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The Law of Litigation Privilege: The Supreme Court of Canada's Ruling in *Minister of Justice v. Blank* and Beyond

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The decision in *Minister of Justice v. Blank*[1] marked the Supreme Court of Canada's first ruling on the nature and scope of litigation privilege. The decision has important implications for the day-to-day work of litigators, and lower courts have already begun the process of testing its limits.

THE STATE OF THE LAW BEFORE *BLANK*

Before the Supreme Court's decision in *Blank*, the Court's most significant comments on litigation privilege were in *Smith v. Jones*.[2] In the majority judgment, Justice Cory referred to the possibility that litigation privilege and solicitor–client privilege may both attach to an expert report, but also referred to the possibility of "distinctions between a solicitor–client privilege and a litigation privilege." Since litigation privilege was not at issue on the appeal, the matter was not discussed any further. Apart from other passing references to litigation privilege,[3] the SCC had not seriously considered this subject before *Blank*. By contrast, the principles of the law of privilege generally, and the law of solicitor–client privilege (also known as legal advice privilege[4]) in particular, had been extensively considered by the SCC.[5]

The *Blank* case finally put the issue of litigation privilege squarely before the SCC.

THE *BLANK* CASE

The *Blank* case arose from two access to information requests under the *Access to Information Act* (ATIA),[6] made by an individual named Sheldon Blank. Mr. Blank owned a company that operated a paper mill in Manitoba. The company had been charged with various pollution-related offences, but all charges were ultimately either stayed or quashed. Mr. Blank and his company sued the federal government over the prosecutions, making a variety of claims, including abuse of prosecutorial power. In support of the civil action, Mr. Blank sought access to the government records relating to the alleged offences and the prosecutions.

With thanks to David Outerbridge for his contribution.

1 [2006] 2 S.C.R. 319 [*Blank*].

2 [1999] 1 S.C.R. 455 at para. 44.

3 *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 at 688-689, 692-694; *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 44; and *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456 at paras. 15, 25, 44.

4 Note that the term "legal advice privilege" is increasingly used to refer specifically to the privilege that arises from the giving and receiving of legal advice, rather than "solicitor–client privilege," to avoid the confusion that sometimes arises regarding the latter terminology.

5 *A.M. v. Ryan*, [1997] 1 S.C.R. 157; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *R. v. McClure*, [2001] 1 S.C.R. 445; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Maranda v. Richer*, [2003] 3 S.C.R. 193.

6 R.S.C. 1985, c. A-1.

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In response to his access requests, Mr. Blank received disclosure of certain documents, but was also advised that other documents were exempt from disclosure under various provisions of the ATIA, including under section 23 – the exemption for documents protected by solicitor–client privilege.

Both Mr. Blank and the federal government agreed that the term "solicitor–client privilege" within the meaning of section 23 of the ATIA included both litigation privilege and legal advice privilege. The parties disagreed, however, about the proper duration of litigation privilege, and thus about whether privilege persisted over the documents at issue. The Minister of Justice asserted that litigation privilege (like legal advice privilege) lasts indefinitely. Mr. Blank's position was that litigation privilege, unlike legal advice privilege, ends with the litigation.

The case made its way up to the Federal Court of Appeal, which divided on the issue of litigation privilege. The majority[7] held that legal advice privilege is not limited in duration but litigation privilege is. The interpretation of the particular wording of section 23 also featured in the Court's consideration of the privilege issue. The majority concluded that under section 23, litigation privilege had come to an end.

Justice Létourneau, dissenting, was of the opinion that litigation privilege did not necessarily end with the completion of the underlying litigation. He observed that premature disclosure of documents covered by litigation privilege would prejudice any person or entity facing common and recurring litigation, such as the federal government, which is often involved in simultaneous litigation or consecutive proceedings involving similar facts or legal issues. He said that automatic or uncontrolled access to the government "lawyer's brief" in such contexts would provide adversaries with access to the government's legal strategy – the very thing that litigation privilege is designed to prevent. Therefore, Justice Létourneau favoured a discretionary approach balancing the considerations on a case-by-case basis.

The SCC dismissed the appeal brought by the Minister of Justice.

The Court concluded that the purpose of litigation privilege is distinct. Litigation privilege is intended to create a "zone of privacy" in relation to pending or apprehended litigation. Quoting from an often-cited article by R.J. Sharpe (now an appeal justice), Justice Fish adopted the following articulation of the distinction:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is [page 331] very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

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[7] Pelletier J.A. and Décary J.A., concurring on the cross-appeal.

> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).[8]

Justice Fish concluded as follows:

> In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.
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> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose—and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.[9]

The Court further held that, while the privilege ends with the underlying litigation, "litigation" should be understood to encompass more than the particular proceeding that gave rise to the privilege. As Justice Fish put it,

> As mentioned earlier, however, the privilege may retain its purpose—and, therefore, its effect—where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
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> At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.[10]

Justice Fish stated that into the latter category of proceedings falls repeat litigation involving the same defendant (e.g., the government or a corporation) but different plaintiffs. An example is product liability litigation, in which a corporate defendant faces claims raising the same issue by different

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[8] *Blank, supra* note 1 at para. 28, citing R.J. Sharpe, "Claiming Privilege in the Discovery Process," in *Law in Transition: Evidence*, [1984] *Special Lect. L.S.U.C.* 163, at pp. 164–65.

[9] *Ibid.* at paras. 33–34.

[10] *Ibid.* at paras. 38–39.

plaintiffs.[11] This is a very important clarification and, arguably, a broadening of the concept of litigation privilege.

At the same time, the Court found that litigation privilege may be abrogated when a party alleges in a subsequent proceeding that the opposing party had engaged in an abuse of process or similar "blameworthy conduct".[12] In those cases, documents that would otherwise be subject to litigation privilege may be ordered produced upon a *prima facie* showing of actionable misconduct related to the proceedings regarding which litigation privilege is claimed. In such an application, the court may review the materials to determine whether their disclosure should be ordered on this ground.

The Court also made it clear that much of a litigation file is covered by legal advice privilege and should be protected indefinitely, regardless of whether litigation privilege over the file has ended:

> In practice, a lawyer's brief normally includes materials covered by the solicitor-client privilege because of their evident connection to legal advice sought or given in the course of, or in relation to, the originating proceedings. The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context.
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> Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain *clearly and forever privileged.*[13]

The Court touched on a number of related issues. Among other things, it confirmed the "dominant-purpose" test, and clarified the relationship between litigation privilege and the statute at issue – the ATIA. The Court also emphasized that, unlike legal advice privilege, litigation privilege may arise and operate even in the absence of a solicitor–client relationship; it applies to all litigants, whether or not they are represented by counsel.

DEVELOPMENTS SINCE *BLANK*

Blank has already been considered in a number of decisions of other courts. The most notable of those cases are discussed below.

Smith v. London Life Insurance Co.

In *Smith v. London Life Insurance Co.*,[14] the Divisional Court granted an appeal from an order requiring that the defendant produce its entire claims file from a prior action between the parties, including documents authored by in-house counsel. In so doing, the Divisional Court had to interpret the concept of "related litigation" as contemplated in *Blank.*

The plaintiff had first sued for reinstatement of long-term disability benefits under a group insurance policy. That action was ultimately settled, but not before the plaintiff commenced a second action for aggravated and punitive damages.

The defendant had been represented by in-house counsel in the first action. At the examination for discovery in the second action, plaintiff's counsel requested production of in-house counsel's file in the

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[11] *Blank, supra* note 1 at paras. 39–41.

[12] *Ibid.* at paras. 44–45.

[13] *Ibid.* at paras. 49–50 [emphasis added].

[14] [2007] O.J. No. 189 *Smith.*

first action, as well as a litigation consultant's notes and a memo that an employee prepared for legal counsel. While the primary issue on the motion was waiver, the motions judge ordered the documents produced for a number of reasons, one of which was the termination of litigation privilege. Since the first action was over, any litigation privilege that had arisen in that action had ended.

Between the disposition of the motion and the appeal, the SCC released its decision in *Blank*. Applying *Blank*, the Divisional Court found that the second action was so closely related to the first as to warrant the continuation of any litigation privilege attaching to any of the litigation-privileged documents from the first action. In addition, the Court reinforced the principle that any communication falling within solicitor–client (or legal advice) privilege remains clearly and forever privileged, including such documents found in litigation counsel's file.

The Divisional Court also adopted the principle contemplated in *Blank* that litigation privilege, even when found to be applicable, may be abrogated in a case in which there has been a prima facie showing of abuse of process or similar blameworthy conduct, with the qualification that a mere allegation in a pleading is not sufficient for this purpose:

> Thus, in summary, after a determination has been made as to whether or not litigation privilege applies to a particular document, a further review may be required of the privileged documents to determine whether or not the production of such documents may be required on the ground set out by the Court in *Blank*, referred to in paragraph 24, *supra*. We are of the view that *"a prima facie showing of actual misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed"* requires something more than merely an allegation in the pleading.[15]

Thus, the *Smith* case contributes significantly to our understanding of the law of litigation privilege in the post-*Blank* era.

Hetherington v. Loo

In *Hetherington v. Loo*,[16] a claim for damages sustained by a pedestrian struck by a motor vehicle, *Blank* was cited for the proposition that litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor–client privilege, and that the dominant-purpose test is more compatible with the contemporary trend favouring increased disclosure. Offering further guidance on the method whereby assertions of litigation privilege should be assessed, the Court went on to say this:

> In order that proper assessment may be made as to the propriety of a claim of litigation or dominant purpose privilege it is necessary that sufficient particulars of the documents be given. In most cases dealing with documents involving adjusters files and certainly in this case, particulars as to date and author must be provided. When dealing with interview notes, transcripts, and statements, it may also be necessary to identify if not the actual subject, at least the category of subject (e.g. eyewitnesses, home-care worker, etc.) involved.[17]

The plaintiff's motion for production and inspection of documents over which litigation privilege had been claimed was partially successful. Only certain of the documents over which the privilege had

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[15] *Ibid.* at para. 26.

[16] [2007] B.C.J. No. 154.

[17] *Ibid.* at para. 10.

been claimed were found to have met the dominant-purpose test, and only those documents would continue to be protected; the others (which were prepared before the commencement of the action) were ordered to be produced.

Blank v. Canada (Department of Justice)

The Federal Court of Appeal has decided another case involving Mr. Blank.[18] In this case, the Minister of Justice appealed a decision of the Federal Court concerning the extent of the Minister's duty to disclose parts of documents containing communications covered by legal advice privilege. Mr. Blank attempted to rely on the SCC's decision in *Blank* to support his position that given the importance of the duty to disclose under the ATIA, any part of a privileged solicitor–client communication, save for the advice itself, ought to be disclosed unless this would be harmful to the public interest.

The Federal Court of Appeal disagreed with Mr. Blank, commenting as follows:

> First, as I have already indicated, *Blank 2006* dealt with whether *litigation* privilege falls within section 23 and, if it does, whether it expires on the termination of the litigation to which the documents relate. Fish J. was at pains to emphasize throughout his reasons that legal advice privilege and litigation privilege are "distinct conceptual animals" (at para. 7), which "are driven by different policy considerations and generate different legal consequences" (at para. 33). Second, the permissive nature of section 23 reflects the fact that solicitor-client privilege may be waived by or on behalf of the client. It can be assumed that, by asserting solicitor-client privilege in this case, it has been decided that waiver would not be in the public interest. There is nothing in the record before us to establish that the Minister failed to consider waiving the privilege, or that his consideration was vitiated by bad faith, as Mr. Blank alleges, or was otherwise unlawful.

Accordingly, the Minister of Justice's appeal was allowed.

OTHER CASES

Many other cases that have cited *Blank* since its release have not been of as much assistance in clarifying the issues that were arguably left open in *Blank*, such as the precise definition of "related litigation" or the manner in which particular claims of litigation privilege should be assessed. Here is a brief overview of some of those cases:

- *In Horodynsky Farms Inc. v. Zeneca Corp. (c.o.b. Zeneca Argo)*,[19] the Court of Appeal for Ontario set aside an order requiring production (after the trial was concluded) of a memorandum from counsel's file containing a transcription of a telephone conversation between counsel and her client's expert witness. The Court found that, while the information in the memorandum was subject to discovery, the memorandum itself was subject to litigation privilege. Citing *Blank*, the Court held that there could be no doubt that the privilege over the document continued because the litigation continued.
- In *Hargraves v. Lombard General Insurance Co. of Canada*,[20] an insurance company sought clarification of an insurer's right to communicate privately with a member of a DAC assessment team for the purpose of preparing that individual to give evidence at an arbitration hearing. Having decided that an insurer does *not* have such a right, the tribunal found it unnecessary to determine whether the

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[18] *Blank v. Canada (Department of Justice)*, [2007] F.C.A. 87.

[19] (2006), 272 D.L.R. (4th) 545 (Ont. C.A.).

[20] F.S.C.O. Arb. February 12, 2007.

substance of any such communications are protected by litigation privilege. Citing *Blank*, the tribunal commented: "[I]t would seem to follow that in the event that there was a one-sided meeting with a DAC assessor, an Order requiring the production of a written record of the substance of that conversation might be appropriate."

- In *Wexler v. Bhullar*,[21] a proceeding involving an inquiry by the Veterinary Medical Association concerning the alleged misconduct of one of its members, the Court allowed the petition of the lawyer for the Association and the registrar for the Association, quashing the subpoenas served on them by the respondent to testify about the content of discussions they had with one of the respondent's witnesses. The registrar had claimed her conversations with the Association's counsel and with the respondent's witness were covered by litigation privilege and that the privilege had not been waived. Citing *Blank*, the Court held that litigation privilege is not restricted to communications between a lawyer and client, but may attach to communications with third parties when the dominant purpose of the communication is preparation for litigation.
- In *Rousseau v. Wyndowe*,[22] the Federal Court granted an application for access to notes made by a doctor during an independent medical examination of the application on behalf of his insurer, holding that the notes constituted "personal information" as defined in PIPEDA (*Personal Information Protection and Electronic Documents Act*). On the basis of the finding in *Blank* that the solicitor–client privilege in the ATIA was intended to include litigation privilege, the Court found that it was reasonable to make this assumption in respect of the solicitor–client exception in PIPEDA as well. However, there was no evidence to suggest that the notes were prepared for the dominant purpose of litigation or in the context of a formal dispute resolution process, and they were therefore not subject to privilege.
- In *609897 Saskatchewan Ltd. v. Great Western Brewing Co.*,[23] the Court allowed a motion seeking an order that a certain memorandum, sent to the company president from the lawyers acting for the defendant, over which the defendant had claimed solicitor–client privilege, be produced on the basis that it was not privileged or had lost or should lose its privilege. The Court found that the memo attracted solicitor–client privilege because it was written by the defendant's legal team and contained legal advice, and that the privilege attaching to the document had not been waived. The Court cited *Blank* as authority for the sanctity of solicitor–client privilege and the proposition that the privilege should not be lost through inadvertence. The Court nevertheless ordered that the memo be produced on the basis of its potential to establish fraudulent conduct on the part of the defendant.
- In *Louch v. Decicco*,[24] the Court allowed the defendant's motion for an order compelling the plaintiff to produce documents in the control of a third party, and partly allowed the defendant's motion for production of documents subject to litigation privilege. The Court also allowed the plaintiff's motion for an order compelling the defendant to produce documents subject to litigation privilege. Both orders were made on the basis of Rule 68 of the British Columbia Rules of Court, which requires parties to produce all documents not subject to solicitor–client privilege intended for use at trial, including those prepared in contemplation of litigation. The case contains no analysis of *Blank* beyond citing it as the authority for principles of litigation privilege.
- In *Thomson v. Berkshire Investment Group Inc.*,[25] the Court dismissed the plaintiff's application for the defendant investment company to produce documents related to its investigation of its employee's transactions that gave rise to the plaintiff's action. The documents were found to be protected from disclosure by litigation privilege, since they were prepared in contemplation of litigation, or by solicitor–client privilege. The Court cited *Blank* for the proposition that the purpose of litigation

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[21] [2006] B.C.J. No. 2192.

[22] [2006] F.C.J. No. 1631.

[23] [2006] S.J. No. 804.

[24] [2006] B.C.J. No. 3293.

[25] [2007] B.C.J. No. 45.

privilege is to create a "zone of privacy" in relation to pending or apprehended litigation, and that, to achieve this purpose, the parties to litigation must be left to prepare their positions in private and without fear of premature disclosure.

- In *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd.*,[26] the Court refused to order production of documents prepared in contemplation of litigation. *Blank* was cited as having confirmed that the dominant-purpose test should not be replaced by the substantial-purpose test in assessing claims of litigation privilege.
- In *R. v. Wiebe*,[27] the Court was called on to consider whether, in the context of criminal proceedings, the defence was entitled to claim solicitor–client privilege and/or work-product privilege (the term being used in this case to refer to litigation privilege) regarding a Charter Notice. The Crown relied on *Blank* for its discussion on the differences between solicitor–client privilege and work-product (litigation) privilege. The Court held that work-product privilege did not apply to a Charter Notice because, with the preparation and delivery of a Charter Notice, the defence is going past the point of preparation and premature disclosure to the point of taking an informed, strategic and substantive step in the defence. In taking such a decision, confidential communications previously protected by solicitor–client privilege and other information previously protected by work-product (litigation) privilege, which now appear in a Charter Notice, can no longer be protected by either form of privilege.
- In *Société coopérative agricole de St-Damase c. Coopérative fédérée de Québec*,[28] the plaintiffs sought production of two reports prepared by one of the defendants' employees. The reports consisted of the employee's analysis of the incident giving rise to the litigation, based on a number of witness interviews. Citing *Blank*, the Quebec Superior Court confirmed that the purpose of litigation privilege is to create a "zone of confidentiality" in cases of actual or anticipated litigation, and that the court should apply the dominant-purpose test in determining whether a particular document is subject to litigation privilege. The Court found that the employee's reports were not subject to litigation privilege because the employee would have prepared incident reports even if litigation had not been contemplated, and therefore the reports could not be said to have been prepared for the dominant purpose of litigation.

Conclusion

Although the complete impact of the Supreme Court of Canada's decision in *Blank* is not yet known, its significance is undoubted. It confirms the importance of legal advice privilege in the context of a litigation file, and confirms that a different approach must be taken to litigation privilege. The decision also gives rise to a number of new issues, whose full scope remains to be determined, including the extent of the concept of "related litigation" and the newly crafted process to apply for documents otherwise covered by litigation privilege in the context of abuse of process litigation.

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[26] [2007] B.C.J. No. 179.

[27] [2007] A.J. No. 135.

[28] [2007] J.Q. No. 596.