Paralegals to Receive Solicitor-Client Privilege?

In a judgment dated July 20, 2007, the Ontario Superior Court of Justice decided the novel legal issue of whether the solicitor-client privilege extends to paralegals. The case is timely given that Ontario passed a law in 2006 (to take effect in 2008) for the Law Society of Upper Canada to regulate paralegals.

1. *Chancey v Dharmadi* [1], the Court held that the privilege should theoretically extend to paralegals and their clients [2]. This would mean that any communication between paralegals and their clients would be confidential. To rule otherwise, the Court noted, would create a "two-tier" system of justice since paralegals are generally more affordable than lawyers. According to the Court, "paralegals fill an affordability gap in delivering legal services in [matters such as traffic tickets, small claims, and tenants' rights] and provide access to justice and legal representation where clients could not afford to retain a lawyer and would otherwise proceed unrepresented" [3].

In this case, the defendant hired a paralegal as counsel because she could not afford a lawyer. The paralegal defended her in traffic court. The defendant was then sued in civil court for the injuries that were caused in the accident that had brought her before the courts. The lawyer for the injured party wanted to know what the defendant had discussed with her paralegal. The paralegal claimed that the discussions they had were subject to confidentiality privileges, the lawyer for the injured party felt that they were not confidential.

The issue of access to justice engages section 15 of the Charter of Rights and Freedoms, which guarantees the right to equal treatment and benefit of the law, as well as section 10(b) (right to counsel) and section 7 (life, liberty, and security of the person). Access to justice is a prominent legal issue given the Supreme Court of Canada's recent decision in *British Columbia (Attorney General) v Christie*, which held that there is no constitutional right to state-funded counsel.

Chancey v. Dharmadi also raises the issue of an accused person's right to a fair trial under the Charter. This right would be compromised if a client could not fully disclose the circumstances of their case to counsel. Moreover, if paralegals were not granted the same privilege as lawyers, then in an action where the parties are represented by a lawyer and a paralegal, the paralegal's client would be at a disadvantage.

The solicitor-client privilege is "one of the best-known long-standing recognized classes of

privilege" and is essential to the effective operation of the justice system [5]. It ensures that clients can speak "with candour to [their] lawyer without fear that their communications will be divulged" and receive effective representation [6]. Relationships such as priest and penitent, doctor and patient, and journalist and informant are not accorded the same blanket privilege.

Although the Court agreed that the solicitor-client privilege should extend to paralegals, in the future, the Court held that this should not occur until paralegals become a regulated profession. Otherwise, courts would be faced with the historical problem of unregulated agents appearing before them. However, using criteria known as the "Wigmore test," a court can extend the privilege on a case-by-case basis if all the criteria are met. The judge noted that the "Wigmore" criteria include an examination of:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

In this particular case the Court held that on its unique facts there was still a privilege based on the common law.

Cases

- *Chancey v Dharmadi*, [2007] OJ No 3852.
- *British Columbia (Attorney General) v Christie*, 2007 SCC 21.

[1] *Chancey v Dharmadi*, [2007] OJ No 3852.
[2] The Court held that the judgment should not be considered law until the proper factual circumstances comes before a court.
[3] *Supra* note 1 at para 37.
[4] *Ibid* at para 18.
[5] *Ibid* at para 18.
[6] *Ibid* at para 27.
[7] *Ibid* at para 44.