



Supreme Court of Canada confirms litigation privilege of limited duration

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In its first review of the lifespan of litigation privilege, the Supreme Court of Canada has recently ruled that, unlike solicitor-client privilege, it “expires with the litigation of which it was born.”

In *Blank v. Canada (Minister of Justice)*, Sheldon Blank, a director of Gateway Industries Limited, sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers in relation to 13 charges against Blank and the company for regulatory offences under the *Fisheries Act* and the *Pulp and Paper Effluent Regulations*. The charges were laid in 1995 for alleged pollution of the Red River and alleged breaches of reporting requirements. Eight charges were quashed in 1997 and the remaining 5 were quashed in 2001. In 2002, the Crown laid new charges by way of indictment and stayed them prior to trial.

Blank and Gateway then instituted their civil action against the federal government. Blank made repeated attempts to obtain documents from the government in relation to his prosecution and the prosecution of Gateway. His requests for these documents under the *Access to Information Act* were denied on various grounds, including “solicitor-client privilege”. Blank pursued this denial by way of an application for review pursuant to s. 41 of the *Access to Information Act*. The Federal Court initially ruled that documents excluded

from disclosure on the basis of litigation privilege should be released if the litigation to which the record relates has ended. The Federal Court of Appeal upheld the lower court’s decision.

Fish J., writing for the majority, held that the purpose of litigation privilege is to create a “‘zone of privacy’ in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification.” However, where litigants or related parties are involved in related litigation or where related litigation is reasonably apprehended, the litigation cannot be said to have been terminated in any meaningful sense.

This decision will no doubt be helpful to all litigants as the nature, scope and duration of litigation privilege has been clearly opined upon by the high court.



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