PRIVILEGE WINS OUT OVER DOCUMENT PRODUCTION REQUESTS, ORDERS AND FOI LEGISLATION - SCC CONFIRMS STATUS OF SOLICITOR-CLIENT PRIVILEGE AND LITIGATION PRIVILEGE

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Last week, the Supreme Court of Canada ("**SCC**") issued a pair of companion decisions clarifying the law regarding privilege. Notably, these decisions: (1) cement and arguably elevate the status of litigation privilege; and, (2) make clear that solicitor-client privilege is a fundamental principle of law even when pitted against claims made under freedom of information regimes.

Solicitor-client privilege and litigation privilege are well understood to be conceptually distinct concepts. The purpose of solicitor-client privilege is to protect a relationship. The role of litigation privilege, on the other hand, is to ensure the efficacy of the adversarial process by preventing the disclosure of communications whose dominant purpose is to prepare for litigation (i.e.: a lawyer's file, oral and written communications between lawyers and third parties such as experts or witnesses). Moreover, solicitor-client privilege is permanent, while litigation privilege applies only until the litigation itself lapses.

Litigation Privilege: *Lizotte v. Aviva Insurance Company of Canada*[1]

The issue in *Lizotte v. Aviva* related to the decision of an insurance company (Aviva) to deny a provincial regulator access to information over which Aviva claimed litigation privilege. The regulator relied on a statutory provision[2] which granted it the ability to request production of "any document" of a representative under investigation. The SCC found that the legislation did not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege. As such, Aviva was entitled to assert litigation privilege and deny access to the information requested by the provincial regulator.

The SCC makes clear in this decision that, while litigation privilege is distinguishable from solicitor-client privilege, it is nonetheless fundamentally important to our legal system. Litigation privilege, like solicitor-client privilege, is a class privilege. And while subject to clearly defined exceptions, the Court clarified that litigation privilege will not be subject to a case-by-case analysis about balancing competing interests. None of the

exceptions to the application of litigation privilege were held to apply here, so the Court went on to examine whether the statutory provision invoked by the regulator was sufficient to overcome the claim of litigation privilege.

The Courts have traditionally imposed strict requirements for the amendment or abrogation of certain fundamental common law rules. The SCC acknowledged in this decision that both solicitor-client and litigation privilege are fundamental to the proper functioning of the legal system and therefore cannot be abrogated by inference; rather, there must be clear, explicit and unequivocal language. The legislative provision at issue here referred to the production of "any document", and the Court found this language was not sufficiently explicit to overcome the assertion of litigation privilege.

By requiring explicit language for the abrogation of litigation privilege – the same standard applied when determining applicability of solicitor-client privilege – the SCC has effectively elevated the status of litigation privilege to a level not previously recognized.

Solicitor-Client Privilege: Alberta (Information and Privacy Commissioner) v. University of Calgary[3]

This case involved a document production order made by a delegate of the Alberta Information and Privacy Commissioner in the context of a constructive dismissal claim against the University of Calgary. The request for information was made pursuant to *Alberta's Freedom of Information and Protection of Privacy Act*[4], which places an obligation on a public body to produce records "despite … any privilege of the law of evidence". The University resisted production of the documents on the basis of solicitor-client privilege.

At issue here was whether Alberta's FOI legislation permitted the review by the Commissioner of documents over which solicitor-client privilege had been claimed.

The SCC reiterated in its decision that solicitor-client privilege is a fundamental policy of the law, and any legislative language purporting to abrogate, set aside or infringe must demonstrate a clear and unambiguous legislative intent to do so. Solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved over time into a substantive protection. In the result, the SCC found here that solicitor-client privilege was properly asserted in this context, and the reference in the FOI legislation to "any privilege of the law of evidence" did not satisfy the high threshold required to trump solicitor-client privilege.

Take Aways

These companion decisions provide additional certainty around the law of privilege and confirm that neither solicitor-client privilege nor litigation privilege can be overcome without clear, explicit and unequivocal legislative language demonstrating an intention to do so. By clarifying that a restrictive approach is to be taken regarding the infringement of both classes of privilege, the SCC has left little room for infringement through

inference. As a result of these decisions, parties can confidently develop litigation and business strategies and know that their legitimate assertions of privilege will not readily be set aside by the courts.

by Katherine Reilly

[1] 2016 SCC 52.[ps2id id='1' target='/]
[2] Act respecting the distribution of financial products and services, CQLR, c. D-9.2, s. 337.[ps2id id='2' target='/]
[3] 2016 SCC 53.[ps2id id='3' target='/]
[4] Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, s. 56(3).[ps2id id='4' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.