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In-House Counsel

Devastating consequences of accessing privileged information

By **James Dunphy**

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(February 28, 2022, 9:08 AM EST) -- The Supreme Court of Canada in *Smith v. Jones*, [1999] S.C.J. No. 15, described solicitor-client privilege as the highest privilege recognized by the courts. In its recently issued judgment in *Continental Bank of Canada v. Continental Currency Exchange Canada Inc.*, 2022 ONSC 647, the Ontario Superior Court of Justice underscored the sanctity of the privilege and provided a stark reminder to litigants of the powerful remedies available to the court when an opposing party accesses confidential and privileged information which is relevant to the issues in the litigation.

In *Continental Bank*, the Sprott Parties and Penfound Parties were engaged in a business transaction towards the establishment of a new Schedule 1 licensed bank. The proposed business transaction failed. The parties had been sharing the same business premises and a common information technology environment, which continued after the relationship breakdown. After the business transaction failed, Penfound asked that all of the e-mails belonging to one of the Sprott Parties be backed up and delivered to him in a USB. The USB contained "many thousands of emails" which included communications between one of the Sprott Parties' general counsel and external counsel at Norton Rose and at Baker McKenzie, as well as internal e-mails between the general counsel and officers. Litigation subsequently developed between the parties. During the discovery process, it came to light that the Penfound Parties were in possession of privileged documents.

The Sprott Parties moved to stay the claims made by the Penfound Parties as an abuse of process. In the alternative, the Sprott Parties sought an order removing the Penfound Parties' lawyers as their lawyers of record.

The court answered two questions on the motion: (1) Did the Penfound Parties obtain privileged materials belonging to the Sprott Parties? (2) If they did, what is the appropriate remedy?

Were privileged materials accessed?

The Penfound Parties contended that there was no direct evidence that privileged information was actually accessed or reviewed by them or their lawyers. They argued that an assertion of privilege, without more, is in and of itself insufficient in law to establish that solicitor-client privilege attaches to a particular document. They argued that the onus was on the Sprott Parties to establish that a privilege applies in respect of any particular document over which privilege is claimed and how that document relates to the issues in the litigation.

The court rejected the Penfound Parties' argument that the onus lay with the Sprott Parties to demonstrate that the information was privileged. The court followed the principles expressed by the Supreme Court of Canada in *MacDonald Estate v. Martin*, 1990 S.C.J. No. 41 and in *Celanese Canada Inc. v. Murray Demolition Corp.,* 2006 SCC 36.

MacDonald involved a junior lawyer who was actively engaged in a defendant's case before moving to the firm which represented the plaintiff. The junior lawyer, as well as senior members of the plaintiff's firm, swore affidavits that the case was not discussed between them and would not be discussed.

Justice John Sopinka held that, as it had been shown that the junior lawyer had obtained relevant confidential information attributable to a solicitor and client relationship, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.

In *Celanese*, privileged solicitor-and-client communications of the defendants were inadvertently taken during a search pursuant to an Anton Piller order, and viewed by the plaintiffs' counsel. The court found that the onus lay with the recipient of the privileged information to show that there is no real risk such confidences will be used to prejudice the defendant.

Relying on *MacDonald* and *Celanese*, Justice Peter Cavanagh held that once it is shown that an opposing party or its lawyers have had access to relevant confidential information that is protected by privilege, prejudice is presumed and the onus rests on the recipient of the information to rebut the presumption of prejudice.

What is the appropriate remedy?

The Sprott Parties sought a stay, or in the alternative, the removal of the Penfound Parties' lawyers.

Justice Cavanagh held that the appropriate remedy will be informed by the extent to which the Penfound Parties rebutted the presumption of prejudice that arose, given the court's finding that they had access to privileged material. The court found that the standard to be applied was whether the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. Echoing the comments of Justice Ian Binnie in *Celanese*, the court held that, in order to rebut the presumption of prejudice, the recipient of the privileged information was required to disclose to the court what has been learned and the measures taken to avoid the presumed resulting prejudice.

The court found that the Penfound Parties failed to provide full particulars of the information which was accessed by them. As a result, the court found that they did not discharge their onus of showing that they did not access and review privileged emails. The court made an order permanently staying the claims by the Penfound Parties.

There are two key takeaways from *Continental Bank*. The first is the importance of monitoring and controlling data where two or more parties are engaged in a business transaction and share an information database. Each party should ensure that their confidential data can be quickly isolated and protected in the event of a relationship breakdown.

The second takeaway is that, upon discovering that privileged information has been accessed by either counsel or client, counsel for the recipient must make full and frank disclosure of all privileged materials in their client's possession and be prepared to explain the measures taken by them or their client to rebut the presumed resulting prejudice. As Justice Sopinka observed in *MacDonald*, this will be a difficult burden to discharge. As *Continental Bank* shows, the consequences of failing to discharge that onus can be devastating.

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