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James Goudkamp
University of Wollongong, jamesg@uow.edu.au

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Abstract

Litigation privilege has become unfashionable. It is under attack on multiple fronts throughout the common law world! In the United Kingdom, perhaps the most notable inroad on the privilege is that made by the House of Lords in *Re L (A Minor) (Police Investigation: Privilege)*.² In that case it was held that the privilege is an incident of adversarial proceedings and that, consequently, it did not obtain in respect of material generated for the purposes of proceedings that were not predominantly adversarial in nature. There are signs that more radical restrictions are to come. In *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* Lord Scott of Foscote foreshadowed that a fundamental reconsideration of litigation privilege may be necessary?

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Litigation privilege: transient or timeless? *Blank v Canada (Minister of Justice)*

By James Goudkamp*

Visiting Fellow, Faculty of Law, University of Wollongong

Litigation privilege has become unfashionable. It is under attack on multiple fronts throughout the common law world.¹ In the United Kingdom, perhaps the most notable inroad on the privilege is that made by the House of Lords in *Re L (A Minor) (Police Investigation: Privilege)*.² In that case it was held that the privilege is an incident of adversarial proceedings and that, consequently, it did not obtain in respect of material generated for the purposes of proceedings that were not predominantly adversarial in nature. There are signs that more radical restrictions are to come. In *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* Lord Scott of Foscote foreshadowed that a fundamental reconsideration of litigation privilege may be necessary.³

In Australia, the Federal Court in *AWB Ltd v Cole* followed the decision of the House of Lords in *Re L* and held that documents brought into existence for the purposes of proceedings before a Royal Commission do not attract the privilege as such proceedings lack some of the central features of adversarial litigation.⁴ Another notable development is the lifting of the privilege from experts' reports in Queensland⁵ and South Australia.⁶ It seems that further incursions into litigation

* Email: james.goudkamp@magd.ox.ac.uk. The author is grateful to Professor Adrian Zuckerman and Roderick Bagshaw for their helpful comments on a draft of this case note.

1 See Richard Mahoney, 'Reforming Litigation Privilege' (2001) 30 *Common Law World Review* 66 at 69–76.

2 [1997] AC 16.

3 [2005] 1 AC 610 at [29]; cf. at [53], *per* Lord Rodger of Earlsferry.

4 (2006) 152 FCR 382 at [158]–[164].

5 Uniform Civil Procedure Rules 1999 (Qld), r. 212(2) (see *Parr v Bavarian Steak House Pty Ltd* [2001] 2 Qd R 196; *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373).

6 Supreme Court Rules 2006 (SA), r. 160(1). In the United Kingdom, Lord Woolf, in his Interim Report on Access to Justice, recommended removing litigation privilege from communications with experts (*Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, Recommendation 108* (HMSO: 1995)). This recommendation received a predictably hostile response from the profession and was dropped (see *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, [13.31]–[13.32] (HMSO: 1996)). However, a small dent in

privilege are likely. The Federal Government, concerned that legal professional privilege is unduly hampering investigative and regulatory bodies, has recently requested the Australian Law Reform Commission to advise as to the desirability of augmenting existing statutory exceptions to the privilege.¹⁴

In Canada, litigation privilege has come under heavy fire. Contrary to the position adopted by the House of Lords and the High Court of Australia, the Supreme Court has held that neither litigation privilege nor legal advice privilege is absolute and that both will be subordinated to the interest of permitting an accused to make a full answer and defence.⁸ Similarly, the Supreme Court, in its important decision in *Blank v Canada (Minister of Justice)*,⁹ held that litigation privilege does not persist indefinitely but withers when the proceedings that gave rise to it and any related proceedings are complete.¹⁰

The decision in *Blank* has been the subject of a previous note in this journal.¹¹ The authors of that note remarked that the decision was relatively uncontroversial. Indeed it was. In Canada, the weight of authority supported that holding.¹² However, a decision to the same effect in many other jurisdictions would be regarded as a landmark in the law of evidence. In the United Kingdom and Australia, for instance, once a document or communication attracts litigation privilege, it is privileged in perpetuity, subject to the possibility of waiver. As Lord Lindley MR famously remarked in *Calcraft v Guest*, the general rule is ‘once privileged always privileged’.¹³ It is irrelevant that the action in respect of which the privilege arose has been completed: the ‘privilege attaches for all time’.¹⁴ It is also immaterial that the privileged material was prepared in anticipation of litigation

the privilege was made in CPR r. 35.10(3). This provision states that experts must set out their instructions in their reports. CPR r. 35.10(4) provides that if reasonable grounds exist for believing that an expert has failed to comply with this duty the expert may be cross-examined as to his or her instructions.

7 See ALRC, *Client Legal Privilege and Federal Investigatory Bodies*, IP No. 33 (2007).

8 *R v McClure* [2001] 1 SCR 445. Contra *R v Derby Magistrates' Court, ex p. B* [1996] AC 487 and *Carter v Managing Partner of Northmore Hale Davy & Leake* (1995) 183 CLR 121. Although see Evidence Act 1995 (Cth, NSW and Tas), s. 123.

9 [2006] 2 SCR 319.

10 It is arguable that the same position prevails in New Zealand: *R v Craig* [1975] 1 NZLR 597 at 599; Evidence Act 2006 (NZ), s. 56.

11 Dale Ives and Stephen Pitel, ‘Filling in the Blanks for Litigation Privilege: *Blank v Canada (Minister of Justice)*’ (2007) 11 E & P 49.

12 See the authorities referred to in *Blank* [2006] 2 SCR 319 at [36].

13 [1898] 1 QB 759 at 761. See also *Bullock v Corry* (1878) 3 QBD 356 at 358–9.

14 *Hobbs v Hobbs and Cousens* [1960] P 112 at 116.

that never took place.¹⁵ Nor does it matter that the client has died.¹⁶ The privilege will continue for the benefit of the client's successors in title.

Considering the current hostile attitude towards litigation privilege, it seems likely that English courts will be called upon to reconsider the duration of litigation privilege in the near future. Accordingly, it is worth grappling with the arguments for and against abrogating the 'once privileged always privileged' rule. It will be argued that the modification of this rule wrought by the Supreme Court of Canada in *Blank* is a positive development. However, it should be observed that if such an adjustment were made in England, it would be insufficient to remove concerns¹⁷ as to the compatibility of litigation privilege with Article 6 of the European Convention on Human Rights. An attempt will be made to explain why this is so.

The facts in *Blank*

The salient facts in *Blank* can be stated within a short compass. Mr Blank and a company that he controlled were charged with pollution offences and failing to report to regulatory authorities. All of the charges were ultimately either quashed or stayed. Mr Blank and the company subsequently brought proceedings against the Federal Government of Canada alleging fraud, abuse of process and other wrongs. For the purposes of these proceedings, Mr Blank sought access to certain government records.¹⁸ The Government withheld some of these records on the grounds of litigation privilege.

The decision of the Supreme Court

The Supreme Court of Canada, affirming the decisions of the courts below,¹⁹ held that the privilege enjoyed by the Government had been extinguished upon the conclusion of the criminal proceedings. As readers will be familiar with the Supreme Court's reasoning there is no need to examine it in detail. In short, the court's conclusion rests upon the differences between legal advice privilege and litigation privilege. Fish J, who delivered the principal reasons, observed that these two species of privilege are driven by different policy considerations. Legal advice privilege is aimed at ensuring that litigants are not discouraged from seeking

15 *Pearce v Foster* (1885) 15 QBD 114.

16 *Bullivant v Attorney-General for Victoria* [1901] AC 196 at 206; cf. T. Neoh and A. Eu, 'The Duration of a Claim of Legal Professional Privilege' (1982) 12 *Hong Kong Law Review* 66.

17 See e.g. Gavin Murphy, 'The Innocence at Stake Test and Legal Professional Privilege: A Logical Progression for the Law ... But Not in England' [2001] Crim LR 728.

18 The contents of these documents remain unknown.

19 *Blank v Canada (Department of Justice)* [2003] FCT 462; *Blank v Canada (Department of Justice)* [2005] 1 FCR 403.

advice about the law.²⁰ Litigation privilege is concerned with the efficacy of the adversarial process.²¹ It is thought that, without litigation privilege, litigants would be hindered in their preparations for litigation by a fear that their adversaries could benefit from the fruits of their work. Its purpose is to create a ‘zone of privacy’²² in relation to preparations for contemplated or pending litigation. With this difference in mind, Fish J reasoned that the rationale for litigation privilege ordinarily disappears when the proceedings that gave birth to it have drawn to an end. Consequently, it was held that, as a general rule, the privilege should only continue for the duration of the litigation from whence it sprung.²³

Importantly, however, Fish J perceived a need to extend the protection of litigation privilege beyond the proceedings which gave rise to it in circumstances where a litigant could be discouraged from properly preparing for extant litigation out of a concern for his prospects of success in related litigation. He defined ‘related litigation’ expansively. He asserted that ‘at a minimum’ it entails (1) ‘separate proceedings that involve the same or related parties [that] arise from the same or a related cause of action (or “juridical source”)’ and (2) ‘[p]roceedings that raise issues in common to the initial action and share its essential purpose’.²⁴

Commentary

There is a range of positions that the courts could take in relation to the duration of litigation privilege. At one end of the spectrum, the privilege could expire upon the conclusion of the litigation that gave rise to it. At the other end, the privilege could continue indefinitely (as in England). The intermediate position is for the privilege to continue after the litigation that generated it is complete if related litigation is pending or anticipated (as in Canada). Obviously, ‘related litigation’ could be defined broadly or narrowly. The more liberal the definition, the more resilient the privilege is likely to be.

If one believes that litigants should enjoy a litigation privilege in respect of documents generated for the purposes of proceedings in which they are presently embroiled, it is plainly very difficult to defend the position that the privilege should lapse upon the finalisation of the litigation that generated it. If litigants are liable to be discouraged from preparing for pending litigation out of a concern that their adversaries could benefit from those preparations, it is surely the case

20 *Blank* [2006] 2 SCR 319 at [26].

21 *Ibid.* at [27].

22 *Ibid.* at [32], [34].

23 *Ibid.* at [34]–[36].

24 *Ibid.* at [39].

that they may also be discouraged by the possibility that their preparations could hinder their prospects of success in related litigation, especially where related litigation is likely.

The choice, therefore, is essentially between the 'once privileged always privileged' rule and the intermediate position. In support of the intermediate position is the decision in *Blank* and Fish J's intuition that lifting the privilege where the litigation that gave birth to it and any related litigation has come to an end would not unduly inhibit preparations for litigation. Obviously, however, it can be contested whether Fish J's assumption about litigant behaviour is correct. Consider, for example, the following argument advanced by Brennan J in the decision of the Supreme Court of the United States in *Federal Trade Commissioners v Grolier Inc.* against circumscribing the duration of work product immunity:²⁵

... disclosure of work product connected to prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved. Many government agencies, for example, deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation. Few of these cases will be 'related' to each other in the sense of involving the same private parties or arising out of the same set of historical facts; yet large classes of them may present recurring, parallel factual settings and identical legal and policy considerations. It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons. He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate on wits borrowed from the adversary. Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled. Nor is the problem limited to government agencies. Any litigants who face

25 462 US 19 (1983) at 30-1 (citations omitted). Work product immunity is the functional equivalent of litigation privilege. An important difference, however, is that unlike litigation privilege, the immunity is not absolute. It may be lifted 'upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means' (see Federal Rules of Civil Procedure, r. 26(b)(3)).

litigation of a commonly recurring type ... have an acute interest in keeping private the matter in which they conduct and settle their recurring legal disputes.

It is suggested that whether Fish J or Brennan J is correct about the relationship between the privilege and litigant behaviour is a matter that cannot be confidently determined in the abstract. Empirical data are needed to settle the issue of whether placing a temporal limitation on litigation privilege would have a chilling effect on preparations for litigation. However, in this author's view, it is unlikely that the derogation from the 'once privileged always privileged' rule effected by *Blank* would discourage preparations for litigation.²⁶ Because this derogation is relatively minor due to the broad definition of 'related litigation', most litigants would brush aside the risk that their preparations would come back to bite them. This is particularly so when it is remembered that even if litigation privilege has been lost, the material in issue may be subject to legal advice privilege.

There is, however, another argument, unrelated to litigant behaviour, in support of the 'once privileged always privileged' rule that is worth briefly examining. As the rule reduces the probability of privileged material that casts doubt upon the rectitude of decisions coming to light, it might be argued that, because the revelation of such material is liable to have a deleterious effect on public confidence in the law, the rule is justified. There are several grounds for rejecting this argument. First, considering that our system of judicial adjudication is largely concerned with discovering the truth, it is odd to say that the truth can hurt. Secondly, the argument is self-defeating. If it became known that the truth was being concealed simply to promote the appearance of accurate verdicts, confidence in the law would be jeopardised. Thirdly, this argument cannot explain why facilities exist for reopening decisions, in both the civil and criminal contexts, where fresh evidence has emerged.

In the absence of a plainly sound ground for maintaining the 'once privileged always privileged' rule it follows that the curtailment of that rule by the decision in *Blank* is a step forwards. However, it should be observed that were *Blank* followed in England, doubts as to the compatibility of litigation privilege with Article 6 would not be removed. The concern is that litigation privilege (and legal advice privilege) may infringe the right to a fair trial as the privilege is inviolate regardless of the need for the privileged material in a specific case and irrespective

²⁶ See also Rosemary Pattenden, 'Litigation Privilege and Expert Opinion Evidence' (2000) 4 E & P 213 at 221.

of whether the individual entitled to the privilege would suffer any adverse consequences as a result of its removal. Imposing a limitation on the duration of litigation privilege would not address this concern. For instance, whether the privilege has been exhausted under the *Blank* formulation turns on the mechanical question of whether the relevant litigation and any related litigation is complete. This formulation is insensitive to impact of the privilege on the fairness of proceedings in individual cases. In particular, it does not necessarily allow defendants in criminal proceedings to invade the privilege where the privileged material may cast reasonable doubt upon their guilt and the party entitled to the privilege would not be disadvantaged by its loss.

Conclusion

The decision of the Supreme Court of Canada in *Blank* conforms to the general trend of reining in litigation privilege. The courts in other jurisdictions will doubtlessly be tempted to follow the Supreme Court's lead and reconsider the 'once privileged always privileged' rule. However, it should not be thought that embracing such a restriction would remove concerns about the compatibility of litigation privilege with Article 6. The restriction developed by the Supreme Court does not engage with the fairness of recognising the privilege within the four corners of individual cases. Examining the privilege in this way is, however, essential to determining whether the privilege is a disproportionate restriction on the right to a fair trial.