

Defendant ordered to produce documents encompassed by “circle of privilege” (Will Murray & Associates v. Nader Fakh)

Litigation & Dispute Resolution

6 February 2026

During the course of litigation, parties are generally required by the Ontario *Rules of Civil Procedure* to produce all documents that are relevant to the issues in dispute. Solicitor-client privilege is one of the few grounds that a party may rely upon as a refusal to produce relevant documents. Whether or not solicitor-client privilege actually applies to the documentation requires an assessment of the circumstances in which the communications occurred.

A recent decision of the Superior Court of Justice addressed the concept of the “circle of privilege” on a motion requiring the defendant to produce relevant documents: *Will Murray & Associates v. Nader Fakh*, 2026 ONSC 657 (CanLII).

The plaintiff in the case was a criminal law firm and the defendant was a former partner of the firm. After the defendant left the firm, the firm sued him for alleged misconduct he had committed before his departure. Among other things, the firm alleged that the defendant had provided legal services in the areas of tort and personal injury civil litigation even though the firm was not permitted to provide such services, and that he had directed client funds from the settlement of a tort/personal injury civil litigation file to be sent to another law firm, approximately 10 days before his departure from the firm.

One specific allegation was that the defendant lawyer had received client bail funds personally, rather than those monies going to the firm’s clients who were entitled to receive those funds. In that regard, the firm had an email from the defendant in which he stated, “These peasants owe me money still so I’m taking their bail money.”

In the litigation, the firm’s counsel prepared a proposed discovery plan requesting that the defendant disclose and produce various documents including numerous emails to clients from his personal Hotmail account, personal bank records, copies of his communications with the law firm to which he had directed client funds, and copies of the documents contained in his portal with Legal Aid.

In response, the defendant provided a blanket refusal to produce any of the requested documents on the basis of solicitor-client privilege. The firm brought a motion for production.

In deciding the motion, the court affirmed that solicitor-client privilege is a fundamental tenet of the legal system and is integral to the administration of justice. As discussed by the Supreme Court of Canada, privilege encourages the free and full disclosure by the client required to ensure effective legal representation: *R. v. Cunningham*, 2010 SCC 10, at paragraph 26.

However, the Supreme Court has also confirmed that not all communications between a lawyer and their client are privileged. In order for a communication to be privileged, it must arise from communication between a lawyer and the client where the latter seeks lawful legal advice: *R. v. McClure*, 2001 SCC 14, at paragraph 36.

Here, the defendant attempted to argue that the firm was not entitled to the documents requested since, among other things, the clients at issue were not parties to the litigation. He took the position that his counsel could not review the solicitor-client privileged documents unless the client's privilege had been waived, or until the court orders that the privilege does not apply.

In rejecting this argument, the court referred to the concept of the "circle of privilege", as discussed in *R. v. Basi*, 2009 SCC 52, which refers to a limited group of people who can receive privileged legal communications without destroying solicitor-client privilege. Privilege survives if communications stay within a defined, justifiable circle of individuals, including judges.

A "circle of privilege" concept applies in cases where a lawyer decides to sue a client because it is necessary for the lawyer to disclose privileged information: *J.D. Buote Professional Corporation v. McLeod*, 2022 ONSC 7110.

The court reasoned that the plaintiff firm must be able to make its claim against the defendant for the funds claimed to be owed. The parties' litigation counsel should be considered to be within the circle of privilege and steps could be taken to protect the information being disclosed beyond that circle. Further, the deemed undertaking rule under Rule 30.1 of the *Rules of Civil Procedure* applied to prohibit the use of documents for any purpose other than the lawsuit, and additional protections such as redactions and even a sealing order could be sought if necessary.

What was not appropriate was for the defendant to provide a blanket refusal based on privilege as a means of avoiding his production obligations.

The court also noted that many of the documents in issue such as the defendant's bank records were likely not covered by privilege in any event. The mere fact that a client would consider certain information to be confidential will not suffice for it to be protected by solicitor-client privilege: *Maranda v. Richer*, 2003 SCC 67, at paragraph 42.

In the result, the defendant was ordered to produce the documents sought by the plaintiff and the parties were directed to work together to agree on further protections of any privileged information.

The decision provides a good illustration of the interplay between the production obligations of a party during proceedings and the potential protection and scope of solicitor-client privilege. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com