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Family Law Newsletters
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— **Franks & Zalev - This Week in Family Law**

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The Next Time a Client Brings You an E-mail that Seems Too Good to Be True . . .

2177546 Ontario Inc. v. 2177545 Ontario Inc., 2023 CarswellOnt 16112 (C.A.) — Thorburn, Harvison Young, and Favreau J.J.A.

Does this sound familiar? Your client seems to "know" information about the other side that they should not know? Or maybe even provides you with emails or other documents between the other side and third parties — possibly even counsel? Big problems. And the excuse usually offered is that "the emails were not password protected" or "s/he knew I knew the password." Does that matter? Read on.

This is not a family law case — but given the propensity of some family law clients to "snoop" family law counsel should take notice and offer appropriate warnings to clients. Curiosity killed the cat; and it might do the same to family law claims. Privilege is no less important in family law cases: *Eizenshtein v. Eizenshtein* (2008), 62 R.F.L. (6th) 182 (Ont. S.C.J.) and the principles at play here apply equally in family law cases. Spouses snooping through the private, confidential — and privileged — records of their separated spouses is common enough in family law cases that counsel must be aware of the possible very serious consequences when advising their clients. So again — read on.

In this case, the Court of Appeal for Ontario upheld an application judge's decision to strike the Respondent/Appellant's (the "Appellant") response to an application, allowing the Applicant/Respondent's (the "Respondent") application to proceed undefended. The application judge struck the Appellant's response because its principal, Mr. Halyk, accessed and reviewed the Respondent's privileged information relevant to litigation between the parties, including discussions between the Respondent's principal, Mr. Labiris, and his counsel regarding settlement offers, litigation strategy, and negotiating strategy.

As the Supreme Court of Canada has noted, a breach of privilege "creates a serious risk to the integrity of the administration of justice" and, to prevent this, the courts must act "swiftly and decisively": *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4623 (S.C.C.) at para 34.

The facts are not complicated.

Mr. Halyk and Mr. Labiris were brothers-in-law and business partners. They worked together on various real property ventures under the name of the "Zitia Group".

In July 2008, their companies acquired, as tenants-in-common, a vacant piece of development land in Simcoe, Ontario. When their relationship broke down in 2021, an application was brought before the Committee of Adjustments to sever the property into two equal 51-acre parcels. Mr. Halyk's and Mr. Labiris' signatures appear on the partition application, and Mr. Labiris and a colleague swore that they witnessed Mr. Halyk sign it.

Mr. Halyk denied that he signed the partition application and claimed that his signature was forged. He insisted he did not want to sever the property because it was more valuable sold as a single parcel, and if it was partitioned, he would receive less developable land.

In April 2021, the Committee approved the partition application and issued a Consent to Sever, which will expire on April 21, 2024 if not fully implemented.

In May 2021, Mr. Halyk appealed the approval of the Consent to Sever to the Ontario Land Tribunal, claiming he did not consent to the partition application. In January 2022, he withdrew his appeal but refused to implement the Consent to Sever by signing documents to convey the property into two parcels. As a result, the Respondent started an application under the *Partition Act* to sever the property.

During the litigation, Mr. Halyk gained unauthorized access to Mr. Labiris' privileged emails, read some, and retained copies that pertained to the litigation. These email included Mr. Labiris' proposed settlement terms and discussions with counsel about negotiating strategy, litigation strategy, settlement proposals, and strategic advice. For example, he reviewed and printed an email thread that included emails between Mr. Labiris and his lawyer about the terms of an offer to settle.

In March 2023, Mr. Labiris suspected that Mr. Halyk might have accessed his confidential information. He contacted Mr. Kopke, a technician who had provided IT services to the Zitia Group. Mr. Kopke advised that he had granted Mr. Halyk full access to Mr. Labiris' email account in April 2021. This was two weeks after a contested shareholders' meeting that led to Mr. Halyk beginning an oppression claim in May 2021.

After discovering that Mr. Halyk had accessed Mr. Labiris' confidential information, the Respondent brought an application to stay the Appellant's proceeding and sought judgment in its favour.

At the hearing, Mr. Halyk did not deny that he had gained access to Mr. Labiris' email account. Instead, he argued that the email account was a general email account for the Zitia Group, that he did not review anything that impacted the Respondent's litigation strategy, and that it was doubtful that the materials were privileged.

The application judge disagreed and found that Mr. Halyk had deliberately accessed Mr. Labiris' privileged emails. However, the Court below was not prepared to grant judgment in the Respondent's favour without the benefit of a full record. Instead, His Honour struck the Appellant's response to the application, barred it from filing any evidence and ordered that the Respondent's application proceed before a judge at an undefended hearing, subject to leave being granted by the judge hearing the matter.

The Appellant — as appellants do — appealed, arguing that the application judge erred by:

- (1) imposing a remedy that was neither pleaded nor proven by the Respondent; and
- (2) failing to consider that lesser remedies such as appointing another director or officer of the Appellant to instruct counsel, or appointing a litigation trustee to act on behalf of the Appellant, could cure any prejudice.

Of note, the Appellant *did not* appeal the finding that he accessed privileged information relevant to the litigation, although he disputed that any such access was deliberate on his part.

Before analysing the application judge's decision, the Court of Appeal reiterated the three-part test to resolve the issue of unauthorized access to privileged documents, which test was set out in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4623 (S.C.C.) and *Continental Bank of Canada v. Continental Currency Exchange Canada Inc.*, 2022 CarswellOnt 1053 (S.C.J.), aff'd 2023 CarswellOnt 873 (C.A.):

[12] At the first stage, the moving party (in this case, the respondent) must establish that the opposing party (in this case, the appellant) obtained access to relevant privileged material.

[13] At the second stage, **the risk of significant prejudice is presumed** and the respondent does not have the onus of proving "the nature of the confidential information" disclosed: *Celanese*, at paras. 42 and 48. Rather, the appellant has the onus to rebut the presumed prejudice flowing from receipt of privileged information: *Celanese*, at para. 48.

[14] The presumption of prejudice can be rebutted by identifying "with some precision" that: (i) the appellant did not review *any* of the privileged documents in their possession; (ii) the appellant reviewed *some* documents, but they were not privileged; or (iii) the privileged documents reviewed were nevertheless "not likely [to] be capable of creating prejudice": *Celanese*, at para. 53. The evidence must be "clear and convincing" such that "[a] reasonably informed person would be satisfied that no use of confidential information would occur": *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1260-63; see also, *Celanese*, at para. 42. "*A fortiori* undertakings and conclusory statements in affidavits without more" do not suffice: *MacDonald Estate*, at p. 1263.

[15] Where the precise extent of privileged information is unknown and possibly unknowable, "the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant": *McDonald Estate*, at p. 1290. . . .

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[16] The third stage of the analysis is to fashion an appropriate remedy.

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[18] A number of non-exhaustive factors should be considered in determining the appropriate remedy including:

- i. How the documents came into the possession of the appellants or their counsel;
- ii. What the appellants and their counsel did upon recognition that the documents were potentially subject to solicitor-client privilege;
- iii. The extent of review of the privileged material;
- iv. Contents of the solicitor-client communications and the degree to which they are prejudicial;
- v. The stage of the litigation; and
- vi. The potential effectiveness of a firewall or other precautionary steps to avoid mischief: *Celanese*, at para. 59.

The Court of Appeal then explains the reasoning behind the presumption of prejudice and why the onus is actually on the responding party to *prove there was no prejudice* in accessing privileged information:

[15] . . . As summarized in *Celanese*, at paras. 49-51, there are compelling reasons for the presumption of prejudice and the reverse onus on the appellants in receipt of privileged information including:

- i. Requiring the respondent whose privileged information has been disclosed or accessed to prove actual prejudice would require them to disclose further confidential or privileged materials;
- ii. Placing the burden on the appellant who has access to the privileged information is consonant with the usual practice that "the party best equipped to discharge a burden is generally required to do so"; and
- iii. The respondent does not have to bear "the onus of clearing up the problem created by the [appellants'] carelessness".

In terms of a remedy, because a stay has significant consequences, a party seeking a stay must show "special circumstances." A stay is **only** granted where "there is prejudice to the right to a fair trial or the integrity of the justice system and there is no alternative remedy to cure the prejudice: *Etco Financial Corp. v. Royal Bank*, 1999 CarswellOnt 3071 (S.C.J.) at para. 3; *R. v. Babos*, 2014 CarswellQue 575 (S.C.C.) at para. 32."

The Court of Appeal concluded that the application judge made no error in applying the three-part test in *Celanese* and in crafting the appropriate remedy.

For the first part of the test, there was no dispute that Mr. Halyk had accessed Mr. Labiris' confidential and privileged information relevant to the litigation and that he had not disclosed it. The application judge found that the conduct was intentional:

[77] . . . Halyk made the decision to go into the *zitia@zitiagroup.com* e-mail account. When he saw documents what [*sic*] were privileged and confidential, such as communications between Labiris and/or Ms. Cooper and their lawyers, he chose to read the documents. In the case of the January 30, 2023 e-mail thread between Ms. Cooper and Mr. Rosenbluth about the proposed offer to settle, Halyk chose to print and retain a copy. He appears to have attempted to provide at least some of the e-mails to his lawyer. **Although Halyk may not have stolen a password or hacked into a computer, his conduct was intentional.** [emphasis added]

So much for the "it was on the family computer" or "s/he knew I knew his/her password" excuse.

The Court of Appeal upheld the application judge's finding that Mr. Halyk's decision to read, download and print the privileged documents was deliberate, as he "could not have genuinely believed he had licence to read Mr. Labiris' privileged emails after the parties were engaged in litigation."

As for the second part of the test, the application judge concluded, and the Court of Appeal agreed, that the Appellant had not rebutted the presumption of prejudice. Apart from producing hard copies of four email threads he downloaded, Mr. Halyk did not provide any evidence that these were the only emails he reviewed. He did not explain what he did with the documents he printed. He was not cooperative in handing over his devices and allowing a forensic expert to review them (which would have shed light on what other emails and documents he may have reviewed). These were hardly the actions of someone with nothing further to hide.

In determining the appropriate remedy, the application judge was clearly driven by the very sensitive nature of the emails accessed by Mr. Halyk:

[44] He [the application judge] noted however, that it would be inappropriate to order a remedy that would allow Mr. Halyk to "use to his benefit any confidential and prejudicial information he may have accessed." To do so would give the appellant an advantage in the litigation and reward him for accessing and reading e-mails that he would have known were privileged communications not intended for him.

[45] The application judge noted that access to privileged information such as legal advice risks serious prejudice and that **since the appellant did not discharge its onus to rebut the presumption of prejudice, the court could draw an adverse inference and presume that the respondent suffered and would continue to suffer significant ongoing prejudice.** [emphasis added]

The Court of Appeal disagreed with the Appellant that the application judge reversed the onus at this stage of the test by relying on the Appellant's failure to rebut the presumption of prejudice in crafting a remedy. The Appellant argued that it was for the Respondent "to establish with some certainty the documents the appellant may have seen, in order to show that the prejudice suffered by the respondent justified the extraordinary remedy sought". But the Court of Appeal was in complete agreement with the application judge — requiring the Respondent to do so would mean disclosing further privileged information. There was, in fact, a reverse onus; and it was by design, not by accident.

Moreover, the Court of Appeal found that it was also completely proper for the application judge to rely on the Appellant's failure to rebut the presumption of prejudice in ordering that its response be struck. As a result of Mr. Halyk's lack of cooperation and failure to specify what information he accessed, and given what the application judge knew of the information he *did* access — including the Respondent's litigation strategy, his instructions to his expert witnesses, and his negotiation positions — there really was no other option than to strike the Appellant's response.

The Court of Appeal did not agree with the Appellant that there were lesser remedies available to the application judge. Mr. Halyk was not forthcoming with the Court about the information he accessed so as to allow the Court to assess the potential harm and perhaps tailor another appropriate remedy. Essentially, the Court of Appeal drew an adverse inference against Mr. Halyk:

[52] As this court in *Bruce Power* observed in upholding a stay of proceedings, the court may presume that "if the [party in receipt of privileged material] had been able to lead evidence to rebut the presumption of prejudice, it would have done so": *R. v. Bruce Power Inc.*, 2009 ONCA 573, 90 O.R. (3d) 272, at para. 63. In the absence of such evidence, the appellant must "shoulder the consequences" at the remedy stage: *Celanese*, at paras. 62-63.

And none of the "lesser remedies" proposed by the Appellant, for example, appointing a litigation trustee, were appropriate in this case based on what was known of the privileged information Mr. Halyk did access. Not only was the information known to Mr. Halyk, but it was also now part of his court materials which could be reviewed by a litigation trustee. As colourfully noted by the English Court of Appeal: "the cat so generally out in the open cannot be rebagged": *G.C. v. J.C.*, [2001] EWCA Civ 469. There was no way to undo what had been done, except to strike the Appellant's response given the significant prejudice, not only to the Respondent, but to the administration of justice in allowing a party to continue participating in a proceeding and benefit from their bad behavior.

It is apparent in the Court of Appeal's decision that they were "unhappy" with Mr. Halyk. The Court and the Supreme Court of Canada have repeatedly stated that solicitor-client privilege is no longer just an evidentiary rule, but a general principle of substantive law. It is sacrosanct, and an "important civil and legal right and principle of fundamental justice in Canadian law." [*Maranda c. Québec (Juge de la Cour du Québec)*, 2003 CarswellQue 2477 (S.C.C.); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 CarswellAlta 2248 (S.C.C.) at para. 31; *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 CarswellNat 2244 (S.C.C.) at para. 9; and *Ontario (Auditor General) v. Laurentian University*, 2023 CarswellOnt 6202 (C.A.) at para. 24.] Mr. Halyk went out of his way to access, review and download solicitor-client privileged communications undoubtedly to gain an advantage in his dispute with Mr. Labiris. By upholding the application judge's decision, the Court of Appeal is sending a clear message to parties that there are serious consequences for such conduct.

It is important for family lawyers to be aware of the potential consequences should a client access the privileged information of an opposite party. Often spouses gain access to their spouse's phone (which is made easier with fingerprint and face ID to unlock cell phones), hack into their emails, or set up recording devices in their home. Many parties have solicitor-client information on their phones and in their emails, since most people have email on their phone and most people communicate with their lawyers by email. If a spouse accesses their spouse's cell phone or email that includes correspondence with counsel, they may have just "obtained access to relevant privileged material," and would then have to rebut the *presumption* of prejudice by explaining what they accessed, what they reviewed, and what they did with any information reviewed. And not only that, but any information they do obtain, even if not covered by solicitor-client privilege, might be inadmissible as evidence, as Courts do not want to encourage such "odious" behaviour: *D(SJ) v. P(RD)* (2023), 87 R.F.L. (8th) 210 (Alta. K.B.); and *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.).

And should counsel accidentally — even if innocently — review any such materials from their client, disqualification and removal as counsel is one of the possible "lesser steps" if it cannot be shown that there is no real risk of that confidential information being used: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4623 (S.C.C.); *Autosurvey Inc. v. Prevost*, 2005 CarswellOnt 5000 (S.C.J.). For this reason, clients should be warned about the consequences of breaching privilege at the very start of the retainer, and it should be made clear to them the consequences that might befall them — and you — if they do not follow your advice.

So let's all be careful out there.

Some Comments Worth Thinking About

Ilaslan v. Poirier, 2024 CarswellOnt 699 (S.C.J.) — Audet J.

While we wouldn't normally limit a Newsletter comment to a single quote, we could not have said it any better than Justice Audet in *Ilaslan*, in which she comments on the sad state of our adversarial system:

PRELIMINARY COMMENTS — TRIAL WITH SELF-REPRESENTED LITIGANTS

[3] The claims made by the Applicant in this matter raise complex legal principles. It would have been trying, even for an experienced counsel, to cogently and convincingly present all the relevant evidence necessary to support these claims. For a self-represented party, this was simply an impossible task, no matter how knowledgeable or skilled that self-represented individual might be. The Applicant in this case had very little understanding — if any — of the legal principles applicable to his claims, or of the evidence he needed to adduce to prove them. His understanding of the trial process, including what was relevant evidence and how to present it, was extremely limited.

[4] The Applicant was self-represented for most of this proceeding. His pleadings were fraught with problems and the legal issues he raised several years after the parties' separation, which were tried more than ten years later, necessitated a massive amount of disclosure which became a whole separate litigation in and of itself, taking up an enormous amount of judicial resources over the course of almost five years.

[5] To add to these significant challenges, this trial proceeded with two self-represented litigants who, with no legal training, struggled to focus on what was relevant to the legal issues before the Court, as opposed to what appeared relevant to them on a personal basis. In that context, cross-examination became an opportunity for them to prolong their decades-long spousal conflict, re-victimize each other, and vent once more all the wrongs they felt they had suffered at the hands of each other (relevant or not) in a different forum.

[6] There is something very wrong about our adversarial system when it becomes the only option available to self-represented litigants to resolve their family disputes.

[7] In many ways, this proceeding was an unfortunate waste of important and scarce judicial resources over the course of five years. Despite countless court appearances, including many conferences in which dedicated and experienced family judges tried to make the parties understand the process, the evidentiary burdens, the legal issues and the complexity of a trial, by the end of day four of this trial, the Applicant was still unable to articulate with any specificity the relief he was seeking from the Court. "I want my rightful share of the home" and "I am entitled to spousal support" were his ultimate requests, which he was still unable to quantify with any degree of specificity (the home was never professionally appraised on the different dates he claimed a share in it, and "whatever you feel is appropriate" was how he quantified his spousal support claim). I was bombarded with thousands of pages of documentary evidence (some relevant, some not) going back more than fifteen years, and I was left as the trial judge with the Herculean responsibility of formulating the Applicant's claims, quantifying them and generally sorting all this out for these parties.

[8] I am not making these preliminary comments to shame the parties. They did the best they could with the knowledge they were able to gain from all the resources they were directed to over the years by various people. The Respondent, in particular, had been able to retain counsel to guide her through this process and she was somewhat organized, although she had difficulty focusing on (only) what was relevant.

[9] I am making these preliminary comments to reiterate what has been stated over and over again by countless legal professionals, scholars, and judges from all levels of court over the course of too many years. **Our adversarial system, no matter how much effort we devote to making it user-friendly, is not suited for self-represented litigants. The resources available within our judicial system, including judicial resources, are stretched way too thin to leave it to**

the Court to sort out extremely important family issues with self-represented litigants who have no legal training, and most of whom are unable to present their case in any meaningful way in the context of what is a very complex and rule-driven adversarial process. [emphasis added]

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