S.C.C. Court File No. 37476

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

DEREK BRASSINGTON, DAVID ATTEW, PAUL JOHNSTON and DANNY MICHAUD

Respondents

[Style of Cause continued on inside page]

FACTUM OF THE INTERVENER (FEDERATION OF LAW SOCIETIES OF CANADA, INTERVENER)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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[Style of Cause continued]

AND BETWEEN:

PERSON A

Appellant

-and-

DEREK BRASSINGTON, DAVID ATTEW, PAUL JOHNSTON and DANNY MICHAUD

Respondents

AND BETWEEN:

SUPERINTENDENT GARY SHINKARUK

Appellant

-and-

DEREK BRASSINGTON, DAVID ATTEW, PAUL JOHNSTON and DANNY MICHAUD

Respondents

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

DEREK BRASSINGTON, DAVID ATTEW, PAUL JOHNSTON and DANNY MICHAUD

Respondents

-and-

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PART I – OVERVIEW

1. The solicitor client relationship lies at the core of Canada's legal system. The courts have long recognized that the work lawyers do for their clients makes justice possible. Canadians would be unable to navigate the legal system, and Courts would be unable to resolve their legal issues, without lawyers and clients working together.

2. While there is no doubt that informer privilege is a useful tool for law enforcement and an important part of the criminal justice system, it must be fairly balanced with the importance of the solicitor client relationship. Requiring accused people to bring applications in court before they can discuss informer privileged information with their lawyers intolerably interferes with that relationship. Fundamentally, the Federation of Law Societies of Canada (FLSC) submits that the issue of sharing informer privileged information with counsel is one that must be managed by the lawyer according to well established and vigorously regulated standards of professionalism and ethics.

3. All parties agree that clients must be able to share informer privileged information with counsel in at least *some* circumstances. There are two key questions that must be answered on this appeal. **First,** when can clients share the information with counsel? **Second,** what rules should govern the process of sharing information with counsel?

4. On the **first question,** the right balance is struck between informer privilege and the solicitor client relationship when sharing information is permitted <u>where it is relevant to the client's right to make full answer and defence.</u> In practice, this means information can be shared by an accused, but only when it is necessary to determine if there are grounds to bring an "innocence at stake" application. Requiring counsel and their clients to bring court applications before this information is shared violates the accused's right to a solicitor client relationship that

is free from state interference. It would subject solicitor client communications to an unprecedented vetting process and would erode the right to make full answer and defence.

5. On the **second question**, the standards of professionalism and ethics imposed on lawyers by their law societies provide a rigorous framework for protecting informers and preventing the public disclosure of privileged information. In addition to loyally serving their clients' interests, lawyers are also officers of the Court, bound to act with candour and integrity. They are also bound by solicitor client privilege and a duty of confidentiality. The fact is, lawyers navigate difficult ethical issues that arise from information their clients provide to them on a daily basis. The Courts do not and should not regularly supervise resolving these ethical issues.

6. Cases where it will be appropriate for a client to share informer privileged information with counsel will be rare. This issue simply does not arise often. Counsel, guided by their provincial or territorial law society and their Rules of Professional Conduct, are well equipped to manage the few situations that do arise. Interfering with the solicitor client relationship by vetting and supervising communications between clients and their lawyers on an unprecedented level is not the answer.

PART II – FLSC POSITION ON QUESTIONS ON APPEAL

7. The FLSC submits that requiring an accused to bring an application in court for permission to share informer privileged information with counsel unconstitutionally interferes with the solicitor client relationship. Disclosure should be permitted without a court application, but only in cases where the information is relevant to an accused's right to make full answer and defence. The standards of professionalism and ethics imposed on lawyers by their law societies provide a safe framework for sharing information that respects the purpose of informer privilege.

PART III – STATEMENT OF ARGUMENT

A. When can Clients Share Informer Privileged Information with Counsel?

8. Clients must be permitted to share informer privileged information when it is relevant to making full answer and defence. The solicitor client relationship fundamentally underpins the legal system. This Court's precedent has repeatedly recognized that justice is difficult to achieve without the contribution lawyers make to their client's causes. That is why this Court described the relationship between a lawyer and her client as being "integral to the workings of the legal system itself" in *R. v. McClure*.[1] It is also why the solicitor client relationship is protected under section 7 of the *Charter of Rights and Freedoms*.[2]

9. The solicitor client relationship requires freedom from state interference. In *Attorney General of Canada v. Federation of Law Societies of Canada,* the FLSC brought a constitutional challenge against provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[3] that required counsel to record and store information about their clients. In finding that the provisions violated s. 7 of the *Charter,* this Court held that counsel's relationship with their client and their commitment to the client's cause is "a basic tenet of our legal system."[4] The Court recognized that protection against state interference is key to that relationship:

> …there is overwhelming evidence of a strong and wide-spread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause.[5]

10. In this case, requiring a court application before a client can share informer privileged information would equally interfere with the solicitor client relationship. In order for a lawyer to

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[1] *R. v. McClure*, 2001 SCC 14, at para. 31
[2] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7.
[3] S.C. 2000, c. 17.
[4] *Ibid*, at para. 94.
[5] *Ibid*, at para. 102.

effectively represent a client, it is "essential for the lawyer to know all of the facts" about a client's case.[6] This is the only way for counsel to ensure they understand the full scope of a client's potential liability and every defence that may be available. This Court has recognized that free and candid communication within the solicitor client relationship is crucial. Clients "must be able to speak candidly with their lawyers" to "enable their interests to be fully represented."[7] Communication that is "free and candid" protects "the legal rights of the citizen."[8]

11. Requiring a client to withhold information that is potentially relevant to her right to make full answer and defence, subject only to a successful court application brought at the end of the Crown's case would subject client communications to an unprecedented level of state scrutiny. The FLSC agrees with the Respondents' submission that the very act of bringing an application threatens solicitor client privilege by revealing communications and possible strategies being discussed between a lawyer and client.[9] The application process itself would also be unworkable and would place the lawyer and client in an untenable position. Although the client would have full access to the information that might support the application, the lawyer would have none. The lawyer would be compromised, unable to make any meaningful submissions about why the client should be permitted to share the information.

12. The process would also inject an imbalance in the solicitor client relationship that would undermine "free and candid" communication. If the Crown's position is accepted, it would mean that none of the information held by the client could be discussed with counsel until after succeeding on an "innocence at stake" application at the end of the Crown's case. The unshared

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[6] *R. v. McClure*, 2001 SCC 14, at para. 33.
[7] *Ibid*, at para. 5.
[8] *Ibid*, at para. 33.
[9] Joint Factum of the Respondents, at para. 179.

informer privileged information would be the elephant in the room every time the lawyer and the client meet to discuss and prepare the case. Although the client would know the details of the information and how it is relevant to her defence, she would not be able to discuss it. This would place an untenable strain on the solicitor client relationship.

13. This situation would be the reverse of *R. v. Basi*.[10] In that case, this Court held that permitting disclosure of confidential informer information to defence counsel and not the accused would "strain" the solicitor client relationship by hampering free communication.[11] Communication would be hampered because the lawyer would have information relevant to the case that she could not discuss with her client. This Court held in *Basi* that this informational imbalance would place counsel in "an awkward and professionally undesirable position."[12] As a result, the Court held that counsel could not receive the information. In this case, having clients in possession of information that must be withheld from their counsel creates the same imbalance and is similarly unworkable.

14. Requiring court applications is not necessary to protect the interests that animate the law of informer privilege. As a starting point, the FLSC agrees that informer privileged information is only relevant insofar as it may provide the basis for an "innocence at stake" application. As a result, the information is only relevant in cases where counsel represents an accused person charged with an offence that has engaged his or her right to make full answer and defence. These situations will be rare.

15. However, an accused should not be restricted from sharing the information until "innocence at stake" is established. Permitting the accused to share information with counsel when

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[10] 2009 SCC 52.
[11] *Ibid*, at para. 45.
[12] *Ibid*, at paras. 45-46.

it is relevant to making full answer and defence will not undermine the purposes of informer privilege — protecting informers and encouraging others to come forward. The innocence at stake standard is meant to apply to disclosure of an informant's identity to the accused and the broader public. In such a situation, the informer is placed in danger. Disclosure tells both the accused and the public who the informer is. The privilege is pierced completely and the severity of disclosure is obvious.

16. Sharing informer privileged information with counsel is not the equivalent. When the client is sharing informer privileged information with counsel, it is in a situation where the accused already knows the information, and the information is being discussed privately in circumstances that attract the protection of the rules of confidentiality and of solicitor client privilege.[13]

17. Sharing in a solicitor client relationship poses little risk to the purposes underlying informer privilege. It does not place informers in danger and it will not have a chilling effect on confidential informers coming forward in future cases. An informer's primary concern is that their identities will be revealed to the accused and the public at large. Privately sharing information with counsel, in circumstances that attract privilege, when the accused already knows who the informer is and what the informer has said, does not raise the same concerns. However, sharing information does give effect to the accused's right to make full answer and defence, and it avoids an unconstitutional interference with the solicitor client relationship.

B. What Rules should Govern Sharing Information with Counsel?

18. There is no doubt that sharing informer privileged information with counsel is a serious step that must be carefully undertaken. However, lawyers are much more than just advocates for their clients. They are also officers of the Court, bound to uphold the administration of justice. The

[13] See *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 50.

ethical obligations that all lawyers must follow, including those spelled out in the law societies' rules of professional conduct, provide the safeguards needed to ensure that informer privilege is protected.

19. Although free and candid information sharing is essential to the solicitor client relationship, there are times when ethical and professional limits are placed on the use that can be made of information learned by counsel. The provincial and territorial law societies and Rules of Professional Conduct already govern effectively in these areas. For example, it is accepted that:

1) Lawyers are not permitted to knowingly assist a client in engaging in unlawful conduct[14]

2) Lawyers cannot prepare or assist a client to give testimony that the lawyer knows to be false[15]

3) Lawyers are limited in the defences they can pursue by the information that clients provide to them (e.g. if a client admits to being present at the scene of a crime, a lawyer cannot ethically pursue an alibi defence)[16]

4) If lawyers receive real evidence from their clients, they are obligated to give that evidence to the police[17]

5) If a client reveals information to a lawyer that discloses a threat to public safety, the lawyer may report that information to the authorities despite solicitor client privilege[18]

20. When any of these situations arise, counsel must carefully navigate their ethical and legal obligations in light of legal precedent and regulation by their governing law society. The decisions

[14] Federation of Law Societies of Canada's Model Code of Professional Conduct, Rule 3.2-7.
[15] *Ibid,* Rule 5.4-2.
[16] *Ibid,* Rule 2.1-1, Rule 3.2-7.
[17] *Ibid* Rule 5.1-2A.
[18] *Ibid* Rule 3.3-3.

made by lawyers in difficult ethical situations are not subject to routine supervision and management by the Courts.[19] In all of the situations set out above, counsel are called upon to exercise their professional judgment and carry out their ethical responsibilities with great care. Lawyers are trusted to navigate "ethical minefields" like these on a daily basis. They are well equipped, with guidance from their law societies, to manage the process of sharing informer privileged information within the solicitor client relationship without creating a risk of harm to confidential informers.

21. Existing standards of professionalism and ethics place safeguards around the process of sharing informer privileged information with counsel. Limiting the sharing of information to situations where it is relevant to the right to make full answer and defence means that counsel must carefully determine the potential relevance of the information before it is shared. It falls to counsel to carefully lead this conversation. In the vast majority of cases where a person within the circle of informer privilege is charged with an offence, it will be clear that informer privileged information is not relevant. In those rare situations where informer privileged information is potentially relevant, counsel must act with integrity as officers of the court. And any informer privileged information that is disclosed is shielded by the duty of confidentiality and solicitor client privilege.

22. In order to serve their vital function effectively, our legal system places great trust in lawyers to conduct themselves ethically and responsibly. Our legal system also trusts the law societies to regulate in this area. This Court should protect the solicitor client relationship and reaffirm the trust our legal system places in counsel.

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[19] Indeed, prosecutions in this area are extremely rare. See *R. v. Murray*, 2000 CanLII 22631 (ON SC)

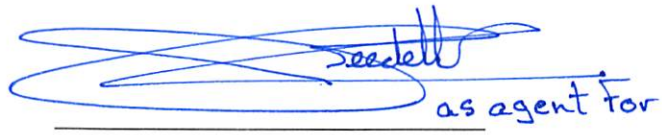
PART IV – SUBMISSIONS ON COSTS

23. The FLSC does not seek costs and asks that it not be liable to pay the costs of any party or intervener.

PART V – ORDER REQUESTED

24. The FLSC takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2018



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PART VI – TABLE OF AUTHORITIES