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Life Everlasting?

The Absurdity of Perpetual Privilege

JEAN DRYDEN

ABSTRACT This article looks at solicitor-client privilege and the lawyers' duty of confidentiality from the perspective of the harm done to legal history and Canada's documentary heritage by the claim that privilege never ends. After discussing the emergence of the field of legal history, the scarcity of lawyers' papers preserved in archives, and efforts to address the perpetual privilege problem, the author examines the rationales for privilege and the justifications for its purportedly absolute and unending nature and finds them wanting. The article then sets out the role of archival institutions in preserving historically valuable records and making them available for research. The author argues that, after a reasonable interval, the public interest in access to lawyers' papers trumps privilege and that archivists have the tools and experience to manage (temporary) access restrictions to such materials. The recent guidelines on disclosure of historical records under the *Access to Information Act* signal that privilege need not be perpetual and indicate the need to start a conversation to finally resolve the conflict between privilege and fuller documentation of both the legal profession and its impact on society.

RÉSUMÉ Cet article examine le privilège avocat.e-client.e et le devoir de confidentialité des avocat.e.s du point de vue du préjudice causé à l'histoire juridique et au patrimoine documentaire du Canada par l'allégation selon laquelle le privilège juridique ne prend jamais fin. Après avoir discuté de l'émergence du domaine de l'histoire du droit, de la rareté des documents d'archives provenant des avocat.e.s préservés dans les centres d'archives ainsi que des efforts pour résoudre le problème de la notion de privilège perpétuel, l'auteur.e examine les motifs de ce privilège et les justifications de sa nature prétendument absolue et sans fin, indiquant qu'elles sont insuffisantes. L'article souligne ensuite le rôle des institutions archivistiques dans la préservation des archives d'une valeur historique et la facilitation de leur accès pour les chercheur.e.s. L'auteur.e affirme qu'après un délai raisonnable l'intérêt du public pour les documents des avocat.e.s l'emporte sur la notion de privilège. De plus, elle mentionne que les archivistes disposent des outils et de l'expérience pour gérer les restrictions d'accès (temporaires) à ce type de documents. Les récentes lignes directrices sur la divulgation des documents historiques de la *Loi sur l'accès à l'information* stipulent que la notion de privilège n'a pas à être perpétuelle et souligne la nécessité de démarrer une conversation pour résoudre une fois pour toutes le conflit entre le concept de privilège et une documentation plus complète sur la profession juridique ainsi que son impact sur la société.

Our most immediate goal should be to resist sanctifying our own unexamined assumptions.¹

Introduction

Imagine a decades-old law firm that has been a litigant or an intervenor in landmark legal cases that address emerging societal issues. The records generated by such cases are of considerable research value – not just for legal history but also as sources for other scholarly disciplines that investigate legal issues in their political, social, cultural, or economic contexts. The court records (e.g., documents filed by litigants, affidavits, motions, correspondence from the court, decisions) are generally publicly available.² But what about the case files of the lawyers involved (e.g., notes, research, communications with or about clients)? Such files complement the official record and should at some point be available for research. Regrettably, those case files may never be saved. Communications with clients seeking legal advice and information received from the client or from third parties are *forever* protected by solicitor-client privilege and by the lawyer's ethical duty of confidentiality, respectively.

Solicitor-client privilege provides that communications between lawyer and client in pursuit of legal advice cannot be disclosed without the consent of the client. Absent that consent, privilege lasts forever. The supposedly permanent duration of privilege has resulted in the destruction of a key source for legal history: lawyers' papers. Lawyers' papers include client files but can also include potentially privileged material such as notebooks, memoirs, legal opinions, diaries, and teaching materials. Relatively few lawyers' papers have been preserved in archives since there is little incentive to allocate resources to cataloguing and storing them if they can never be used. A significant portion of the documentary heritage of the legal profession is missing because of a legal doctrine that was developed for a completely different and much more limited purpose.

This article looks at privilege from the perspective of the harm done to legal history and Canada's documentary heritage by the claim that privilege never ends. Part 1 looks at the emergence of the field of legal history and examines

1 W. Wesley Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers," *Alberta Law Review* 33, no. 4 (1995): 730–67, 732.

2 This is true unless access is limited or restricted due to privacy or other considerations.

efforts to address the perpetual privilege problem and the resulting dearth of lawyers' papers in the historical record. Part 2 examines the rationales for privilege generally, as well as the justifications for the purportedly absolute and unending nature of privilege, and finds them wanting. Part 3 sets out the public-interest role of archival institutions in preserving historically valuable records and making them available for research, arguing that, after a reasonable interval, the public interest in access to such records trumps privilege. Part 4 proposes some measures to resolve the conflict between privilege and preservation of the complete historical record.

Before looking at the emergence of the field of legal history, it is important to clarify the scope of the article and the meanings of certain terms. This article focuses on *lawyers' papers* – that is, the records of lawyers and law firms that potentially contain privileged information. Lawyers' papers of course include client files, but they can also include notebooks, legal opinions, diaries, memoirs, and teaching materials. Privileged material can be found among business or personal records or in the papers of a lawyer who achieved prominence in a secondary field (e.g., public office) whose papers include records of the earlier law practice.³

Related to solicitor-client *privilege* is the lawyer's ethical duty of *confidentiality*. These are different (but closely related) concepts that are often confused and/or conflated, even by the courts.⁴ The distinction between the two is discussed further in part 2. However, a strict analysis of their differences is beyond the scope of this article. Here, solicitor-client privilege and confidentiality will be treated together and referred to as privilege, except where it is essential to demarcate the two.

Finally, this article is primarily focused on the situation in Canada, where privilege has developed differently than in other common law jurisdictions. A series of Supreme Court of Canada decisions has transformed privilege from an

3 Adam M. Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis Canada, 2014), 315; Doug Whyte, "The Acquisition of Lawyers' Private Papers," *Archivaria* 18 (Summer 1984): 142–53, 145.

4 See, for example, Christine J.N. Kates, "The Osgoode Society: Preservation of Legal Records," *Law Society Gazette* 21, no. 1 (1987): 58–70, 58; Clare Cowling, *Legal Records at Risk: A Strategy for Safeguarding Our Legal Heritage* (London: University of London Press, 2019), 1, <https://uolpress.co.uk/book/legal-records-at-risk-a-strategy-for-safeguarding-our-legal-heritage/>; Dodek, *Solicitor-Client Privilege*, 21–23; Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Oxford: Hart, 2000), 57–78; and Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham, ON: LexisNexis, 2011), 119–20.

evidentiary rule to a quasi-constitutional right.⁵ Nonetheless, despite Canada's unique approach to privilege, other jurisdictions face similar barriers to the preservation of sources for legal history; thus, the discussion includes relevant American and British sources.

1.0 The Emergence of Legal History as a Field of Study

The restrictive privilege rules have caused complaints among archivists and legal historians since legal history emerged as a distinct field of study in the 1970s.⁶ R.C.B. Risk⁷ and David H. Flaherty⁸ set out comprehensive research agendas for the field, and Flaherty noted the indispensable nature of archival sources in advancing legal history: "Future research on our legal past necessitates greater efforts at preservation and archiving of old and new records relevant to such studies. Preserving source materials and making them available has to remain a major priority for those concerned with promoting the legal history of Canada."⁹

Archivists and historians in Ontario attempted to address this issue. In the 1970s, the implementation of records disposition schedules in the Ontario government resulted in the transfer of vast extents of court records to the Archives of Ontario.¹⁰ While court records document the official versions of events, archivists and historians have long recognized that the records of lawyers and law firms would complement these official records and have lamented the absence of such records in archives.¹¹ Acknowledging that the legal profession's

5 Dodek, *Solicitor-Client Privilege*, xlix–l, 15–21.

6 Whyte, "The Acquisition of Lawyers' Private Papers," 151–52.

7 R.C.B. Risk, "A Prospectus for Canadian Legal History," *Dalhousie Law Review* 1, no. 2 (1973): 227–45, 236–37.

8 David H. Flaherty, "Writing Canadian Legal History: An Introduction," in *Essays in the History of Canadian Law. Vol 1* (Toronto: University of Toronto Press, 1981), 16–17.

9 Flaherty, 33.

10 Catherine Shepard, "Court and Legal Records at the Archives of Ontario," *Archivaria* 24 (Summer 1987): 117–20, 117–19.

11 Catherine Shepard and Peter Oliver, "The Osgoode Society, the Archivist and the Writing of Legal History in Ontario," *Law Society Gazette* 14, no. 2 (1980): 192–202, 197–98; Whyte, "The Acquisition of Lawyers' Private Papers," 152; C.J. Shepard, "Review of *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada*," *Archivaria* 18 (Summer 1984): 276–77; Shepard, "Court and Legal Records," 119–20; Douglas

respect for privilege has presented barriers,¹² they have sought solutions that would permit access to privileged material.

The Osgoode Society for Canadian Legal History was established in 1979 to “study and promote public interest in the history of the law, the legal profession and the judiciary in the Province of Ontario and to stimulate research and publications on this subject.”¹³ There was great interest in achieving “a relaxation in solicitor-client privilege and a revision in the confidentiality rule in order to permit solicitors to deposit their records and make them available for research,” and “discussion was commenced regarding amendment of Law Society rules.”¹⁴ In 1983, a survey of Ontario law firms was conducted to determine the extent of records of archival value. The results were disappointing: many firms routinely destroyed client files and were unwilling to deposit such files in an archives without resolving the privilege/confidentiality issues.¹⁵ Nonetheless, the Osgoode Society remained “committed to action on amendments to solicitor-client privilege. Barring this, it will seek some more informal system of preservation of private legal records, with rigorous time restrictions on use and some form of data use agreement to be administered by the archives that would permit researchers to examine files but protect the identity of the client.”¹⁶ Although the society’s legal records committee prepared guidelines to provide lawyers with a process for depositing records in an archives,¹⁷ it did not address “the

Hay, “Archival Research in the History of the Law: A User’s Perspective,” *Archivaria* 24 (Summer 1987): 36–46, 36; Michael Gourlie, “The Records of Lawyers: Archival Appraisal and Access” (MAS thesis, University of British Columbia, 1994), 42–44, <https://open.library.ubc.ca/soa/cIRcle/collections/ubctheses/831/items/1.0099115?o=0>.

Bonnie Hobbs provides references to unpublished papers by Morris L. Cohen (1984), R. Michael McReynolds (1988), and A. Morse (1992) that discuss the value of legal records for scholars in other disciplines. Unfortunately, copies of these papers can no longer be located. Bonnie Hobbs, “Lawyers’ Papers: Confidentiality Versus the Claims of History,” *Washington and Lee Law Review* 49, no. 1 (1992): 179–211, 179nn1–7.

12 Shepard and Oliver, “The Osgoode Society, the Archivist and the Writing of Legal History in Ontario,” 198–200; Whyte, “The Acquisition of Lawyers’ Private Papers,” 145–46; Shepard, “Court and Legal Records,” 119–20; Hay, “Archival Research in the History of the Law,” 46; Roy Schaeffer, “The Osgoode Society Survey of Private Legal Records in Ontario,” *Archivaria* 24 (Summer 1987): 181–85, 181.

13 Shepard and Oliver, “The Osgoode Society, the Archivist and the Writing of Legal History in Ontario,” 192.

14 Schaeffer, “The Osgoode Society Survey of Private Legal Records in Ontario,” 181.

15 Schaeffer, 183–84.

16 Schaeffer, 184.

17 Kates, “The Osgoode Society,” 63–70.

thorny issues of confidentiality.”¹⁸ No progress was made in relaxing privilege or amending the rules of the Law Society of Ontario.

In 1983, the Social Science and Humanities Research Council’s Consultative Group on Research and Education in Law echoed the need for fuller archival sources and decried the obstacle posed by privilege:

We are concerned that fundamental research on law may be inhibited by the absence of certain kinds of data or by the presence of rules that limit access to them. Historical and socio-legal research examining the performance of courts, prisons, or lawyers is very much dependent upon documentation that may be hidden in archives or current files, routinely destroyed, or simply never collected in usable fashion. For example, we may never learn much about what lawyers did a hundred years ago, or do today, because professional ethics prevent any disclosure of a client’s files.¹⁹

The consultative group went on to recommend,

With a view to amending existing legislation, professional rules and administrative policies that permit the destruction or promote the sequestering of legal records, professional bodies and governments should enter into discussion with legal researchers to encourage the formation of legal archives and agree upon appropriate terms of access and use of legal archival material.²⁰

Regrettably, the consultative group’s recommendation was not followed. Legal scholars and archivists in various jurisdictions have continued to promote the research value of lawyers’ papers and lament the perpetual privilege problem to this day.²¹

¹⁸ Kates, 63.

¹⁹ Social Sciences and Humanities Research Council, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Ottawa: The Council, 1983), 125.

²⁰ Social Sciences and Humanities Research Council, 159.

²¹ Hay, “Archival Research in the History of the Law,” 46; Shepard, “Court and Legal Records,” 119–20; DeLloyd J.

A quarter-century later, these questions were addressed in the report of the Legal Records at Risk (LRAR) project, a three-year project on private-sector legal records in England and Wales, which systematically explored certain issues that apply equally to Canada.²² Using a wide definition of legal records – “all the records of any institution (or individual) specialised to law” – the project focused on 20th- and 21st-century records.²³ Among its key observations,

If the legal profession does not facilitate the preservation of records of value we will be left with a major gap in our historical record, undermining the understanding of the importance of legal developments to our nation's history. . . . the legal profession is an important part of our national heritage but its history is still under-represented in archives.²⁴

Guth, “Retention and Disposition of Client Files: Guidelines for Lawyers” *The Advocate (Vancouver)* 46, no. 2 (1988): 229; Brian Bucknall, “The Archivist, the Lawyer, the Clients and their Files,” *Archivaria* 33 (Winter 1991–92): 181–86, 181; Ken Whiteway, “Voyeurs with Pedigree?: Historical Legal Research and Solicitor-Client Privilege,” *Commonwealth Law Librarian* 2, no. 1–2 (1993): 137; Gourlie, “The Records of Lawyers,” 49–62; Pue, “In Pursuit of Better Myth,” 763–67; Frank J. Tough, “‘The X-Files’: The Truth Is In the Archives, but Access Is Restricted,” in *Minds Alive: Libraries and Archives Now*, ed. Patricia Demers and Toni Samek (Toronto: University of Toronto Press, 2020), 185–231, 185.

The problem is also well-documented in the American discourse. See Jerold S. Auerbach, “Part III – Lawyers Papers as a Source of Legal History: The 20th Century,” *Law Library Journal* 69, no. 3 (1976): 310; David A. Kaplan, “A Matter of Truth or Confidences: Does Attorney-Client Privilege Outweigh Demands of History?” *National Law Journal* 10, no. 43 (1988), sec. 10; Marsha Trimble, “Archives and Manuscripts: New Collecting Areas for Law Libraries,” *Law Library Journal* 83, no. 3 (1991): 429; Hobbs, “Lawyers’ Papers: Confidentiality Versus the Claims of History”; Louis M. Brown, “Lawyering Decisions: New Materials for Law Libraries to Collect,” *Law Library Journal* 87, no. 1 (1995): 7; Organization of American Historians Ad Hoc Committee on Access to Lawyers’ Files, “Historians and Access to the Files of Lawyers,” American Society for Legal History, March 7, 1994, <https://aslh.net/resources-for-doing-legal-history-legacy/historians-and-access-to-the-files-of-lawyers/>; Akiba J. Covitz, “Providing Access to Lawyers’ Papers: The Perils ... and The Rewards,” *Legal Reference Services Quarterly* 20, no. 1–2 (2001): 151–79, 151; Patrick Shilling, “Attorney Papers, History and Confidentiality: A Proposed Amendment to Model Rule 1.6,” *Fordham Law Review* 69, no. 6 (2001): 2741.

In the UK, the Legal Records at Risk project noted “the disconnect between the legal, archives and research sectors over defining confidentiality” (Cowling, *Legal Records at Risk*, 1, 31–33). For another UK perspective, see Victor Tunkel, “Lawyer-Client Files: A Historical Source, But Can We See Them?” *Legal Reference Services Quarterly* 20, no. 1–2 (2001): 181–89.

22 Cowling, *Legal Records at Risk*, vii.

23 Cowling, xii, 1.

24 Cowling, 19.

The report also noted,

[The] risk is not only due to universal factors affecting all private sector records such as globalisation, mergers and acquisitions, digital obsolescence and neglect but because of issues potentially unique to the legal sector such as an *over-emphasis on long-term client confidentiality*, a lack of transparency about how the profession conducts its affairs and a very low awareness of information as an asset.²⁵

One of the five themes that emerged from the project was “the disconnect between the legal, archives and research sectors over defining confidentiality”;²⁶ this conclusion was based largely on the content of an LRAR seminar titled *Legal Records, Confidentiality and Access: Breaking Down the Barriers*.²⁷ The report concluded that the primary obstacle to the preservation of legal records was client confidentiality issues²⁸ and recommended an in-depth study of issues around confidentiality to resolve the concerns of the legal sector.²⁹ However, before addressing these concerns, it is necessary to examine privilege, its rationales, and the justification for the claim that it is absolute and perpetual.

2.0 Privilege and Its Rationales

Solicitor-client privilege must be set in the context of privilege generally.³⁰ Privilege is fundamentally a rule of evidence pertaining to what can or cannot be disclosed in court. Recognition of any privilege is the result of an ongoing balancing act. One view states that the administration of justice requires that all reliable evidence relevant to a case be available to the court so it can make a fully

²⁵ Cowling, 1 (emphasis added).

²⁶ Cowling, 1, 31–33.

²⁷ The seminar papers, presentations, and discussion summary are available in Appendix IX (Cowling, 141–66).

²⁸ Cowling, 38.

²⁹ Cowling, 3.

³⁰ A discussion of the historical evolution of privilege is beyond the scope of this article. Details about the origins of privilege can be found in Dodek, *Solicitor-Client Privilege*, 3–7; and Auburn, *Legal Professional Privilege*, 2–8.

informed decision. The opposing view holds that “there may be a social interest in preserving and encouraging particular relationships . . . which are based upon confidential communications” that are not normally disclosed to those outside those relationships.³¹ In this context, the protected relationship is that between client and solicitor.³²

The judicial system is designed to facilitate the truth-finding process, but where evidence is privileged, it is not admissible in court. Thus, privilege of any sort “is inimical to the search for truth in that it leads to the loss of otherwise relevant and reliable evidence.”³³ For that reason, privileges cannot be established lightly. Consequently, once they are established, their justification is unlikely to be questioned, and they are not easily uprooted.

Solicitor-client privilege in Canada is best understood as “a quasi-constitutional right to communicate in confidence with one’s lawyer.”³⁴ The lawyer cannot disclose privileged information (during or outside court proceedings) without the client’s consent or a court order. Nor can the client be compelled to disclose privileged information.³⁵

John H. Wigmore’s³⁶ definition of solicitor-client privilege was adopted by the Supreme Court of Canada (SCC) in 1927 and has been affirmed in subsequent SCC decisions.³⁷ Wigmore defined solicitor-client privilege as follows: “Where legal advice of any kind is sought from a professional legal adviser, in his capacity as such, the communications relating to that purpose, made in confidence by the

31 Sidney N. Lederman, Michelle K. Fuerst, and Hamish C. Stewart, *The Law of Evidence in Canada*, 6th ed. (Markham, ON: LexisNexis, 2022), 1042. Examples of other privileges include litigation privilege (which shields from disclosure for the duration of the litigation any information prepared for the dominant purpose of litigation); spousal privilege (which protects spouses from being compelled to testify against each other); informer privilege (which protects the confidentiality of police informants); and settlement privilege (which protects communications between parties during negotiations to reach a settlement agreement). A discussion of such other forms of legal privilege is beyond the scope of this article.

32 *Blank v. Canada* (Department of Justice), 2006 SCC 39, at para. 26, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2313/index.do>.

33 David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015), 236.

34 Dodek, *Solicitor-Client Privilege*, 21.

35 Dodek, 21.

36 John H. Wigmore (1863–1943) was an American legal scholar and author of the 10-volume *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (first published 1904–1905).

37 Dodek, *Solicitor-Client Privilege*, lii.

client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the privilege be waived.”³⁸

We must also consider the lawyer’s ethical duty of confidentiality, which is set out in codes of conduct of the provincial and territorial law societies that regulate the practice of law in Canada. The codes are based on the Federation of Law Societies of Canada’s *Model Code of Professional Practice*, which states,

A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Law Society; or
- (d) otherwise permitted by this rule.³⁹

While they overlap in practice and are often conflated, solicitor-client privilege and the duty of confidentiality are two different concepts, as discussed by Alice Woolley.⁴⁰ A lawyer’s duty of confidentiality to a client is broader than solicitor-client privilege and applies without regard to the nature or source of the information or to the fact that the information may be legitimately known by others.⁴¹ In other words, information can be confidential but not privileged, but information cannot be privileged without also being confidential. As Woolley concludes, “Absolute secrecy is required for information that is confidential and privileged,”⁴² and “the duty of confidentiality and the privileged status

³⁸ Dodek, lii.

³⁹ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, October 2022, section 3.3-1, 29, <https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/Model%20Code%20Oct%202022.pdf>. The provincial and territorial law societies have similar wording in their codes of conduct.

⁴⁰ Woolley, *Understanding Lawyers’ Ethics in Canada*, 109–45. See also Lederman, Fuerst, and Stewart, *The Law of Evidence in Canada*, 1046–47; and Dodek, *Solicitor-Client Privilege*, 21–23.

⁴¹ Lederman, Fuerst, and Stewart, *The Law of Evidence in Canada*, 1046–47.

⁴² Woolley, *Understanding Lawyers’ Ethics in Canada*, 119.

of information last indefinitely.”⁴³ Therein lie the seemingly insurmountable obstacles to preserving lawyers’ records in archives.

Legal scholars have discussed the rationales for privilege.⁴⁴ Generally speaking, privilege is based on three interrelated rationales. Most cited in commentary and jurisprudence is the “full and frank disclosure” argument. Law is so complicated that ordinary people must rely on the advice of a lawyer to successfully navigate the law. Thus, they must be confident that they can confide fully in their lawyer with no risk that their communications will be disclosed without their consent.⁴⁵

A second rationale speaks to the role of privilege in the effective administration of justice. Our legal system is an adversarial process that is perceived to be the best way to resolve disputes.⁴⁶ As stated in *R. v. Derby Magistrates*, privilege is “a fundamental condition on which the administration of justice as a whole rests.”⁴⁷ In *Blank v. Canada*, the SCC found that “the resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.”⁴⁸ American law holds a similar view, noting that “sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”⁴⁹

A third rationale has been hinted at, but not fully articulated, in certain judicial decisions that link privilege with access to justice and personal autonomy.⁵⁰ These decisions have opened the door to a judicial expansion of privilege from an

⁴³ Woolley, 120.

⁴⁴ Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham, ON: Butterworths, 1993), 5–6; Auburn, *Legal Professional Privilege*, 13–15; Lederman, Fuerst, and Stewart, *The Law of Evidence in Canada*, 1060–62; Dodek, *Solicitor-Client Privilege*, 7–10; Woolley, *Understanding Lawyers’ Ethics in Canada*, 146–47. For Dodek’s critique of the standard rationales, see Adam M. Dodek, “Reconceiving Solicitor-Client Privilege,” *Queen’s Law Journal* 35, no. 2 (2010): 506–14.

⁴⁵ Dodek, *Solicitor-Client Privilege*, 7–9; Auburn, *Legal Professional Privilege*, 13–14.

⁴⁶ Dodek, *Solicitor-Client Privilege*, 9.

⁴⁷ *R. v. Derby Magistrates Court* [1995] UKHL 18, at para. 58, <https://www.bailii.org/uk/cases/UKHL/1995/18.html>. This decision usefully summarizes the judicial history of privilege in the UK.

⁴⁸ *Blank*, at para. 26.

⁴⁹ *Upjohn Co. v. United States*, 449 U.S. 383, (1981), at 389, <https://casetext.com/case/upjohn-company-v-united-states?>

⁵⁰ Dodek, *Solicitor-Client Privilege*, 9–10.

evidentiary rule to a right. As a result of further SCC decisions, solicitor-client privilege has acquired the status of a quasi-constitutional right.

Adam Dodek has explored the evolution of this judicial expansion of privilege, which connects privilege to section 7 of the Canadian Charter of Rights and Freedoms, which states, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the *principles of fundamental justice*.”⁵¹ The SCC has recognized solicitor-client privilege as a principle of fundamental justice;⁵² therefore, any deprivation of life, liberty, or security of the person that does not respect solicitor-client privilege contravenes section 7.⁵³

Dodek has been critical of the rationales that supposedly undergird solicitor-client privilege,⁵⁴ stating that while “courts . . . protect it zealously without challenging any of their assumptions about it . . . the privilege relies more on rhetoric than on reasoned argument.”⁵⁵ Dodek proposes a client-focused, rights-based theory of privilege based on “dignity, privacy and autonomy,” arguing, “The inherent dignity of the individual . . . involves the need to respect the privacy of an individual’s communications; and the protection of the individual’s right to exercise autonomy over the disclosure of those communications.”⁵⁶ He argues that there may be good reasons for elevated rights-based protection of solicitor-client communications in the criminal law realm but that heightened protection is not justified in the civil law context. It is equally difficult to justify its application only to lawyers. If human dignity dictates autonomy over personal information at a quasi-constitutional level, this should apply to confidential communications exchanged in other professional relationships – for example,

51 Canadian Charter of Rights and Freedoms, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c.11, <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/index.html> (emphasis added).

52 R. v. McClure, 2001 SCC 14, at para. 41, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1850/index.do>.

53 Dodek, *Solicitor-Client Privilege*, 15–21; Dodek, “Reconceiving Solicitor-Client Privilege,” 500–504, 522.

54 Dodek, “Reconceiving Solicitor-Client Privilege,” 506–14.

55 Dodek, 538.

56 For a fuller discussion of a rights-based theory of privilege, see Dodek, “Reconceiving Solicitor-Client Privilege.” From an American perspective, Edward Imwinkelried articulated an alternate justification for privilege based on a similar foundation. See Edward J. Imwinkelried, “The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges,” *Boston University Law Review* 83, no. 2 (2003): 325–27; Edward J. Imwinkelried, *The New Wigmore A Treatise on Evidence: Evidentiary Privileges*, vol. 1 (New York: Aspen Law & Business, 2002), 253–438.

those between patients and medical professionals, parishioners and clergy, and the like.⁵⁷ Privilege, as it exists in Canada, appears to rest on shaky foundations that have “allowed it to become a monolithic, sweeping doctrine that does not correspond to the realities of our legal system.”⁵⁸

2.1 Privilege Is Absolute

Of interest to this article are two characteristics of privilege: that it is absolute and that it is never-ending. Jonathan Auburn has critically examined the theory and practice of legal professional privilege in several jurisdictions, including Canada.⁵⁹ In his exhaustive study of the concept of absoluteness, he explores several possible meanings of *absolute* and concludes that the term most commonly refers to the fact that exceptions to privilege are very limited and are justified only in exceptional circumstances.⁶⁰ This view is supported by Edward Imwinkelried, who explains Wigmore’s understanding of *absolute* in this way: “One of the most important tenets of Wigmore’s position on privileges is that a true communications privilege must be ‘absolute’ in character. . . . [However], Wigmore acknowledged . . . that the scope of a privilege could be subject to an exception stated *beforehand* in clear, bright-line terms.”⁶¹ As the US Supreme Court said in 1981, “If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”⁶²

Solicitor-client privilege is a class privilege, as distinct from a case-by-case privilege. That is, where a class privilege exists, it is presumed that the privileged communications are inadmissible in court, and the party urging admission must show why the materials are not privileged. In contrast, where no class privilege

57 Dodek, “Reconceiving Solicitor-Client Privilege,” 524–26.

58 Dodek, 496.

59 Auburn, *Legal Professional Privilege*, 1–146.

60 Auburn, 99.

61 Edward J. Imwinkelried, “Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges,” *University of Pittsburgh Law Review* 65, no. 2 (2003): 147–48 (emphasis added).

62 *Upjohn*, at 393. See also David M. Paciocco, Palma Paciocco, and Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020), 348.

exists, the communications are presumed to be admissible, and it is up to the party requesting exclusion to demonstrate why the communications should be privileged in that case.⁶³

Despite its status as a class privilege, solicitor-client privilege is subject to several exceptions that are well-established in Canadian jurisprudence.⁶⁴ Privileged information can be revealed in the following situations: (1) where there is a clear, serious, and imminent threat to public safety;⁶⁵ (2) where innocence is at stake (i.e., where there is a danger of wrongful conviction);⁶⁶ and (3) with regard to estates of deceased clients, where it is important to know the intention of the deceased.⁶⁷ Privilege can also be overridden by statute, although “statutory overrides are rare in Canada,” for reasons explained by Dodek.⁶⁸

However, the statutes that establish the law societies include provisions requiring lawyers to produce privileged material in law society investigations.⁶⁹ As well, the courts have implicitly accepted certain lawyers’ exceptions, which are set out in law society codes of conduct. These exceptions authorize lawyers to disclose privileged material to defend themselves in allegations of misconduct or disputes over fees.⁷⁰ As Woolley says, “Giving lawyers the discretion to disclose whatever confidential information they see fit simply to collect fees, or because their reputation may be hurt by an allegation of ineffective assistance of counsel, is a significant intrusion into the client’s right to confidentiality.”⁷¹

63 Paciocco, Paciocco, and Stuesser, 290. The SCC refused to recognize a class privilege comparable to solicitor-client privilege for confidential communications with a religious advisor in *R. v. Gruenke* [1991] 3 SCR 263, <https://www.canlii.org/en/ca/scc/doc/1991/1991canlii40/1991canlii40.html>.

64 Dodek, “Reconceiving Solicitor-Client Privilege,” 515–16.

65 Dodek, *Solicitor-Client Privilege*, 259–71; Paciocco, Paciocco, and Stuesser, *The Law of Evidence*, 8th ed., 312–13; Dodek, “Reconceiving Solicitor-Client Privilege,” 502, 516–18.

66 Dodek, *Solicitor-Client Privilege*, 271–74; Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 152–53; Paciocco, Paciocco, and Stuesser, *The Law of Evidence*, 8th ed., 308–12.

67 Dodek, *Solicitor-Client Privilege*, 304–308; Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 177–83, 213.

68 Dodek, *Solicitor-Client Privilege*, 280–85.

69 Dodek, 287–92.

70 Dodek, *Solicitor-Client Privilege*, 292–304; Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 239; Dodek, “Reconceiving Solicitor-Client Privilege,” 516–18; Woolley, *Understanding Lawyers’ Ethics in Canada*, 130–33.

71 Woolley, 132.

These self-interest exceptions “seem both unnecessarily broad and unjustifiable in light of the strong justification for the duty of confidentiality. . . . If the right to confidentiality is as important as lawyers and judges say it is, then it makes no sense to allow that right to bend uniquely to lawyers’ own convenience.”⁷²

Given these exceptions, the SCC has somewhat softened its stand on the absoluteness of privilege, but it continues to state that privilege “must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.”⁷³

Auburn analyzed empirical studies of the confidentiality expectations of attorneys’ clients and therapists’ patients from various perspectives – for example, with respect to awareness (or not) of confidentiality,⁷⁴ differing motives for consulting and confiding, and different types of confidentiality.⁷⁵ While the findings are far from conclusive, they suggest that “the privilege is not as important as usually assumed.”⁷⁶ Imwinkelried also examined the empirical studies and concluded that “the data . . . do not support the generalization that a layperson would neither consult nor confide absent an evidentiary privilege.”⁷⁷ He also surveyed the psychological literature on communication in general and self-disclosure in particular. He concluded, “If the question is whether the psychological literature validates Wigmore’s case for absolute evidentiary privileges, the answer must be no.”⁷⁸ Auburn came to similar conclusions, saying, “It will be clear that the privilege is not, and does not need to be, as ‘absolute’ as many

⁷² Woolley, 156.

⁷³ *McClure*, at paras. 34–35; repeated in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, *White, Ottenheimer & Baker v. Canada (Attorney General)*, *R. v. Fink*, 2002 SCC 61, at para. 36, <https://www.canlii.org/en/ca/scc/doc/2002/2002scc61/2002scc61.html>.

⁷⁴ Auburn says, “It is usual for lawyers during the first meeting with clients to tell them that everything said is confidential, but not to explain to them the limits of confidentiality.” He concludes, “It is hard to resist the conclusion that the law of privilege is built on active deceit.” Auburn, *Legal Professional Privilege*, 95, 75. See also Shilling, “Attorney Papers, History and Confidentiality,” 2763.

⁷⁵ Auburn, *Legal Professional Privilege*, 69–78.

⁷⁶ Auburn, 77.

⁷⁷ Imwinkelried, “The New Wigmore: An Essay on Rethinking the Foundation,” 321; See also Imwinkelried, “Questioning the Behavioral Assumption,” 156–62.

⁷⁸ Edward J. Imwinkelried, “A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights from the Literature on Self-Disclosure,” *Loyola of Los Angeles Law Review* 38, no. 2 (2004): 726.

believe.”⁷⁹ He continues, “The structure of the privilege should be re-examined in the light of a more realistic view of the goals of the rule, and the resultant degree of ‘absoluteness’ actually required for the attainment of these goals.”⁸⁰

Looking at absoluteness from a Canadian perspective, Woolley argues for the status quo, concluding,

Given the limited empirical data, we are to some extent stuck with our intuitions as to the effect of confidentiality on client’s willingness to disclose, and with our experience as lawyers in determining the importance of such disclosure to functional lawyer advocacy. While intuitions should not be clung to when they are demonstrated to be false, they should not be ignored.⁸¹

On the other hand, Dodek argues for a critical examination of the traditional theoretical underpinnings of privilege with a view to reframing it as a rights-based rationale. He states,

[the] justification [of privilege] remains largely grounded in nineteenth-century legal assertions with no contextual interpretation and no balancing of competing interests or rights. The Supreme Court of Canada has been unwilling to revisit the theoretical bases for the privilege in a comprehensive way. It has become a critical element in the dominant mythology of the legal profession, seemingly impervious to critical analysis.⁸²

2.2 Privilege Never Ends

Turning to the second problematic characteristic of privilege, Wigmore argued that privilege continued even after the lawyer-client relationship ended because there was “no limit of time beyond which the disclosures might not be used to

⁷⁹ Auburn, *Legal Professional Privilege*, 9.

⁸⁰ Auburn, 8.

⁸¹ Woolley, *Understanding Lawyers’ Ethics in Canada*, 149–50.

⁸² Dodek, “Reconceiving Solicitor-Client Privilege,” 494.

the detriment of the client or of his estate.”⁸³ The perpetuity of privilege has received little attention in the legal academic literature and jurisprudence. Neither Imwinkelried nor Auburn refer to duration in their discussions of absoluteness.⁸⁴ Dodek devotes much of his book to a systematic exegesis of the elements in Wigmore’s definition, revealing the many limits or conditions on the scope of privilege.⁸⁵ Unfortunately, he does not fully address the claim that privilege never ends.

Canadian courts have rarely addressed duration of privilege.⁸⁶ Where absoluteness and duration are both mentioned, the contexts suggest that they are different issues. For example, the *Blank* court stated, “Thus, the principle ‘once privileged, always privileged,’ so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.”⁸⁷ As noted above, Canadian courts have relaxed the rule in estate cases involving wills of deceased clients where it is important to know the deceased’s intention.⁸⁸ However, just as no Canadian court has critically examined the rationales for privilege, none has addressed the justification for eternal privilege.

The matter was more directly addressed by the US Supreme Court in *Swidler & Berlin v. United States* in 1998. The government sought the notes of an interview that took place between Deputy White House Counsel Vincent Foster and his attorney shortly before Foster’s suicide. The trial court rejected the government’s argument that the posthumous survival of the privilege should be overridden by the government’s need for the information in the attorney’s notes. While

⁸³ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2nd ed. (Boston: Little, Brown & Co., 1923), section 2323, 75.

⁸⁴ See Imwinkelried, “Questioning the Behavioral Assumption,” 147–48; Imwinkelried, “The New Wigmore: An Essay on Rethinking the Foundation,” 317–19; Auburn, *Legal Professional Privilege*, 99.

⁸⁵ Dodek, *Solicitor-Client Privilege*, liii, 31–256. See also Lederman, Fuerst, and Stewart, *The Law of Evidence in Canada*, 1062–82; Paciocco, Paciocco, and Stuesser, *The Law of Evidence*, 8th ed., 299–304.

⁸⁶ See, for example, *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860 at 872, <https://decisions.scc-csc.ca/scc-csc/dec-scc-csc/en/item/2444/index.do>.

⁸⁷ *Blank*, at para. 37. Litigation privilege shields from disclosure any information prepared by the lawyer for the dominant purpose of litigation and lasts only for the duration of the litigation.

⁸⁸ Dodek, *Solicitor-Client Privilege*, 304–307; Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 177–83; Lederman, Fuerst, and Stewart, *The Law of Evidence in Canada*, 1089–91.

the appeal court reversed that decision,⁸⁹ the Supreme Court overturned the appeal court and found that the privilege in the attorney's notes survived Foster's death.⁹⁰

The *Swidler* court acknowledged that "most cases merely 'presume the privilege survives,'" and rely "on the case law's 'implicit acceptance' of a continuous privilege."⁹¹ However, the court provided the following rationale for maintaining the privilege posthumously in criminal and civil cases:

Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. . . . Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.⁹²

However, as H.L. Ho noted, while "the deceased client may retain a personal, reputation, and economic interest in confidentiality . . . these are more accurately seen as interests . . . of those whom he has left behind."⁹³

Others have argued that privilege should end at some point.⁹⁴ The decision of the *Swidler* appeal court provides several arguments in favour of limits on posthumous privilege.⁹⁵ Supreme Court Justice Sandra Day O'Connor, in her dissent in *Swidler*, provided a fuller discussion questioning the perpetuity of privilege.

⁸⁹ *In Re: Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), <https://law.justia.com/cases/federal/appellate-courts/F3/124/230/620367/>.

⁹⁰ *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), <https://supreme.justia.com/cases/federal/us/524/399/>.

⁹¹ *Swidler & Berlin*, 414–15.

⁹² *Swidler & Berlin*, 407.

⁹³ H.L. Ho, "Legal Professional Privilege After Death of Client," *Law Quarterly Review* 115, no. 1 (1999): 29. Shilling makes a similar point, stating that "the danger is not to deceased clients but to current and future clients who may not be as frank with their attorneys if they know their communications may someday be revealed" if records are donated to archives. Shilling, "Attorney Papers, History and Confidentiality," 2752.

⁹⁴ See, for example, the comment that "one would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." Charles A. Wright & Kenneth W. Graham, quoted in *In Re: Sealed Case*.

⁹⁵ *R. v. McClure*, 2001 SCC 14, at para. 41, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1850/index.do>.

She stated,

I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. . . . But, after death, the potential that disclosure will harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether. . . . the common law authority for the proposition that the privilege remains absolute after the client's death is not a monolithic body of precedent.⁹⁶

Responding to the *Swidler* decision, David A. Kaplan vigorously questioned the perpetuity of privilege (and the duty of confidentiality) as being particularly inimical to the interests of legal history,⁹⁷ as did Patrick Shilling.⁹⁸ Although Richard Wydick agreed with the *Swidler* decision, he thought that privilege should end sometime and proposed several options. However, his proposed limits on duration applied only to attorney-client privilege and did not extend to the duty of confidentiality.⁹⁹ Auburn stated, "The rule that the privilege survives the death of the client may possibly be justified on a rights-based rationale, but such a justification has not yet been offered."¹⁰⁰

In the Canadian context, Dodek argues that privilege need not be permanent. He notes that lawyers have revealed information that may well be confidential or privileged either in their writings,¹⁰¹ for the purposes of continuing education, or in oral history interviews. Others have deposited their records in archives, where they are available for research.¹⁰² As Dodek states, "The privilege may be necessary to encourage client candour but it does not necessarily need to

⁹⁶ *Swidler & Berlin*, 414–15.

⁹⁷ Kaplan, "A Matter of Truth or Confidences," sec. 10.

⁹⁸ Shilling, "Attorney Papers, History and Confidentiality," 2758–66.

⁹⁹ Richard C. Wydick, "The Attorney-Client Privilege: Does It Really Have Life Everlasting?" *Kentucky Law Journal* 87, no. 4 (1999): 1165.

¹⁰⁰ Auburn, *Legal Professional Privilege*, 32.

¹⁰¹ See, for example, Jean Chrétien's account of his early law practice in *My Stories, My Times*, vol. 2 (Toronto: Random House Canada, 2021), chap. 9.

¹⁰² Dodek, *Solicitor-Client Privilege*, 315.

be permanent to accomplish this. . . . Instead of maintaining the myth that the privilege is absolute and lasts forever, courts should address the issue head on and recognize a ‘public information’ exception and articulate proper boundaries thereof.”¹⁰³ This possibility leads us to consider the role of archives in preserving lawyers’ papers so they are available for research.

3.0 Preserving Lawyers’ Papers in Archives

Legal scholars make it clear that privilege need not necessarily be absolute or perpetual. Thus, there could be an exception to permit access to lawyers’ papers for research purposes after a specified time. However, it would take a long time for the courts to carve out a coherent public information exception. From an archival perspective, it is easier to consider how long privilege should last and archivists’ long experience in managing access to sensitive records.

The problem would go away if clients waived their privilege in such material. That, however, is unrealistic.¹⁰⁴ Leaving aside issues such as determining the identity of the client in corporate contexts,¹⁰⁵ as well as clients’ possible reluctance to waive privilege without fully understanding it, lawyers are unlikely to regularly include waiver of privilege in their discussions with clients.¹⁰⁶ Furthermore, neither lawyers nor archivists are likely to allocate resources to retroactively seeking waivers from past clients.

Material is preserved in archives to be used, but that does not mean that records are immediately available for research as soon as they are deposited in an archives. Access may be legitimately constrained for several reasons. As stated in the Society of American Archivists’ *Core Values of Archivists* regarding access and use,

¹⁰³ Dodek, 316.

¹⁰⁴ Whyte, “The Acquisition of Lawyers’ Private Papers,” 150.

¹⁰⁵ Dodek, *Solicitor-Client Privilege*, 167, 201–209; Hobbs, “Lawyers’ Papers: Confidentiality Versus the Claims of History,” 192.

¹⁰⁶ Cowling, *Legal Records at Risk*, 145.

Archivists should promote and provide the widest possible accessibility of materials, while respecting legal and ethical access restrictions including public statutes, cultural protections, donor contracts, and privacy requirements. While access may be justifiably limited in some instances, archivists still seek to foster open access and unrestricted use as broadly as possible when appropriate.¹⁰⁷

However, access restrictions must be “of limited duration.”¹⁰⁸ If privilege never expires, why would an archives bother to acquire lawyers’ papers that can never be consulted by researchers?

Archival institutions have “well developed techniques for dealing with ‘sensitive’ records, including closure periods and conditions on access and use.”¹⁰⁹ Such conditions include provision of access only with the permission of the donor or creator of the records; requirements that researchers sign agreements (e.g., that they will not identify individuals when reporting the results of their research); and redaction of information.¹¹⁰ For lawyers’ papers, however, these measures are problematic. Only the client can waive privilege, and obtaining client waivers can be difficult, as noted. Access to privileged material could be authorized if researchers agree to anonymize aggregate data or to avoid disclosing identifying information about individuals. However, such undertakings would be ineffective if researchers cannot even examine privileged material.¹¹¹ Such a condition could require identifying privileged material in advance – a resource-intensive process whether carried out by lawyers or by archivists (who would require legal guidance).¹¹²

Redaction, albeit time-consuming, could be as straightforward as expunging personal information such as social insurance numbers or birthdates. But for lawyers’ papers, it could include the destruction of privileged documents or

¹⁰⁷ Society of American Archivists, “Core Values of Archivists,” August 2020, <https://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics> (emphasis added).

¹⁰⁸ International Council on Archives, Committee on Best Practices and Standards Working Group on Access, *Principles of Access to Archives*, principle 4, 9, August 24, 2012, <https://www.ica.org/en/principles-access-archives>.

¹⁰⁹ Cowling, *Legal Records at Risk*, 108.

¹¹⁰ Cowling, 149–50. See also Whyte, “The Acquisition of Lawyers’ Private Papers,” 147.

¹¹¹ Trimble, “Archives and Manuscripts,” 444.

¹¹² Hobbs, “Lawyers’ Papers: Confidentiality Versus the Claims of History,” 197–98.

entire files, leaving the equivalent of a novel with key pages or chapters missing. Alternatively, temporary withdrawal of the privileged material and restoration to its original place after an appropriate interval (whatever that may be) would keep the story intact for eventual use.¹¹³ In either case, identifying privileged material would require considerable effort.

Thus, closure for a specified period is the most straightforward way to address the supposedly perpetual nature of privilege. It is well-established that “the risk of harm arising from the unauthorised access or inappropriate access to records diminishes with time.”¹¹⁴ The International Council on Archives has articulated the underlying principle as follows: “Archivists seek to limit the scope of restrictions to those imposed by law or to identified instances where a specific harm to a legitimate private or public interest *temporarily* outweighs the benefit of disclosure at the time.”¹¹⁵

The period of closure would be based on the most recent date of the privileged document or file, which is usually readily known. For example, if all were to agree that privilege ends after 50 years, a file that was completed in 1975, would be open for research on January 1, 2026. An interval based on the date of a document is much easier to implement than one based on the death of a client, which is often difficult to ascertain, and applying the “death of a client” trigger to corporate clients would be much more complicated. For those reasons, the closure interval must start with the date the documents were created or date the file was closed.

So, what is an appropriate period of closure? A risk-based approach is needed. The answer appears to be when there is no risk of harm to the client (or their family, if the client is deceased)¹¹⁶ or to the lawyer (given that lawyers have a considerable stake in privilege).¹¹⁷ Commentators have offered suggestions from various jurisdictions. In the UK, the National Archives (along with most other archival institutions) usually imposes closure periods of 100 years on

¹¹³ Hobbs, 197–98.

¹¹⁴ Cowling, *Legal Records at Risk*, 149. The report noted that, among archivists, researchers, and lawyers at the LRAR seminar, “the only agreement reached was that risk diminishes over time.” Cowling, 33.

¹¹⁵ International Council on Archives, *Principles of Access to Archives*, principle 4, 9 (emphasis added).

¹¹⁶ Shilling, “Attorney Papers, History and Confidentiality,” 2778–79.

¹¹⁷ Possible harms include breach of privilege (possibly resulting in litigation) and reputational damage. Cowling, *Legal Records at Risk*, 18, 138.

personal or confidential data or data subject to legal professional privilege.¹¹⁸ In the US, Marsha Trimble proposed 50–75 years.¹¹⁹ In practice, the American Civil Liberties Union has implemented a 75-year closure for its legal case files preserved at the Princeton University Archives.¹²⁰ In Canada, Christine J.N. Kates proposed a term of 75 years in a model deposit agreement.¹²¹ The sole legal case that addresses the duration of access restrictions to legal files deposited in archives implies that 50 years would be an appropriate closure period for the privileged material included in the papers of Montreal lawyer Louis M. Bloomfield deposited at Library and Archives Canada (LAC).¹²² An amendment to the BC lawyers' code of conduct, proposed in 1983, included a 30-year closure;¹²³ however, it was not adopted.

The matter of privilege in government records deserves particular attention. Governments employ lawyers who produce records that undoubtedly contain much privileged material. But governments have a mission to act in the public interest and, to that end, must be transparent and accountable for their actions, which are documented in government records. Consequently, privilege should not inappropriately impede access to a government's legal records.¹²⁴ Nonetheless, privilege has long stood in the way of citizens' access to government records. Writing in 1984, archivist James Whalen stated, "The principle of solicitor-client privilege, and its application to records of the Department of Justice, has been most effective in closing off a large portion of these records to historical research."¹²⁵ More recently, Frank Tough recounts a succession of occasions when

¹¹⁸ Cowling, 32. See also Kates, "The Osgoode Society," 62.

¹¹⁹ Trimble, "Archives and Manuscripts," 444.

¹²⁰ Princeton University Library, "Guide to the American Civil Liberties Union Records at the Mudd Manuscript Library," accessed November 15, 2024, <https://libguides.princeton.edu/c.php?g=330597&p=3174253>. The closure is 100 years for cases involving children.

¹²¹ Kates, "The Osgoode Society," 66. See also Whiteway, "Voyeurs with Pedigree?," 141, quoting Bucknall, "The Archivist, the Lawyer, the Clients and their Files," 186.

¹²² *Philipps v. Canada* (Librarian and Archivist), 2010 FCA 88. While the court did not comment directly on the 50-year closure period, its silence could be interpreted as tacit approval.

¹²³ Whyte, "The Acquisition of Lawyers' Private Papers," 149–50.

¹²⁴ See Dodek, *Solicitor-Client Privilege*, chapter 12, for a comprehensive discussion of the issues.

¹²⁵ James M. Whalen, "The Application of Solicitor-Client Privilege to Government Records," *Archivaria* 18 (Summer 1984): 135–41, 140.

his access to legal opinions pertaining to Indigenous rights was restricted.¹²⁶ Due to government's public-interest role, Dodek recommends a 30-year closure for government records.¹²⁷

The open government movement also points to less restriction. The LRAR report notes,

There is a mismatch between the public and private sectors over transparency. The public sector and some parts of the business sector are leaning heavily towards being more open and transparent; the legal sector is still leaning towards secretiveness. The latter is risk averse and out of step with recent trends in both government and business towards transparency, public accountability and community engagement.¹²⁸

It remains to be seen how the legal units of government bureaucracies respond to open government initiatives.

Three Canadian repositories are devoted to the preservation of legal materials: the Law Society of Ontario (LSO) Archives,¹²⁹ the Legal Archives Society of Alberta (LASA),¹³⁰ and the Law Society of British Columbia (LSBC) Legal Archives.¹³¹ All take a strict view of privilege, although their approaches differ. The LSO Archives was established in 1982 to preserve the heritage of the legal profession in Ontario. The LSO Archives does not acquire client files, but it does have a memoir-writing project that could potentially result in privileged information being disclosed.¹³²

¹²⁶ Tough, "The X-Files," 187-214.

¹²⁷ Dodek, *Solicitor-Client Privilege*, 443.

¹²⁸ Cowling, *Legal Records at Risk*, 141.

¹²⁹ Law Society of Ontario, "Archives," accessed November 15, 2024, <https://lso.ca/about-lso/osgoode-hall-and-ontario-legal-heritage/archives>. The Law Society of Ontario is a separate entity from the Osgoode Society.

¹³⁰ Legal Archives Society of Alberta, "Home," accessed November 15, 2024, <https://legalarchives.ca/>.

¹³¹ The LSBC website (<https://www.lawsociety.bc.ca/>) contains no link to the archives. An overview of the Archives' holdings is available at Memory BC, "Law Society of British Columbia Legal Archives," accessed November 15, 2024, <https://www.memorybc.ca/law-society-of-british-columbia-legal-archives>.

¹³² Law Society of Ontario, "Memoir Writing Project," accessed November 15, 2024, <https://lso.ca/about-lso/osgoode-hall-and-ontario-legal-heritage/help-us-make-history/how-to-begin-writing-your-memoirs>.

The LSBC Legal Archives was established in 1984.¹³³ In addition to LSBC records, the archives also holds records of individuals prominent in the legal community, but it does not acquire client files. Requests for access to archival holdings are dealt with on a case-by-case basis, subject to BC's *Freedom of Information and Protection of Privacy Act* and the *Legal Profession Act*.¹³⁴ The LASA was established in 1990 to preserve and promote the history of the legal profession in Alberta through various programs, including an archives and library, an oral history program, publications, and records and archives consulting.¹³⁵ LASA acquires client records and attempts to obtain client waivers. If it cannot obtain waivers, it retains the client files but does not make them available for research.

Other archival institutions also acquire private legal records of various sorts. In 1984, 41 Canadian archives responded to a survey investigating the extent of private legal collections in their holdings and the impact of privilege.¹³⁶ Not surprisingly, the survey found that privilege was a problem and that it had been addressed in various ways.¹³⁷ A recent random sampling of current online descriptions revealed that little had changed. The sample included an ad hoc search of the ArchivesCanada.ca database by subject term (e.g., client files) as well as an examination of select online descriptions of lawyers' papers mentioned in sources cited in this article. Key findings of the search, including a wide variation on access conditions, are described below.¹³⁸

John Diefenbaker was Canada's 13th prime minister. His papers (including client files of his law practice, 1919–1956) are preserved at the University of Saskatchewan. Documents subject to privilege were withdrawn and stored separately until a more permanent solution could be found.¹³⁹ Because that day has not yet arrived, access to the legal series remains restricted. In contrast, eight volumes of legal correspondence relating to Sir John A. Macdonald's legal

133 Guth, "Retention and Disposition of Client Files," 234.

134 Supervisor, Privacy, Records and Information Management at LSBC, email message to author, July 29, 2022.

135 Legal Archives Society of Alberta, "About," accessed November 15, 2024, <https://legalarchives.ca/about/>.

136 It is not clear who instigated this survey, which was done concurrently with, but differently from, the Osgoode Society's survey of Ontario law firms.

137 Whyte, "The Acquisition of Lawyers' Private Papers," 146, 150.

138 Further information about individual collections can be found by searching the institutional websites.

139 Gourlie, "The Records of Lawyers," 57–78; Whyte, "The Acquisition of Lawyers' Private Papers," 147–48.

practice (1835–1873) have been open for research at LAC for nearly a century.¹⁴⁰

The records of the Kelly and Porter law firm at the Archives of Ontario contain client case files and other client records (1836–1956) that are covered by privilege. It appears that records older than 100 years are open for research; requests for access to more recent files must be submitted to the Archives' Information and Privacy Unit.¹⁴¹ The case files (1917–1951) of Saul Cherniack, a lawyer who assisted Japanese Canadians interned during the Second World War, are at LAC.¹⁴² The access restriction on these was lifted in 2020. Also preserved at LAC are the records of Blake and Redden (1814–1953), the British law firm that handled Canadian cases heard before the Judicial Committee of the Privy Council. They have been open for research since at least 1994.¹⁴³

Within the sample of collections of lawyers' papers in Canadian archives that were surveyed, most are open for research. Due to the donor's wishes, access to the papers of the legal and judicial career (1906–1976) of Thomas G. Norris was never restricted.¹⁴⁴ However, of the seven lawyers' fonds at Glenbow Archives¹⁴⁵ that include series of client files, one is closed for 50 years, two others restrict sensitive material, and there are no restrictions for the remaining four. The basis for determining access to these types of records is not clear. More systematic research is needed to determine how much privileged material is preserved in Canadian archives and the extent and nature of the related access restrictions.¹⁴⁶

American archives contain many legal collections that are open for research. Trimble's 1991 survey of 143 law libraries revealed that the collections were open, albeit with some restrictions, but no respondent indicated that the confidential collections would never be opened.¹⁴⁷ Shilling states,

¹⁴⁰ Whyte, 145.

¹⁴¹ Archives of Ontario, "Kelly and Porter Fonds," F1295, accessed November 15, 2024, https://aims.archives.gov.on.ca/scripts/mwimain.dll/144/DESCRIPTION_WEB/WEB_DESC_DET?SESSIONSEARCH&exp=sign%20584.

¹⁴² Gourlie, "The Records of Lawyers," 60, 68.

¹⁴³ Gourlie, 56.

¹⁴⁴ Gourlie, 31–39, 56, 67–70.

¹⁴⁵ These are now at the University of Calgary: University of Calgary, "Glenbow Library and Archives," accessed November 15, 2024, <https://www.libguides.ucalgary.ca/glenbowlibraryandarchives>.

¹⁴⁶ The author has since conducted a more comprehensive search of the ArchivesCanada.ca database; the results will be published in due course.

¹⁴⁷ Trimble, "Archives and Manuscripts," 450; Shilling, "Attorney Papers, History and Confidentiality," 2770n262.

Many attorneys have determined on their own that the historical benefit of the information in their files is more important than the duty of confidentiality. These lawyers have recognized the historical value of their papers and, in contravention of their ethical duties, have disclosed confidential information, either by writing “tell-all” books or by donating their files to historical repositories.¹⁴⁸

He lists the many prominent lawyers who have deposited their papers in archives, often without access restrictions.¹⁴⁹

Various commentators have suggested that many lawyers’ papers are available for research without restrictions because donors and/or archivists are unaware of, or have chosen to ignore, the privilege problem.¹⁵⁰ Despite this, no litigation has resulted in Canada or the US,¹⁵¹ and it is not evident that lawyers who have breached privilege have been disciplined. As Dodek remarks, “The practice of lawyers revealing privileged information or of legal archives containing lawyers’ and client files severely undercuts the absolutist arguments about the privilege.”¹⁵²

Recent agreements providing access to the records of judges offer encouraging precedents for an appropriate closure interval. Judges’ records are protected by judicial privilege, which grants judges immunity from civil lawsuits and from being compelled to testify about how they arrived at decisions. Judges often keep notes during proceedings in benchbooks that summarize the evidence and arguments presented. However, benchbooks may also contain “comments about the credibility of witnesses and the effectiveness of the arguments. An examination of a judge’s notes might therefore be expected to reveal at least a portion of the reasoning process used to accept or discount the material presented.”¹⁵³

¹⁴⁸ Shilling, “Attorney Papers, History and Confidentiality,” 2755–56.

¹⁴⁹ Shilling, 2757.

¹⁵⁰ Whyte, “The Acquisition of Lawyers’ Private Papers,” 145; Gourlie, “The Records of Lawyers,” 56; Dodek, *Solicitor-Client Privilege*, 315; Shilling, “Attorney Papers, History and Confidentiality,” 2770; McReynolds, quoted in Kaplan, “A Matter of Truth or Confidences”; Trimble, “Archives and Manuscripts,” 443; Hobbs, “Lawyers’ Papers: Confidentiality Versus the Claims of History,” 194.

¹⁵¹ Whiteway, “Voyeurs with Pedigree?,” 139; Trimble, “Archives and Manuscripts,” 445; Shilling, “Attorney Papers, History and Confidentiality,” 2767.

¹⁵² Dodek, *Solicitor-Client Privilege*, 316.

¹⁵³ S. Goudge, A.K. Lokan, and J. Brecher, “Testimonial Immunity,” in *Halsbury’s Laws of Canada* (Markham, ON: LexisNexis, 2022 reissue), para. HJC-18.

Where there is a panel of judges, members arrive at their decision and reasons for judgment through a collegial process.

The Archives of Ontario contains many benchbooks that are open for research pursuant to an agreement with the chief justice of the Superior Court of Ontario, which provides that access is restricted to 75 years after the date of creation. Neither a research agreement nor anonymization are required for benchbooks older than 75 years. In 2017, the SCC and LAC signed an agreement that SCC case files more than 50 years old would be transferred to LAC and would be open for research. The announcement explicitly noted that “certain categories of the Court’s judicial information, such as the Collegial files of the judges of the Supreme Court of Canada, will become accessible to the public 50 years after a case file has been closed, thereby providing insights into the inner deliberations of the Court.”¹⁵⁴ Despite the fact that these agreements pertain only to judicial privilege, they bolster the argument that the public interest in a full and accurate record of Canada’s legal heritage trumps privilege after the passage of time.

A recent development has signalled that privilege is not necessarily perpetual. On May 29, 2024, the Treasury Board of Canada Secretariat (TBS) issued guidelines on the disclosure of historical records under the federal *Access to Information Act*. Federal government records subject to solicitor-client privilege can be disclosed after 100 years.¹⁵⁵ While this is an encouraging development, it is nonetheless very conservative compared with guidelines already in place. Much more is needed to ensure that lawyers’ papers are preserved in archives and available for the study of the legal profession.

¹⁵⁴ Supreme Court of Canada and Library and Archives Canada, “Supreme Court of Canada and Library and Archives Canada Sign Agreement on Transfer, Preservation and Access to Case Files,” News release, June 9, 2017, <https://scc-csc.lexum.com/scc-csc/news/en/item/5547/index.do>.

¹⁵⁵ Treasury Board of Canada Secretariat, “Policy Guidance on the Disclosure of Historical Records under the *Access to Information Act*,” May 29, 2024, <https://www.canada.ca/en/treasury-board-secretariat/services/access-to-information-privacy/access-information/access-information-policies-guidance/policy-guidance-disclosure-historical-records-access-information-act.html>.

4.0 Conclusion

As Roy Schaeffer notes, “Lawyers’ activities touch on every aspect of community life, whether social, economic, or political.”¹⁵⁶ Thus, it is essential to understand how the legal profession works and its impact on Canadian society over time. To do so, it is vital to have the resources for the study of legal profession at hand. But many obstacles stand in the way. For a profession so deeply entrenched in precedent, it is surprising that “so few members of the legal profession have anything other than an anecdotal appreciation of legal history.”¹⁵⁷ As the LRAR report recommended, “The legal sector . . . [must] understand the importance of its records not only for its own business benefit but for the safeguarding of our national heritage and to allocate resources to the management of its records and the preservation of those of value.”¹⁵⁸

We have already noted that the legal sector is out of step with current trends toward transparency.¹⁵⁹ Furthermore, the profession (with few exceptions) has shown little interest in critically examining the questionable assumptions on which privilege rests. Lawyers might argue that it is up to the courts, not the profession, to examine the foundations of privilege, but courts have been content to rely on earlier jurisprudence without questioning the underlying assumptions. The issue has not caught the attention of the bodies that regulate the legal profession.

The most straightforward solution is to address the matter of perpetual privilege by clearly determining the duration of privilege. To make this happen, both archivists and the legal profession (particularly its regulatory bodies and professional associations) must be involved. As recommended by the LRAR project, “It is in the public interest that legal institutions and archives should collaborate and co-operate to facilitate the preservation of records of value.”¹⁶⁰ Archivists have long stood ready to begin this conversation. The TBS guidelines on disclosure of historical records, which clearly acknowledge that privilege

¹⁵⁶ Schaeffer, “The Osgoode Society Survey of Private Legal Records in Ontario,” 183.

¹⁵⁷ Bucknall, “The Archivist, the Lawyer, the Clients and their Files,” 181.

¹⁵⁸ Cowling, *Legal Records at Risk*, 3.

¹⁵⁹ Cowling, 19.

¹⁶⁰ Cowling, 2.

need not last forever, provide a good starting point, but much is required of the legal profession.

Law societies provide guidance on the management of records when a lawyer closes a practice or retires. With regard to closed client files, the LSO obviously prefers that such files be destroyed, although it half-heartedly offers an alternative: “Lawyers may choose not to destroy client files and to retain client files indefinitely despite the winding up of their practices or retirement from the practice of law.”¹⁶¹ However, the archival option is not mentioned.

Other solutions already exist but have not been implemented. For example, the BC *Legal Profession Act* provides for legal archives as follows:

The benchers may make rules permitting a lawyer or law firm to deposit records in the possession of the lawyer or law firm in an archives, library or records management office in Canada.

- (2) Rules made under this section may provide for
- (a) the time after which the records may be deposited,
 - (b) the restrictions or limitations on public access that the lawyer or law firm may attach on depositing them, and
 - (c) circumstances under which the lawyer or law firm cannot be liable for disclosure of confidential or privileged information arising out of the deposit.¹⁶²

Regrettably, this provision has never been acted upon. A similar provision was apparently under consideration in Ontario but never reached the legislature.¹⁶³ As Ken Whiteway noted, “Should these proposed rules ever be implemented, they (along with similar ones in other jurisdictions) will give guidance to archivists and librarians as well as removing the ethical dilemma for lawyers.”¹⁶⁴

If such provisions were included in Canadian law, this would provide the perfect opportunity to connect two hitherto disconnected activities: (1) the

¹⁶¹ Law Society of Ontario, “Closing Down Your Practice,” April 14, 2019, <https://lso.ca/lawyers/practice-supports-and-resources/practice-management-guidelines/closing-down-your-practice>.

¹⁶² *Legal Profession Act*, SBC 1998, c 9, s 92.

¹⁶³ Kates, “The Osgoode Society,” 61.

¹⁶⁴ Whiteway, “Voyeurs with Pedigree?,” 140.

management and disposition of lawyers' records and (2) their archival preservation. If it were agreed that privilege expired after a specified interval, this would close the gap between legal practice and respect for legal history by suggesting that lawyers work with archival repositories to ensure the preservation of files of enduring value. Such an agreement would free Canadian archives to expand their acquisition mandates and enrich their holdings.

To start the conversation, the archival profession must engage with the legal profession. There are many players that operate at the national, provincial, and institutional levels, so any advocacy campaign must be planned and well organized. The first step is to educate archivists about the problem, particularly those who work in institutions that acquire the legal records of their parent bodies or the records of private sector legal firms. This could be done through the professional development committees of professional associations. Much can be learned from the experience of larger institutions, particularly LAC, which have long been concerned about this issue.

There are also opportunities at the institutional level. Conversations with researchers who use the legal records in our holdings could identify some allies. It may also be useful to hold discussions with the legal departments that create the legal records of parent bodies to acquaint them with archivists' concerns. Any approach to the Federation of Law Societies of Canada and the provincial law societies must be more formal. One possibility is to seek opportunities to present the archival perspective at meetings of professional legal organizations. For example, the Canadian Bar Association's 2024 Privacy and Access Law Conference featured a panel on solicitor-client privilege in historical government records. Such presentations could be followed up with more formal submissions to open the door to discussions.

"This seems an appropriate point to appeal for the development of an archival standard for the acquisition of papers generated by the Canadian legal profession."¹⁶⁵ Those words were written nearly 40 years ago; regrettably no such standard yet exists. It is time to try again. The task is daunting, but clarifying this longstanding and contentious issue provides considerable benefits to historians, archivists, the legal profession, and society at large.

165 Whyte, "The Acquisition of Lawyers' Private Papers," 152.

BIOGRAPHY Jean Dryden is an archival consultant, independent scholar, and adjunct professor in the Faculty of Information at the University of Toronto. She has many years of experience as a staff archivist and archival administrator at the National Archives of Canada, the Provincial Archives of Alberta, and as Chief Archivist of the United Church of Canada/Victoria University Archives. Throughout her career, she has been active on committees and boards of professional associations in Canada and the US. A member of the International Council on Archives' (ICA) Expert Group on Legal Matters, she represents the ICA at the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights. Her research interests focus on barriers to access to archival holdings, particularly impediments posed by copyright. Her doctoral dissertation investigated the copyright practices of Canadian archival repositories in making their holdings available online. Her interest in solicitor-client privilege arose during a project to appraise, arrange, and describe the records of an organization involved in a series of landmark legal cases. The possibility that the records would be stripped of privileged materials led to her investigation of the rationale for perpetual privilege, which resulted in this article.