

Use of authorities

Not recommended:

12. The case of *Smith v. Smith* (1999), 2 R.F.L. (3d) 324 (Que. C.A.) is highly relevant to this case. In that case, the Court of Appeal considered whether a document was covered by solicitor-client privilege. A lawyer was retained to conduct an interview of various witnesses, assess liability and then give a legal opinion. The lawyer performed these tasks, wrote his opinion and delivered it. In the opinion was a summary of what the witnesses told him. The opposing side argued at discovery that he should obtain the letter with all legal advice excluded. His aim was just to get the summary of what the witnesses had said. The Court ruled that the summaries of what the witnesses had said were so inextricably bound up with the legal advice that they should be excluded. The test was whether there was a "substantial connection between the advice given and the facts set out in the advice".

13. The case of *Jones v. Jones* (2000), 3 R.F.L. (3d) 239 (Ont. S.C.J.) is also relevant. In that case, a lawyer summarized the contents of a number of documents in her opinion to her client. The documents later disappeared in a fire. The opposing side argued that the summaries should be produced. The Court ruled that the summaries were "significantly bound up with the legal content of the opinion and should not be produced".

14. Finally, in *Brown v. Brown* (2001), 4 R.F.L. (3d) 451 (Man. C.A.), the Manitoba Court of Appeal considered a reporting letter written by a lawyer to a client. The reporting letter set out a number of facts, some of which were relevant to the conclusions in the letter and some of which the other side thought were not relevant. The other side production of the portions of the letter setting out the facts. The Court declined to rule on the issue of relevance, holding that it was not necessary. It held that all of the facts should not be produced, stating that "it is enough that there be some overlap between the facts set out and the privileged opinion component of the letter".

15. Therefore, the test to be applied in this case is whether there is some overlap or some substantial connection between the facts set out and the privileged, "legal opinion" part of the letter.

Recommended:

12. There is no obligation to produce purely factual portions of an opinion letter if there is substantial connection between those portions and the advice portion of the letter, or even just some connection.

Smith v. Smith (1999), 2 R.F.L. (3d) 324 (Que. C.A.) ("substantial connection between the advice given and the facts set out in the advice" so no production)

Jones v. Jones (2000), 3 R.F.L. (3d) 239 (Ont. S.C.J.) (summaries were "significantly bound up with the legal content of the opinion" so no production)

Brown v. Brown (2001), 4 R.F.L. (3d) 451 (Man. C.A.) ("some overlap between the facts set out and the privileged opinion component of the letter" so no production)