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Litigation Privilege, the Adversarial System, and the Search for Truth

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Case Commented On: *Waissmann v Calgary (City)*, [2018 ABQB 131 \(CanLII\)](#)

Waissmann v Calgary (City) is a decision about occurrence reports produced by a Calgary transit bus driver following an accident on July 30, 2007 in which Mr. Waissmann was injured. Mr. Waissmann is suing the city and was seeking to compel the city to produce the occurrence reports. The city asserted litigation privilege over the occurrence reports. Master Robertson agreed with the city and determined the occurrence reports were subject to privilege and need not be produced (at para 44).

Litigation privilege is used to exclude documents that would otherwise be subject to disclosure in the litigation process. Master Robertson found that the test for whether litigation privilege applies “is whether the report was prepared for the ‘dominant purpose’ of litigation” (at para 18). The intent of the author of the document, their superiors, or the corporation is to be considered (at para 23). It does not matter whether litigation has already started or been threatened (at para 27), and the onus of showing the privilege applies is on the party claiming privilege (at para 29). Litigation privilege is distinct from solicitor-client privilege, and because he determined that litigation privilege applied, Master Robertson did not consider whether solicitor client privilege applied (at para 13).

Master Robertson found that although the occurrence reports might have been used for some other purpose, the dominant purpose was to prepare for the chance of litigation (at para 33). Documents produced by a system of internal reporting for occurrences that could bring litigation, like the one at issue in this case, were found to be subject to litigation privilege (at paras 24-26, 42).

Master Robertson noted that the Court of Appeal had “considered the conflict that exists between protecting the litigant’s interest and the general desire to promote disclosure” in *Nova v Guelph Engineering Company*, [1984 ABCA 38 \(CanLII\)](#) at para 20, where Justice Stevenson wrote:

In my opinion the sole viable rationale is to be found in the demands of the adversary system... The only case for exclusion which can be made is for documents which were brought into existence by reason of an intention to provide information to solicitors. That this is an object is insufficient - such a test provides a cloak where other purposes predominate. Such a test would clothe material that probably would otherwise have been prepared, and otherwise not privileged, with a privilege intended to serve a narrow interest. Such a test conflicts with the object of discovery today which is to disclose material provided for other purposes.

The Supreme Court addressed the purpose of litigation privilege in *Lizotte v Aviva Insurance Company of Canada*, [2016 SCC 52 \(CanLII\)](#) (at paras 20-22). The rule was once known as the “lawyer’s brief rule”, with the classic examples of material covered by litigation privilege being “the lawyer’s file and oral or written communications between a lawyer and third parties” (*Lizotte*, at para 19). The purpose of the privilege is to prevent the lawyer’s research, materials, and communication with third parties from being turned against the lawyer’s client, and to ensure the efficacy of the adversarial process.

It seems to me that *Waissman* shows litigation privilege may have been stretched too far. A rule originally meant to protect a lawyer’s work, the lawyer’s communications with third parties, and the protected area of investigation and preparation for trial is transforming into a blanket privilege parties can throw over all documents created after they have contemplated the possibility of litigation. The adversarial process is not an end in itself - the purpose of the adversarial process is to search for the truth. We should be cautious about allowing litigation privilege to prevent so much disclosure that it interferes with the adversarial process’ search for the truth, rather than assisting it.

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