

THE GR COURT DOCKET

November 27, 2019

Solicitor-Client Privilege: Claim for breach denied and argument to preserve upheld

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

Gavin J. Tighe
Partner
416.865.6664
gjtighe@grllp.com

James Cook
Partner
416.865.6628
jcook@grllp.com

Stephen Thiele
Partner
416.865.6651
sthiele@grllp.com

James Beesley
Associate
416.865.6782
jbeesley@grllp.com

Lauren Rakowski
Associate
416.865.4016
lrakowski@grllp.com

The law of solicitor-client privilege occupies a lot of shelf space in the professions and occupations section of the library. It is a topic that has received much judicial consideration, and over time has moved from a rule of evidence to a quasi-constitutional substantive right.

The importance of solicitor-client privilege cannot be underestimated. The privilege permits a client to fully disclose to their lawyer everything they know about a particular issue, without fear that their private and confidential communications will be disclosed to a third party or the public.

In two recent cases, lawyers at Gardiner Roberts LLP were involved in matters involving solicitor-client privilege. We were successful in both cases.

In the first case, we protected a lawyer against a claim for breach of solicitor-client privilege.

In the second case, we protected a lawyer from having to disclose to a litigant the privileged contents of one his files.

Claim for breach of privilege denied
Kazen v. Whitten & Lublin Professional Corp.¹, involved a claim whereby the plaintiff lawyer, SK, sought damages against the defendant law firm and their lawyers for disclosing in a wrongful dismissal action against SK's law firm alleged solicitor-client privileged information belonging to SK.

The wrongful dismissal action had been brought by a former employee of SK's law firm. The former employee in that case was represented by the defendant law firm.

However many years before the wrongful dismissal action, SK had consulted with the defendant law firm in connection with another matter. This fact had been put into evidence on a motion in the wrongful dismissal action.

That motion sought the removal of SK as lawyer of record for his own law firm on the grounds that he was too close to the case to properly represent his firm and that he would be a witness at trial.

SK complained about the disclosure of

his solicitor-client privileged information that had been included in the affidavit of the former employee even though SK referenced the solicitor-client information in responding material.

SK also complained that the defendant law firm and their lawyers could not represent the former employee because they were in a conflict of interest.

A reply affidavit was then filed on the motion by the former employee's lawyer. This affidavit further briefly referenced the basic relationship that existed between SK and the defendant law firm and its lawyers. The affidavit explained that SK had consulted with the law firm on a matter that was unrelated to the former employee's wrongful dismissal action.

Master Sugunasiri found that SK had waived solicitor-client privilege on the motion. She then concluded that SK should be removed as lawyer of record for his law firm.

Although SK appealed the Master's order, the appeal was later withdrawn.

In the breach of solicitor-client privilege action, the defendant law firm brought a motion to strike SK's action on the grounds that it represented a collateral attack against the Master's order in the wrongful dismissal action, that the solicitor-client privilege action was frivolous, vexatious and an abuse of process and that the solicitor-client privilege action disclosed no reasonable cause of action.

The Court agreed.

The Court found that the breach of solicitor-client privilege action was an improper attempt to relitigate the Master's finding that privilege had been waived.

While SK contended that the breach of solicitor-client privilege action was based on the fact that the Master had not specifically referenced the contents of the reply affidavit in her decision, the Court held that the reply affidavit formed part of the record that was before the Master. Even though the Master did not specifically refer to the reply affidavit in her decision, this did not mean that it was not considered by her.

Based on *Housen v. Nikolaisen*², the Court was allowed to presume that the Master had reviewed and considered all of the material that was before her "absent further proof that the trial judge forgot, ignored or misapprehended the evidence." SK provided the Court with no evidence to rebut this presumption.

The Court also held that SK was precluded from bringing his action against the defendant law firm and its lawyers on the grounds of issue estoppel.

The question that formed the basis of SK's claim for breach of solicitor-client privilege was the same question that was decided by the Master, the Master's order was final, and the parties involved in the motion before the Master were the same or were privies.

Although the Court was mindful that it had a discretion not to apply issue estoppel, SK had shown no basis for the Court doing so.

Claim to solicitor-client privilege upheld

In *Glegg v. Glass*³, the Court was required to determine if Letters Rogatory issued by a Florida judge seeking the production of an Ontario lawyer's file should be enforced in Ontario.

The applicant in this case was an Ontario resident who had started an action in Florida claiming damages for parental alienation of his daughter.

The defendants in the Florida action were the applicant's former wife and her new husband. Despite the existence of an order that granted the applicant custody of the daughter, the applicant alleged that his ex-wife, her husband and others interfered with his custody rights and caused the daughter to withdraw from his parental control and to obtain an Ontario court order to this effect.

To support his Florida action, the applicant wanted material in the files of the Ontario lawyers who had represented his daughter.

Rather than bringing an application against the daughter for her lawyers' files, the applicant sought production directly from the lawyers, whose client (the daughter) had not provided her consent.

The Court reviewed the law related to the granting of an application to enforce Letters Rogatory and solicitor-client privilege.

The Court explained that the enforcement of Letters Rogatory was discretionary and that it had the ability to independently assess whether the request for the assistance of the Ontario court complied with Ontario law.

One of the factors to be considered in this assessment was whether the order sought by the applicant was or was not contrary to public policy.

The Court held that enforcing the Letters Rogatory the applicant had obtained in Florida would be contrary to Ontario public policy on the following grounds.

First, the applicant's claim in Florida was a claim that Ontario law forbid.

Causes of action for enticement, harbouring, seduction and loss of services had long ago been abolished in Ontario. Ontario law simply did not recognize a claim for interference with parental rights.

Thus, the applicant's Florida action was based on law that was offensive of what was just and reasonable in Ontario.

Second, the disclosure sought by the Letters Rogatory would wrongly pierce the solicitor-client privilege.

The Court noted that solicitor-client privilege is nearly an absolute right. For the privilege to apply, a communication between a lawyer and a client has to occur while the lawyer is acting in a professional capacity as a lawyer, has to be made in the context of obtaining legal advice, and has to have the intent of being confidential.

Although the applicant argued that he was not seeking documents that were protected by the solicitor-client privilege and that a "privilege log" could be created in the alternative, the Court held that the disclosure requested, even the information sought by the suggested "privilege log", would breach the daughter's confidence and would violate the solicitor-client privilege.

The information that was sought by the applicant was presumptively privileged and the applicant had failed to rebut the presumption.

The applicant's evidence did not show (i) that there was no reasonable possibility that the disclosure of the requested information would not lead, directly or indirectly, to the revelation of confidential solicitor-client information; or (ii) that the requested information was linked to the merits of his case in Florida and that its disclosure would not prejudice the daughter.

Representation by Gardiner Roberts LLP

The law firm and lawyers involved in the breach of solicitor-client privilege action were represented by **Gavin Tighe**, senior litigation partner and specialist in civil litigation, and senior litigation associate **Lauren Rakowski**.

One of the lawyers responding to the application to enforce the Florida Letters Rogatory was represented by senior litigation partner, **James Cook**, and senior litigation associate **James Beesley**.

Written legal argument in both cases was provided by Stephen Thiele, partner and director of legal research.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)

- 1 2019 ONSC 6598
- 2 2002 SCC 33
- 3 2019 ONSC 6623