducting research (either academic or empirical), interviewing witnesses or other third parties, drafting letters or memoranda, or any of the other myriad tasks that a lawyer performs in the course of his or her job. It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are communicated verbally, by written correspondence, or by statement of account.

The Court further drives home its conclusion that lawyers' bills of account are privileged in their entirety by means of the following commentary on the fact that severed copies had already been disclosed (at page 109):

> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly

> commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.

Another passage from Stevens (at page 97) indicates that the law to be relied on in connection with the solicitor-client privilege exemption in the Access to Information Act is the common law of solicitor-client privilege and that this is unaltered by its inclusion in an access statute:

> The effect of the provisions of the Act on the content of the privilege is nil. It was correctly determined by Rothstein J. that section 23 of the Act incorporates holus-bolus the common law of solicitor-client privilege. That term is not defined elsewhere in the Act. Hence, it can only be presumed that what is covered by the words "solicitor-client privilege" is the common law doctrine of solicitor-client privilege. That being the case, it is necessary for the government head to determine, before considering the operation of the Act, whether a document is subject to the privilege. If it is, then he or she may refuse disclosure. But the preliminary question is determined not in the context of the Act, but in the context of the common law. If the material is subject to the privilege, then the discretionary decision under section 23, whether to disclose it or not, is done in the context of the Act along with its philosophical presuppositions.

Accordingly, despite the complexity of the issues, the bottom line in Stevens is clear. Unless an exception such as waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption. I agree. Accordingly, in my view, because Records 12, 13, 14, 15 and 20 would be subject to solicitor-client privilege at common law, I find that they are properly exempt under section 19 of the Act.

The public policy objectives referred to in the Stevens case are valid, and the same considerations are present here. However, if the institution chooses not to waive privilege and disclose the total amounts charged by legal counsel on the lawyers' bills of account, it is worth noting that this information may not be subject to privilege if it is requested from other sources, such as copies of the institution's accounting records.

For example, in Greymac, the question of privilege arose in the context of a solicitor's activities with respect to money held in trust for the client. Southey J. held that the privilege did not attach to this activity. He stated [at page 337]:

> Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged . . .

Further, in Law Society of Prince Edward Island v. Prince Edward Island (Attorney General) [(1994), 382 A.P.R. 217 (P.E.I.S.C.)], the R.C.M.P. attempted to seize documents in the possession of a lawyer relating

to trust ledgers, general ledgers and bank reconciliation ledgers which pertained to the dealings of a number of the lawyer's clients. MacDonald C.J.T.D. determined [at p. 221]:

> It is the communications between the client and his lawyer that are privileged. The trust ledgers, general ledgers and bank reconciliation ledgers are not communications between the solicitor and the client. These documents form part of the solicitor's records and are reports of acts, not communications. Privilege does not attach to these documents.

Communications between the LCBO and the Attorney General's Offices

This category encompasses Records 7, 17-19, 21 and 30. Each of these records are or would reveal confidential written communications between the LCBO and its legal advisors within the Ministry of the Attorney General and are directly related to seeking legal advice. Accordingly, I find that Records 7, 17, 18, 19, 21 and 30 are all exempt under section 19.

Litigation privilege

The scope of this privilege was described in Order P-1551 as follows:

> Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor-client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.
>
> The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508-511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424-425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), reversed on other grounds (1998), 35 O.R. (3d) 727 (Gen. Div.)]. As the Ontario Court (General Division) Divisional Court explained in Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:
>
> > The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early

> disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175-177; In re Sealed Case, 676 F.2d 793 at 809-810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].

Internal notes and summaries of the LCBO Legal Services Department

This category encompasses Records 22, 24-26, 28 and 29. Each of these records consists of notes made by a lawyer or legal assistant within the LCBO Legal Services Department for its files. The LCBO submits that each record is subject to litigation privilege, in that each record was prepared by or for the LCBO's legal counsel for use in providing legal advice to the LCBO, in contemplation of litigation or for use in litigation.

Having reviewed the records at issue, I find that Records 22, 24, 25, 26, 28 and 29 consist of "opinion" work product. In the circumstances, I am satisfied that the rationale for litigation privilege is present with respect to these records. Accordingly, despite the termination of litigation, I find that these records qualify for exemption under section 19 of the Act.

ORDER:

I uphold the LCBO's decision.

Original signed by: September 2, 1999
Holly Big Canoe
Adjudicator