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Re: Request for Comments, Attorney-Client Privilege in Japan

Dear President Murakoshi,

I am writing in response to your recent letter regarding the study by the Japan Fair Trade Commission of attorney-client privilege (known in Canada as solicitor-client privilege). I invite you to forward our comments to the Commission on our behalf.

In Canada, solicitor-client privilege began as a rule of evidence that shielded confidential communications between a client and a lawyer from disclosure during the course of legal proceedings. The privilege has, however, evolved into a principle of fundamental justice protected under s. 7 of the *Canadian Charter of Rights and Freedoms*.[1] Far from seeing the privilege as something that interferes with the proper administration of justice, in a series of cases decided during the past two decades, the Supreme Court of Canada has held that the privilege is essential to the proper functioning of Canada's justice system.

The foundation for the Court's treatment of solicitor-client privilege is the belief that it is essential that clients seeking advice be able to speak candidly to their lawyers knowing that, subject to clearly defined exceptions, their communications may be disclosed only with their consent. This free and open communication is necessary for clients to obtain the best legal advice possible.

The Supreme Court has held that solicitor-client privilege must remain as close to absolute as possible "in the high public interest in maintaining the confidentiality of the solicitor-client relationship".[2] The Court has held the privilege is subject to two narrow exceptions: public safety and the right to make full answer and defence.[3] There may also be statutory exceptions to the privilege, but, as the Supreme Court held in the *Blood Tribe* case, "express words are necessary to permit a regulator or other statutory official

[1] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61(CanLII).
[2] Ontario (Public Safety and Security) *v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII) at para 54. See also *Lavallee, supra* note 1, and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44* (CanLII) at paras 10-11.
[3] *Criminal Lawyers' Association, supra,* note 2 at para 54.

to 'pierce' the privilege ... Open-textured language governing production of documents will be read *not* to include solicitor-client documents."[4]

In Canada, solicitor-client privilege can be used both as a shield, to protect information from disclosure, and as a sword, for example to strike down legislation.[5] It is also worth noting that it applies equally to communications between government lawyers and the government departments or agencies that are their clients.[6]

I hope that this brief overview of the treatment of solicitor-client privilege in Canada provides the information you were seeking.

Sincerely,

Marié-Claude Bélanger-Richard, Q.C.
President

[4] *Supra,* note 2 at paras. 2 and 11.
[5] See, for example, *Lavallee, supra,* note 1.
[6] *Pritchard v. Ontario (Human Rights Commission*), 2004 SCC 31(CanLII).