LITIGATION - CANADA

Supreme Court elevates solicitor-client and litigation privilege

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AUTHORS

Norm Emblem

Aoife Quinn

Introduction

On November 25 2016 the Supreme Court issued two decisions on privilege – one on solicitor-client privilege(1) and the other on litigation privilege(2) – which elevates the status of both privileges and affirms a broad application for both. Notably, the court gave its first serious interpretive guidance on litigation privilege since the defining case of *Blank v Canada* in 2008.(3) These two cases affirm that solicitor-client and litigation privilege do much more than just shield evidence from disclosure in adversarial civil proceedings and can be asserted in administrative or regulatory proceedings, including access to information requests and professional standards investigations.

Solicitor-client privilege

Put broadly, solicitor-client privilege prevents from disclosure any communications between lawyer and client that were intended to be confidential and were made for the purpose of seeking or receiving legal advice.(4) Solicitor-client privilege is a class privilege and therefore presumptively applies to all communications that meet its requirements, subject only to limited exceptions. These exceptions are where:

- it is necessary to assert the innocence of the accused;
- the communications are criminal or made to facilitate the commission of a crime; or
- an identifiable group is in imminent danger of death or serious bodily harm.(5)

In Canada, solicitor-client privilege has evolved from a rule of evidence to a rule of substance and has been referred to by the Supreme Court as "a substantive right that is fundamental to the proper functioning of our legal system".(6) For that reason, the Supreme Court has held that solicitor-client privilege applies to shield all communications between lawyer and client from disclosure, not merely when one side seeks to compel another to produce documents or testimony in civil proceedings.

Alberta v University of Calgary

In *Alberta v University of Calgary* a delegate of Alberta's Information and Privacy Commissioner ordered the production of records over which the University of Calgary had claimed solicitor-client privilege. The alleged authority for this was Section 56(3) of Alberta's Freedom of Information and Protection of Privacy Act,(7) which requires a public body to disclose required records to the commissioner "[d]espite... any privilege of the law of evidence".

The Supreme Court disagreed, holding that 'any privilege of the law of evidence' does not include solicitor-client privilege, as solicitor-client privilege is not merely a privilege of the law of evidence,

but it is a substantive right. The interpretive principle that language looking to set aside solicitor-client privilege "must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so" applied.(8) The wording 'any privilege of the law of evidence' was not sufficiently clear to abrogate solicitor-client privilege and therefore the university was justified in refusing to disclose the records. Therefore, even statutory schemes designed to increase access to information cannot override solicitor-client privilege unless the language explicitly empowers them to do so.

Litigation privilege

Litigation privilege is a common law rule that gives rise to immunity from disclosure for documents and communications that are created for the "dominant purpose" of litigation(9) where the litigation in question or related litigation is pending "or may reasonably be apprehended".(10) The purpose of litigation privilege is to "ensure the efficacy of the adversarial process" and to maintain a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate".(11)

Litigation privilege is often confused with solicitor-client privilege, but has both a broader and more limited scope. It is broader in that it also applies to non-confidential documents, but it is narrower in that it is time limited. Thus, it is plausible that a document could be covered by litigation privilege and not solicitor-client privilege, such that the document would be shielded from disclosure during litigation, but may have to be disclosed when the litigation or any related litigation has ended.(12)

Lizotte v Aviva Insurance Company

In *Lizotte v Aviva Insurance Company* the Supreme Court confirmed that litigation privilege is a class privilege, like solicitor-client privilege. Litigation privilege does not arise on a case-by-case basis and therefore there is no need for the party asserting the privilege to prove that the privilege should apply in light of the context of the situation.(13) As a class privilege, litigation privilege is subject to certain limited exceptions, which are the same as those identified for solicitor-client privilege (as above) and also include where disclosure is necessary to show abuse of process or similar blameworthy conduct on the part of the party claiming the privilege.(14) The Supreme Court also extended the principle that any statute that purports to override solicitor-client privilege must be clear and unequivocal to litigation privilege, such that there must be clear legislative intent to override litigation privilege.

In *Lizotte* the court also confirmed that litigation privilege can be asserted against third parties, not simply against those on the other side of litigation. Thus, litigation privilege can be asserted against administrative or criminal investigators.(15) The court cited several reasons for this, including the chilling effect that a converse finding must have on litigation – it would in effect encourage lawyers not to reduce anything to writing for fear of disclosure.(16)

In *Lizotte* the assistant syndic of the *Chambre De L'Assurance De Dommages* (the body that regulates damages insurers in Quebec) asked an insurance company to disclose a claims file in the course of its investigation into a claims adjuster. The company disclosed some files, but withheld others on the grounds of litigation privilege. The syndic argued that Section 337 of the Act respecting the distribution of financial products and services(17) was sufficient to lift litigation privilege because it created an obligation to produce "any... document" concerning a person whose professional conduct was being investigated.

The court disagreed with the syndic, extending the principle requiring clear and explicit language to abrogate solicitor-client privilege to litigation privilege. The court noted that while litigation privilege does not have the same status as solicitor-client privilege and is less absolute than the latter, it is also fundamental to the proper functioning of the legal system and is essential to the adversarial system.(18) A provision that merely refers to 'any... document' does not contain the sufficiently clear, explicit and unequivocal language required to abrogate litigation privilege.(19) While the court was clear to articulate the difference in status between solicitor-client and litigation privilege, the court grafted onto litigation privilege many of the features of solicitor-client privilege, such as its application in broad contexts and that clear, explicit language is required for a statute to abrogate it.

Comment

In these recent cases, the Supreme Court affirmed that solicitor-client privilege and litigation privilege apply in all circumstances where communications and documents may be disclosed – and not simply within the adversarial litigation context – and are subject to limited defined exceptions.

Counsel would be well advised to keep these considerations in mind when advising clients of their obligations to produce documents when requested to do so in regulatory or administrative contexts, including where such requests are made by statutory access to information agencies or by third party investigators.

For further information on this topic please contact Norm Emblem or Aoife Quinn at Dentons Canada LLP by telephone (+1 416 863 4511) or email (norm.emblem@dentons.com or aoife.quinn@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53.

(2) *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52.

(3) *Blank v Canada (Department of Justice)*, 2006 SCC 39.

(4) *Solosky v R*, [1980] 1 SCR 821 at para 28.

(5) *Smith v Jones*, [1999] 1 SCR 455 at paras 52-59 and paras 74-86.

(6) *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9.

(7) RSA 2000, c F-25.

(8) *Alberta v University of Calgary*, *supra* note 1 at para 28.

(9) *Blank*, *supra* note 3 at para 59.

(10) *Blank*, *supra* note 3 at para 38.

(11) *Blank*, *supra* note 3 at para 24.

(12) *Aviva v Canada*, *supra* note 2 at para 22.

(13) *Aviva v Canada*, *supra* note 2 at para 37.

(14) *Blank*, *supra* note 3 at para 44.

(15) *Aviva v Canada*, *supra* note 2 at para 47.

(16) *Aviva v Canada*, *supra* note 2 at para 53.

(17) Chapter D-9.2.

(18) *Aviva v Canada*, *supra* note 2 at para 64.

(19) *Aviva v Canada*, *supra* note 2 at para 66.