

ISSUES IN SOLICITOR-CLIENT PRIVILEGE

Michael Eizenga and Monique Radlein

INTRODUCTION

In *Dublin v. Montessori Jewish Day School of Toronto*¹, the Honourable Justice Perell fairly outlines challenges faced by lawyers in performing the sometimes daunting task of compiling an affidavit of documents. Many of these challenges involve the amorphous concept of privilege:

In our contemporary world of information excess, apart from the ever more onerous burden of collecting documents from their myriad of technological resting places, when preparing an affidavit of documents, a lawyer is confronted with many difficult questions. Does the document have a semblance of relevance to the action as pleaded? If the document is relevant to the issues in the proceedings, then is it subject to a privilege? And there are many privileges, including lawyer and client privilege, litigation privilege, a special relationship or Wigmore privilege, settlement communication privilege, spousal privilege, self-incrimination privilege, public interest immunity, informant privilege, judicial privilege, and privilege granted by statute. And the categories of privilege are not closed... If the document is privileged then is it caught by an exception to privilege; for example, the crime or fraud exception, or the innocence at stake exception, or the public safety exception? Or, if the document is privileged, has the privilege been waived advertently or inadvertently? And if the privilege has been waived inadvertently, can the privilege be reasserted?² [Citations omitted.]

However, the *Dublin* decision itself adds another dimension to the considerations of privilege by expanding the exceptions to privilege for communications in furtherance of unlawful conduct (often called the "future crime or fraud" exception) to include any future unlawful, or tortious

¹ *Dublin v. Montessori Jewish Day School of Toronto*, 2007 CarswellOnt 1663 (S.C.J.) (WL) [hereinafter *Dublin*].

² *Ibid* at para. 2.

act.³ More to the point for litigators, the case represents a potential new intrusion into the zone of protection provided by the solicitor-client privilege doctrine.

Dublin involved an appeal from a ruling by Master Albert which directed that that an e-mail correspondence, inadvertently disclosed by the defendants during documentary discovery, should be returned to the defendants as it was protected by solicitor-client privilege (the "E-mail").

The plaintiff, Dublin, was the head of the defendant Montessori Jewish Day School of Toronto (the "Montessori"), a not-for-profit corporation whose members are the parents of the students attending the Montessori. In October, 2003, Dublin took a leave of absence from his post as Head, to recover from an illness. It is alleged that in his absence, the Montessori, the Chair of the Montessori's board of directors, and Dublin's temporary replacement as Head of the Montessori, began a process that led to Dublin's wrongful dismissal shortly after he returned to his post.

The board of directors met on the day Dublin's leave of absence began. At that meeting, the Chair was authorized to contact legal counsel regarding several issues, including questions arising from Dublin's absence as head of the school. Counsel was retained and, in the context of the solicitor-client relationship, the Chair sent her counsel an e-mail addressing, among other things, Dublin's employment and medical leave of absence. Additionally the e-mail contained pejorative statements which "may" have shown that there was an intent to inflict emotional harm on Dublin and his family.

Dublin resumed work in January 2004, but was dismissed in May of that year. Dublin commenced an action against the Montessori, the Chair and his replacement as Head of the Montessori, alleging wrongful dismissal, intentional or negligent infliction of emotional harm, negligence, breach of trust, and breach of confidence.

In the course of the litigation, the E-mail was inadvertently disclosed to the plaintiffs, who refused to return it to the defendants. The plaintiffs contended that the E-mail was evidence of the defendants' malice and bad faith. The defendants brought a motion for the E-mail's return arguing that the E-mail was exchanged in order to obtain legal advice and as a result is privileged. Master Albert agreed. On appeal, however Justice Perell found that the Master

³ *Ibid.*

erred. The E-mail was "an exception to privilege because it was arguably in furtherance of unlawful conduct and that is an exception to privilege"⁴.

THE SOLICITOR-CLIENT PRIVILEGE

The foundation of Canadian justice is that everyone is entitled to retain legal counsel to defend and protect their interests. No one, no matter how unconscionable the alleged offence, should be denied a full defence. Nor should they be prejudiced by openly discussing their case with their chosen counsel.⁵

Since its inception in the mid-16th Century, solicitor-client privilege has developed into an integral part of the Canadian legal system.⁶ Well over a century ago Jessel M.R. recognised the importance of the rule in *Anderson v. Bank of British Columbia*:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.⁷

Cory J., delivering the judgment of the majority of the Supreme Court in *Smith v. Jones* adopted the reasoning in *Anderson* and commented further:

[Solicitor-client privilege] has deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, personal foibles

⁴ *Ibid* at para. 5.

⁵ *Smith v. Jones*, [1999] 1 S.C.R. 455 (QL) at para. 6 [hereinafter *Smith*].

⁶ *Ibid* at para. 45; See also, *R v. Campbell*, [1999] 1 S.C.R. 565 at para. 49 [hereinafter *Campbell*]; *R v. McClure*, 2001 CarswellOnt 496 (S.C.C.) (WL) at para. 17 [hereinafter *McClure*]; and, *Solosky v. Canada*, 1979 CarswellNat 4 (S.C.C.) (WL) at para. 21 [hereinafter *Solosky*].

⁷ *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.) at 649; See also, *McClure*, *ibid*, at para. 32.

and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.⁸

It is in the public's interest therefore, that individuals should be able to confide freely and frankly in their legal counsel for the purpose of obtaining skilled, professional legal advice without fear that their confidences will be disclosed and used against them.⁹ Solicitor-client privilege arose to ensure the protection of these confidences. If the confidences clients share with counsel were not protected by privilege, clients would hesitate to confide in their legal advisors, who in turn could not adequately represent them.¹⁰

The modern statement of privilege for solicitor-client communications, as adopted by the Supreme Court of Canada, is as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.¹¹

Communication will only be found to be subject to solicitor-client privilege if it is: (i) between a client and his or her solicitor, who must be acting in a professional capacity; (ii) made in relation to the seeking or receiving of legal advice; and (iii) intended to be confidential.¹²

Although the privilege originated as purely a rule of evidence, protecting communications only to the extent that a solicitor could not be forced to testify,¹³ the privilege has evolved into a substantive rule of law¹⁴. As Dickson J. (as he then was) wrote in *Solosky v. The Queen*, "[r]ecent case law has taken the traditional doctrine of privilege and placed it on a new plane.

8 *Smith*, *supra* note 5, at para. 46; See also, *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 14 [hereinafter *Pritchard*].

9 *Goldman, Sachs & Co. v. Sessions*, 1999 CarswellBC 2772 (B.C.S.C.) (WL) at para 6 [hereinafter *Goldman, Sachs & Co.*].

10 *Smith*, *supra* note 5.

11 *Solosky*, *supra* note 6, at para. 23; See also, *Descôteaux v. Mierzwinski*, 1982 CarswellQue 291 (S.C.C.) (WL), at para. 21 [hereinafter *Descôteaux*].

12 *Solosky*, *supra* note 6, at para. 28.

13 *Smith*, *supra* note 5, at para.48.

14 *McClure*, *supra* note 6, at para. 17.

Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a courtroom¹⁵.

Lamer J. (as he then was) expanded on this statement in *Descôteaux v. Mierzwinski*¹⁶ when he discussed the content of this substantive rule:

It was quite apparent that the Court in [*Solosky*] applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which has long ago given rise to a rule of evidence, had also since given rise to a substantive rule.¹⁷

As a result, although solicitor-client privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his or her professional capacity, it does afford protection to all consultation between a lawyer and client for *legal advice* whether litigious or not.

Solicitor-client privilege, once established, is broad and all encompassing,¹⁸ and its special relevance to the proper functioning of the judicial system has accorded it the highest protection recognized by the courts.¹⁹ Evidence protected by solicitor-client privilege may be both relevant and of substantial probative value. Thereby, the decision to exclude it reflects policy:

The tension between privilege and discovery is a manifestation of two competing policies. The purpose of discovery is to advance the search for the truth of the dispute between the parties. The purpose of the privilege, which may result in the suppression of the truth, is to protect the legal system.²⁰

¹⁵ *Solosky*, *supra* note 6, at para. 25.

¹⁶ *Descôteaux*, *supra* note 11.

¹⁷ *Ibid*, at para. 26.

¹⁸ *Pritchard*, *supra* note 8, at paras. 16 and 21; And also, *Ibid* at para. 71.

¹⁹ *Smith*, *supra* note 5, at paras. 44 and 50.

²⁰ *Goldman, Sachs & Co.*, *supra* note 9.

Nevertheless, no privilege is absolute. The importance of solicitor-client privilege is evidenced by its entrenchment in our legal system; in certain circumstances however, the courts have found that other societal values must prevail.²¹

THE FUTURE CRIME OR FRAUD EXCEPTION

Despite the paramount position of solicitor-client privilege within our legal system, there are circumstances in which public policy in favour of full disclosure will succeed in subordinating the privilege. Imminent threat to the public,²² inhibition of an individual's right to make full answer and defence under section 7 of the *Charter of Rights and Freedoms*,²³ and communications made in furtherance of crime or fraud have,²⁴ all been recognized by the courts as legitimate exceptions to solicitor-client privilege.

Lamer J., speaking for the court in *Descôteaux*, a case which concerned a fraudulent legal aid application, held that communications which, in and of themselves, are criminal or that are intended to obtain legal advice to facilitate criminal activities, are not privileged:

There are certain exceptions to the principle of the confidentiality of solicitor-client communications, however. Thus, communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged, *inter alia*.²⁵

The future crime or fraud exception provides therefore, that in the circumstance where a client seeks advice from a lawyer in order to facilitate the commission of a crime or fraud, the communication will not be privileged. "It is immaterial whether the lawyer is an unwitting dupe or knowing participant."²⁶

Courts have also held that the client's intention to commit a wrongful act is the key determinant as to whether the communication is privileged.²⁷ The future crime or fraud exception only applies where the client is knowingly pursuing a criminal purpose. In circumstances where the client has a wrongful intent, the lawyer, in providing advice that may facilitate the illegal activity

²¹ *Smith*, *supra* note 5, at para. 51; See also, *McClure*, *supra* note 6, at para. 33.

²² *Solosky*, *supra* note 6; See also, *Smith*, *ibid*, at paras. 56-59.

²³ *McClure*, *supra* note 6; See also, *Smith*, *ibid*, at paras. 52-54.

²⁴ *Descôteaux*, *supra* note 11; See also, *Smith*, *ibid*, at para. 55.

²⁵ *Descôteaux*, *ibid*, at para. 72.

²⁶ *Solosky*, *supra* note 6, at para. 24; See also, *Campbell*, *supra* note 6, at para. 62; *R v. Cox and Railton* (1884), 14 QBD 153, at 168 [hereinafter *Cox and Railton*]; and *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at 621 [hereinafter *O'Rourke*].

²⁷ *Campbell*, *ibid*, at para. 58.

is not acting in a professional capacity. In *R v. Campbell*²⁸, the characterization of legal advice sought by an RCMP officer in connection with an entrapment scheme was at issue. The court concluded that the advice was not sought to "facilitate" the crime, but only to determine whether the operation the RCMP officer had in mind was lawful. According to Binnie SCJ., this was the "sort of advice sought everyday from lawyers and did not vitiate the privilege"²⁹.

The decision of *R v. Cox and Railton*³⁰ is often cited as outlining the reasoning behind the future crime or fraud exception:

In order that the rule [the solicitor-client privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object was avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by fraud. For the purposes of the exception, fraud is not limited to the tort of deceit but includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham transactions.³¹

In this sense, the future crime or fraud exception to solicitor-client privilege is not truly an exception, but rather a negation of solicitor-client privilege.

It should be kept in mind however, that the courts have consistently stated that the application of an exception will only occur where "absolutely necessary". "Absolute necessity is as restrictive a test as may be formulated, short of an absolute prohibition in every case."³² As stated by the court in *R. v. McClure*³³:

Solicitor–client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only

²⁸ *Ibid.*

²⁹ *Ibid.*, at para. 56.

³⁰ *Cox and Railton*, *supra* note 26.

³¹ *Ibid.* at 168.

³² *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 CarswellOnt 4077 (S.C.C.) (WL), at para. 20 [hereinafter *Goodis*].

³³ *McClure*, *supra* note 6.

yield in certain clearly defined circumstances, and does not involve a balancing of interest on a case-by-case basis.³⁴

As a result, destruction of the privilege takes more than evidence of the existence of the crime and proof of prior consultation with a lawyer. It requires the establishment of *prima facie* evidence that the allegation has a foundation in fact. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a dupe or conspirator.³⁵ As stated by Viscount Finlay in *O'Rourke v. Darbishire*³⁶:

If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some *prima facie* evidence that it has some foundation in fact. It is in reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications.³⁷

EXPANSION OF THE EXCEPTION TO INCLUDE TORTIOUS CONDUCT

Several courts have been reluctant to extend the future crime or fraud exception to include tortious conduct in addition to criminal and fraudulent conduct. For example, in one of the earliest decisions on the subject, *Crescent Farms (Sidcup) Sports Ltd. v. Sterline Offices Ltd. and Another*³⁸, the plaintiffs argued that "fraud" should be liberally construed so as to include any conduct that would give rise to a tortious claim. In rejecting that submission, Goff J. said:

³⁴ *Ibid* at para. 35. See also, *R. v. Lavallee, Rackel & Keintz*, [2002] 3 S.C.R. 209 at para. 36; and *Goodis*, *supra* note 32, at para.15.

³⁵ *Campbell*, *supra* note 6, at para. 62; See also, *O'Rourke*, *supra* note 26; and, *Hallstone Products Ltd. v. Canada (Customs and Revenue Agency)*, [2004] O.J. No.496 (S.C.J.) (QL) at para. 9 [hereinafter *Hallstone Products*].

³⁶ *O'Rourke*, *ibid*.

³⁷ *Ibid* at 604.

³⁸ *Crescent Farms (Sidcup) Sports Ltd. v. Sterline Offices Ltd. and Another*, [1972] 2 W.L.R. 91 (Ch. D.) [hereinafter *Crescent Farms*].

I do not consider the principle requires any extension. On the contrary, I think the wide submission of the plaintiffs would endanger the whole basis of legal professional privilege. It is clear that parties must be at liberty to take advice as to the ambit of their contractual obligations and liabilities in tort and what liability they will incur whether in contract or tort by a proposed course of action without thereby in every case losing professional privilege. I agree that fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances, but I cannot feel that the tort of inducing a breach of contract or the narrow form of conspiracy pleaded in this case come within that ambit.³⁹

Prior to Justice Perell's decision in *Dublin*, the definitive case in Ontario on the issue was *Rocking Chair Plaza (Bramalea) Ltd. v. Brampton (City)*⁴⁰. The case concerned allegations of bad faith in the issuance of a building permit. In that case O'Driscoll J. relied upon the decision in *Crescent Farms* as accurately setting out the law in Ontario.⁴¹ On that basis O'Driscoll J. refused to extend the future crime or fraud exception to solicitor-client privilege to any breach of duty or wrongful act, holding that criminal fraud must be established to warrant setting aside the privilege.⁴²

Until the *Dublin* decision, there was no other word, in Ontario, on the subject. A decade after the *Rocking Chair Plaza* decision, Smith J. took a contrary position in the British Columbia case of *Goldman, Sachs & Co. v. Sessions*⁴³, citing *Campbell*⁴⁴, a Supreme Court of Canada decision released just prior to the *Goldman, Sachs & Co.* hearing in 1999. Smith J. determined that *Campbell* "ended the debate about whether the exception extends beyond crime and fraud". Smith J. cited Binnie SCJ.'s unqualified adoption, in *Campbell*, of the words "crime or tort" and "unfounded claims of illegal projects", as demonstrative that the Supreme Court of Canada did not consider that "unlawful conduct" is confined strictly to criminal and fraudulent conduct. As a result, Smith J. concluded:

³⁹ *Ibid* at 565.

⁴⁰ *Rocking Chair Plaza (Bramalea) Ltd. v. Brampton (City)*, 1988 CarswellOnt 445 (H.C.J.) (WL) [hereinafter *Rocking Chair Plaza*].

⁴¹ *Ibid* at para. 31.

⁴² *Ibid* at paras. 21-31; As similarly recognised by Master Dash in *Hallstone Products*, *supra* note 35, at para. 13: "The principle of extending the exception to any unlawful conduct, including all torts, has not been supported by any Ontario court, and in fact has been specifically excluded by *Rocking Horse*. In my view such an all-inclusive extension is not the law of Ontario". See also, *Crescent Farms*, *supra* note 38.

⁴³ *Goldman, Sachs & Co.*, *supra* note 9.

⁴⁴ *Campbell*, *supra* note 6.

[I]ntended crimes and frauds are but instances of the application of the general principle that the privilege does not attach to communications in relation to intended unlawful conduct. In this context, "unlawful conduct" has a broader meaning than simply conduct that is prohibited by criminal law. It includes breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty. Breaches of contract and of civil duties are "unlawful" because, although they are not prohibited by any enactment, they cause injury to the legal rights of other citizens and give rise to legal remedies. They are therefore contrary to law.⁴⁵

This analysis resonated with Justice Perell who found, that the statement made in *The Law of Evidence in Canada* (2nd ed.)⁴⁶ heralded such an expansion:

The authors of Canada's leading evidence test, Sopinka, Lederman, and Bryant... state in para. 14.58: "There is no reason why this exception to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortious conduct which may become the subject of criminal proceedings."

In my opinion, there is also no reason why the exception should not include communications perpetrating tortious conduct that may become the subject of civil proceedings.⁴⁷ [Emphasis added.]

Justice Perell understood the *Goldman, Sachs & Co.* decision as advancing the proposition that:

...if it can be shown that the client communicated with a lawyer with the intention of committing an unlawful act, *be it criminal or tortious*, because the client knew or ought to have known that the intended conduct was unlawful, then the communication with the lawyer is not privileged. [Emphasis added.]

However, Justice Perell also notes that a "mere assertion that the lawyer's advice was sought in furtherance of an illegal purpose would not be sufficient; some convincing evidence of the illegal purpose is required"⁴⁸. Further, although the language used in *Dublin* is fairly wide on

⁴⁵ *Goldman, Sachs & Co.*, *supra* note 9, at para. 16.

⁴⁶ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Markham: Butterworths Canada Ltd., 1999).

⁴⁷ *Dublin*, *supra* note 1, at paras. 38-39.

⁴⁸ *Dublin*, *supra* note 1, at para. 43.

occasion, the case itself concerned the commission of "various intentional torts against Dr. Dublin and his son."⁴⁹

On the other hand, the *Campbell* decision, which is the harbinger of the expansion, concerned a case where criminal conduct is alleged and does not deal with tortious conduct. As a result, reference to the potential inclusion of tortious conduct ought to be considered obiter. Although Binnie SCJ.'s reasons in *Campbell* do refer to and quote articles which seem to imply that facilitation of tortious conduct may also be included in the future crime or fraud exception, the words of the judgment, as delivered for the court, refer only to an exception in the case of the facilitation of a crime:

In my view, destruction of the privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. *There must be something to suggest that the advice facilitated the crime* or that the lawyer otherwise became a "dupe or conspirator". [Emphasis added.]⁵⁰

The weight of jurisprudential consideration acknowledges solicitor-client privilege as a fundamental tenet of our legal system, giving it the highest protection accorded to privilege by our courts, and establishing that exceptions to the rule will only be allowed when absolutely necessary. As stated by Major J. in *McClure*, delivering the judgment of the court:

This privilege, by itself, commands a unique status within the legal system. The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the working of the legal system itself.⁵¹

The law in this area is clearly in a state of flux. Tortious behaviour covers a wide spectrum of causes of action from misrepresentation to intentional torts to negligence to interference with property rights. Although all tortious conduct, in a broad sense, is "unlawful", in that it may lead to legal consequences, not all torts involve the same degree of moral turpitude as fraud. As recognized by O'Driscoll J. in *Rocking Chair*, there is a vast difference between "fraud" and

⁴⁹ *Dublin*, *supra* note 1, at para. 44.

⁵⁰ *Campbell*, *supra* note 6, at para. 62.

⁵¹ *McClure*, *supra* note 6, at para. 31.

"bad faith". An individual acting in bad faith does not necessarily act fraudulently.⁵² "People go to jail for fraud, but they do not go to jail for bad faith".⁵³

CONCLUSION

Queries concerning civil conduct form the pith and substance of everyday legal consultations. Clients come to lawyers to ask about the legality and scope of their civil endeavours and obligations. Occasionally, clients "blow off steam", sometimes in e-mails, although there is no reason that the expansion of the exception would not apply to other forms of communication. Statements that may be considered to "perpetrate tortious conduct" seem to introduce a broad category of concern. Further, the line is not as bright as that between criminal and non-criminal standards. Criminal and fraudulent activities are legislated against, and as a result are comparably much more definitive and identifiable in comparison to civil misconduct which is more often governed by juridical decisions.

As stated by the Supreme Court of Canada:

Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client.⁵⁴

Justice Perell acknowledges that lawyer and client privilege is categorical and approaches an absolute right. He also fairly notes that his position may be "contentious" (a comment referenced by Carnwath JA. in granting leave to the Divisional Court⁵⁵). In any event, the practical reality is that, litigation counsel must be aware that the number and nature of communications regarding which claims of privilege may be at risk has potentially been significantly expanded and should be approached with caution. The rules of engagement between solicitor and client may well have been changed.

⁵² *Rocking Chair Plaza*, supra note 40, at para. 25.

⁵³ *Ibid*, at paras. 23-26.

⁵⁴ *McClure*, supra note 6, at para. 33.

⁵⁵ *Dublin v. Montessori Jewish Day School of Toronto*, 2007 CarswellOnt 6097 (Div. Ct.) (WL). Note that the case was settled prior to the hearing of the appeal in Divisional Court.