Raising the Bar

Raising the Bar – First Edition

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On behalf of the Litigation Practice Group at Hicks Morley, we are delighted to introduce the inaugural issue of Raising the Bar.

Our goal is to provide you with timely information and analysis about the key litigation-related legal developments that will have an impact on employers. Our focus is squarely on giving you the practical information that you need, in a form that is easy to digest and interesting to read.

In this issue, you'll find the latest word from the Ontario courts on issues ranging from class actions to privilege to document disclosure to summary judgment. You'll also find an in-depth look at the thorny area of privilege, which is an issue that all lawyers (and the courts) face one way or another on almost a daily basis. Lastly, in our "Did you know?" section, you'll find a tip about a potentially rich source of evidence-gathering that you may not have considered.

We thank Stephanie Jeronimo and Deanah Shelly for their helpful contributions to this issue of Raising the Bar.

This publication is for you, the reader, so we hope that you'll get in touch to let us know what you found useful, and what you might like to see in the future.

We look forward to hearing from you!

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PART 1 – CASES YOU NEED TO KNOW ABOUT

Brown v. the Attorney General of Canada, 2011 ONSC 7712 (CanLII)

This is an important appeal decision in the class actions area because it limits how far a judge can go in assisting a plaintiff in

a certification motion. The motion judge granted conditional certification of a class action, after concluding the statement of claim failed to disclose a cause of action. The motion judge assisted the plaintiffs by framing a new common issue and allowing the plaintiffs to amend their statement of claim accordingly. The Attorney General argued that this prevented it from opposing the certification, as the outcome of the motion was now predetermined. The Divisional Court agreed. It found that when the statement of claim fails to disclose a cause of action, it is inappropriate for a motion judge to assist the plaintiff in this manner. “Conditional certification” is not available. Instead, the certification motion should be adjourned to permit an amendment, or the pleading should be struck with leave to amend. This approach leaves the question of whether the amended statement of claim discloses a cause of action to be determined at a later date.

Pottruff v. Don Berry Holdings Inc., 2012 ONSC 311 (CanLII)

This is an interesting decision in which the judge ordered the return of improperly taken documents which were subject to solicitor-client privilege. While providing computer assistance to the defendant’s principal, the plaintiff’s husband had copied emails between the defendant, the defendant’s lawyer and an outside consultant. The Court found that the consultant, who provided the information to the lawyer for the purpose of obtaining legal advice and then summarized the resulting advice, was acting as the defendant’s agent and thus the communications were protected by solicitor-client privilege. The Court also found that a person’s computer is a highly personal storage device which attracts an extremely high expectation of privacy. The plaintiff’s husband was not given access to documents on the computer and therefore, his actions constituted theft. The plaintiff was ordered to return the emails to the defendant and the emails were struck from the record.

Tuerr Holdings Inc. v. Vrankovic, 2012 ONCA 5 (CanLII)

This is an important decision because it is the Court of Appeal’s first application of the new “full appreciation” test for granting summary judgment. Vrankovic appealed a summary judgment decision enforcing his guarantee on a second mortgage to Tuerr Holdings. The Court found that the motion judge was able to have a “full appreciation” of the evidence and issues before her to decide the case without the need for a trial. The Court found that it was open to the motion judge to prefer the evidence of Tuerr’s secretary-treasurer over that of Vrankovic because Vrankovic’s affidavit consisted largely of unsubstantiated bald allegations and lacked any supporting documentation. The Court also found that he failed to adduce any convincing evidence, even taken at its highest, of an alleged oral agreement or to support his claim that his company suffered damage as a result of Tuerr’s actions. The Court therefore agreed that the affidavit failed to reveal any genuine issues requiring a trial and dismissed the appeal.

Jones v. Tsige, 2012 ONCA 32 (CanLII)

Does Ontario law recognize a right to bring a civil action for damages for the invasion of personal privacy? After a long debate in the courts, the answer in Ontario is now “yes”, there is a tort of “intrusion upon seclusion.” According to the Court of Appeal, in order to establish this tort, the plaintiff must prove the following: 1) the defendant’s conduct must be intentional (which includes being reckless); 2) the defendant must have invaded, without lawful jurisdiction, the plaintiff’s private affairs or concerns; and 3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

The Court went on to find that while proof of harm is not necessary, the lack of it will result in damages being limited to a modest conventional sum. In order to determine the level of “moral damages” to be awarded, courts should consider the following factors: 1) the nature, incidence and occasion of the defendant’s wrongful act; 2) the effect of the wrong on the plaintiff’s health, welfare, social, business or financial position; 3) any relationship, whether domestic or otherwise, between the parties; 4) any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and 5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant. In addition, the Court found that while awards for punitive and aggravated damages should not be excluded, they also should not be encouraged. Given the potential application of this new tort, the Court rightly noted that this tort may very well give rise to competing claims.

PART 2 – SHINE A LIGHT ON…*PRIVILEGE*

Privilege is an important protection from disclosure which is afforded to certain communications. Privilege is an exception to the general principle that relevant evidence is presumptively admissible in court as part of the search for truth. Recent decisions in the context of settlement, solicitor-client and litigation privilege demonstrate that parties and counsel should be mindful of the specific circumstances in which communications will, and will not, be protected.

TWO CATEGORIES OF PRIVILEGE: CASE-BY-CASE & CLASS

There are generally two categories of privilege at common law: case-by-case privilege and class privilege.

Case-by-case privilege involves a balancing of interests. With this approach, there is a presumption of disclosure unless the party asserting privilege can establish that four so-called "*Wigmore*" criteria are met:

1. the communications must originate in a confidence that they will not be disclosed;
2. this confidentiality must be essential to the relationship in which the communication arises;
3. the relationship must be one which should be diligently fostered for the public good; and
4. the public interest in protecting confidentiality outweighs the public interest in getting at the truth.

For communications that fall within a class privilege, on the other hand, there is a presumption of non-disclosure unless the party seeking disclosure can establish that the circumstances are within an exception to the privilege. The most common examples of class privilege are solicitor-client, spousal, litigation and settlement privilege. Class privileges are narrow in scope but difficult to displace.

The difference between case-by-case and class privilege was highlighted in the Supreme Court of Canada's decision in *R. v. National Post* in 2010. The Court rejected a claim for class privilege for journalists' secret sources and signalled a clear preference to deal with future claims of new types of privilege by using the case-by-case rather than class privilege analysis. Among other things, the Court said that a blanket class privilege approach is too rigid and preferred the more flexible case-by-case approach.

SETTLEMENT PRIVILEGE

The difference between case-by-case and class privilege has also recently come to light in the context of settlement privilege. Settlement privilege protects statements made during unsuccessful settlement negotiations from disclosure during litigation. The goal is to foster settlement between the parties because settlement is seen to be cost effective and time efficient.

The underlying rationale for a settlement *privilege* is that the protection afforded to settlement discussions is necessary for parties to engage in meaningful, honest and transparent negotiations. Admissions made by a party in trying to resolve a dispute should not be used against that party if the dispute does not settle.

Until recently, it was unclear whether settlement privilege was a class or a case-by-case privilege. In *Johnstone v. Locke*, the Ontario Superior Court rejected an earlier decision which had described settlement privilege as a case-by-case privilege. The judge in *Johnstone* preferred the class privilege approach predominantly used in other decisions because the "case by case analysis did not adequately support the policy underlying settlement privilege." This is an important decision for parties seeking the protection of settlement privilege.

Settlement privilege will apply if three necessary conditions are met:

1. A litigious dispute must be in existence or within contemplation.
2. The communication must be made with the express or implied intention it would not be disclosed in a legal proceeding

in the event negotiations failed.
3. The purpose of the communication must be to attempt to effect a settlement.

Once a communication falls within this protected class, a party seeking disclosure must establish that the communication is relevant and the disclosure is necessary, either to show the fact that a settlement *agreement* was reached or to address “a compelling or overriding interest of justice”. This is a high bar. However, as with other forms of privilege, settlement privilege may be waived explicitly or implicitly by the parties. Settlement privilege will also not protect behaviour contrary to the public interest such as oppressive threats, unethical and illegal conduct, and fraud.

Much like the specific purposes behind settlement privilege, there is a different and important rationale for each different class privilege. This is exemplified by comparing solicitor-client and litigation privilege.

SOLICITOR-CLIENT AND LITIGATION PRIVILEGE

Solicitor-client privilege and litigation privilege are related but conceptually distinct. The Supreme Court of Canada has noted that: “They often co-exist and one is sometimes mistakenly called by the other’s name, but they are not coterminous in space, time or meaning.”

Solicitor-client privilege protects confidential communications between a solicitor and her client made in the course of seeking legal advice. Indirect communications between a solicitor and client, through an agent or assistant, will also be privileged if there was an expectation that the communication be confidential.

By contrast, litigation privilege is not directed at or restricted to communications between solicitor and client. Litigation privilege attaches to documents created for the dominant purpose of litigation. It extends to non-confidential communications between a solicitor and third parties, and protects even non-communicative material. The goal of this privilege is to create a “zone of privacy” for parties and counsel to prepare a case.

Two recent examples of the application of solicitor-client and litigation privilege are instructive. In *Reis v. CIBC Mortgages Inc.*, the Ontario Superior Court held that notes prepared by an in-house lawyer and the defendant for the purpose of receiving external legal advice about the complaint were protected by solicitor-client privilege. In *McIntyre v. Sun Life Assurance*, the same court found that litigation privilege and solicitor-client privilege applied to protect witness interview notes compiled after the action had commenced. The presence of the defendant’s human resources employee along with counsel did not remove the protection of privilege.

However, another recent decision, *Humberplex v. TransCanada Pipelines*, sounds a key note of caution: the Ontario Superior Court held that solicitor-client privilege will not attach to documents prepared for purposes of simultaneous review by legal and non-legal personnel because the primary purpose is not to secure legal advice.

CONCLUSION

Privilege is an important protection from disclosure. These recent court decisions emphasize the importance of understanding the bounds of privilege so that necessary protections are maintained and not lost.

PART 3 – DID YOU KNOW?

Did you know… that Facebook material may have to be produced and preserved for discovery purposes? Although the issue is still being worked out by the courts, asking for production and preservation of these pages may be useful for employers when defending claims made against them by former employees or when suing former employees who are in breach of post-employment obligations.

If you have any questions about the issues discussed in Raising the Bar, or would like more information, please contact a member of the Hicks Morley Litigation Practice Group, and we would be pleased to assist you.

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