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Internal Communications with Law Firm Committees: Privileged?

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In *Lipson v Cassels Brock & Blackwell LLP*, 2019 ONSC 5483, 148 O.R. (3d) 146, a class action by investors against a law firm, Justice Perell revisits the law of privilege, but in the context of the internal workings of a law firm. The issue before him was the following: were the communications arising from a partner seeking the advice of the firm's Ethics and Standards Committee producible?

After reviewing the communications in issue, Justice Perell found that they were irrelevant. Nonetheless, he went on and examined whether or not a claim for privilege could be sustained if he had found otherwise. The basis advanced for the claim of privilege was that the communications satisfied the test for "quality assurance privilege". This privilege appears to be used by the medical profession for hospitals. The issue in *Lipson* was whether lawyers may have a case-by-case privilege based on the circumstances of their examining or inquiring about the quality of their own legal work in order to avoid mistakes in the provision of legal services. As pointed out by Justice Perell, an affirmative answer to this question only means that, on a case-by-case basis, law firms can assert a quality assurance privilege if the firm can satisfy the Wigmore criteria, that is: (1) the communications must originate in a confidence that they will not be disclosed; (2) confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would arise by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.

While his opinion was that a quality assurance privilege may, on a case-by-case basis, be difficult to prove, Justice Perell found that the quality assurance privilege was available to a law firm. He stated that for the quality assurance privilege to be available in the context of legal services, the court must be satisfied from its own review of the documents that the communications were genuinely made as a quality assurance measure with a view to improving the quality of legal services, and to ensure that the firm's clients are safeguarded from mistakes in the firm's provision of legal services.

The critical finding of the motion judge is in paragraph 52.

The attachments to the memorandum and Mr. Saltman's evidence reveals that he was communicating about whether the law firm may have legal and professional obligations in the circumstances where its opinion is being made available as part of the promotional material for a client's investment product. Mr. Saltman's communication was about a matter of the use that could be made of the firm's legal work product. From his perspective, the communication was being made as a quality assurance measure with a view to improving the quality of legal services the firm provided and to ensure that the firm's clients were safeguarded from mistakes, reservations, or qualifications to the firm's provision of legal services.

It is interesting to compare this finding with the work of another law firm committee, such as the Conflicts Committee. Why could not the same privilege be used to shield the communications arising in and from such a committee? In an earlier case of solicitor's negligence dealing with the same law firm and involving a conflict of interest, no similar privilege was claimed with respect to the

discussions of an “ad hoc committee” that discussed conflicts issues.[1] But would that position be the same today, especially in light of Justice Perell’s reasoning?

From a principled approach, why should the work of firm committees be shielded? Would it not be important and in the public interest for all engaged in such committees to know that their communications might well be subjected to scrutiny?

The reasons of Justice Perell on this issue are *obiter*, and given his findings on relevance, it is unlikely that leave to appeal would be granted. However, given his reasons, it is reasonable to expect that this issue will arise again.

[1] *Trillium Motor World Ltd. v General Motors of Canada Limited and Cassels Brock & Blackwell LLP*, 2015 ONSC 3824 at paras. 387-389.

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