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Family Law Newsletters

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— Franks & Zalev - This Week in Family Law

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***One York Street Inc. v. 2360083 Ontario Limited*, 2026 CarswellOnt 3448 (C.A.) — Huscroft, Copeland and Rahman JJ.A.**

When we speak to students and judicial law clerks about why family law is so interesting, we often note that family lawyers have to have working knowledge of many different areas of law: employment, tax, real estate, intellectual property, evidence . . . and the list goes on. Historically, we usually joke that the only areas of law with which family lawyers need *not* be familiar is the law of shopping centre leases. Well, maybe we can't make that joke anymore.

While *One York Street* is a commercial lease case, it is, at its core, a lesson in how — and when — a party's litigation position can inadvertently waive solicitor-client privilege.

We are all familiar with the idea that privilege can be explicitly waived. And we are all familiar with the idea that privilege can be implicitly waived by making the presence or absence of legal advice relevant to one's state of mind: *Guelph (City) v. Super Blue Box Recycling Corp.*, 2005 CarswellOnt 4379 (S.C.J.); *Laliberté v. Monteith*, 2021 CarswellOnt 19 (S.C.J.), aff'd (2021), 57 R.F.L. (8th) 323 (Ont. Div. Ct.). But in *One York Street*, the Ontario Court of Appeal makes it clear that a client just referring to their *understanding of their legal position* can result in a waiver of privilege. D'oh!

For family lawyers, the implications are immediate. Attacks on domestic contracts, disputes over settlements reached at mediation, a request to withdraw an admission can all put a client's understanding of their legal position in issue. And once that happens, the lawyer's file may quickly follow.

The decision confirms a dangerously simple proposition: you do not need to say you relied on legal advice, or that you lacked it, to waive privilege. If your claim or defence depends on your understanding of your legal position, and you had legal advice on that issue, privilege may be gone — not because of what you said — but because of what the case depends on.

In *One York Street*, the landlord sued for unpaid rent. The tenant counterclaimed, alleging it had been induced to enter into a long-term lease and extension based on misrepresentations about the volume of foot traffic.

The tenant's original pleading went further. It said it did not understand the ramifications of the lease extension and signed it without legal advice. That turned out to be wrong, because the tenant had counsel throughout.

In an attempt to rectify that particular problem, the tenant amended its pleading — and the "no legal advice" language disappeared.

But the damage was done. The landlord still sought production of the tenants' lawyer's file. The motion judge found deemed waiver. The Divisional Court reversed, holding that once the explicit reference to legal advice was removed, the basis for waiver fell away.

The landlord appealed the Divisional Court's decision to the Court of Appeal for Ontario. And the Court of Appeal did not agree with the Divisional Court.

The Court of Appeal allowed the appeal and restored the motion judge's production order. Justice Copeland, writing for a unanimous Court, held that the Divisional Court had made three errors. The **first** was procedural — applying the wrong standard of review. The **second** and **third** are the ones that matter here: the Divisional Court misread the motion judge's reasons as relying on the original rather than the amended pleading; and it wrongly concluded that once the explicit references to legal advice were removed, the basis for waiver disappeared.

The Court of Appeal began its analysis by setting out a concise and helpful summary of the governing principles relating to waiver of solicitor-client privilege (with references to the supporting jurisprudence throughout the reasons, which we have omitted for readability but which can be found at paragraphs 32 to 49 of the court's reasons):

1. **Deemed waiver is grounded in fairness and consistency:** A party cannot advance a position that is inconsistent with maintaining privilege.
2. **Intention is irrelevant:** The question is not whether the party meant to waive privilege, but whether it would be unfair to allow them to maintain it.
3. **The governing test has two elements:** (a) the presence or absence of legal advice must be relevant to a claim or defence; and (b) the party must make the advice — or their understanding of the legal effect of their position — an issue in the litigation.
4. **The second element does the real work:** Waiver does not arise simply because legal advice is relevant. Privilege protects otherwise relevant information — if relevance were enough, the privilege would have no substance. What triggers waiver is reliance: the party must rely on the advice, or on their legal understanding, as part of their case.
5. **The analysis is case-specific:** Courts must assess the pleadings, the theory of the case, and the overall conduct of the litigation to determine whether maintaining privilege would be unfair.

The Court of Appeal rejected any requirement that a party must explicitly refer to legal advice (or the absence of it) to trigger deemed waiver. Justice Copeland addressed this directly at paragraph 62:

[62] Some passages of the Divisional Court reasons could be read as suggesting that for a party to put in issue its state of mind in relation to its legal position such that it can give rise to a deemed waiver of privilege, the party must do so explicitly. . . . In any event, for the reasons explained above, **it is not a necessary requirement for deemed waiver of privilege that the party alleged to have waived privilege explicitly refer to legal advice or the lack of legal advice in a pleading or other step in litigation. What is required is that the party rely on their understanding of their legal position as an element of their claim or defence.** [emphasis added]

This is the critical clarification. The Divisional Court had reversed the motion judge on the basis that the amended pleading removed the explicit "no legal advice" language. The Court of Appeal held that this was an error. What matters is not whether the pleading uses magic words like, "I did not have legal advice," or "I relied on my lawyer." What matters is whether the position advanced in the pleading necessarily engages the party's *understanding* of their legal rights.

The pleading did not have to say anything about lawyers. The theory of the case said it loud and clear. The question is not what the pleading says — it is what the case depends on.

Therefore, where a party advances a position that depends on their understanding of their legal position — their rights or obligations — and they had legal advice on that issue, privilege is at risk.

How does this impact family lawyers?

These principles are not abstract. They commonly arise in attacks on domestic contracts, but also in settlement disputes and motions to withdraw admissions.

However, before considering those scenarios, one distinction is worth flagging: not every claim that puts a party's "state of mind" in issue will amount to an implied waiver of privilege. The Court of Appeal in *One York Street* was careful to distinguish between state of mind in a general sense — such as whether a party relied on a factual representation — and state of mind about one's *legal position*. A claim of factual misrepresentation, without more, will not waive privilege. But a claim that engages the party's understanding of their *legal rights* — what the contract meant, what they were entitled to, what they were giving up — crosses the line into implied waiver. That distinction now carries real weight.

(a) Attacks on Contracts

The most fertile ground for privilege disputes is an attack on a contract. In family law, that usually means a domestic contract — a marriage contract, cohabitation agreement, or separation agreement — but the same principles apply wherever a party seeks to avoid an agreement.

Non-disclosure claims can quickly raise issues of privilege.

A party alleging non-disclosure may themselves put their state of mind in issue, particularly where they had legal advice at the time. The responding party will argue that they knew enough, chose not to inquire further, or accepted the risk. As Justice Brown, as he then was, explained in *Quinn v. Epstein Cole LLP* (2007), 44 R.F.L. (6th) 337 (Ont. S.C.J.), aff'd (2008), 55 R.F.L. (6th) 241 (Ont. C.A.), parties are expected to use due diligence in ascertaining the facts underlying their agreements; a party cannot fail to ask questions and then rely on a lack of disclosure.

Once the case turns on what the attacking party understood about disclosure obligations, their legal understanding is in play. If they had legal advice, that advice may become relevant and privilege may be waived.

That is one side of the problem.

The other side is illustrated by *Laliberté v. Monteith* (2021), 57 R.F.L. (8th) 323 (Ont. Div. Ct.), which we discussed in the April 25, 2022 (2022-15) edition of *TWFL*.

There, the husband denied that he had knowingly or deliberately misled his spouse about a significant business transaction. That denial put his state of mind squarely in issue. The problem was not just the pleading — it was what followed. At discovery, the husband admitted that he relied on his lawyer's advice at all material times. That single admission allowed the court to connect the legal advice to the non-disclosure and find implied waiver. His lawyer's file was ordered produced.

We were critical of that result. The husband had already admitted the non-disclosure, and the agreement was unlikely to survive in any event. It was not obvious why piercing privilege was necessary to achieve a fair result in that case.

But whether or not that criticism is right, *One York Street* now makes the underlying logic harder to resist. Once a party's position depends on their understanding of their legal obligations, and legal advice was in the mix, the fairness rationale for waiver becomes difficult to avoid.

The lesson cuts both ways: whether you are attacking or defending a contract, once your case depends on your legal understanding, and legal advice was involved, privilege may be in play.

Claims that a party did not understand the nature or consequences of a contract go even further. Those claims directly put a party's understanding of the legal effect of the agreement in issue. If the party had legal advice at the time, the question is unavoidable: what did the lawyer tell you?

If the lawyer explained the legal effect of the agreement, the claim is undermined. If the lawyer failed to explain it, the claim may be strengthened — but either way, the advice bears directly on the issue the court must decide.

That does not mean privilege is automatically lost. The analysis remains grounded in fairness and is case-specific. But where the claim depends on an asserted lack of understanding of the agreement's legal effect, and legal advice was received on that issue, it may be inconsistent to maintain privilege over that advice.

The same logic applies to claims of duress, undue influence, and unconscionability. Each turns, in part, on the party's ability to understand and protect their legal interests at the time of execution. Were they able to exercise independent judgment? Were they in a position to protect themselves? Where a party advances such claims, and had legal advice at the time, the content of that advice may be directly relevant.

Before leaving the subject of domestic contracts, one additional ground of alleged waiver deserves mention. In *Balsmeier v. Balsmeier* (2014), 50 R.F.L. (7th) 390 (Ont. S.C.J.), which was discussed in the April 25, 2022 (2022-15) edition of *TWFL*, the court held that a solicitor's Certificate and Affidavit of Independent Legal Advice resulted in waiver of privilege as to the matters referenced therein.

We have previously expressed doubt about the breadth of this proposition. A certificate designed to prove voluntariness should not become a gateway to waive privilege over all advice received. But where the claim to set aside the agreement is anchored in alleged failure to understand it, or duress, or undue influence — the very matters the certificate addresses — the waiver argument has force. The Certificate provides *prima facie* evidence that the party understood the nature and consequences of the agreement, was satisfied with the disclosure provided, and signed voluntarily. When a party later claims the opposite, that they did not understand, that disclosure was inadequate, or that they signed under duress, the certificate directly contradicts that claim — and "hello waiver."

(b) Settlement Disputes

Settlement disputes raise the same issues. These disputes are common in family law, particularly in the context of mediation and judicial dispute resolution processes.

Settlement privilege is distinct from solicitor-client privilege. It protects from disclosure all communications made in furtherance of settlement or compromise: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 CarswellNS 429 (S.C.C.). It is jointly held and cannot be waived unilaterally: *Leonardis v. Leonardis* (2003), 43 R.F.L. (5th) 144 (Alta. Q.B.); *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 CarswellAlta 76 (C.A.). (This is a common misconception; many believe that a party can unilaterally waive its own settlement privilege. Nope. The underlying theory is that were I to reveal my offer to settle, you then feel that you have to disclose your offer to settle.)

But there is a critical exception to settlement privilege. Settlement privilege does not prevent disclosure of communications to prove that a settlement was reached or to determine its terms. This was confirmed by the Supreme Court of Canada in *Association de médiation familiale du Québec v. Bouvier* (2021), 64 R.F.L. (8th) 1 (S.C.C.), a case we discussed in the January 17, 2022 (2022-02) edition of *TWFL*.

The *Bouvier* exception makes sense. If there was a deal, the court must be able to see it. You can use the deal to prove the deal.

But that only answers the settlement privilege question. What about solicitor-client privilege?

If a party resists enforcement of an alleged settlement on the basis that they did not understand the terms or did not intend to be bound, their understanding of the legal effect of the agreement is squarely in issue. Where the resisting party had legal advice at the time, it may be inconsistent to maintain privilege over that advice. The logic of *One York Street* applies.

Widdifield v. Hunter (2023), 97 R.F.L. (8th) 194 (Ont. S.C.J.), which we discussed in the May 20, 2024 (2024-19) edition of *TWFL*, is illustrative. There, the husband tried to resile from a settlement reached at mediation, claiming he did not understand that the parties had reached a binding agreement. That position put his understanding of his legal position squarely in issue. He had legal advice at the time. The court found deemed waiver and ordered production of his lawyer's file. The logic of *One York Street* would now clearly demand that result.

The practical implication is straightforward. If you are resisting enforcement of an alleged settlement on the basis that you did not understand or intend the deal, be prepared for scrutiny of the legal advice you received at the time. Once your understanding of the settlement becomes the issue, the advice that informed that understanding may not remain privileged.

(c) Motions to Withdraw Admissions

Motions to withdraw admissions are another flashpoint.

This can arise in two ways: through express waiver, where privileged communications are disclosed, and through implied waiver, where the explanation for the admission puts the party's legal understanding in issue.

Consider a motion to withdraw an admission about the date of separation. The moving party must explain why the admission was made and why it should now be withdrawn. If that explanation turns on their understanding of the legal significance of the date, or the legal definition of "the date of separation", their understanding of their legal position is in issue.

That is what happened in *F.C.A.S. v. C.E.S.* (2023), 89 R.F.L. (8th) 338 (B.C. S.C.), which we discussed in the September 4, 2023 (2023-34) edition of *TWFL*. The wife's explanation — that her admissions about the date of separation and the children's parentage resulted from inadvertent errors on the part of herself and her counsel — put her understanding of her legal position squarely in play. Note that this case involved more than just a claim of misunderstanding; by attributing the error to counsel, the wife also effectively put the content of her legal advice directly in issue. That is a well-recognized waiver trigger in its own right. The communications with her lawyers became directly relevant.

This is consistent with *One York Street*. If your motion to withdraw an admission depends on your understanding (or misunderstanding) of your legal position at the time it was made, and you had legal advice on that issue, it may be inconsistent to maintain privilege over that advice.

What should family lawyers take from *One York Street*?

- 1. Be careful and surgical with pleadings:** If you are attacking a contract, frame the claim as narrowly as possible. Do not plead that your client "did not understand" the agreement unless you are prepared to produce everything that bears on that understanding, including their lawyer's file. Plead the *facts* — what was not disclosed and/or what was misrepresented — without characterizing your client's understanding of their legal rights. "He did not tell her about the imminent sale" is a fact. "She did not understand her rights with respect to the business" is a legal state of mind. The first is safe. The second is not.
- 2. Look before you leap:** Before taking a position that could put your client's understanding of their legal position in issue, review the lawyer's file. You need to know what advice was given before deciding whether you are prepared to waive privilege over it.
- 3. Be careful about how you characterize things:** Legal labels — pleading that a contract was "unconscionable" rather than simply unfair, or that a party "did not understand" rather than was not told — can transform a factual case into a legal one and trigger waiver.

4. **Be extremely careful at discovery:** Do not connect your client's conduct to legal advice.

5. **Frame production arguments properly:** Relevance alone is not enough. The issue is whether the party has put their legal understanding in issue.

6. **Distinguish general state of mind from legal understanding:** Not every state-of-mind issue triggers waiver. A party who claims they relied on a factual misrepresentation (e.g., "he told me the business was worth \$2 million") has put their state of mind, but not their *legal understanding*, in issue. A party who claims they did not understand that by signing an agreement with full releases they were giving up rights, crosses into legal territory. There is a difference between factual reliance and legal understanding.

7. **Do not rely on amendment as a cure:** It remains unclear whether waiver, once triggered, can be undone. In *One York Street*, the Court of Appeal expressly declined to decide whether waiver, once triggered, can ever be "unwaived" by amendment. But unless and until an appellate court decides otherwise, the safest assumption is that waiver of privilege is a bell that, once rung, may not be unrung. A cat so generally out in the open cannot be rebagged: *G.C. v. J.C.*, [2001] EWCA Civ 469.

One York Street does not reinvent the law. But it sure does make it clear.

Privilege may be lost not because of what you say — but it can be lost because of how it is said or because of what the case depends on.

Once your client's understanding of their legal position becomes relevant, the advice that informed that understanding may no longer stay in Vegas.

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