〔Article〕

Solicitor-Client Privilege as a Principle of Fundamental Justice

Keisuke Mark Abe

I. Introduction

Just as communications between doctors and patients are treated as confidential in many legal systems around the world, due to candor on the part of the patient being essential in order for the doctor to determine the appropriate treatment, privacy of communications between lawyers and clients has been legally protected in many jurisdictions, as it is considered indispensable for effective advocacy and counseling. Japan in effect follows this principle to some extent; the difference being that the right to refuse production of professional communication documents is generally understood as a reflection of the duty of an attorney, who can be forced to yield to the need of a criminal investigation, as opposed to the client having the right to legal advice on a totally confidential basis.

As the Japanese legal system has traditionally been influenced by the laws of European continental jurisdictions since the Meiji era (1868-1912), the scope of legal confidentiality appears to be relatively narrow as compared with most common-law countries. Recently, however, the European Union and Switzerland have explicitly recognized the right to refuse disclosure of communications between lawyers and clients, effectively leaving Japan behind like a lone dinosaur.

One could gain insight from investigating legal developments in Canada, the global frontrunner in terms of extensive protection of legal professional privilege. Before introducing cases in a prominent recent trend in Canadian law, the comparison of the backgrounds of Canadian and Japanese legal systems might well be considered: both Canada and Japan share similar constitutional commitments typical of the Anglo-American legal tradition such as the rule of law and personal privacy, since Japanese constitutional law, unlike many other areas of law, is mostly Anglo-American, for the present Constitution of Japan was drafted by U.S. legal advisors after the Second World War. The constitutions of Canada and Japan have plenty of common ground dating as far back as Magna Carta, including, for example, the prohibition of deprivation of property not in accordance with "the law of the land," a notion now known as due process.

Starting from a commonly shared premise, the Canadian Supreme Court's jurisprudence in interpreting its Charter of Rights and Freedoms is instructive as an example of perhaps the most expansive formulation of an individual's autonomy, with respect to the confidentiality of communications with his or her lawyer, even among common-law countries. Its decisions with respect to solicitor-client privilege probably represent the maximum constitutional protection available to lawyers and clients.(1)

II. The Constitutionalization of Solicitor-Client Privilege in Canada

The issue of client confidentiality was brought to the fore when the

(1) The term "Solicitor-Client Privilege is now somewhat of a misnomer in Canada because conceptually a privilege is distinct from a right. . . . Solicitor-Client Privilege began as a privilege but has developed into a right which can be asserted even in the absence of legal proceedings." *See* Adam Dodek, *Solicitor-Client Privilege in Canada: Challenges for the 21st Century*, Discussion Paper for the Canadian Bar Association, at 6 (2011).

Canadian Supreme Court decided *Solosky v. The Queen* in 1979.(2) In analyzing whether or not prison authorities could open an inmate's correspondence with his lawyer, the Court noted that solicitor-client privilege has long been recognized as fundamental to the due administration of justice, and that the right to communicate in confidence with one's legal advisor is a fundamental civil and legal right. Three years later, in *Descôteaux v. Mierzwinski* (1982),(3) the central issue of which was whether the police could lawfully search a legal aid bureau and seize the form filled out by a legal aid applicant, for the purpose of demonstrating that he had lied about his financial status, the unanimous Court laid out a basic framework for assessing claims of solicitor-client privilege. It states that, when the law gives someone the authority to act in a way which might jeopardize solicitor-client confidentiality, that decision and the means of exercising that authority should be determined with a view to not interfering with solicitor-client confidentiality "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation." In these two instances, however, the Court ultimately rejected the parties' claims for confidentiality for technical reasons.

Thereafter, from around the turn of the millennium, a line of more substantive decisions came to be rendered under the leadership of Chief Justice Beverley McLachlin, who had been a scholar of the law of evidence before entering the judiciary. The expansion and constitutionalization of solicitor-client privilege have been considered to be one of the most notable features of the McLachlin Court (2000-2017).(4)

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(2) [1980] 1 S.C.R. 821.

(3) [1982] 1 S.C.R. 860.

(4) *See* Freya Kristjanson, *Procedural Fairness at the McLachlin Court: The First Decade*, Paper for the Canadian Bar Association Conference, at 10 (2009), https://www.cavalluzzo.com/docs/default-source/publications/procedural-fairness-at-the-mclachlin-court-the-first-decade-(c2357659xa0e3a).pdf?sfvrsn=0.

Most importantly, in *R. v. McClure*,[5] decided in 2001, the Canadian Supreme Court formally declared that solicitor-client privilege is now a principle of fundamental justice protected under Section 7 of the Charter.[6] The facts were somewhat idiosyncratic but certainly not unimaginable: When McClure, a librarian accused of sexual offenses against his former students, one of whom had filed a civil suit, sought production of a litigation file belonging to the plaintiff for the purpose of assessing the extent of his motive to fabricate or exaggerate the incidents of abuse, the trial judge ordered it to be disclosed. In an appeal to the Canadian Supreme Court, however, the order for production was set aside, thereby confirming that solicitor-client privilege is one that must be protected as close to absolute as possible and may be waived only by the client, as it is "integral to the workings of the legal system itself." Faced with the challenge of balancing this unique privilege against the accused's right to make full answer and defense, the Court noted that both are "principles of fundamental justice" and that the "importance of both of these rights means that neither can always prevail." After deliberation, the Court concluded that the circumstances in this case did not justify invading the solicitor-client privilege, given that the accused must first establish that the information sought in the solicitor-client file was not available from any other source and that he was otherwise unable to raise a reasonable doubt about his guilt in any other way. Here, one could clearly see the elevation of an evidentiary privilege rooted in the common law to a constitutionally guaranteed right under the Charter of Rights and Freedoms.

After reiterating the essentiality of solicitor-client privilege to Canada's justice system and overturning another lower court's "premature" order

(5) [2001] 1 S.C.R. 445.

(6) Section 7 of the Canadian Charter of Rights and Freedoms reads, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

for production of documents in *R. v. Brown* (2002),[7] the Canadian Supreme Court proceeded further and struck down legislation as infringing the privilege for the first time in *Lavallee, Rackel & Heintz v. Canada* (*Attorney General*),[8] also decided in 2002. In the latter case, in relation to a client's suspected money laundering and possession of proceeds of crime, the law firm had been searched and the documents taken into police custody despite the solicitor's claim of solicitor-client privilege. The Court made a general statement at the outset that, if a procedure set out in a statute results in an unreasonable search and seizure contrary to Section 8 of the Charter,[9] such a statute cannot be said to comply with the principles of fundamental justice embodied in Section 7; hence there is no need to undertake an independent Section 7 analysis when the compatibility with Section 8 is also under review. Following the finding that the accused had had a reasonable expectation of privacy and that the search in question was an unreasonable intrusion on that right to privacy, the Court invalidated Section 488.1 of the Criminal Code, which had provided procedural safeguards, due to it being insufficient to ensure that citizens' Section 8 rights would be adequately protected. Applying the minimal impairment standard, one of the most rigorous criteria used in constitutional law, the Court held that Section 488.1 was inconsistent with Section 8, because, *inter alia*, the lawyer must identify the client by name in order to assert the privilege under Section 488.1, even though, paradoxically, clients' names themselves might well deserve legal protection. In addition, the Attorney General was allowed by Section 488.1 to inspect the seized documents where the judge was of the opinion that it would materially assist him or her in deciding whether the document would be privileged. The Court found these and other irregularities in contravention with the Charter, making it clear that there is a violation of Section 8 whenever solicitor-client privilege is breached in excess of the

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（7） [2002] 2 S.C.R. 185.

（8） [2002] 3 S.C.R. 209.

（9） Section 8 of the Canadian Charter of Rights and Freedoms provides that everyone has the right to be secure against unreasonable search or seizure.

minimum necessary extent.

Canada (*Attorney General*) *v. Federation of Law Societies of Canada*,[10] a decision rendered in 2015, could then be seen as the culmination of these significant developments in Canadian law. At issue was the constitutionality of a controversial statute, the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA), and its associated regulations called the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations (PCMLTFR). Together they created an overarching legal framework, under which all the lawyers in Canada (i.e. advocates and notaries in Quebec, and barristers and solicitors in all other provinces), as well as banks, life insurance companies, securities dealers, accountants, and many other areas of business, were required to collect information about their clients and report "suspicious financial transactions" to the Financial Transactions and Reports Analysis Centre (FINTRAC), the national financial intelligence agency. Most invasively, in order to ensure compliance, Section 62 of the PCMLTFA stipulated that a person authorized by the Director of FINTRAC could freely enter premises, examine records, and inquire into the affairs of any lawyer without a warrant. This power encompassed the ability to search through lawyers' computers and print or copy records, although injunctions issued by the lower courts precluded the statute's application to lawyers pending the final determination of this case. Other notable provisions included Sections 33.4 and 59.4 of the PCMLTFR, the combination of which imposed obligations on lawyers to ascertain the identity of those on whose behalf they pay or receive money, to issue a "receipt of funds record" for each transaction over $3,000, and to keep such records for five years. The Federation of Law Societies argued that these extraordinary requirements would make lawyers' offices "archives for the use of the prosecution."

(10) [2015] 1 S.C.R. 401.

Extending the hitherto formulated case law, the Canadian Supreme Court held that the challenged provisions of the PCMLTFA and the PCMLTFR were unconstitutional and of no force or effect. The Court rejected the Attorney General's contention that the legislative scheme might be properly characterized as "an administrative law regulatory compliance regime"; instead, it pointed out that the scheme's character was predominantly criminal, considering that its purposes were to facilitate the investigation and prosecution of money laundering and terrorist financing and that the regime imposed penal sanctions on lawyers for non-compliance. From this it followed that *Lavallee* should serve as the important precedent for this case. The Attorney General's justification for the PCMLTFA failed the *Lavallee* minimal impairment test, since, according to the justices, unanimously, there were other less drastic means of pursuing the stated objectives of combating money laundering and terrorist financing. As such, the PCMLTFA's challenged provisions were found to be violative of Section 8.

In addition, Justice Cromwell, writing for the majority consisting of five justices, noted that the overall regulatory scheme, especially the information gathering and retention provisions, infringed Section 7 as well, as it limited the liberty of lawyers in a way not in accordance with the principles of fundamental justice. Justice Cromwell emphasized that the independence of the bar is one of these principles, as preserved by Section 7. Such independence enables the lawyer to fulfill his or her duty of commitment to the client's cause without fear of government interference. Fiduciary and ethical duties of lawyers in turn stem from this duty of commitment; these duties, fiduciary and ethical, play a central role in the administration of justice by preventing the risk of misuse of confidential information and of impairment of the lawyer's client representation. The importance of preventing misuse of information is particularly reflected in cases offering constitutional protection to solicitor-client communications. He concluded that the regulatory scheme in question, by requiring lawyers to collect more information than otherwise required

under professional ethical standards already in place and not adequately protecting solicitor-client privilege, "undermined the lawyer's ability to comply with his or her duty of commitment to the client's cause."

The remaining two justices, Chief Justice McLachlin and Justice Moldaver, reached the same result with respect to Section 7, but noting that their colleagues in the majority in effect relied on breach of solicitor-client privilege, based their decision on the more direct view that the principle offended in this case was not the "lawyer's commitment to the client's cause" derived from the independence of the bar, but solicitor-client privilege itself, which had already been recognized as a constitutional norm.

Despite the difference in their modes of analysis, the majority and the concurring justices in *Federation of Law Societies* both discussed solicitor-client privilege in the constitutional context, and on that basis, whether implicitly or explicitly, invalidated the challenged provisions of the PCMLTFA and the PCMLTFR. This decision has already served as a key precedent for some subsequent Supreme Court cases: In *Canada (Attorney General) v. Chambre des notaires du Québec* (2016),[11] the Court, denying the Attorney General's argument that the taxpayer's expectation of privacy for information protected by professional secrecy was diminished in the civil and administrative context, held that the "requirement scheme" in the Income Tax Act (ITA), which authorized the Canada Revenue Agency (CRA) to issue a formal demand to any legal adviser, including any notary in Quebec, to provide information concerning a taxpayer without notifying that taxpayer, was invalid because it breached solicitor-client privilege and was therefore an unreasonable seizure prohibited by Section 8 of the Charter. The exception in the ITA, excluding any "accounting record of a lawyer" from the protection of solicitor-client privilege, was also declared unconstitutional,

(11) [2016] 1 S.C.R. 336.

as the manner in which it limited the scope of professional secrecy was not necessary to achieve the stated purposes of the ITA, namely the collection of amounts owed to the CRA and tax audits. All justices concurred. Another case, *Canada* (*National Revenue*) *v. Thompson* (2016),[12] decided on the same day as *Chambre des notaires*, applied the established case law to a set of facts involving an individual taxpayer, in which this taxpayer, a lawyer, refused to comply with the CRA's request for documents sent pursuant to the ITA and did not provide details about his accounts receivable, such as the names of his clients, on the basis that they were protected by solicitor-client privilege and were therefore exempt from disclosure. The Court, again unanimously, held that, because the lawyers' accounting records exception in the ITA was unconstitutional, the lawyer had no obligation to disclose the withheld client documentation. The Minister of National Revenue's request for disclosure of the documents was rejected, as the information contained therein was presumptively privileged.

III. Evaluation and Implications for Japan

The International Report on Professional Secrecy and Legal Privilege, published by the International Association of Lawyers in 2019, observes that "virtually every developed legal system in the world shares the belief that communications between lawyers and clients are, and should be, confidential."[13] It points out that this concept is universally recognized as essential to the rule of law, although different countries refer to it differently, using various terms such as "professional secrecy," "attorney-client confidentiality," "legal privilege," and so forth. It notes that, "while some jurisdictions elevate professional secrecy to a fundamental human right," others consider it a "core legal principle."

(12) ［2016］1 S.C.R. 381.

(13) International Association of Lawyers, *International Report on Professional Secrecy and Legal Privilege*, at 7 (2019), https://www.uianet.org/sites/default/files/international_report_professional_secrecy.pdf.

Beyond the conceptual significance of professional confidentiality and the fine distinctions between approaches for its protection taken by various legal systems, the report, indirectly but clearly, reveals the fact that there must have been numerous instances in which the confidentiality of legal communications was threatened or actually violated by the authorities in many countries. Otherwise, such strengthened protections would have been unnecessary and unheard of in the first place. The presence of these protections across the world seems to indicate that, regardless of location, there have been repeated unreasonable searches and seizures by the authorities, and that lawyers and citizens have come to feel keenly the need for legal privilege, triggering legislatures and judiciaries to craft ways to cope with this kind of abusive use of governmental power.

Japan has not been an exception, unfortunately, with respect to the fact that obtrusive searches and seizures have been conducted on occasion. In March 2020, for example, the President of the Kanagawa Bar Association protested in public that, earlier that year, despite the attorney's objection based on his right to refuse seizure pursuant to Article 105 of the Japanese Code of Criminal Procedure,[(14)] prosecutors from Tokyo had broken into a law office through the back door, remained there for hours ignoring the attorney's repeated requests to vacate the premises, destroyed an inside door key, and videoed the interior of the office where

(14) Article 105 of the Japanese Code of Criminal Procedure reads as follows:"A physician, dentist, midwife, nurse, attorney (including a foreign lawyer registered in Japan), patent attorney, notary public or a person engaged in a religious occupation, or any other person who was formerly engaged in any of these professions may refuse the seizure of articles containing the confidential information of others with which said person has been entrusted, and retains or possesses in the course of said person's duties; provided however, that this does not apply when the person in question has given consent, when the refusal is deemed to be an abuse of rights exclusively for the interests of the accused (unless said person is the accused), or where there exist other circumstances provided for by the Rules of Court."

case records had been maintained. “It was an act of illegality which had no room for justification whatsoever,” the President asserted.

Given the current state of affairs exemplified by this case, it seems advisable that Japan should consider incorporating into its legal system the increasingly universal rule that professional confidentiality deserves more protection not only as a corollary of lawyers’ obligations, which can arguably be removed whenever the government sees fit, but as an imperative arising from clients’ rights or privileges. The approach recently taken by Canada, based on its Charter of Rights and Freedoms, which stands in the same Anglo-American tradition as the present Japanese constitution, has rich implications for the future course of Japanese law, in that its Supreme Court has characterized solicitor-client privilege as one of the embodiments of the principles of fundamental justice, thereby elevating it to the status of a constitutional right.

Pessimists would say that there will always be lawless searches and seizures, no matter how strong the protections afforded to communications between lawyers and clients. Besides, the argument might go, even if such protection were constitutionalized, the judiciary would perhaps come up with an exception so that the government would be able to circumvent the mandate of constitutional law, particularly in nations where conservative judges generally have the edge. There is undeniably some truth in this view; however, it does not mean that comparative law is ineffective or that drawing insights from landmark Canadian Supreme Court cases is a futile exercise for Japan. The following analogy might illustrate this point.

In 1213, just two years before Magna Carta was signed by King John of England, a relatively unknown event, which would be called condemnation proceedings today, took place in Kyoto, at that time the capital of Japan. On a sunny spring afternoon, Fujiwara no Teika, one of the best-known tanka poets of the Middle Ages, was shocked to find that a horde

of Samurai, or armed government officers, were digging up willow trees in his garden. Explaining that the willows in the palace of Retired Emperor Gotoba had withered and died, they uprooted two of Teika's cherished trees to transplant into His Majesty's courtyard. There had been no prior notice or hearing; nor was Teika awarded just compensation for the taking of his property. "There is no justice left in this world," the poet lamented in his diary. This incident occurred in the first year of Kenpo, the name of an era which happens to be a homophone in Japanese for "constitutional law."

Would Teika's willow trees not have been commandeered if there had been any of Magna Carta, the Canadian Charter of Rights and Freedoms, or the Constitution of Japan at that time? It is extremely unlikely that the answer to this would be *no*, because noble principles printed on a paper scroll could not have driven the Samurai away like a magical guardian conjured up by Harry Potter. In fact, that basic reality has not changed much in centuries, in the sense that a private citizen in the year 2021 would still stand little chance against the authorities in a fight to block confiscation of his or her property. Having said that, no one living today would envy Fujiwara no Teika, simply because he was afforded no guarantee of due process. When the authorities unreasonably try to expropriate private property in modern day Japan, citizens have on their side Article 29 of the Japanese Constitution, which preserves the inviolability of property rights and obligates the government to properly compensate the owner for seizing his or her property. The presence of this legal weapon empowers Japanese lawyers to defend their clients' rights and legal interests, although it of course does not mean that they will always be successful.

As for the confidentiality of communications between lawyers and clients, unlike in the neighboring sphere of property rights, the legal protection provided to Japanese people nowadays is not so different from what Fujiwara no Teika had in the thirteenth century, despite a number

of potentially powerful provisions in the Constitution of Japan, such as Article 31, which prohibits the deprivation of liberty except according to procedure established by law, and more specifically, Article 35, which forbids searches and seizures except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized. The image of fundamental justice reflected in these and other constitutional provisions can certainly be utilized to promote solicitor-client privilege, mirroring the developments in Canada.

Finally, though, in opposition to the suggestion above, one might point to the fact that Japanese legislators, prosecutors, and judges do not seem to be at all amenable or enthusiastic to the possibility of strengthening such privilege at the moment. Most probably, this is a problem caused by either the lack of information or insufficient understanding of its significance, which is precisely why more exchange of ideas and opinions on this subject is seriously needed. Whether, as happened recently in Japan, one is a prime minister criticized for hosting a cherry blossom viewing party at public expense or a prosecutor in trouble for playing mahjong for money, one might very well appreciate the confidentiality of legal communications. Solidifying professional confidentiality would benefit all citizens, regardless of their position, status, or privilege.

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