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The Supreme Court of Canada reinforces the protection of litigation privilege by elevating it to class privilege status

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Ten years after *Blank* v. *Canada (Minister of Justice)*,[1] the leading case regarding litigation privilege, the Supreme Court of Canada has seized the opportunity to reaffirm and expand on the principles set out in that important decision. Indeed, in its most recent case, *Lizotte* v. *Aviva Insurance Company of Canada*,[2] rendered on November 25, 2016, Canada's highest court clarified the limits and reinforced the scope of litigation privilege. It also closely considered what legislators would have to do to derogate from the application of this common law privilege which also applies under Québec civil law.

The context

This case originated in the context of an investigation by the assistant syndic of the Chambre de l'assurance de dommages of a claims adjuster subject to her powers of investigation in matters of professional conduct. Relying on section 337 of the *Act respecting the distribution of financial products and services* (the "Act"), which provides for the duty of an insurer to forward "any document or information" on the activities of a representative under investigation, the assistant syndic asked the Aviva insurance company to provide her with a full copy of the claim file held by the adjuster. Aviva opposed the request on the ground that some of the documents were protected by litigation privilege. Although the privilege issue later became moot since a settlement was reached in the litigation involving Aviva and its insured, the syndic nonetheless decided to file a motion for a declaratory judgment before the Court on the issue of whether the general wording of section 337 of the Act is enough to set aside litigation privilege.

The characteristics of litigation privilege

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As stated in the *Blank* case, rendered by the Supreme Court in 2006, the purpose of litigation privilege is to ensure the efficacy of the adversarial process, by leaving the parties “to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure”.[3] Litigation privilege therefore creates an immunity from disclosure with respect to documents and communications whose “main purpose” is the preparation for litigation.

Due to its origins, this privilege has often been conflated with solicitorclient privilege. However, the *Blank* case made a very clear conceptual distinction between these two notions. In *Blank*, the Supreme Court noted that “[t]hey often co-exist and one is sometimes mistakenly called by the other’s name, but they are not coterminous in space, time or meaning”.[4] The Court also states that litigation privilege, “unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration”.[5]

The distinctions between these two concepts as identified in the *Blank* case are repeated in the *Lizotte* case:

> The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process*;
> Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends;
> Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services;
> Litigation privilege applies to non-confidential documents. In fact, contrary to solicitor-client privilege, confidentiality is not an essential condition of litigation privilege;
> Litigation privilege is not directed at communications between solicitors and clients as such.

Despite the clear distinctions between these two types of privilege, the *Lizotte* case does point out their common characteristics, particularly the fact that they serve a common cause: the secure and effective administration of justice.[6] The Court is then asked to address the issue of whether litigation privilege can be raised against third parties, particularly investigators. According to the Court, it would not be appropriate to exclude third parties from the application of this privilege or to expose this privilege to the uncertainties of disciplinary and legal proceedings which could result in the disclosure of documents that would otherwise be protected, even assuming that there is no risk that a syndic’s inquiry will result in the disclosure of privileged documents. Indeed, the mere possibility of a party’s work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done.[7] As a result, unless a third party can satisfy the conditions of a recognized exception to litigation privilege, such privilege can be raised against him or her.

Finally, it is interesting to note that in the *Blank* case, the Court recognized that while solicitor-client privilege has benefited from a liberal interpretation, commensurate with its importance, the situation has been notably different for litigation privilege, the scope of which had to be adapted to the modern trend in the legislation and case law towards mutual and reciprocal disclosure, the hallmark of the judicial process.[8]

The recognition of a new class privilege

However, this last remark, which could correctly be referred to as an *obiter dictum*, did not prevent the Supreme Court from pushing further the recognized protection of litigation privilege in the *Lizotte* case by elevating it to “class privilege” status, that is, a privilege with a nondisclosure presumption each time its conditions of application are met. This is to be contrasted with a privilege recognized on a case-by-case basis, whose application depends upon a specific analysis based on a four-pronged test, including a balancing of the interests involved. The Court states as follows:

> **“[36] Thus, although litigation privilege differs from solicitor-client privilege in that its purpose is to facilitate a process — the adversary process (*Blank*, at para. 28, quoting**

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Sharpe, at paras. 164-65) — and not to protect a relationship, it is nevertheless a class privilege. It is recognized by the common law courts, and it gives rise to a presumption of inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation (*Blank*, at para. 60).

[37] This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue (*National Post*, at para. 58)."

To grasp the importance of the *Lizotte* case, one must understand that the law has recognized precious few of these so-called "class" privileges. Except for solicitor-client privilege, which is "the most notable example of a class privilege,"[9] the only other class privileges which we have encountered in the case law are police informer privilege,[10] spousal privilege[11] and litigation privilege.[12]

In the case of *R.* v. *National Post*, the Supreme Court even refused to recognize class status for the privilege of journalists' confidential sources, noting that "[i]t is likely that in future such "class" privileges will be created, if at all, only by legislative action."

Exceptions to litigation privilege

As with other class privileges, litigation privilege is subject to clearly defined exceptions, rather than a balancing of interests on a case-by-case basis. The Court has therefore decided that the recognized exceptions to solicitor-client privilege are also applicable to litigation privilege,[13] that is, those exceptions related to public safety, the innocence of an accused, and communications of a criminal nature. There is also the exception to litigation privilege already recognized in the Blank case regarding the disclosure of "evidence of the claimant party's abuse of process or similar blameworthy conduct."

Legislative exceptions to litigation privilege

Although it is undeniable that litigation privilege does not benefit from the same status as solicitor-client privilege — a principle of fundamental justice and a "civil right of supreme importance in the Canadian justice system"[14] — it nonetheless remains the case that it has been referred to as being "fundamental to the proper functioning of our legal system"[15] since it is at the heart of our accusatory and contradictory system and because it promotes the search for truth by allowing the parties to adequately prepare for litigation.

For this reason, the Court reminded us of the requirement whereby the modification or revocation of common law rules, which are of fundamental importance, requires that the legislator use clear and explicit language. As a result, a party cannot be deprived of the right to claim litigation privilege in the absence of a clear and explicit legislative text. In that respect, section 337 of the Act, on which the assistant syndic was relying, was not deemed to be sufficient to set aside the application of that privilege.

Therefore, the Québec legislator, as well as the legislators of the other provinces and the federal legislator, will have to take note of this important decision and will likely be called upon to amend the wording of the general provisions regarding the production of documents where they do not specify

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that they apply to documents in respect of which litigation privilege, or any other privilege of a similar nature, may be relied upon.

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1. [2006] 2 S.C.R. 319 (“*Blank*”).
2. 2016 SCC 52 (“*Lizotte*”).
3. *Blank*, para 27.
4. *Id.*, para 1.
5. *Id.*, para 37.
6. *Lizotte*, para 24.
7. *Id.*, para 52.
8. *Blank*, para 60, 61.
9. *R.* v. *McClure*, [2001] 1 S.C.R. 445, para 28.
10. *R.* v. *Basi*, [2009] 3 S.C.R. 389, para 22.
11. *Canada Evidence Act*, RSC 1985, c C-5, sec. 4(3); *R.* c. *McClure*, cited above, para 28.
12. *Sable Offshore Energy Inc.* v. *Ameron International Corp.*, [2013] 2 S.C.R. 623, para 12.
13. *Smith* v. *Jones*, [1999] 1 S.C.R. 455, para 44.
14. *Canada (Attorney General)* v. *Chambre des notaires du Québec*, 2016 SCC 20, para 5.
15. *Canada (Privacy Commissioner)* v. *Blood Tribe Department of Health*, [2008] 2 S.C.R. 574.

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