Supreme Court of Canada confirms robust protection of solicitor-client and litigation privilege

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The Supreme Court of Canada recently released two significant decisions on solicitor-client privilege and litigation privilege: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (*Lizotte*) and *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (*Alberta (Information and Privacy Commissioner)*). Taken together, these decisions confirm and develop the Court's robust protection of solicitor-client and litigation privilege and set a high standard for legislatures to abrogate their application.

Where a regulator or other statutory decision-maker demands the production of documents over which a claim of privilege is made, *Lizotte* and *Alberta (Information and Privacy Commissioner)* confirm the need to closely examine the statutory provision empowering the production demand. Only "clear, explicit and unequivocal language" in the legislation can compel the production of documents subject to either solicitor-client privilege or litigation privilege. Neither legislative regime in *Lizotte* nor *Alberta (Information and Privacy Commissioner)* satisfied this high standard.

Lizotte – protection of litigation privilege

The central question in *Lizotte* was whether the assistant syndic of the Chambre de l'assurance de dommage (the Syndic) was empowered to demand an insurance company (the Insurer) to produce for inspection documents subject to litigation privilege. Section 337 of the *Act respecting the distribution of financial products and services* (the Act) required the insurer to "forward any required document or information concerning the activities of a representative" (i.e., of a claims adjuster employed by the insurer). The Insurer produced some documents to the Syndic and withheld some documents on the basis that they were covered by, among other things, litigation privilege.

The Syndic filed a motion for declaratory judgment. Both the Superior Court of Québec and the Québec Court of Appeal held that litigation privilege cannot be abrogated absent an express provision. The Supreme Court unanimously dismissed the Syndic's appeal.

Litigation privilege protects against the compulsory disclosure of documents prepared for the dominant purpose of pending or anticipated litigation. Prior to *Lizotte*, in *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 (*Blank*), the Supreme Court clarified the relationship between this doctrine and solicitor-client privilege. Although both privileges "serve [as] a common cause [the] secure and effective administration of justice according to law,"[1] the two doctrines are distinct and have differing characteristics. Solicitor-client privilege is designed to protect the integrity of a relationship (between lawyers and clients), whereas

litigation privilege is designed to protect the integrity of a process (the adversarial litigation process central to Canadian dispute resolution).[2] Litigation privilege creates a "zone of privacy" within which litigants can prepare cases for court.[3]

The Court's ruling in *Lizotte* builds on *Blank* by confirming the fundamental importance of litigation privilege. Though different from the near-absolute protection of solicitor-client privilege, litigation privilege "serves an overriding 'public interest' [...] to ensure the efficacy of the adversarial process."[4] By giving litigants a zone within which to conduct investigations and prepare for trial, litigation privilege "promotes 'access to justice' and the 'quality of justice'," two features of solicitor-client privilege.[5] Litigation privilege is less absolute, but it remains fundamental to the proper functioning of the legal system and is "inextricably linked to certain founding values."[6] The doctrine allows parties to advance their best case, and thereby "promotes the search for truth" central to the court process.[7]

Given this centrality of litigation privilege, the Court adopted the same presumption of statutory interpretation applicable to determining whether legislation abrogates solicitor-client privilege: "unless clear, explicit and unequivocal language has been used to abrogate solicitor-client privilege [or litigation privilege], it must be concluded that the privilege has not been abrogated."[8] Neither litigation privilege nor solicitor-client privilege can be abrogated by inference.[9] As demonstrated in the companion *Alberta (Information and Privacy Commissioner)* decision released at the same time, this principle requires a very high standard of clarity to abrogate privilege (discussed below).

In applying this standard, the Court found that the open-ended language of section 337 of the Act ("any document") did not meet this standard of "clear, explicit and unequivocal language." Accordingly, the Court concluded that litigation privilege was not abrogated in the circumstances.

In addition to reaffirming the fundamental importance of litigation privilege and adopting the "clear, explicit and unequivocal language" test for statutory abrogation from the solicitor-client privilege context, the Court in *Lizotte* also provided significant clarification of the scope of protection provided by litigation privilege. In particular, the following rulings will have broad application to litigation privilege claims in Québec and across Canada:

1. Litigation privilege is a class privilege, meaning that there is a presumption of protection once it is shown that the conditions of application are met.[10] For litigation privilege, this means that: (1) the document must have been created for the dominant purpose of litigation; and (2) the litigation or related litigation is either pending or may reasonably beapprehended.[11] There is then a presumption of inadmissibility, without any need for a case-by-case weighing of interests. This protection lapses, however, when the litigation ends.[12]

2. Litigation privilege is subject only to clearly defined exceptions.[13] Rather than balancing interests in each case, the exceptions to litigation privilege are specific, defined, and at least include the exceptions applicable to solicitor-client privilege.[14] The Court left open identifying further exceptions in the future, but limited such exceptions to narrow classes.[15]

3. Litigation privilege can be asserted against third parties, including regulators.[16] Although

litigation privilege protects a zone of privacy in the context of litigation, it applies against not only the other party to the litigation. Even where the third party has an obligation of confidentiality, compelling disclosure would create an unacceptable risk to the privilege.[17]

Alberta (Information and Privacy Commissioner) – protection of solicitor-client privilege

Alberta (Information and Privacy Commissioner) demonstrates the robust nature of the "clear, explicit and unequivocal" test to abrogate solicitor-client privilege. The majority of the Court (*per* Justice Côté) concluded that the Alberta legislation at issue was not sufficiently clear and explicit to abrogate the privilege, whereas Justice Cromwell (writing for himself) concluded that it was.[18]

At issue was section 56(3) of the Alberta *Freedom of Information and Protection of Privacy Act* (the *FOIPP*), which provides that a public body must produce to the Information and Privacy Commissioner records on demand "[d]espite any other enactment or any privilege of the law of evidence." The University of Calgary (the University) supported its claim of privilege in accordance with the practice in Alberta at the time (including a list of documents identified by page number and an affidavit indicating that solicitor-client privilege had been asserted over the listed records). Despite this, a delegate of the Commissioner (the Delegate) issued a Notice to Produce Records (the Notice to Produce) requiring the University (a public body) to produce those records over which the University had claimed solicitor-client privilege.

The University applied for judicial review of the Delegate's decision to issue the notice. At first instance, the Delegate's decision was upheld. However, on appeal, the Alberta Court of Appeal held that "any privilege of the law of evidence" did not refer to solicitor-client privilege. The Supreme Court dismissed the Commissioner's appeal.

The central question before the Court was whether the statutory language ("[d]espite [...] any privilege of the law of evidence") was sufficiently clear, explicit, and unequivocal to abrogate solicitor-client privilege and to permit the Commissioner to compel production of these documents. In prior rulings, the Court had underscored that while solicitor-client privilege had historically originated as a privilege of the law of evidence, the doctrine has evolved into a substantive rule that protected communications between a solicitor and client against compelled disclosure.[19] The Court had also held that solicitor-client privilege was a civil right of supreme importance and a principle of fundamental justice.[20] In view of the importance of the privilege, the Court had previously found that the privilege could only be statutorily abrogated by legislative language that was clear, explicit and unequivocal.[21]

In light of the language of the statute in this instance, and given that the Notice to Produce engaged solicitor-client privilege in its substantive rather than evidentiary role, Justice Côté concluded that the legislation did not reach the standard of clear, explicit, and unequivocal language. In addition, she noted that the statutory scheme of *FOIPP* reinforced that privilege was not abrogated:

1. Solicitor-client privilege was expressly referred to in section 27 of *FOIPP* as an example of a type of "legal privilege" upon which a public body may refuse to disclose information to a freedom of information applicant. This demonstrates that the legislature turned its mind to solicitor-client privilege yet chose not to use equally precise language in s. 56(3).[22]

2. The comparison between sections 27 and 56(3) also demonstrated that the legislature drew a distinction between "legal privilege" and "privilege of the law of evidence." The

former was intended to be a broader category than the latter, not limited to evidentiary privileges.[23]

3. Had the legislature intended to abrogate solicitor-client privilege, it would have legislated safeguards to define such matters as when and to what extent privilege may be set aside, and to address the issue of waiver. The absence of safeguards or statutory guidance on these issues suggests that the legislature never intended to pierce solicitor-client privilege.[24]

Justice Côté clarified that the "clear, explicit and unequivocal" test is an application of the modern, purposive-contextual approach to statutory interpretation, not a return to the plain meaning rule. Requiring clear and explicit language recognizes legislative respect for fundamental values such as solicitor-client privilege.[25] It is clear that this presumption of statutory intent is robust. The exact words "solicitor-client privilege" may not be necessary, but a high standard of clarity is required.[26]

In his concurring opinion, Justice Cromwell concluded on the same legislative scheme that the language was sufficiently clear, explicit, and unequivocal to abrogate solicitor-client privilege. In his view, as solicitor-client privilege is also an evidentiary privilege (in addition to its substantive and constitutional dimensions), it was expressly captured as a "privilege of the law of evidence."[27] However, he concluded that the Delegate had made a reviewable error by ordering production in this instance in the face of the evidence submitted in relation to the claim of privilege.

Justices Côté and Cromwell further agreed that, assuming the legislation was intended to abrogate privilege, the actual application of that power in the circumstances was a legal error reviewable on a standard of correctness.[28] In her separate concurring opinion, Justice Abella reached the same ultimate conclusion, but she would have applied a different standard of review. More specifically, she would have applied a standard of review of reasonableness, and under that standard, she would have found that the Delegate had acted unreasonably in issuing the Notice to Produce.[29] As the University had asserted its claim for solicitor-client privilege in accordance with the governing law in Alberta at the time, and as there was no evidence or argument to suggest that the claim was improper, the delegate could not insist on reviewing the documents to confirm the claim.

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[1] *Blank*, para. 31.

[2] *Blank*, para. 27.

[3] *Blank*, para. 34.

[4] *Lizotte*, para. 63.

[5] *Lizotte*, para. 63.

[6] *Lizotte*, para. 64.

[7] *Lizotte*, para. 64.

[8] *Lizotte*, paras. 61, 63. This was previously affirmed in the context of solicitor-client privilege in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574.

[9] *Lizotte*, para. 5.

[10] *Lizotte*, para. 31.

[11] *Lizotte*, para. 33.

[12] *Lizotte*, para. 23.

[13] *Lizotte*, para. 31.

[14] *Lizotte*, para. 41.

[15] *Lizotte*, paras. 42, 45.

[16] *Lizotte*, para. 31.

[17] *Lizotte*, paras. 48-50.

[18] Justice Abella also wrote partially concurring reasons concluding that the applicable standard of review was reasonableness (the majority held that that applicable standard was correctness, and Justice Cromwell assumed as much), but that the decision of the delegate of the Information and Privacy Commissioner was unreasonable.

[19] *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, p. 875.

[20] *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, para. 5.

[21] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574.

[22] *Alberta (Information and Privacy Commissioner)*, para. 52.

[23] *Alberta (Information and Privacy Commissioner)*, para. 53-54.

[24] *Alberta (Information and Privacy Commissioner)*, para. 58.

[25] *Alberta (Information and Privacy Commissioner)*, para. 29.

[26] *Lizotte*, para. 61.

[27] *Alberta (Information and Privacy Commissioner)*, paras. 81-82.

[28] *Alberta (Information and Privacy Commissioner)*, paras. 67-70, 127.

[29] *Alberta (Information and Privacy Commissioner)*, para. 137.