



Defence counsel removed for deliberate use of privileged documents

BY [KENNETH A. DEKKER](#), AFFLECK GREENE ORR LLP.

It has not taken long for Ontario litigants to begin feeling the impact of the recent decision by Canada's Supreme Court that protection of solicitor-client privilege required the removal of plaintiff's counsel in *Celanese Canada Inc. v. Murray Demolition*.¹ If there was any doubt as to the serious consequences that can flow from counsel's receipt and review of an opposing party's privileged documents, that doubt was surely erased for a defendant that was recently deprived of its counsel of choice at the beginning of trial.

In *2000768 Ontario Inc. v. 514052 Ontario Limited* and a related action,² the plaintiffs sought specific performance of two real estate deals with the same defendants, collectively known as Orfus Realty. During discoveries, the solicitors for one of the plaintiffs inadvertently delivered to counsel for Orfus document briefs that contained documents listed in its Affidavit of Documents as solicitor-client privileged. This inadvertent disclosure of privileged materials was only discovered when defendants' counsel, Milton Davis, delivered a Request to Admit based on his review of those documents. Plaintiff's counsel immediately responded by demanding that he return the privileged documents, a request that was refused.

The plaintiff ultimately moved to remove Mr. Davis as solicitor of record for the defendants which, due to scheduling difficulties, ended up being brought before the trial judge at the outset of the trial of the action. The defendants responded by claiming that privilege had been waived during the course of several conversations among counsel for the parties and further said that the prejudice to the defendants that would be caused from the removal of their counsel and a delay in the trial outweighed

any prejudice from their use of the plaintiff's privileged materials.

As prescribed by the Supreme Court in *Celanese*, it is presumed that prejudice has been caused to the disclosing party by production of privileged materials. It is up to the receiving party to rebut that presumption. Van Melle J. found that Mr. Davis' decision to retain materials he knew were privileged and use them to formulate a request to admit and on the examination for discovery of one of the other plaintiffs made it clear that this presumption of prejudice could not be rebutted. As such, Van Melle was compelled to take the "extreme step" of removing Mr. Davis and his firm as solicitors of record for the defendants on the eve of trial.

As anyone who has had to conduct (or pay for) the trial of a complex action will know, the cost of preparing for a trial is significant. Much of that cost is inevitably wasted if the trial does not proceed as scheduled. For the party that has its counsel removed, there is also the expense of retaining new counsel and getting them up to speed on litigation that has proceeded to the point of trial. However, as Van Melle J. observed, this significant expense and hardship could have been avoided had Mr. Davis followed the proper procedures when he received privileged documents. Those procedures require counsel to either return the privileged documents or, if privilege is disputed, seal them pending a judicial determination of whether they are privileged.



For more information contact:

Kenneth Dekker, Affleck Greene Orr LLP

Tel: 416-360-6902

Email: kdekker@agolaw.com

¹Link to our firm's previous article on the Supreme Court of Canada's decision in *Celanese v. Murray Demolition* at: http://www.agolaw.com/reslibrary_article.asp?article=celanese20061101

² Link to the full decision at: <http://www.canlii.org/on/cas/onsc/2006/2006onsc16493.html>