



In *PetroFrontier*, Alberta Court of Appeal Advises on Protecting Solicitor-client Privilege When Pleading

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PetroFrontier Corp v Macquarie Capital Markets Canada Ltd, 2022 ABCA 136 arose from a bought-deal securities offering gone wrong. The defendant terminated an underwriting agreement with the plaintiffs when the plaintiffs failed to file a final prospectus on time. The plaintiffs sued the defendant, alleging that the defendant and its legal counsel, Torys LLP, agreed to extend the prospectus-filing deadline. The claim also alleged that Torys had actual and ostensible authority to bind the defendant. The Statement of Defence stated that Torys neither agreed to an extension, nor held authority to do so.

At questioning, the defendant's witnesses objected to questions about the communications between Torys and the defendant about the prospectus deadline, claiming privilege. Eventually, the master, and on appeal, Justice Campbell ordered the defendant to answer. Justice Campbell held the Statement of Defence raised a new factual issue: the defendant never instructed Torys to agree to an extended deadline. The Court of Appeal agreed, and offered practical advice on how to draft statements of defence, without bringing solicitor-client communications into issue.

ANALYSIS

I. Privilege extends to more than just advice

The Court of Appeal helpfully summarized the law on solicitor-client privilege, including *Solosky v R*, [1980] 1 SCR 821: when legal advice of any kind is sought from a professional legal adviser in that capacity, (a) "the communications relevant to that purpose" made in confidence by the client, are permanently protected from disclosure, (b) except if the client waives privilege. The Court emphasized that the phrase "communications relevant to that purpose" means that privilege protects the client's interests and attaches to more than just the advice that a professional legal adviser gives their client.

II. Privilege can be lost by the conduct of the holder—when putting the communication in issue

The Court covered two methods of losing privilege. The first is **voluntary disclosure** to a third party. The second method is **waiver by operation of law**, which involves weighing the fairness to both sides in upholding or denying solicitor-client privilege. The Court of Appeal concluded that a court should lift privilege when:

- a. Denying access to the privileged facts would impair the other side's ability to present its case.



- b. That harm would exceed the harm to the privilege holder by putting the otherwise protected facts into issue.

III. The language of pleadings affects privilege

The Court canvasses how a privilege holder should draft its pleadings to reduce the risk its pleadings will cause a court to lift privilege. The Court noted that pleadings are important, as they identify the issues a court must resolve. Thus, a privilege holder should be cautious when responding to an allegation in a pleading that the privilege holder's lawyer did something adverse. A defendant may safely plead that:

- a. The privilege holder's lawyer did not do what the adversary alleges.
- b. The lawyer had *no apparent or ostensible* authority (as opposed to *actual* authority) to do the alleged act.

When a defendant wishes to respond to an allegation in a Statement of Claim that the privilege holder's lawyer had *actual* authority to do something, as in this case, the defendant may safely plead that:

- a. The facts do not support the plaintiff's claim that the privilege holder's lawyer had *actual* or *apparent* authority.
- b. The plaintiff has pled facts subject to lawyer-client privilege, thereby invoking privilege.

Ultimately, if a defendant denies specific allegations subject to lawyer-client privilege, that brings risk that a court may conclude that the defendant has put these facts in issue, and so can be questioned on these facts. For example, here the defendant pled that it had given Torys LLP "no instructions to agree to an extension" and that its lawyer lacked the authority to do so. This pleading put into issue the *actual* authority of the lawyers and the related communications. Instead, the defendant could have pled in any of these ways:

- a. denied the allegation that Torys notified the plaintiffs its client had agreed to an extension
- b. denied that the pleaded facts constituted Torys' ostensible or actual authority to bind Macquarie
- c. invoked lawyer-client privilege over the allegation that Torys had actual authority to bind Macquarie to a prospectus-filing extension.

Lesson: Do not bring your lawyer-client communications into issue in your pleadings

The Court dismissed the appeal, finding that the plaintiff could question on communications between Torys and the defendant relating to the prospectus deadline. The key takeaway is that when responding to a pleading that alleges a wrong connected to lawyer-client communications, a party should take care



to draft a responding pleading that does not draw into issue facts that are the subject of privilege.

Some methods of drafting a pleading to protect solicitor-client privilege include:

- denying the allegation in a way that does not call into question the communications between the solicitor and client
- denying that the pled facts prove the conduct alleged
- invoking lawyer-client privilege.

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