Ontario Superior Court confirms what communications are protected by spousal privilege

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In *Wendy Sokoloff Professional Corp. v Chorney*, the Superior Court of Justice for Ontario found that section 11 of the Ontario *Evidence Act* does not allow spouses to refuse to disclose their communications to their spouse, only the communications *made to them* by their spouse.

Facts

The plaintiff, the law firm of Sokoloff Lawyers, brought this action claiming breach of contract, breach of fiduciary duty, and the duty of good faith. The plaintiffs alleged that the defendants took steps to take over their Brampton office in 2021. The defendants to the action were the office manager and lead lawyer, who also happened to be married to each other. At examinations for discovery, they each refused specific questions based on spousal privilege.

The plaintiffs brought a motion to produce further and better Affidavits of Documents from the defendants, along with an order that both defendants attend further examinations for discovery.

Decision

The sole issue on this motion was whether the defendants were able to assert spousal privilege over their communications, and if so, the scope of that privilege.

Pursuant to the Ontario *Evidence Act,* parties to an action are considered competent and compellable to give evidence on behalf of themselves or any of the parties. One of the exceptions is contained under section 11, which provides that a person is not compellable to disclose any communication *made to the person* by his or her spouse during the marriage (similar to subsection 4(3) of the *Canada Evidence Act*).

The Court found that the statute does not confer a privilege over communications *made by a* person to their spouse, as the wording of the statute was not that broad. While a

spouse can decline to disclose communications made from their spouse to them, section 11 does not allow them to refuse to disclose their communications to their spouse.

The defendants argued that the Court's interpretation created an outcome that was contrary to the underlying policy rationale protecting conversations between spouses. The Court disagreed, holding that the legislature's intention was to create a limited spousal privilege, and the defendants interpretation ignored the clear language of section 11, to create a different and expanded privilege.

In this case, because both spouses were parties to the litigation, the consequence was that the plaintiffs could, through discovery, obtain the entire relevant conversation between the defendants, which included text messages exchanged.

Key takeaways

- Spousal privilege does not allow spouses to refuse to disclose their communications to their spouse, the privilege is given to the recipient of the communications and protects only the communications *made to them* by their spouse.
- This decision would be equally applicable to spousal privilege under subsection 4(3) of the *Canada Evidence Act.*
- The outcome of this decision could be relevant in actions where a plaintiff's spouse is included as a *Family Law* claimant.

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