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Breaking New Ground: Ontario Court of Appeal Issues Landmark Ruling on Deemed Waiver of Privilege

In *One York Street Inc v 2360083 Ontario Limited,* Lenczner Slaght's Matthew Lerner and Jim Lepore succeeded with an appeal on behalf of their client, Menkes Developments (One York Street) in the Ontario Court of Appeal's first decision to substantively address deemed waiver of solicitor-client privilege by pleading a party's state of mind. Waiver of privilege is often said to exist when a party "places its state of mind in issue," but before the Court of Appeal provided clarity, there was much confusion as to what it means for a party to place its state of mind in issue.

In this decision, the Ontario Court of Appeal allowed the landlord (One York)'s appeal and restored the motion judge's order requiring production of the respondent tenant's solicitor's file on the basis of deemed waiver of solicitor-client privilege.

The Court adopted Lenczner Slaght's submissions and established a five-point framework for assessing deemed waiver of privilege. The decision provides much needed clarity for courts across the country on a previously unresolved legal question.

The appeal arose from a multi-million-dollar lease dispute in which the respondents (Coppa's Fresh Market) are alleged to have abandoned the premises 4 years into a 20-year term and filed a multi-million-dollar counterclaim alleging the landlord had misrepresented foot traffic levels surrounding the premises as "guarantees."

Precedent-Setting Implications

It is the first decision of the Ontario Court of Appeal to spell out when deemed waiver of solicitor-client privilege occurs due to claims of defences that place a party's state of mind (at the time of the events giving rise to the dispute) at issue. The Court held that deemed waiver does not require a party to explicitly refer to legal advice or its absence in a pleading. Rather, what is required is that a party rely in its claim or defence on its understanding of its legal position – and where that party in fact

received legal advice on the relevant issue, privilege is deemed to be waived. The Court clarified the prior jurisprudence and provided litigants and other courts with a five-point framework to resolve this much debated legal question.

The decision also resolves an important standard of review question. The Court held that whether a deemed waiver of privilege has occurred is a question of mixed fact and law, reviewable on the palpable and overriding error standard – not correctness, as the Divisional Court had applied without consideration of the underlying factual matrix and cross-examination evidence.