



[5] The issue in the present case is different from that in the *Blood Tribe* case. Here we are dealing with litigation privilege. As the Supreme Court noted in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, litigation privilege and solicitor-client privilege are two very different legal constructs; they are driven by different policy considerations and generate different legal consequences. Therefore, I do not think that the reasoning in *Blood Tribe* applies to the present case.

## II. ISSUE TWO: IS LITIGATION PRIVILEGE OVER THE EXPERT'S FILE AUTOMATICALLY WAIVED ONCE THE EXPERT IS CALLED TO TESTIFY?

[6] Litigation privilege means that documents prepared for the dominant purpose of litigation, including expert reports, do not have to be revealed to adverse parties unless the privilege is waived: *Blank, supra*. However, normally the party who commissioned an expert report will waive the litigation privilege, and file the report in court. Once the privilege is waived, adverse parties are entitled to see the report as well as other documents in the expert's file. (*Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2007 BCSC 909)

[7] Canadian courts have taken different approaches to determining the scope of litigation privilege waiver. The Respondents assert that by operation of sections 2 and 40 of the *Canada Evidence Act*, the Tribunal is obliged to apply the law in Ontario. Section 40 of the *Canada Evidence Act* stipulates that in all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken apply to those proceedings.

[8] I am not sure that it can be said that the proceedings were taken in Ontario. To be sure, Ms. Walden filed her complaint in Ontario, but she is not the only complainant in this matter. There are approximately 400 other Complainants who reside and work in cities across Canada. The events giving rise to the complaints occurred in more than one province.

[9] The parties reached an agreement whereby all Complainants, other than Ms. Walden, were considered to have filed a complaint when they contacted a regional representative Complainant who put their name on a Complainant list. Otherwise, the Complainants would likely have filed individual complaints in the Commission's regional offices throughout Canada.

[10] It must also be recognized that the proceedings in issue are of an administrative nature and the initiating documents (the complaints) were not filed at a local court house, but rather with a federal agency (the Commission) which has a national mandate. Moreover, the Commission's requests for the institution of an inquiry are made to the Tribunal, which also has a national mandate.

[11] In light of the foregoing facts, it is virtually impossible to identify a single province as being the *locus* of the proceedings. For this reason, while reliance must be placed on jurisprudence from provincial superior courts, the law of evidence of one province cannot be readily excluded in favour of the law of another. Moreover, a review of the case law cited by the parties together with related precedents suggests that a consensus on the state of the law in a given province is not always discernable. For these reasons, I have decided not to limit my review of the law to the Ontario jurisdiction.

[12] There are at least two approaches in Canada to the waiver of litigation privilege: one favours greater production, and the other leans toward a more narrow view of the waiver of litigation privilege.

[13] The case of *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289 is an example of the approach favouring greater production. In that case, the British Columbia Supreme Court held that the exception to litigation privilege extends broadly to all documents in the witness's possession which are relevant to the preparation or formulation of the opinions offered, as well as to his or her consistency, reliability, qualification and other matters touching on the witness's credibility (see also: *Jesionowski v. Gorecki* [1992] F.C.A. no. 816; *Browne (Litigation Guardian of) v. Lavery* [2002] O.J. No. 564 (S.C.))

[14] Not all courts have been willing to construe the waiver of litigation privilege so broadly. For example, in *Bell Canada v. Olympia and York Developments Ltd.* (1989), 68 O.R. (2d) 103 (H.C.J.) the court dealt with a motion to compel an expert to produce all correspondence between himself and the instructing solicitor. The court refused to order such production stating that to do so would jeopardize solicitor and client privilege. In doing so, the court refused to apply the reasoning in *Vancouver Community College, supra* (see also: *Edmonton (City) v. Lovat Tunnel Equipment Inc.* 2000 ABQB 182; *R. v. 1278481 Ontario Ltd.* 2007 NLTD 151; *Highland Fisheries Ltd. V. Lynk Electric Ltd.* (1989), 63 D.L.R. (4<sup>th</sup>) 493 (N.S. S.C.); *Martin v. Inglis* 2002 SKQB 24)

[15] I think that the approach taken by the British Columbia Supreme Court to the common law on litigation privilege and waiver in *Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2007 BCSC 909 represents a balanced approach to addressing the issue. That case involved a request to have the working files of three expert witnesses for the defense resource biologists produced. The files included draft reports, communications between counsel and the experts as well as other reports.

[16] The Court stated:

I do not think that the statements by Finch J., as he then was, in *Vancouver Community College v. Phillips, Barratt* regarding exceptions to the waiver of litigation privilege can be taken as blanket exceptions which will apply in all cases regardless of the circumstances. He was citing examples where exceptions may occur, but the principle he was espousing was that the court must balance the competing policies of disclosure versus privilege and determine what is fair in each particular case (*Lax Kw'alaams Indian Band, supra*, at para 15).

[17] In determining whether litigation privilege has been waived, the decision maker should have regard to the following principle: when an expert witness who is not a party is called to testify, or when his or her report is tendered in evidence, he or she may be required to produce documents in his or her possession which are or may be relevant to matters of substance in his or her evidence or credibility, unless it would be unfair or inconsistent to require such production.

[18] The British Columbia Supreme Court resolved the dispute by examining the documents to determine if litigation privilege applied. The Court held that some of the documents were to be disclosed because they went to the substance of the opinion or the credibility of the witness but not all of them. (see also: *Piché et als v. Lecours Lumber Co. Ltd. et al* (1993), 13 O.R. (3d) 193

in which the Ontario Court (General Division) used a similar approach to resolving claims of litigation privilege, albeit applying a different test.)

[19] It should also be noted that a number of courts that have employed an approach similar to that of the court in *Lax Kw'alaam Indian Band, supra*, have relied upon a passage from Sopinka and Lederman's text on *The Law of Evidence in Canada* in which the authors comment on the *Vancouver Community College* by stating:

As to the expert's credibility, caution should be exercised before that becomes the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports. In any event, it might just lead to a general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem. (Sopinka and Lederman, *The Law of Evidence in Canada* (2<sup>nd</sup> ed.) at p. 763, cited in *Martin v. Inglis, supra*, at para. 10)

[20] I think that these comments are important to bear in mind when assessing whether litigation privilege has been waived over documents in the expert's possession.

[21] The Respondents were asked to provide me with copies of the documents over which litigation privilege is asserted. I stated that I would review them to determine whether the privilege has been waived having regard to the principles set out above.

"Signed by"

Karen Jensen

OTTAWA, Ontario  
August 8, 2008

#### PARTIES OF RECORD

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APPEARANCES:	
Laurence Armstrong	For the Complainants
Ikram Warsame	For the Canadian Human Rights Commission
Patrick Bendin/Claudine Patry	For the Respondents

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