Privilege: Recent Issues

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As our Court of Appeal stated in *National Post v. Canada*, "privilege" is an exception to the fundamental proposition that everyone has a general duty to give evidence relevant to a matter before the Courts. A privilege is recognized only where required by an overriding societal interest.[1] Claims of privilege are concerned with different types of interests, including the individual's interest, interests that may arise out of a particular relationship or the societal or public interest in preserving a particular privilege.[2] For example, solicitor-client privilege protects the confidentiality of the solicitor-client relationship, which is "a necessary and essential condition of the effective administration of justice"[3]; settlement privilege promotes settlements and improves access to justice[4]; and litigation privilege permits litigants a zone of privacy which "serves the secure and effective administration of justice according to law"[5].

Given that each privilege serves different societal interests, each reflects an intrinsic balance that is tailored to the interest it is meant to promote and protect. For example, solicitor-client privilege lasts forever, but is limited to communications between lawyer and client for purposes of obtaining legal advice[6]; settlement privilege also lasts forever whether or not a settlement is reached and is limited to communications made for the purpose of settlement[7];

[1] *National Post v. Canada*, (2008) 89 O.R. (3d) 1 (C.A.), aff'd 103 OR (3d) 398 (SCC) at para. 77
[2] For a detailed discussion on privilege classes see "Exclusionary Issues" Chapter 8, Harold Niman's Evidence in Family Law, which Chapter was written by George Karahotzitis, Patrick Schmidt and Joanna Harris.
[3] *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at para. 25
[4] *Sable Offshore Energy v. Ameron International*, 2013 SCC 37 at para. 12
[5] *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at para. 31
[6] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 at para. 10
[7] *Sable Offshore Energy v. Ameron International*, 2013 SCC 37 at para. 18

litigation privilege is limited to materials that have been prepared for the dominant purpose of litigation, but is not limited to solicitor-client communications or even to confidential communications, and it ceases to apply once current or anticipated litigation and closely related litigation has come to an end.[8]

Solicitor-client privilege is more than a rule of evidence – it is unquestionably a substantive rule, a principle of fundamental justice and a constitutionally-protected right.[9][10] In *Solosky*, Justice Dickson stated:

> Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts unwilling to so restrict the concept, have extended its application well beyond those limits…[11]

Solicitor-client privilege is a class of privilege (as opposed to a case-by-case privilege) and is the most important class privilege recognized in Canada. Our Supreme Court of Canada has stated that "solicitor-client privilege is fundamental to the proper functioning of our legal system."[12] The protection of solicitor-client communications must be "as close to absolute as possible"[13] to ensure public confidence and relevance. While this privilege is of indefinite duration, it is subject to a limited number of exceptions and can also be waived by a client expressly or by implication where, for example, the client puts in issue his or her state of mind, which was formed through the legal advice received.

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[8] *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at paras. 60, 34 & 32
[9] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 at para 19
[10] *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61.
[11] *Solosky v. Canada*, [1980] 1 S.C.R. 821 at para. 836
[12] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574at para. 9
[13] *Ibid.*

In *Blood Tribe*, the Supreme Court of Canada held that clear and explicit statutory language is required to access information protected by solicitor-client privilege:

> …Parliament must be mindful of the importance of that privilege [solicitor-client privilege] in the administration of justice. Consequently, if Parliament seeks to abrogate solicitor-client privilege it must do so in clear, precise and unequivocal language. Any ambiguity in the language of the legislation at issue must be resolved in favour of protecting the privilege and against any abrogation of the privilege.[14]

Litigation privilege has been implicitly recognized to have a "lesser status" than solicitor-client privilege. It is currently considered a case-by-case privilege and an evidentiary rule. It may be compromised in favour of competing interests, such as the need for disclosure for a fair trial.[15] The Supreme Court of Canada considered the nature and scope of litigation privilege in 2006 in *Minister of Justice v. Blank* ("*Blank*").[16] *Blank* confirmed that the Court will take different approaches to solicitor-client privilege and litigation privilege. Now a decade later, an appeal from the Quebec Court of Appeal in *Lizotte v. Aviva Insurance Company of Canada* was heard by the Supreme Court of Canada on March 24, 2016 with judgment reserved. It is expected that this decision will address whether litigation privilege is limited to an evidentiary rule, which will militate in favour of a shrinking zone of privacy and towards full disclosure, or whether it will be elevated to a substantive rule of critical importance to the administration of justice, in a similar vein to solicitor-client privilege, towards restricted disclosure. If the Supreme Court maintains the analysis applied to litigation privilege that is applied in *Blank*, we could expect a shrinking zone of privacy.

[14] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574
[15] *General Accident Assurance Company et al. v. Chrusz et al*., [1999] O.J. No. 3291 (C.A.) at paras. 23 – 29; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at paras. 44 – 45.
[16] *Minister of Justice v. Blank*, [2006] 2 S.C.R. 319

In *Lizotte v. Aviva Insurance Company of Canada*, the Supreme Court of Canada will also address the issues of whether litigation privilege can be abrogated by statute by inference and if not, what standard for legislative abrogation of litigation privilege is appropriate. This appeal also affords the Supreme Court of Canada with an opportunity to provide guidance as to when, and under what circumstances, the court may set aside litigation privilege. It will be interesting to see if the Court will adopt Justice Doherty's dissenting reasons in *General Accident Assurance Co. v. Chrusz* that litigation privilege should, in each case, be subject to a balancing exercise:

> With respect to litigation privilege**,** litigation privilege claims should be determined by first asking whether the material meets the dominant purpose test. If it meets that test, then it should be determined whether in the circumstances the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production. I would put the onus on the party claiming the privilege at the first stage of this inquiry and on the party seeking production of the document at the second stage of the inquiry.[17]

The doctrines of solicitor-client privilege and litigation privilege are "related but distinct." The two privileges serve different functions. As recognized in *Blank*, "the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences." Whereas solicitor-client privilege focuses on protecting the confidentiality of the solicitor-client relationship, litigation privilege focuses on the integrity of the adversarial system. The different legal consequences that flow from these different functions include the following:

a) *Confidentiality is not required for litigation privilege:* Solicitor-client privilege applies only to confidential communications between the client and his or her

[17] *General Accident Assurance Company et al. v. Chrusz et al*., [1999] O.J. No. 3291 (C.A.) at para. 151

solicitor. Litigation privilege applies to communications of a non-confidential nature between the solicitor and third parties and extends to non-communicative material.

b) *Litigation privilege only applies in the context of litigation*: Solicitor-client privilege exists any time a client seeks legal advice from his or her solicitor whether or not litigation is involved.

c) Litigation privilege does not require a solicitor-client relationship: Litigation privilege applies to all litigants, whether or not represented by counsel.

d) *Litigation privilege ends with the litigation*: Litigation privilege, unlike solicitor-client privilege, is neither absolute in scope nor permanent in duration.

A party that is asserting privilege bears the burden of establishing an evidentiary basis for the claimed privileged.[18] The party seeking to override the privilege bears the onus of admitting the privileged communication.[19, 20]

The Supreme Court of Canada also recently had the opportunity to address settlement privilege. In *Union Carbide Canada Inc. v. Bombardier Inc.*, the Supreme Court of Canada held that settlement privilege is an evidentiary rule "that relates to the admissibility of evidence of communications."[21] Settlement privilege does not prevent a party from disclosing information; it just renders the information inadmissible in litigation.[22]

The Supreme Court of Canada also heard an appeal on April 1, 2016 in *Information and Privacy Commissioner of Alberta v. Board of Governors of the University of Calgary* with judgment reserved. One of the issues to be considered is to what extent solicitor-client privilege

[18] *General Accident Assurance Company et al. v. Chrusz et al*., [1999] O.J. No. 3291 (C.A.) at para. 95
[19] *Dymond v. Dymond*, 2010 CarswellOnt10304 at para. 17
[20] *General Accident Assurance Company et al. v. Chrusz et al*., [1999] O.J. No. 3291 (C.A.) at para. 170
[21] *Union Carbide Canada Inc. v. Bombardier Inc*., [2014] 1 S.C.R. 800
[22] *Union Carbide Canada Inc. v. Bombardier Inc*., [2014] 1 S.C.R. 800

can be pierced by legislation and the extent of legislative clarity required in order to pierce said privilege.

These upcoming decisions of the Supreme Court of Canada will have a profound impact on the legal profession and the manner in which cases are handled.

Litigation Privilege in relation to Experts

Litigation privilege protects communications with experts and documents experts prepare in the course of or in anticipation of litigation. However, this privilege is subject to qualifications. The scope of production in relation to communications between an expert and a party's lawyer was recently defined by the Court of Appeal in *Moore v. Getahun*, 2015 ONCA 55. The Court of Appeal made the following comments about the boundaries of advocacy by counsel in relation to experts:

> The careful and thorough preparation of a case for trial requires an umbrella of protection that allows counsel to work with third parties such as experts while they make notes, test hypotheses and write and edit draft reports.
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> …
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> Making preparatory discussions and drafts subject to automatic disclosure would, in my view, be contrary to existing doctrine and would inhibit careful preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings. [23]

There are three occasions over the course of litigation when a party may gain access to the findings and conclusions of experts that might otherwise be subject to litigation privilege: (i)

[23] *Moore v. Getahun*, 2015 ONCA 55 at paras. 69 & 71

at discovery pursuant to Rule 31.06(3) of the *Rules of Civil Procedure* which requires disclosure of the findings, opinions and conclusions of an expert if a party intends to call that expert as a witness at trial[24]; (ii) through expert reports and the "foundational information" upon which the expert opinion is based, pursuant Rule 53.03 of the *Rules of Civil Procedure*[25] and Rule 20.1 of the *Family Law Rules*; and (ii) at trial during cross-examination of the expert.

Litigation privilege may be pierced where required to meet the ends of justice such as exposing improper conduct.[26] The Court may order the production of expert's draft reports or communications between counsel when there is a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert.[27]

Implied Waiver of Privilege

Deemed waiver arises where a party puts his or state of mind or knowledge in issue and has received legal advice to help form that state of mind:[28]

> When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor-client and litigation privilege. Fairness to the party facing a trial has become a guiding principle in Canadian law. Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. Where a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.[29]

[24] *Ibid* at para. 74
[25] *Ibid* at para. 75
[26] *Ibid* at para. 77
[27] *Ibid* at paras. 77 & 78
[28] *Bank Leu AG v. Gaming Lottery Corp*, [1999] O.J. No. 3939 at paras. 5 – 11 & 43
[29] *Bank Leu AG v. Gaming Lottery Corp*, [1999] O.J. No. 3939 at para. 6

However, there is no waiver where a party merely discloses that he or she received legal advice.[30]

A party often raises the issue of waiver of solicitor-client privilege when asserting a claim to set aside a domestic contract. In *Balsmeier v. Balsmeier*, 2014 CarswellOnt 15046, Justice Kaufman affirmed that a solicitor's certificate attached to a domestic contract is a presumptive waiver of solicitor-client privilege with respect to the matters addressed in it. Justice Kaufman made the following comments when ordering production of the solicitor's file:

> With respect to the issue of waiver of privilege, I have carefully reviewed the affidavits relied upon by the parties in these motions. Both parties make reference to their interpretation of discussions between counsel. There have been references to specific issues relating to the negotiation and formation of the contract. **Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate, or when communication between the solicitor and client is legitimately brought into issue in an action.** The wife accuses the husband of cherry picking among privileged communications, such as the deletion of the word "voluntarily" by Mr. Starzynski in his certificate appended to the marriage contract. The wife implicitly indicates that Mr. Starzynski's pending vacation precluded further negotiation of the agreement. The husband attempts to rely upon Mr. Sutton's notations to the file concerning specific discussions with opposing counsel. **These are but a few of the examples that enable me to determine that privilege has been waived by both parties and that their former counsel must provide full copies of the contents of their respective files.**
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> Finally, **it has been held that a solicitor's certificate and affidavit of independent legal advice is, in fact, a waiver of solicitor/client privilege as to the matters addressed in it.** These certificates are an integral part of the contract. They are exchanged in order to protect the integrity of the agreement with the expectation that each party to the contract can, and will, rely on the other party's solicitor's affidavit and certificate in order to enhance the enforceability of the contract. **Fairness and the intent of the parties at the time of the contract require a ruling that privilege is waived, as the matters addressed in the solicitor's certificate and affidavit.** [Emphasis Added][31]

[30] *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 at para. 35
[31] *Balsmeier v. Balsmeier*, 2014 CarswellOnt 15046 at paras. 28 & 29.

Justice Kaufman cited the decision of *Dymond v. Graham*, [2010] O.J. No. 3944 in waiving solicitor-client privilege. The Court in *Dymond* applied the factors considered in *Eizenshtein v. Eizenshtein*, 2008 CarswellOnt 3822 in deciding when solicitor-client privilege may be overridden, namely, the following:

a) threshold relevance of the communication: whether or not the communication discloses material facts that would assist the trier of fact in arriving at an appropriate decision;
b) the traditional exceptions to solicitor-client privilege: criminal intent, fear of public safety, innocence of a party in a criminal context, disclosure to a third party. The Court in *Dymond* acknowledged that in addition to the traditional exceptions, there should also be a "fairness approach" to determining whether privilege should be waived;
c) the ultimate relevance of the communication: whether the probative value of the evidence outweighs the prejudicial effect in relation to the particular client and the erosion of the sanctity of the solicitor-client privilege.

The Divisional Court in the recent decision of *Roynat Capital Inc. v. Repeatseat Ltd*, affirmed that the principles of fairness and consistency guide when waiver of privilege is deemed to occur:

> Whether fairness and consistency require implied waiver of privilege is case specific and factually dependent. The court provides an important gatekeeper function to avoid inappropriate requests for disclosure, balancing fairness with the importance of solicitor-client privilege. Deemed waiver and disclosure will be limited to circumstances where the relevance of the evidence in question is high,

> and the principles of fairness and consistency require disclosure to allow a party to adequately defend.[32]

Any decision to override solicitor-client privilege should be determined with a view to not interfering with it except to the extent "absolutely necessary."[33]

There has been some concern addressed about the suggestion that a Certificate of Independent Legal Advice attached to a Separation Agreement is in fact a waiver of privilege. However, a closer review of the cases that have made such findings make it clear that the issues raised involved the negotiation of the contract, the intention of parties and the disclosure that had been made at the time the contract was negotiated; thus, resulting in the waiver of solicitor-client privilege.

[32] *Roynat Capital Inc. v. Repeatseat Ltd*, 2015 CarswellOnt 4994 at para. 84
[33] *Dymond v. Graham*, [2010] O.J. No. 3944 at para. 27