



***Bill 122, Broader Public Sector
Accountability Act***

Date: November 23, 2010

Submitted to:

Shafiq Qaadri, Chair
Standing Committee on Social Policy

Submitted by:

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Bill 122, Broader Public Sector Accountability Act (“Bill 122” or “The Bill”)

The Ontario Bar Association (the “OBA”) supports the intent of Bill 122 to bring further accountability to the broader public sector. This submission deals with one discrete issue of concern. As detailed below, some of the provisions in the Bill threaten the public’s long-protected right against compelled disclosure of confidential interaction with its lawyers. We do not believe that there was an intention on the part of the government to encroach on this well-recognized civil and legal right. However, as the matter now stands, some of the Bill’s definitions and disclosure requirements do raise this concern.

The Ontario Bar Association

By way of introduction, the OBA represents 18,000 lawyers, judges, law professors and students in the province of Ontario. OBA members practise law in no fewer than 36 different sectors. In addition to providing legal education for its members, the OBA has assisted governments with several legislative and policy initiatives and frequently makes submissions to government and legislative committees - both in the interest of the profession and, as in this case, in the interest of the public.

Solicitor-Client Privilege

The public’s right not to be compelled to reveal communication with their lawyers is considered “a fundamental civil and legal right” in Canada¹. This right, called “solicitor-client privilege” or “attorney-client privilege”, exists to protect the public, not the lawyer. In fact, it also protects the proper operation of the legal system, business and the public sector. If individuals or organizations cannot be certain that their legal advice can be kept confidential, they may not seek crucial advice. This applies to both the substance of the advice and, in many cases, the very fact that advice is sought or received. To take just one example, if a large public or private organization were reorganizing and needed advice from a lawyer specializing in labour law, the disclosure of the identity of the lawyer and the very fact that this advice was sought could create counterproductive panic, reduce productivity and interfere with employee/employer relations. The requirement to reveal that advice was sought and the attendant consequences would, therefore, be a disincentive to even seeking the necessary advice. A failure to receive the necessary advice would, in turn, lead to costly errors and law suits. The need to avoid this disincentive to receiving critical, complete legal advice is well-recognized law.

Sections at Issue

(a) Section 1: The Definition of “Consultant”

It is clear law in Ontario that the fundamental civil right to confidentiality applies to a client’s relationship with its lawyer and not, generally, to business consultants or other consulting relationships. This fundamental right is not, however, recognized in the definition of “consultant” in section 1 of the Bill. Section 1 provides that:

“consultant” means a person or entity that under an agreement, other than an employment agreement, provides expert or strategic advice and related services for consideration and decision-making.

While likely unintentional, this definition would include a lawyer acting under a legal retainer. So, in short, the distinction between a lawyer/client relationship and a client’s relationship with other consultants has been recognized by the Supreme Court of Canada as a matter of fundamental civil rights. The Bill, however, does not recognize or respect that distinction.

(b) Sections 5, 6, 7 and 9-11: The Disclosure Requirements

As a result of the attorney/client relationship being caught by the definition of consultant, clients will be required to reveal, *at a minimum*, the fact that they have sought and received legal advice (this will be revealed by the very identity of the lawyer) and, to some extent, the nature of that advice (this will be revealed by the amount spent on the advice). It is not clear what other details of the legal advice might be required, by the directives and regulations, to be disclosed. The compelled disclosure outlined in sections 5, 6, and 7 of the Bill is exactly what the fundamental civil right of solicitor/client privilege protects against.

In addition, sections 9-11 of the Bill require public posting of expense claims. Details of to whom this requirement would apply and what information would be posted appear to be left largely to directives and regulation. If this requirement were to include lawyers’ disbursements (expenses such as expert witness fees in litigation), it would also be a serious violation of the right to privilege. I assume the directives and regulations will not require the disclosure of lawyers’ disbursements.

Suggested Remedy

The most effective way to ensure that the legislation does not encroach on the right to solicitor/client confidentiality is to exclude legal retainers from the disclosure requirements. There are a wide variety of factors that affect the precise application of privilege in different circumstances. It would be extremely difficult to enumerate all of the individual circumstances such that chief executives and other officers could be confident that they have protected their attorney/client confidence and still complied with the attestation requirements under sections 14-16 of the Bill. Further expenses could be incurred to obtain the legal advice necessary to assist the relevant officer in this determination. This is contrary to the spirit and intent of the Bill.

Accordingly, the OBA suggests that the Bill be amended to clarify that it does not apply to the retainer of a solicitor or require disclosure of privileged information or communications.

The OBA very much appreciates the committee members taking the time to address this issue with the Bill and we would be happy to answer any questions.

i *Solosky v. Canada* (1980), 105 D.L.R. (3d) 745, at 760 (Supreme Court of Canada)