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Supreme Court of Canada Affirms Protections for Privilege in the Face of Statutory Production Demands

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On November 25, 2016, the Supreme Court of Canada rendered two decisions confirming that express, clear legislative language is required to compel production of solicitor-client- or litigation-privileged documents, and reaffirming the wide protection afforded these privileges.

Alberta (Information and Privacy Commissioner) v. University of Calgary

In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (*Alberta IPC*), a majority of the Supreme Court of Canada declined to force the production of documents over which the University of Calgary had claimed solicitor-client privilege in the face of a request made on behalf of Alberta's Information and Privacy Commissioner.

The university had been sued by a former employee who claimed that the university had constructively dismissed her. In October 2008, the former employee made a request for access to some of the university's records under Alberta's *Freedom of Information and Protection of Privacy Act* (*FOIPP*). The university provided some records in response to the request, but withheld a number of others on the basis that they were solicitor-client privileged.

Although the university took steps to substantiate its claims of privilege for the benefit of the Commissioner, it was ultimately ordered to produce the documents for review under s. 56(3) of *FOIPP*, which requires a public body to produce documents to the Commissioner upon request despite "any privilege of the law of evidence."

The university did not produce the documents. Instead, in October 2010 it sought judicial review of the delegate's decision to order production.

Citing its 2008 decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (*Blood Tribe*), the majority of the Supreme Court of Canada found that the documents did not have to be produced to the Commissioner, because solicitor-client privilege could be set aside only by language reflecting a clear and unambiguous legislative intent to do so.

Even though *FOIPP* required disclosure "[d]espite…any privilege of the law of evidence," the Court found that this language was not sufficiently clear to justify interference with solicitor-client privilege, which had "evolved from a rule of evidence to a rule of substance".[1] This interpretation was supported, in the majority's view, by its reading of the remainder of *FOIPP* (which made explicit reference, in another provision, to a public body's right to refuse to disclose documents that were protected by solicitor-client privilege).

Although it considered access to information to be "an important element of a modern democratic society," the Court emphasized that solicitor-client privilege was "fundamental to the proper functioning of our legal system and a cornerstone of access to justice".[2]

Lizotte v. Aviva Insurance Company of Canada

In *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (*Lizotte*), the Supreme Court of Canada unanimously held that litigation privilege cannot be overridden without "sufficiently clear, explicit and unequivocal language" to that effect in legislation. In effect, it expanded the rule set out in *Blood Tribe* to include litigation privilege.

In *Lizotte*, as part of an investigation into a claims adjuster, the assistant syndic of Québec's *Chambre de l'assurance de dommages* (Syndic) asked the respondent insurer (Aviva) to provide it with a complete copy of the claim file of one of its insureds. The Syndic based its claim on s. 337 of the *Act respecting the distribution of financial products and services* (*ADFPS*), which states that insurers "must, at the request of a syndic, forward any required document or information concerning the activities of a representative" to the syndic. Although Aviva cooperated and produced a number of documents, it indicated that it had withheld certain documents that were covered either by solicitor-client privilege or by litigation privilege. The Syndic filed a motion for declaratory judgment and, while it conceded that the claim of solicitor-client privilege was valid, argued that the *ADFPS* overrode privilege.

The Supreme Court of Canada found that s. 337 of the *ADFPS* is a "general production provision that does not specifically indicate that the production must include records for which…privilege is claimed"[3] and that this legislation does not "contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege".[4] As a result, the documents were not producible.

Furthermore, the Supreme Court of Canada reaffirmed certain principles regarding litigation privilege. To that end, it quoted extensively from *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (*Blank*), a key decision on the topic of privilege that was authored by Justice Morris J. Fish, Q.C.[5] *Blank* stands for the proposition that litigation privilege attaches to the class of documents created for the dominant purpose of litigation and identifies the differences between solicitor-client privilege and litigation privilege. In *Lizotte*, the Supreme Court of Canada:

- confirmed that litigation privilege is a "class privilege" that creates a presumption that the documents in question are inadmissible;
- held that litigation privilege is subject to clearly defined exceptions, including (i) existing exceptions that apply to solicitor-client privilege and relate to "public safety, to the innocence of the accused and to criminal communications"[6] and (ii) the exception to "evidence of the claimant party's abuse of process or similar blameworthy conduct",[7] as set out by the Supreme Court of Canada in *Blank*; and
- found that litigation privilege can be asserted against anyone – including third-party investigators who have a duty of confidentiality – and not only against the other party to litigation.

Conclusion

Both *Alberta IPC* and *Lizotte* demonstrate that when a statute requires the production of documents, those production obligations will presumptively not extend to documents covered by either solicitor-client privilege or litigation privilege unless the statute in question clearly and unequivocally says otherwise. Although this presumption against disclosure is not new to solicitor-client privilege (which has acquired quasi-constitutional status in recent years), it represents a step forward in the protection of litigation-privileged documents.

To those faced with an order compelling them, under statute, to produce documents that are litigation or solicitor-client privileged, *Alberta IPC* and *Lizotte* also show that it may well be worth the effort to resist production.

[1] *Alberta IPC* at para. 38.

[2] *Alberta IPC* at para. 30.

[3] *Lizotte* at para. 66 citing *Blood Tribe* at para. 21.

[4] *Lizotte* at para. 67.

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[6] *Lizotte* at para. 41.

[7] *Ibid.* at para. 41 citing *Blank* at para. 44.

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