Solicitor-client privilege trumps access to information

By donalee Moulton

The Lawyers Weekly

Vol. 30, No. 4
(May 28, 2010)

FOCUS ON CIVIL LITIGATION

Far fewer documents may be making their way to the Office of the Information and Privacy Commissioner in the wake of a Supreme Court of Newfoundland and Labrador Trial Division decision that determined solicitor-client privilege has been broadened to a rule of substance - and the language in provincial legislation does not capture that privilege.

Lawyers across the country may want to take note of the decision, Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner), [2010] N.J. No. 52. "It's an area of law where there is not a whole lot of jurisprudence. Whatever decision Justice [Valerie] Marshall made, she was going to be making new law," said Anna Cook, a partner with Cox & Palmer in St. John's who represented the Information and Privacy Commissioner.

That new law, said Cook, "will surprise lawyers who have experience in privacy and access."

In this case, the attorney general sought an order declaring that the commissioner was not entitled to specific information under s. 52 of the Newfoundland and Labrador Access to Information and Protection of Privacy Act because of solicitor-client privilege. The government argued that solicitor-client privilege is no longer a rule of evidence and, therefore, not captured by the language of the section in question.

The court agreed. "The judge took the position that this has been elevated from the rules of evidence to a substantive right," said Cook. "Anything that is going to abrogate that right has to be absolutely explicit in the legislation.

"All the courts so far have been preaching that access legislation should be interpreted broadly," she added. "Justice Marshall said it does not get a broad interpretation when it comes to lawyer-client privilege."

The anomaly was not lost on Justice Marshall. "I am cognizant that undertaking a restrictive interpretation may seem at odds with the liberal construction directed by section 16 of the Interpretation Act," she stated.

"Nevertheless," she noted, "it is important to recognize that solicitor-client privilege commands its own niche in law and must therefore be considered in isolation when interpreting legislation."

Justice Marshall did point out in her decision that there is support for the commissioner's contention that the amelioration of the privilege to the status of a rule of substance does not obviate the privilege as a rule of evidence. "In Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860, Chief Justice Lamer does not suggest that the substantive rule replaces the rule of evidence," she stated. "On the contrary, he identified the issue in Descôteaux as being 'to determine whether the solicitor-client relationship, which confers the confidentiality protected by the substantive rule and the rule of evidence, arises.'"

Ultimately, however, the court found that the Office of the Information and Privacy Commissioner was not entitled to information protected by client-solicitor privilege. "There was nothing in the legislation, nor in any evidence, to suggest that the purpose of the Act is to grant unfettered powers to the Commissioner; to allow him to assume a role analogous to that of a court as an independent verifier of claims of solicitor-client privilege," said Justice Marshall.

"No matter what expertise, protocols and assertions of confidentiality may be proffered by the Commissioner, his office is not a court, nor is it an adjudicative body," she noted. "An interpretation excluding solicitor-client privilege from the purview of section 52(3) is, therefore, an interpretation which is not inconsistent with the purpose of the Act."

While Justice Marshall determined the legislation enabled "an expansive review," it is not one that allows a review of solicitor-client privileged documents, she determined.

That decision, which is now being appealed, will have practical implications for the Office of the Information and Privacy Commissioner. In a release issued by the office, it was noted that prior to this decision, there were 49 incidences where solicitor and client privilege was claimed, and in all cases, those records were provided to the commissioner for review. In each instance, the information was reviewed, and where the solicitor and client exception applied, the information was not recommended for release.

The office is now concerned that it is expected to take, on face value, that information is protected. "If that were the case, it could arguably be seen to erode the confidence of the public in the Act by the appearance or perception that the process is not independent, transparent or accountable. It could also be argued that the head of the public body could intentionally withhold information from review by the Commissioner by simply stating that it falls under Section 21," the release stated.

"Bearing in mind the relatively large number of previous requests for review where Section 21 has

been claimed, the current situation proves problematic and could significantly impact the Commissioner's mandate to provide appropriate oversight of the Legislation, particularly if Section 21 continues to be claimed often, or perhaps increases in frequency," it concluded.

In the past, the commissioner has often been able to help parties reach an acceptable conclusion for both sides. "Now," said Cook, "there may be no opportunity to broker a resolution. The applicant will have no choice but to go to court. Who's going to do that?"

"The result is less freedom of information," she added. "It goes against the legislation and effectively hamstrings the office of the commissioner."