ARTICLES

LEGAL PROFESSIONAL PRIVILEGE: IS IT ABSOLUTE?

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Legal Professional Privilege ("LPP") is deeply rooted in the common law and has even been described as a right of a constitutional nature. In the recent decision of the Three Rivers *case (2005), Lord Scott described LPP as an "absolute right", subject only to the well established crime / fraud exception. In another decision, Taylor CJ opined that once LPP is established, it is not subject to any further balancing exercise. In contrast, the Canadian Supreme Court refused to adopt the same approach and decided to subject LPP to the same proportionality exercise as any fundamental constitutional right. This article explores the scope of LPP and argues that the Canadian approach should be preferred. While the Canadian approach seems to have been endorsed by the Court of Final Appeal in a recent disciplinary appeal, it criticises the Court of Final Appeal for having swung the pendulum too far by adopting a relatively loose standard to allow LPP to be abrogated. Finally, it explores how the Court should approach an application for a warrant to conduct covert surveillance under the newly adopted Interception of Communication and Surveillance Ordinance 2005 when such covert surveillance may interfere with LPP.*

Introduction

The Interception of Communications and Surveillance Ordinance 2005 provides that any covert surveillance that is likely to result in the acquisition of knowledge of matters subject to Legal Professional Privilege ("LPP") can only be carried out with the authorisation of a judge.[1] A similar proposal has been put forward by the Law Reform Commission.[2] The proposal is strongly

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1 Ordinance No 20 of 2006, *Hong Kong SAR Government Gazette, Legal Supplement No 1* (9 Aug 2006), p A1193. A copy of the legislation can be found on http://www.sb.gov.hk/eng/news/index.htm. The Bill was passed by the Legislative Council on 6 August 2006 after a marathon deliberation of the second and third readings that lasted continuously for over 50 hours. It was gazetted and came into operation on 9 August 2006. Part 3 of the Ordinance introduced a two-tier system in authorising covert surveillance, depending on the degree of intrusion into privacy. For less intrusive covert surveillance (Type 2 surveillance), it can be authorised internally by a senior officer with a law enforcement agency. For more intrusive covert surveillance (Type 1 surveillance), it can only be authorised by a High Court judge. Any surveillance which is likely to obtain any information that is covered by LPP is deemed to be Type 1 surveillance and can only be authorised by a judge: *see* definition of "Type 2 surveillance", ss 5 and 8 of the Ordinance.

2 Law Reform Commission, *Privacy: The Regulation of Covert Surveillance* (Government Printer, 2006), Ch 2.

opposed by some members of the Legislative Council on the basis that any covert surveillance against a lawyer will destroy LPP. It is argued that LPP is absolute, subject only to the fraud / crime exception.[3]

Is LPP absolute? What are its scope and limits? Should covert surveillance against a lawyer ever be permitted? If it is to be permitted upon a court order, how should the courts exercise this power? These are the issues that this article intends to explore.

The Historical Origin

LPP has its origin in the common law. It was at first designed for the protection of "men of honour", such as professional lawyers, but with the decline in the ethos engendering the rule, it gradually evolved into a constitutional right for the protection of the client. As Lord Simon pointed out:[4]

> "A man of honour would not betray a confidence, and the judges as men of honour themselves would not require him to. Thus originally legal professional privilege was that of the legal adviser, not the client. But, with the decline in the ethos engendering the rule, the law moved decisively away from it. The turning point was the *Duchess of Kingston's Case* (1776) 20 State Tr 355 at 386–391, where both the duchess's surgeon and a personal friend, Lord Barrington, were compelled to give evidence in breach of confidence."

LPP is founded upon the public interest in upholding the confidential relationship which exists between lawyer and client. It is more than an ordinary rule of evidence, but a fundamental condition on which the administration of justice as a whole rests.[5] It covers both legal advice privilege and litigation privilege. "Litigation privilege" covers all documents brought into being for the purposes of litigation. It relates to communications at a stage when litigation is pending or in contemplation, and covers communications between a legal advisor and a potential witness.[6] However, it will not apply if the dominant purpose of the communication is not related to litigation. In *Waugh v British Railways Board*,[7] the House of Lords rejected a claim for privilege of a

[3] The Hong Kong Bar Association also appears to adopt this view: *see* Bar Circular No 56/06, 5 June 2006.
[4] *D v NSPCC* [1978] AC 171 at 238.
[5] *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, at 649, *per* Sir George Jessel MR; *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487, at 506, *per* Lord Taylor CJ.
[6] *In re L (A Minor)(Police Investigation: Privilege)* [1997] AC 16, *per* Lord Nicholls.
[7] [1980] AC 521.

report of a joint internal inquiry conducted by the Railway Board's personnel after a railway accident, as the report was prepared partly for railway operation and safety purposes and partly for obtaining legal advice in anticipation of litigation, the latter being one of the purposes and not the dominant purpose.

"Legal advice privilege" covers all communications made in confidence between lawyer and client which come into existence for the purpose of giving or getting legal advice, and applies even when litigation is not in contemplation. For instance, it has been held that LPP applies to advice on the presentation of a case to a public inquiry in relation to a client whose conduct might be criticised by the enquiry.[8] While litigation privilege and advice privilege overlap to some extent, their justification remains so far distinct from one another. Such distinction, however, has been queried and it has been suggested that the two forms of privilege are merely integral parts of a single privilege.[9]

Litigation privilege is tied to the adversarial system under which each party should be free to prepare their case as fully as possible without the risk that their opponent will be able to recover the material generated by his preparation. *In re L (A Minor) (Police Investigation: Privilege)*, the House of Lords held by a majority that proceedings under Part IV of the Children Act 1989 were "investigative" rather than "adversarial" in nature and that litigation privilege was therefore excluded by necessary implication.[10] This may unjustifiably restrict the scope of litigation privilege in light of the recent trend of moving away from the adversarial nature of litigation in England and Wales and in Hong Kong, particularly in relation to family matters and minors. In this regard, the dissenting judgment of Lord Nicholls (with whom Lord Mustill concurred) is more convincing. Lord Nicholls argued forcefully that it was artificial to draw a rigid distinction between adversarial and inquisitorial proceedings. Family law proceedings exhibit features of both kinds. More importantly, such a distinction diverts attention to the key issue. The crucial question is not whether, and to what extent, the proceedings are inquisitorial rather than adversarial, but what is required if the proceedings are to be conducted fairly. His Lordship held that LPP was a key aspect of procedural fairness, and such requirement of fairness applied to all court proceedings, be it inquisitorial or adversarial. In this way, the justification is shifted from the adversarial nature of proceedings to a requirement of a fair hearing. This issue

8 *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610.

9 *In re L (A Minor)(Police Investigation: Privilege)* [1997] AC 16, per Lord Nicholls.

10 [1997] AC 16. It was held that litigation privilege did not extend to reports obtained by a party to care proceedings which could not have been prepared without the leave of the court to disclose documents already filed.

was raised before the House of Lords again in the *Three Rivers* case.[11] Their Lordships, however, preferred to leave open the issue for the future.

In contrast, the basic principle justifying legal advice privilege is that no legal advice can be effectively obtained "unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."[12] Lord Hoffmann explained:[13]

> "It is not the case that LPP does no more than entitle the client to require his lawyer to withhold privileged documents in judicial or quasi-judicial proceedings, leaving the question of whether he may disclose them on other occasions to the implied duty of confidence. The policy of LPP requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all."

An Absolute Right?

LPP has been described as an "absolute right". In the leading case of *Three Rivers District Council v Bank of England (No 6)*, Lord Scott held:[14]

> "Secondly, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute (cf *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, but it is otherwise absolute. There is no balancing exercise that has to be carried out: see *B v Auckland District Law Society* [2003] 2 AC 736 at 756759, paras 46–54)."

Similarly, in *R v Derby Magistrates' Court, ex parte B*, Lord Taylor CJ stated that "if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits."[15] The learned judge acknowledged that "there would be cases where the principle would work hardship on a third party seeking to

[11] *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 at 647, para 29, per Lord Scott, and at 655, para 53, *per* Lord Rodger.
[12] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 607, para 7, *per* Lord Hoffmann.
[13] *Ibid.*
[14] [2005] 1 AC 610 at 646, para 25.
[15] [1996] 1 AC 487 at 508.

assert his innocence, but in the overall interest of administration of justice, it is better that the principle should be preserved intact"[16](sic).

No doubt Lord Scott and Lord Taylor CJ are fully aware that LPP can be abrogated by statute. Thus, their reference to LPP as absolute simply means that, as a matter of common law, LPP cannot be overridden by some supposedly greater public interest. Therefore, it is not open to the court to conduct any further balancing exercise between LPP and other public interest. It is in this sense that LPP is "absolute". Since 1997, LPP is protected as a constitutional right under Article 35 of the Basic Law, and this "absolute" nature of LPP is further entrenched.

It is readily conceded that LPP can only be overridden in the most exceptional circumstances, and that the court should only reach this conclusion after the most careful scrutiny. However, if it is to take the point further to argue that LPP is absolute in that it could no longer be relevant or necessary to balance it against other competing public interests, it will be necessary to succeed on two different planks. First, LPP is of such a nature that it should prevail over any other competing public interests. Secondly, even if it is not absolute in the above sense, LPP acquires an absolute nature when it is elevated into a constitutional right in Article 35. Both premises are doubtful.

Scope of LPP

LPP is subject to exceptions. First, as a privilege of the client, it can of course be waived, expressly or impliedly, by the client. For example, there is a waiver when the client brings proceedings for professional negligence against the solicitor,[17] or where the client applies for an order of wasted costs against the solicitor.[18] On the other hand, without the client's consent, a barrister has no right to disclose materials that form the subject matter of LPP, even when the disclosure would have exculpated the client from an order of wasted costs.[19]

Secondly, LPP is subject to the well-known "crime-fraud exception" where the communication is criminal in nature or intended to further any criminal purpose. Lawyers have no privilege to commit crimes. The exception applies whether the lawyer knows or is ignorant of the criminal purposes. If they know of the criminal object, they are conspirators and are not advising professionally; if they are ignorant of the criminal object, the client reposes

16 *Ibid.*
17 *China Light & Power Co Ltd v Ford* [1998] 1 HKLRD 382; *Lillicrap v Nalder & Sons* [1993] 1 WLR 94; *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183.
18 *Ma So So Josephine v Chin Yuk Lun Francis* [2004] 3 HKLRD 294.
19 *Medcalf v Mardell* [2003] 1 AC 120, *per* Lord Hobhouse.

no confidence in them, or if the client has done so, such confidence would have no legal effect, and therefore the basis of LPP does not exist.[20]

Thirdly, not everything that passes between client and lawyer is privileged. For instance, LPP does not extend to matters of fact which the attorney knows by any means other than confidential communication with the client, though, if the lawyer had not been employed as an attorney, he probably would not have known them.[21] Communications that are not made for the purpose of seeking and receiving legal advice do not attract LPP. Thus, time sheet, fee record, record of appointment or records of a conveyancing transaction are not covered by LPP.[22] Likewise, LPP does not apply to the client's name and address, or the client's handwriting, mental capacity, or the existence of a retainer between the legal adviser and the client.[23]

Payments in and out of a solicitor's trust account do not constitute communications from the client and are not covered by LPP. In *Re Ontario Securities Commission and Greymac Credit Corp*,[24] the Ontario High Court compelled a solicitor to give evidence as to the movement of funds into and out of his trust account, including the source and recipient of payments, and to produce for inspection his books and records relating thereto. Similarly, in *Re Furney*,[25] Clyne J directed a solicitor to answer questions relating to payment made by his client within a stated period as it related to matters of facts. In *Packer v Deputy Commissioner of Taxation*, the Queensland Court of Appeal held that certain trust account ledgers held by solicitors were not subject to LPP, although Sheperdson J qualified the holding by this remark:[26]

> "I should add that this is not to say that trust account ledgers can never be the subject of legal professional privilege – whether such privilege exists will depend on the particular ledger and whether or not that ledger is written up in such a way that it records the advice given by the solicitor to the client."

These Canadian and Australian authorities were followed by Hartmann J in *Pang Yiu Hung Robert v Commissioner of Police*,[27] where it was held that

[20] As observed by Hartmann J in *Pang Yiu Hung Robert v Commissioner of Police* [2002] 4 HKC 579, at 590, para 24. See also *R v Cox and Railton* (1884) 14 QBD 153; *C v C* [2001] 3 WLR 446.
[21] *Dwyer v Collins* (1852) 7 Exch 639 at 646; 156 ER 1397.
[22] *R v Manchester Crown Court, ex p Rogers* [1999] 1 WLR 832, at 839, *per* Lord Bingham; *R v Crown Court at Inner London Sessions, ex p Baines & Baines (a firm)* [1987] 3 All ER 1025.
[23] McNicol, *Law of Privilege* (The Law Book Company Ltd, 1992), p 97; *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610, at 646.
[24] (1983) 146 DLR (3d) 73 at 83.
[25] [1964] ALR 814.
[26] (1984) 1 Qd R 275.
[27] [2002] 4 HKC 579.

instructions that funds be paid to a legal practitioner were not matters covered by LPP, not at least as those matters stood in isolation unconnected to advice given or sought:[28]

> "On the strength of these authorities, in respect of the present case, I am satisfied that information as to the objective fact that a client has instructed that funds be paid to a legal practitioner are not matters covered by LPP, not at least as those matters stand in isolation unconnected to advice given or sought. In my view, a client who informs his solicitor that he will deposit funds with him and then does so cannot look to that communication (and the subsequent act of payment) as being protected by LPP, not, as I have said, as those matters stand in isolation."

Fourthly, not all advice given by a lawyer is covered by LPP. Legal advice privilege only applies when the advice is given in the "relevant legal context." As Taylor LJ pointed out in *Balabel v Air India*, "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context . . . to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide."[29]

Lord Scott acknowledged that what constituted a "relevant legal context" may not be an easy question to determine, as there are bound to be marginal cases whether the seeking of advice from or the giving of advice by lawyers takes place in a relevant legal context so as to attract legal advice privilege. The test is whether the advice is related to the rights, liabilities, obligations or remedies of the client. In this regard, advice given by lawyers to an objector at a planning inquiry, advice given by lawyers to the promoters of private Bills, or advice given by parliamentary counsel to the Government in relation to the drafting and preparation of public bills would qualify for LPP, but it may not be the case in relation to legal advice given by a lawyer as to how to set about joining a private club.[30]

> "In cases of doubt the judge called upon to make the decision should ask *whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law*. If it does not, then, in my opinion, legal advice privilege would not apply. *If it does so relate then, in*

[28] *Ibid.*, at para 34.
[29] [1988] Ch 317 at 330.
[30] *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 at 651, paras 38–42.

> *my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply?* The criterion must, in my opinion, be an objective one." (italics supplied)

Fifthly, legal advice privilege applies only to communications between client and lawyer. Documents sent to or by an independent third party (even if it is created with the dominant purpose of obtaining a solicitor's advice), would not be covered by legal advice privilege.[31] In the *Three Rivers* case, their Lordships left open the difficult question in that case of whether communications between the solicitors and the Bank employees or ex-employees, or officers or ex-officers, other than those on the Bingham Inquiries Unit, could qualify for legal advice privilege. In this case, following the collapse of the Bank of Credit and Commerce ("BCCI"), the Chancellor of the Exchequer decided to conduct an independent inquiry into the Bank of England ("the Bank"), which has had statutory responsibilities and duties regarding the supervision of BCCI. Bingham LJ was appointed to conduct the inquiry. The Bank appointed three bank officials to deal with all communications between the Bank and the inquiry. These officials, together with other Bank personnel appointed to assist them from time to time, became known as the Bank's Bingham Inquiries Unit ("BIU"). A solicitor firm was retained by the Bank to advise generally on all dealings of the Bank, its officials and employees with the inquiry. An issue arose as to whether documents prepared by the Bank's employees or ex-employees, whether prepared for submission to or at the direction of the solicitors firm or not, should be disclosed as being no more than raw material on which the BIU would thereafter seek advice. In an earlier stage of the proceedings, the Court of Appeal held that LPP did not extend to these documents, as litigation privilege was restricted to communications between clients and their legal advisers, to documents evidencing such communications, and to documents that were intended to be communications even if they were not in fact communicated. The court accepted that, for the purpose of legal advice privilege, the client of the solicitors firm was the BIU, not the Bank itself or any individual officer. Lord Scott accepted that in general communications between the lawyers and third parties could not qualify for LPP. A particular difficulty here is to identify "the clients" to whose communications privilege should attach in the case of a large organisation such as a bank or a government department. The House of Lords avoided the issue as the House found it a difficult issue that could lead to diametrically opposed conclusions,

[31] *Ibid.*, at 643, 647.

both of which were being eminently arguable, and that there was a dearth of domestic authority.[32]

Thus, it can be seen that LPP is itself subject to all kinds of qualification. It can be argued that these matters only go to determine whether LPP exists in the first place. Once it is shown that LPP exists, can it still be subject to further balancing with other public interests?

The Relative Nature of LPP

As a common law right, LPP can be abrogated by legislation. However, an intention to override such rights must be expressly stated or appear by necessary implication, and in the absence of such clear and unambiguous statutory intention, the court would be slow to conclude that LPP has been abrogated or overridden.[33] It follows therefore that LPP can be overridden if Parliament by a majority comes to a view that something more important should be protected. A typical example where LPP is said to have been abrogated is in the context of professional discipline. Lord Hoffmann said:

> "But I think that the true justification for the decision was not that Mr Parry-Jones' clients had no LPP, or that their LPP had been overridden by the Law Society's rules, but that the clients' LPP was not being infringed. The Law Society was not entitled to use information disclosed by the solicitor for any purpose other than the investigation. Otherwise the confidentiality of the clients had to be maintained. In my opinion, this limited disclosure did not breach the clients' LPP or, *to the extent that it technically did, was authorized by the Law Society's statutory powers.*"[34] (italics supplied)

If Parliament can decide that LPP should give way to some more important public interest, is there any logical reason why such a balancing process should be denied to the judiciary in adjudicating in a constitutional context on the constitutionality of a statutory provision restricting LPP?

Indeed, in the *Three Rivers* Case, Lord Carswell clearly referred to a balance of two conflicting public interests in defining the scope of LPP, namely,

[32] *Ibid.*, paras 47, 63, 72. Another reason to avoid the issue was that documents had already been disclosed pursuant to the earlier Court of Appeal decision. For the decision of the Court of Appeal, *see* [2003] QB 1556.

[33] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 607, para 33, *per* Lord Hoffmann.

[34] *Ibid.*, at 612, para 32, explaining *Parry-Jones v Law Society* [1969] 1 Ch 1.

"making the maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves".[35] He found it necessary to define the limits of LPP, especially when the breadth of work of lawyers as well as the number and varieties of courts, tribunals and inquiries had increased dramatically since the early nineteenth century.[36] He concluded, in that case, that "the public interest in the Bank's being able to obtain legal advice in confidence prevails over the public interest in all relevant material being available to the inquiry when reaching its conclusions."[37] This is typical of a balancing exercise, albeit formulated in the form of the ambit of LPP.

In Canada, LPP is regarded as a fundamental principle that has gained constitutional protection by virtue of the enshrinement of the right to full answer and defence, the right to counsel, the right against self-incrimination, the presumption of innocence and the right not to be subject to unreasonable search and seizure in sections 7, 8, 10(b), 11(c) and 11(d) of the Canadian Charter of Rights and Freedoms.[38] In *Jones v Smith*,[39] the Canadian Supreme Court held that the decision to exclude evidence that is both relevant and probative because it is subject to LPP represents a policy decision, and therefore LPP could be set aside if there is a sufficiently compelling public interest, such as public safety. In that case, an accused was charged with an offence of aggravated sexual assault of a prostitute. His counsel referred him to a psychiatrist for a forensic psychiatric assessment and advised the psychiatrist that the assessment was intended to be of assistance to the preparation of the defence or submissions on sentencing in the event of a guilty plea and was therefore privileged. After the assessment, the psychiatrist came to a view that the accused suffered, *inter alia*, from a paraphiliac disorder and that the accused was dangerous and would likely commit further offences unless he received sufficient treatment. The psychiatrist made a detailed report to the accused's counsel setting out the basis of his assessment. The client pleaded guilty. When the psychiatrist learned that his report would not be disclosed to the sentencing judge, he applied for a declaration that he was entitled to disclose the information he had received in the interests of public safety. Cory J held:[40]

35 [2005] 1 AC 610 at 667, para 86.
36 *Ibid.*, at 680–681, para 113.
37 *Ibid.*, at 682, para 116.
38 *Jones v Smith* (1999) 169 DLR (4th) 385 at 391, *per* Major J, and 401, *per* Cory J (describing it as "a principle of fundamental importance to the administration of justice").
39 *Ibid.* The majority of the court expressly stated that the principles set out in this case applies equally to both solicitor–client privilege and litigation privilege: *see* 399, para 44, *per* Cory J.
40 At 401, para 51.

> "Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail."

Cory J pointed out three situations. The first is that LPP must yield to the right of accused persons to fully defend themselves. As Martin JA held in *R v Dunbar and Logan*,[41] "[n]o rule of policy requires the continued existence of the privilege in criminal cases when the person claiming the privilege no longer has any interest to protect, and when maintaining the privilege might screen from the jury information which would assist an accused."

In this regard, Cory J disagreed with the House of Lords in *R v Derby Magistrates Court, ex p B*,[42] and held that LPP has to be balanced with other societal interests:[43]

> "The House of Lords recently considered this issue in *R v Derby Magistrates' Court*, [1995] 4 All ER 526. It held that solicitor-client privilege was absolute and permanent. It could not be set aside even when to do so would allow an accused to present a full answer and defence to a criminal charge. With great respect, I prefer the reasoning of Martin JA. Despite the strength and importance of the privilege, it remains subject to certain well-defined and limited exceptions. These exceptions are not foreclosed and may be expanded in the future, for example, to protect national security. However the question of further exceptions need not be considered in these reasons."

The second situation concerns criminal communications. In *Descoteaux v Mierzwinski*,[44] it was held that communications that were in themselves criminal or that were made with a view to obtaining legal advice to facilitate the commission of a crime would not be privileged. Lamer J upheld the applicability of a proportionality test in this context:

> "When the law does give someone the authority to do something which might interfere with that confidentiality, the decision to do so and the

41 (1982) 68 CCC (2d) 13 at 44.
42 [1996] 1 AC 487.
43 (1999) 169 DLR (4th) 385 at 402, para 53.
44 (1982) 70 CCC 385 at 400.

> choice of means of exercising that authority should be determined with the view to not interfering with it except to the extent absolutely necessary in order to obtain the end sought by the enabling legislation. Moreover, any law or legislation which may infringe the confidentiality must be interpreted restrictively."

The third situation is what Cory J called "public safety exception", where the Court held that in certain circumstances when the safety of the public is at risk the LPP may be set aside. One example he gave is the power to open correspondence between solicitors and inmates in a federal penitentiary, in which case Dickson J ruled that the inmates' privilege must yield when the safety of members of the institution is at risk. *Jones v Smith* itself provided another example when a psychiatric report highlighting the dangerous nature of an accused was not made available to the Court in sentencing. Notwithstanding that the psychiatric report was protected by LPP, the Supreme Court ordered its disclosure in view of the clear, serious and imminent danger posed by the accused, and the disclosure was limited to the part of the report that indicated that there was an imminent risk of serious bodily harm or death to an identifiable person or group. In considering when LPP should be overridden, Cory J proposed three tests:[45]

> "When the interest in the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs. In rare circumstances, these public interests may be so compelling that the privilege must be displaced. Yet the right to privacy in a solicitor-client relationship is so fundamentally important that only a compelling public interest may justify setting aside solicitor-client privilege.
>
> [75] Danger to public safety can, in appropriate circumstances, provide the requisite justification. It is significant that public safety exceptions to the solicitor-client privilege are recognized by all professional legal bodies within Canada . . .
>
> [76] Quite simply society recognizes that the safety of the public is of such importance that in appropriate circumstances it will warrant setting aside solicitor-client privilege. What factors should be taken into consideration in determining whether that privilege should be displaced? . . . .
>
> [77] There are three factors to be considered: First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious

[45] At 407–408, paras 74–78.

bodily harm or death? Third, is the danger imminent? Clearly if the risk is imminent, the danger is serious.

[78] These factors will often overlap and vary in their importance and significance. The weight to be attached to each will vary with the circumstances presented by each case, but they all must be considered. As well, each factor is composed of various aspects, and, like the factors themselves, these aspects may overlap and the weight to be given to them will vary depending on the circumstances of each case. Yet as a general rule, if the privilege is to be set aside the court must find that there is an imminent risk of serious bodily harm or death to an identifiable person or group."

The Canadian position is aptly summarised by Sopinka, Lederman and Byrant as follows:[46]

"The lawyer has a professional duty not to divulge such information without the client's approval or unless required by law to do so. This ethical rule is wider than the evidentiary solicitor-client privilege and applies without regard to the nature of the source of the information or the fact that others may share the knowledge. *Where there is a stronger public interest in disclosure, it will override the professional duties of confidence.*"

A Constitutional Right

It has already been shown that LPP could be restricted, albeit by a clear legislative provision. The reason that it can be restricted is not just because Parliament enjoys supremacy. More importantly, it shows that there could be legitimate reasons to restrict LPP, although the restriction can only be achieved by legislative means. It has also been shown that the so-called "absolute privilege" is indeed highly qualified by well-recognised exceptions, and Lord Scott's conception of absolute privilege has been challenged in Canada.

LPP is expressly protected by the Basic Law. Article 35 provides: "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies." Does the elevation of LPP into a constitutional right in Article alter the nature of LPP?

[46] J Sopinka, S N Lederman and A W Byrant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 2nd edn, 1998), at para 14.12.

Article 35 has not defined the scope of LPP. Thus, it is for the court to determine the scope of LPP under Article 35. In so doing, it is likely that the court will be guided by the common law principles governing LPP. Thus, for instance, the fact that Article 35 does not refer to the well-established crime-fraud exception would unlikely lead the court to conclude that LPP under Article 35 is not subject to this exception. It is a matter of conjecture whether Article 35 is co-extensive of the common law protection or whether it goes beyond the common law. In light of *Jones v Smith*, it is difficult to support an argument that Article 35 intends to confer stronger protection on LPP than that under the common law, save in one respect. As a constitutional right, any legislation abrogating LPP can now be challenged whereas this cannot be done before without a constitution. Whether the legislation in question can be successfully challenged should then be determined by the constitutional tests of legality and proportionality.

Although there is no express limitation of the rights protected in Article 35, the same is true in relation to the rights set out in Article 25 (equality before the law), Article 26 (right to vote), Article 27 (freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration, and the right and freedom to form and join trade unions, and to strike) and Article 32 (freedom of religion), just to name a few. Some of these rights are also protected by the ICCPR, which is entrenched by Article 39 through the Bill of Rights. These rights have been held to be subject to some legitimate restrictions. For instance, LPP forms a core element of the right to fair hearing under Article 14 of the ICCPR, and the right to privacy under Article 17 of the ICCPR.[47] As such, any restriction of these rights is subject to the requirements of legality and proportionality.[48] Alternatively, even if LPP is not within Articles 14 and 17 of the ICCPR and is only covered by Article 35 of the Basic Law, it is submitted that the same tests of legality and proportionality would apply, for otherwise a right that is protected by the Basic Law alone and not the ICCPR would become a "second class right".[49]

[47] See, for example, *Cornelis van Hulst v The Netherlands* (2005) 12 IHRR 309; *Roemen and Schmit v Luxembourg*, Judgment of the European Court of Human Rights, App No 51772/99, 25 Feb 2003.

[48] *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164, para 16.

[49] *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, para 28–29. In this case, it was argued that the right to travel and to enter conferred by Article 31, which was expressly subject to the limitation that its restriction must be prescribed by law, would not be subject to any further restriction, such as that the restriction must not contravene the ICCPR as applied to Hong Kong, as this right to travel is protected by the Basic Law alone. The Court of Final Appeal rejected this argument, and held that "the question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue." Although the Court did not set out the test for judging permissible restriction in this case, it is submitted that a test of proportionality would be an obvious principle to be adopted, especially in light of subsequent jurisprudence on fundamental rights: see, for example, *Leung Kwok Hung v HKSAR*, n 48 above.

The test of proportionality has been adopted by the Court of Final Appeal in *A Solicitor v The Law Society of Hong Kong*.[50] In that case, the Law Society received a complaint from a Shanghai solicitor that the applicant solicitor had failed to pay for his service in relation to certain litigation in Shanghai, notwithstanding that the client had already put in the fund to the applicant solicitor. The allegation was contested, and the client had not made any complaint against the applicant solicitor. The Law Society demanded the applicant solicitor to disclose all information in relation to those litigation files pursuant to section 18 of the Legal Practitioners Ordinance, and the Solicitors Disciplinary Committee convicted him of a disciplinary offence when he refused to disclose the information on the ground that no waiver of LPP has been given by his client. The Court rejected the claim of LPP by the applicant solicitor. Bokhary PJ, delivering the judgment of the Court, emphasised that LPP is only one of the fundamental conditions on which the administration of justice as a whole rests. He said:[51]

> "Properly understood this privilege is indeed, as Lord Taylor of Gosforth CJ so memorably characterized it in the *Derby Magistrates' Court* case at p 507D, 'a fundamental condition on which the administration of justice as a whole rests.' It is of course not the *only* such condition. There are a number of others. Among them is the existence of a legal profession of efficiency and integrity. The Law Society has a very important role to play in maintaining standards within the solicitors' branch of the legal profession. Acting through its Council, the Law Society has frontline responsibility to ensure compliance by solicitors with the rules governing their conduct and activities. And it is necessary for the Council to have adequate powers to do that." (italics in the original)

The Court then considered in some detail the legislative scheme of compelling a solicitor to produce documents under the Legal Practitioners Ordinance, and concluded that "with the safeguard built into section 8B(2), the need for the Council's direction and the strict confidentiality to be accorded to documents produced or delivered, I do not consider section 8B(2) disproportionate to what is needed in the service of that purpose."[52] In other words, as one of the conditions serving the ends of administration of justice, LPP under Article 35 can be restricted when there are other compelling objectives such as the need to protect the integrity of disciplinary proceedings, provided that the restriction is proportionate to the achievement of those other objectives.

[50] FACV 23/2005.
[51] *Ibid.*, para 17.
[52] *Ibid.*, para 25.

However, the decision of the Court of Final Appeal is open to criticism on two different grounds. In applying the proportionality test, the Court emphasised that the information disclosed was confined to the purpose of disciplinary proceedings and could not be used in any way prejudicial to the client. This concept of "prejudice" is borrowed from a dicta by Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* where his Lordship held that whether disclosure of the communications forming the subject for LPP would be prejudicial to the client was a relevant factor:[53]

> "LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law Such advice cannot effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and *used to his prejudice*." (italics supplied)

With respect, it is far from clear that Lord Hoffmann intends to introduce a rigid requirement of prejudice such that there will be no interference with LPP if the material is disclosed without causing any prejudice to the client. The basis of LPP lies in the confidence reposed in one's legal advisor. Such confidence would be destroyed by any prospect of disclosure, irrespective of whether the disclosure is to the prejudice of the client. If there is no breach of LPP so long as the disclosure does not result in any prejudice to the client, this will introduce a high degree of uncertainty as to when information subject to LPP can be disclosed. Who determines whether the disclosure will be prejudicial – the court, the lawyer, or the client? When should this question be determined? What would be the position if the disclosure was not prejudicial at the time of disclosure but it becomes prejudicial subsequently? In the context of covert surveillance, would it be open to the law enforcement agent to intercept communication that is subject to LPP on the basis that the information obtained would not be used to the prejudice of the client? Lord Hoffmann has not provided any justification for the introduction of this element of prejudice, and it does not seem that the absence of prejudice has ever been the basis of disclosing materials subject to LPP. As Lord Taylor CJ put it in a different context, a client's confidence is necessarily lost and the purpose of the privilege would be undermined if the lawyer is "to tell his client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognizable interest' in asserting his privilege." The Court's approach may suggest that a client would not have "any recognisable interest" in asserting his privilege if the information is

[53] [2003] 1 AC 563 at 607.

not to be used to his prejudice. It would be an unfortunate consequence if the Court of Final Appeal is meant to open this Pandora's box of prejudice and to develop the law along this direction.[54]

The second criticism lies in the manner in which the proportionality test was applied by the Court. An essential element of the proportionality test is that any restriction on the LPP should be kept to what is strictly necessary to achieve the objectives justifying the restriction. Therefore, the scope of request of disclosure of information that is subject to LPP must not go beyond what is necessary in the circumstances. In that case, the dispute was on payment of professional fees. The production order made by the Solicitors Disciplinary Tribunal required the disclosure of, *inter alia*, the entire litigation files in relation to the Shanghai proceedings. It is obvious that the litigation files would contain a whole range of sensitive information most of which would go to the heart of LPP and would have no relevance whatsoever to the dispute on payment of professional fees. Hence, the scope of the request for disclosure must be a crucial factor in determining whether a restriction of LPP is justified. Unfortunately, the Court has not considered whether the disclosure as requested by the Law Society caused only minimum impairment to the right of LPP. It may be suggested that it would not be practical to confine the disclosure to that part of the files concerning account records and payments, but there was no such consideration at all.

Preventive Surveillance

It has been argued that it is one thing to allow *ex post facto* abrogation of LPP, it is quite another to allow preventive surveillance against a lawyer as this would destroy LPP altogether. How could any lawyer, as it is contended, ever be able to tell their client with any confidence that the legal advice sought or given would be privileged when covert surveillance could be carried out without thier knowledge? While this argument carries considerable force, it is at the end of the day a matter of degree. Would it be of much comfort to tell the client that "everything you tell me is privileged unless the court subsequently compels me to disclose it" rather than "everything you tell me is privileged, though I do not know if the court has authorised the law enforcement agents to conduct secret surveillance of what you are going to tell me, which is something the court can do under limited circumstances."?

It is necessary to stress again that there is a distinction between any conversation when a person participated as a "lawyer" and when he participated

[54] *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487 at 508.

as a suspected criminal. In *Cornelis van Hulst v The Netherlands*,[55] the author alleged that the interception of his phone calls to his lawyer was in breach of Article 17 of the ICCPR (right to privacy). The Human Rights Committee restated the principle of proportionality in weighing the need of solicitor–client confidentiality and the need for "taking effective measures for the prevention and investigation of criminal offence". When the lawyer himself is a suspect, the conversations were "between two suspects, one of whom happened to be a lawyer".[56]

Even when the lawyer is not a suspect, if there is strong evidence showing that the conversation is to further a crime, this would again take the matter out of LPP and Article 35 of the Basic Law will not present any obstacle to the carrying out of covert surveillance. If the advice given by the lawyer is not done in the relevant legal context, for example, it covers matters of business, investment policy, finance policy and other business matters, LPP does not apply.[57] It is necessary to show that legal advice is given in relation to the client's rights, liabilities and obligations in law. The burden to show that no LPP is involved is on the law enforcement agencies seeking an authorisation. The court has to be satisfied that the purpose of covert surveillance is to investigate a serious crime, that there is evidence to believe that information relevant to the investigation would be collected, that there is no other alternative means to obtain such evidence, and such surveillance is a proportionate response to achieve the objective. It is expected that a court would not lightly authorize a covert surveillance when LPP is involved. It is also most unlikely that the court would authorise covert surveillance against a lawyer on a continuous or indiscriminate basis, eg, by placing a bug at their office. That must be disproportionate as there is nothing to prevent covert surveillance of the conversation between that lawyer and his other clients who have nothing to do with the subject matter of the surveillance. If an authorisation is granted, it should normally be confined to a specific meeting which the law enforcement agency is able to show, on a balance of probabilities, that the meeting will not involve any LPP because it could not apply as it is related to furtherance of crimes or fraud, or because it could be legitimately restricted as there is a higher public interest. In either case, the threshold must be extremely high. Mere suspicion or surmise will not strip otherwise confidential communications of their confidentiality:[58]

> "What you would have to do when you got to trial and the privilege was pleaded would be this: the judge would have to satisfy himself whether

[55] (2005) 12 EHRR 309.
[56] See further in Sarah Joseph, "Human Rights Committee: Recent Cases" (2005) 5 HRLR 105 at 108.
[57] *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 at 651, para 38, *per* Lord Scott.
[58] *Bullivant v Attorney General for Victoria* [1901] AC 196 at 203, *per* Earl of Halsbury LC.

> there was really established to his satisfaction a charge of fraud or something that would displace the privilege – I do not say prove it – but it would be a reasonable and proper thing under the circumstances to establish the proposition that the issue to be tried was whether there was really a fraud or not, and that this was a piece of evidence relevant to establish the fraud."

On the other hand, this approach would still recognise the rare possibility where encroachment on the LPP could be justified by the protection of other compelling public interest or human lives, as in the case of *Jones v Smith*. The court should be vigilant and cautious in making any order that may authorise the collection of material subject to LPP. It may also impose conditions so that any communication subject to LPP which was picked up would be immediately destroyed and reported to the court.

Conclusion

Nothing in this article is intended to undermine the great constitutional importance of LPP in our legal system. It is deeply rooted in the common law system and is an essential aspect of the right to a fair hearing. At the same time, upholding LPP necessarily means that some otherwise relevant material will be withheld from the court. Thus, two different aspects of fair hearing are engaged, let alone the situation when upholding LPP may be in conflict with other societal interests. It is misleading to label LPP as an absolute right if it means that LPP cannot be restricted in any circumstances. Like any fundamental human rights, LPP will have to be balanced against other legitimate interests, albeit with a bias in favour of protecting LPP. Given its constitutional importance, the scrutiny of any encroachment of LPP should be most vigorous. Any justification has to be supported by cogent and persuasive evidence. In general, the well established tests of legality and proportionality and the approach adopted by Cory J in *Jones v Smith* will be sufficient to guide the court in the balancing exercise. At the same time, in light of the risk of abuse in preventive covert surveillance, the court should only grant an authorisation to conduct covert surveillance that may result in the acquisition of material subject to LPP in the most exceptional circumstances. The scope of the authorisation should not go beyond what is strictly necessary in the circumstances. It should be limited both in terms of its scope and duration, and the authorisation should be subject to detailed safeguards in relation to the handling of material subject to LPP. Any attempt to conduct covert surveillance against a lawyer in a manner that it is likely to interfere with the right to LPP of people who are not the specific targets of an operation is likely to be a disproportionate interference with the right to LPP.