



Mahmud Jamal of Osler Hoskin & Harcourt LLP, and Paul Paton, chair of the CBA ethics committee, listen to Prof. Adam Dodek make his case.

## *Highlights from the CBA Council debate*

MICHAEL CREAGAN



# *Privilege* FIGHT CLUB FOR CORPORATE COUNSEL

**T**he heretic went three rounds with the fundamentalist on the issue of solicitor–client privilege during a debate sponsored by the ethics and professional responsibility committee at this summer’s meeting of CBA Council. Here is an edited transcript of the highlights on two of the questions:

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Be it resolved that:

1. Solicitor–client privilege should not be available to corporations or government;
  2. Solicitor–client privilege should be extended to non-lawyer professionals, including paralegals.
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In the ring were:

**For the affirmative:** Adam Dodek, associate professor in the Faculty of Law, University of Ottawa, and author of a discussion paper commissioned by the CBA on solicitor-client privilege.

**For the negative:** Mahmud Jamal, partner at Osler, Hoskin & Harcourt LLP.

The debate was moderated by Paul Paton, then chair of the CBA ethics and professional responsibility committee and a professor of law at McGeorge School of Law, University of the Pacific in Sacramento, CA.

### ROUND 1

**Be it resolved that solicitor-client privilege should not be available to corporations or government.**

#### **Adam Dodek:**

I sort of feel like an apostate in the temple of the legal profession, but what I hope to convince you today is that the view that I espouse represents the true faith in terms of solicitor-client privilege and that we, as a profession, have strayed from that true faith.

We have lost sight of the true meaning and purpose of solicitor-client privilege. It was created in order to protect the powerless, not to further strengthen those with power. The privilege was recognized in order to allow vulnerable persons to seek expert legal advice. It was not created in order to help those who exercise power, whether in the public sphere or the private sphere to hide behind the protection of the privilege.

In Canada, we have now largely constitutionalized the privilege. I think that the best way to understand the privilege as a constitutional right is part of the individual rights to privacy, to autonomy and to dignity. The privilege, properly understood, is

really about fulfilling the individual's right to counsel.

Individuals have a right to counsel, they also have a privilege against self-incrimination and the essence of solicitor-client privilege is to allow an individual to exercise both those rights. If we did not have solicitor-client privilege, an individual would be forced to choose between having the right to counsel or protecting their right against self-incrimination. Having that privilege and having the individual control the right to confidential communications with their legal adviser, allows that individual to exercise autonomy and to protect their dignity as a human being.

Understood properly as a human right, the privilege makes no sense when applied to non-human entities. To me, saying that governments and corporations enjoy a constitutional right to solicitor-client privilege makes as little sense as saying corporations have a right to equality or governments have a right to freedom of speech.

In the name of humanity and all that is holy, we should strip organizations of the right to claim solicitor-client privilege and reserve the most sacred of protections for the most sacred of beings: humans.

#### **Mahmud Jamal:**

There are three points I will give in response.

The first is that the foundation or the premise of Adam's argument is wrong, with respect. It is true, corporations are not natural persons — they are not humans, but the privilege has been articulated and defended as being more than just an individual right; it stretches beyond the parties and is integral to the operation of the legal system. The modern rationale of the privilege is one of a systemic interest — a systemic principle for the functioning of the legal system itself and corporations are just as essential for the functioning of that legal system.

My second point is that corporations like humans — like



individuals, need privacy in order to seek and obtain legal advice and they have the same interest in this respect as everybody else. Without the assurance of the zone of privacy, of confidentiality and protection of the privilege, corporations will simply not seek legal advice and this will not be in the broader public interest.

Lastly, the concern to eliminate the privilege for corporations is really overkill; it will not just eliminate the privilege for corporations, it will effectively eliminate the privilege for everyone else because a large part of legal activity and legal advice is channelled through corporations.

Providing a privilege for government, fundamentally helps promote the rule of law within government because government can then obtain legal advice, as everybody else, and organize public policy and the development of public rules in compliance with the law. That is, surely, a fundamental interest of all Canadians. If transparency is the object, the appropriate role is one of selective waiver — voluntary waiver, which is really a political decision and not a legal one.

#### **Rebuttal: Dodek:**

I have three points in response.

We really have this idea that government could not function without the cloak of solicitor-client privilege. I really find it quite fanciful. If you take that argument seriously and say that government lawyers and civil servants who have a duty of loyalty as public servants would not be able to fulfill their duties, which are recognized as constitutional conventions, without the protection of the privilege. I think that is, actually, offensive to public servants and to government.

On the idea of leaving it up to voluntary and selective waiver, I would just say that is not a part of our history or culture in Canada.

On the second point about corporations, recent studies have

shown that corporate counsel is now doing more and more non-legal work; the good corporate counsel is corporate counsel who is involved in strategy and who knows the business of their client. One of the great challenges we have is unravelling legal advice from the business advice and I would say that stripping the corporation of its right to solicitor-client privilege is only going to put it on par with other essential parts of business advice that corporations need — financial, marketing and technology.

My last point is about access to justice, I think it is offensive to notions of access to justice to try and claim that solicitor-client privilege is about access to justice. It is about people who cannot afford to hire a lawyer; it is not about the fear of something they might say will be disclosed. The idea that [privilege] is an access to justice issue for corporations and government, I think, is inimical to the serious access to justice problem that we have in Canada.

#### **ROUND 2**

**Be it resolved that the solicitor-client privilege should be extended to non-lawyer professionals, including paralegals.**

#### **Dodek:**

[W]e like to say that the law is a jealous mistress. Sometimes I think the law is just plain jealous or insecure! And I would say: do we think so low of ourselves as a profession that we fear extending the same rights to our clients if they consult with another professional legal adviser and sadly, I fear this is often the case because it is not for nothing that the solicitor come first in solicitor-client privilege.

Too often we lose sight of the fact that the privilege is about the client. [W]e are the last major jurisdiction in the world that calls it solicitor-client privilege. In the U.S., of course, it is attorney-client privilege, but everywhere else in the common law



## Feature

Mahmud Jamal  
Partner  
Osler, Hoskin & Harcourt LLP



Adam Dodek  
Associate professor  
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world it is legal professional privilege. I think we would be better off talking about legal professional privilege because the privilege should certainly be expanded to paralegals.

Wigmore has always been our touchstone defining privilege in Canada. Here is how he defined privilege in the passage familiar to most of you and adopted and reiterated by the Supreme Court of Canada time after time:

*“Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal adviser except the privilege be waived.”*

Wigmore wrote those words over 100 years ago and I submit that the only thing dated about that passage is its gender-specific nature. The touchstone of the privilege should be communications with a professional legal adviser, whether that adviser is a lawyer or a paralegal. If we do not extend that privilege to paralegals, we risk further marginalizing those most in need of protection of the

privilege because the privilege should be about the client, not about the lawyer.

It should not matter if [a person] goes to a paralegal or a lawyer; they should be entitled to the same protection of their communications, yet that is not the approach that our courts have taken. The truth is that we have already extended the protection of the privilege to non-legal professionals, but only when those non-legal professionals are involved in multimillion-dollar deals. I am speaking of the recent cases out of Ontario and B.C. over the so-called “deal privilege” which extends the protection of solicitor-client privilege to financial and other advisers who are part of the corporate deal. Yet, if an individual is charged with an offence and decides to have an agent represent them in criminal court and may end up with a criminal conviction that would follow them the rest of their life, that individual’s communications are not protected by privilege if represented by a paralegal.

Is this really the solicitor-client privilege that we want? Can we

possibly defend that in the court of public opinion? The privilege should protect the most vulnerable people, not only the most powerful. To do otherwise would be to pervert our justice system and the sacred trust bestowed on members of our profession by the public.

### Jamal

The debate about whether non-lawyers should be protected by privilege is not about preserving a legal monopoly. It is not about protecting the guild, and I say this despite the presence of some lawyers who market the privilege as a commodity — who sell it as a basis for engaging them — and it is not about the insecurities of the legal profession.

It is about, fundamentally, going back to what I said at the onset which is the principle justification for the privilege and that provides also the reason for non-extension to non-lawyers; that is, the essential and integral role of the lawyer to the operation of the legal system in the rule of law.

So, the question is: Is this individual and their advice integral to the operation of the legal system and the rule of law? That is the question you have to ask and, in my respectful submission, not all non-lawyers are the same in this regard. It is, perhaps, easiest in respect of patent agents who have long been recognized as not being within the ambit of privilege since the 1886 decision of the Court of Chancery.

A somewhat harder case is the situation of accountants and tax accountants, in particular, who may review many of the same rules as lawyers and advise on many of the same rules. The problem is they do not have the same nexus to the operation of the legal system and their advice is not integral to the legal system to the same degree, but I recognize they have a greater claim to being within the ambit of the privilege.

[Paralegals] I believe, do have the greatest claim to coming within the scope to privilege, especially now that in Ontario they are regulated by the Law Society. It seems to me that paralegals quite plausibly should come within the scope of the privilege.

Even if non-lawyers are outside the protection of the privilege, one should not forget that they still have the possibility of coming within a case-by-case privilege

even if they do not benefit from the class privilege.

Fundamentally, this is an issue for the legislature; it is not an issue for creative judicial law-making through the courts and in many jurisdictions it has been addressed by the legislature. That is where the issue properly lies. ■

*This is an edited transcript of the debate. Visit [cba.org](http://cba.org) to watch the full version.*

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