Date: 20260525
Dockets: PR 17-01-08740
(Winnipeg Centre)
Indexed as: Ross v. Ross et al.
Cited as: 2026 MBKB 72

COURT OF KING'S BENCH OF MANITOBA

IN THE MATTER OF: THE ESTATE OF ROBERT THOMAS ROSS, DECEASED

B E T W E E N:

JOHN LEROY ROSS, as Executor of the Estate of ROBERT THOMAS ROSS, Deceased,	)	Nicole D.M. Hamilton
	)	Eliza C. Bell
	)	for the applicant
applicant,	)	
	)	Richard W. Schwartz
- and -	)	for litigation guardian David Asper, K.C.
	)	for the respondent Angela Brady Ross
ANGELA BRADY ROSS, DREW SALTER and HARTLEY KLAPMAN, and the said DREW SALTER and HARTLEY KLAPMAN as Attorneys for ANGELA BRADY ROSS,	)	
	)	George A. Derwin
	)	Loren Klein
	)	for all other respondents
respondents.	)	
	)	
	)	William S. Gange
	)	for the law firms Fillmore Riley LLP
	)	and TDS Law LLP as responding parties
	)	
	)	
	)	Judgment Delivered:
	)	May 25, 2026

Motion for Production of Records of Law Firms filed by the Litigation Guardian for Angela Brady Ross

REMPEL J.

ISSUE

[1] Solicitor-client privilege is a deeply entrenched principle of Canadian law and a constitutionally protected right enjoyed by all Canadians.

[2] The motion before me raises two fundamental questions namely: who may exercise the right to solicitor-client privilege for a person who loses mental capacity to instruct legal counsel during the course of ongoing litigation and whether this right can be exercised at all in such circumstances.

DECISION

[3] I am granting the relief sought by the moving party, who is a court-appointed litigation guardian of a vulnerable person, to access some of the legal files belonging to that vulnerable person before they lost mental capacity to manage their own affairs. The strict enforcement of solicitor-client privilege, in these circumstances, would result in the misapplication of this foundational principle. My reasons follow.

BACKGROUND

[4] Robert Thomas Ross ("Dr. Ross") was an extraordinary person and undoubtedly a great Canadian. He was honoured with an appointment to the Order of Canada in 1994.

[5] Dr. Ross was a leading Canadian neurologist, professor, and founder of modern neurology in Manitoba. Upon his return to his native Manitoba from the United Kingdom in 1953, Dr. Ross became the province's sole neurologist and he led the neurology section of the medical school for decades. The medical papers and neurological handbook

authored by Dr. Ross were published widely and he founded the *Canadian Journal of Neurological Sciences* with his own resources.

[6] Notwithstanding his heavy workload, Dr. Ross was also a renowned philanthropist, who served on the boards of the National Gallery of Canada, the Royal Winnipeg Ballet, the Winnipeg Art Gallery, the Manitoba Chamber Orchestra, and the Winnipeg Library Foundation.

[7] One of Dr. Ross's lesser-known achievements was his expertise in amassing a substantial and valuable art collection. Through the generosity and foresight of Dr. Ross and his wife, Angela Brady Ross ("Ms. Ross"), a significant portion of this collection, gathered over their 46-year marriage, has been donated to the National Gallery of Canada (the "NGC"), where it will benefit countless Canadians for years to come.

FACTS

The Estate

[8] Dr. Ross died in April 2017. He was survived by his spouse, Ms. Ross, and their five children. One of those children, John Leroy Ross, was appointed executor of Dr. Ross's estate (the "Executor"). A grant of probate with respect to this estate was issued by this court in October 2017.

[9] Under the terms of his will, Dr. Ross established a trust (the "Art Trust") for the benefit of Ms. Ross during her lifetime, on the condition that she remain resident in Canada. Upon the earlier of Ms. Ross's death or her ceasing to reside in Canada, the artwork forming part of the Art Trust was to be transferred to the NGC.

[10] Following the grant of probate, a number of legal issues arose, including the potential for Ms. Ross to challenge the validity of the Art Trust pursuant to her rights as a spouse under ***The Family Property Act***, C.C.S.M. c. F25 (the "***FPA***"). In addition, a concern was raised about the possibility that any delay in transferring the artwork to the NGC might jeopardize the estate's ability to obtain the benefit of a charitable donation receipt for tax purposes.

The Law Firms

[11] Initially, the estate was represented by MLT Aikins LLP ("Aikins"), the firm that had drafted Dr. Ross's will. The estate then retained Fillmore Riley LLP ("Fillmore"). A lawyer at Fillmore also provided advice to Ms. Ross concerning a proposed release of her rights against the estate under the ***FPA***. Ms. Ross was subsequently referred to Thompson Dorfman Sweatman LLP ("TDS") for the purpose of obtaining independent legal advice in relation to a separate agreement under which she would renounce her interest as a beneficiary of the Art Trust. (I will refer to Fillmore and TDS collectively as the "Law Firms".)

[12] In December 2017, Ms. Ross executed a release of rights under the ***FPA*** (the "***FPA*** Waiver"). Shortly thereafter, she executed a Deed of Disclaimer and Renunciation in respect of the Art Trust (the "Disclaimer").

[13] As a result of the ***FPA*** Waiver and the Disclaimer, the Executor was in a position to seek court approval to accelerate the charitable gift to the NGC that was described in the Art Trust. In April 2018, the artwork was transferred to the NGC, and the estate received a charitable donation receipt, thereby reducing its tax liability.

The Mental Capacity of Ms. Ross

[14] At the time the ***FPA*** Waiver and the Disclaimer were executed, Ms. Ross exhibited fluctuating levels of cognitive capacity and understanding. It is now undisputed that Ms. Ross has lost the mental capacity to manage her own affairs. She currently resides in a personal care home and is not expected to regain mental capacity or to be able to instruct legal counsel in the future.

[15] There is no dispute between the parties that the ***FPA*** Waiver and the Disclaimer are valid and Ms. Ross had sufficient mental capacity to understand the meaning of these documents based on the legal advice she received at the times they were signed.

The Legal Dispute

[16] I was appointed as case management judge in this matter and conducted the first case management conference in September of 2025. At that time, two competing notices of application were before me.

[17] In February of 2025, the Executor filed a notice of application seeking, among other relief, the appointment of the Public Guardian and Trustee of Manitoba (the "PGT") as litigation guardian for Ms. Ross in place of her daughter, Drew Salter, and her partner, Hartley Klapman (the "Attorneys"), who were acting pursuant to a power of attorney executed by Ms. Ross prior to her mental incapacity. The notice of application also sought advice and direction from the court regarding a handwritten letter Dr. Ross provided to the Executor prior to his death, and its potential effect on the distribution of the remaining assets of the estate.

[18] The Attorneys filed a competing notice of application seeking a declaration that certain works of art that were not included in the Art Trust were the personal property

of Ms. Ross, rather than assets of the estate. The Attorneys also sought an order removing the Executor on the basis of an alleged conflict of interest and the appointment of the PGT as executor of the estate in his place.

[19] Before a contested motion regarding the appointment of the PGT could be heard, the parties reached agreement that David Asper, K.C. should be appointed as litigation guardian for Ms. Ross pursuant to Rules 7.03-7.05 of the ***Court of King's Bench Rules***, M.R. 553/88. I granted a consent order to that effect in December of 2025.

[20] The powers and duties of a litigation guardian are set out in ***King's Bench Rule*** 7.05 as follows:

POWERS AND DUTIES OF LITIGATION GUARDIAN, COMMITTEE, ATTORNEY OR SUBSTITUTE DECISION MAKER	POUVOIRS ET OBLIGATIONS DU TUTEUR À L'INSTANCE, DU CURATEUR, DU FONDÉ DE POUVOIR OU DU SUBROGÉ
Party in a proceeding	Partie à l'instance
7.05(1) Where a party is under disability, anything that a party in a proceeding is required or authorized to do may be done by the party's litigation guardian, committee, attorney or substitute decision maker.	7.05(1) Les actes que doit ou que peut accomplir une partie à l'instance peuvent, si elle est incapable, l'être par son tuteur à l'instance, son curateur, son fondé de pouvoir ou son subrogé.
Attend to interests	Intérêts de l'incapable
7.05(2) A litigation guardian, committee, attorney or substitute decision maker must diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests, including the commencement and conduct of a counterclaim, crossclaim or third party claim.	7.05(2) Le tuteur à l'instance, le curateur, le fondé de pouvoir ou le subrogé veille aux intérêts de l'incapable et prend les mesures nécessaires pour les défendre, y compris l'introduction et la conduite d'une demande reconventionnelle, d'une demande entre défendeurs ou d'une mise en cause.

Representation by lawyer	Représentation par un avocat
7.05(3) A litigation guardian, committee, attorney or substitute decision maker other than the Public Guardian and Trustee must be represented by a lawyer and must instruct the lawyer in the conduct of the proceeding.	7.05(3) Le tuteur à l'instance, le curateur, le fondé de pouvoir ou le subrogé — à l'exception du tuteur et curateur public — est représenté par un avocat auquel il donne les instructions nécessaires à la conduite de l'instance.

Position of the Parties

[21] Upon his appointment as litigation guardian for Ms. Ross, Mr. Asper instructed his counsel to request production of Ms. Ross's legal files held by the Law Firms, relating to the ***FPA*** Waiver and the Disclaimer.

[22] The Law Firms sought guidance from the Law Society of Manitoba, which subsequently advised counsel for Mr. Asper that, in its view, he did not have the authority to waive solicitor-client privilege on behalf of Ms. Ross. The Law Firms therefore opposed production of the legal files.

[23] In response, Mr. Asper, in his capacity as litigation guardian, has brought this motion seeking an order for production of these legal files.

[24] The Attorneys support the motion brought by the litigation guardian.

[25] The Executor does not oppose the motion for production. However, the Executor submits that, if production of the files is ordered, they should be disclosed to all parties.

[26] Counsel for the litigation guardian takes the position that any documents produced pursuant to a court order would remain subject to solicitor-client privilege, and that such privilege could only be waived by the litigation guardian if he elects to do so.

SOLICITOR-CLIENT PRIVILEGE – FIRST PRINCIPLES

[27] The nature and scope of solicitor-client privilege is clearly set out by the Supreme Court of Canada in ***R. v. Fox***, 2026 SCC 4.

[28] ***Fox*** teaches that solicitor-client privilege is a class privilege that automatically protects the confidentiality of all communications in which a client seeks legal advice from a lawyer, provided that the communications do not involve or further unlawful conduct (at paras. 31 and 36).

[29] The Supreme Court of Canada confirms the key characteristics of solicitor-client privilege are as follows:

- The privilege belongs exclusively to the client and can only be waived by the client with their informed consent (at para. 32).
- The privilege is no longer a mere rule of evidence but has evolved into a constitutionally protected "*class privilege*" that is not subject to a case-by-case analysis to determine if meets defined criterion (at para. 36).
- The substantive right protected by the privilege engages s. 7 of the ***Charter*** ("*principle of fundamental justice*") and s. 8 ("*fundamental right to privacy*") (at paras. 37-39).
- The privilege is recognized as "*the strongest privilege protected by law*" and considered "*near-absolute*" and worthy of being "*jealously guarded*" against intrusion other than in "*the most unusual cases*" (at para. 40).

[30] In ***Fox***, the Supreme Court of Canada grounds the robust protections provided by solicitor-client privilege in several key public policy considerations:

- To encourage "*full and frank communication*" between lawyers and their clients, which in turn ensures that lawyers are fully informed as to the facts and in a position to "*advise [their] clients to the best of their abilities"* (at para. 34);
- The privilege is not merely ancillary to the legal system but is "*integral to the workings of the legal system itself*". It is a "*necessary and essential condition for the effective administration of justice*", commanding a unique status because it protects both individual rights and systemic integrity (at para. 35);
- To provide members of the public who engage lawyers with the certainty "*that their communications … will remain entirely confidential*" so that their ability to speak freely will not be undermined (at para. 40); and
- Access to justice is fundamentally compromised if legal advice becomes unavailable due to a fear of disclosure (at para. 35). Therefore, the privilege must be kept "*as close to absolute as possible*" to maintain public confidence in the justice system (at para. 40).

[31] ***Fox*** also teaches that the "*near-absolute*" nature of solicitor-client privilege is subject to three narrowly defined exceptions based on competing societal values. The Supreme Court emphasized that these exceptions apply only in "*clearly defined circumstances*" and do not involve a case-by-case balancing of competing interests (at para. 41).

[32] The specific exceptions to solicitor-client privilege articulated in ***Fox*** include:

a) The "*public safety*" exception, which applies when there are real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm (at para. 41);

b) The "*wills*" exception, which is used to determine the true intention of a deceased testator or settlor in matters relating to a will or trust (at para. 41) and;

c) The "*innocence at stake*" exception, which permits the privilege to yield when core issues regarding the guilt of an accused are involved and there is a genuine risk of a wrongful conviction (at para. 41).

Position of the Law Firms

[33] The key arguments advanced by the Law Firms in opposition to the production of Ms. Ross's client files are as follows:

- The narrowly defined exceptions to solicitor-client privilege established by the Supreme Court of Canada in ***Fox*** do not apply on the facts of this case. This is not a case involving risks to public safety or the ability to offer full answer and defence to a criminal charge. It is also not a case involving the true testamentary intentions of a will signed by Ms. Ross;
- The solicitor-client privilege belongs exclusively to Ms. Ross as the client and she is unable to waive this capacity as she no longer can provide informed consent due to her mental disability; and

- The litigation guardian cannot rely on Rule 7.05 to waive the privilege of Ms. Ross because a procedural rule established by the court cannot override a constitutionally protected right. (See ***Canadian Reform Conservative Alliance Party, Portage-Lisgar Constituency Assn. v. Harms***, 2003 MBCA 112.)

Position of the Executor

[34] Citing ***Brown v. Gowling WLG (Canada) LLP***, 2023 ONSC 1137, the Executor argues that court-appointed guardians or substitute decision makers of a person who lacks sufficient mental capacity do not have an untrammelled right to access all legal files of that person. The court in that case held a person under disability does not forfeit all personal agency or dignity, and a guardian does not automatically gain the right to unilaterally waive solicitor-client privilege (at para. 13).

[35] In coming to that conclusion, the court in ***Brown*** noted that the Ontario Law Society's *Rules of Professional Conduct* which requires lawyers to maintain normal relationships with a client that has diminished mental capacity (at para. 14). The court in ***Brown*** also relies on the commentary to the Ontario Law Society's rule which provides that the ethical duty to protect client confidentiality is wider than the constitutionally protected right of solicitor client confidentiality (at para. 15).

[36] The Law Society of Manitoba has a similar rule with respect to lawyers acting for clients with diminished mental capacity. (See ***McPhee et al. v. The Estate of Robert David McPhee et al.***, 2026 MBKB 60., at paras. 26-27.)

[37] In ***Brown*** the court found that the guardians had an obligation to provide a valid reason to obtain disclosure of the lawyer's client file, despite their appointment to act in the best interests of the person under disability.

[38] Ultimately, the court in ***Brown*** concluded that since the guardians wished to challenge the legal fees at an assessment hearing, the lawyers would be under an obligation to disclose as much of the file as necessary to allow them to prepare for a fee assessment hearing (at paras. 17-19).

[39] The Executor argues that since the ***FPA*** Waiver and the Disclaimer have already been produced as evidence in this matter and their validity is not being challenged, it is not "absolutely necessary" for Mr. Asper, as litigation guardian, to access the past legal files of Ms. Ross in order for her to understand why she signed them.

[40] Further, the Executor argues that permitting the litigation guardian to access the files, while keeping them secret from the other litigants, would be fundamentally inconsistent with and undermine procedural fairness.

[41] Finally, the Law Firms and the Executor argued that the litigation guardian's notice of motion was overly broad because it demands disclosure of all files of Ms. Ross held by the Law Firms, which could improperly capture advice on other, unrelated matters for which Ms. Ross retained them. It was also argued that there was a logical inconsistency in the litigation guardian's stated desire to genuinely understand Ms. Ross's state of mind when she signed the ***FPA*** Waiver and the Disclaimer, because the validity of these documents are not at issue and the files of a third lawyer retained by Ms. Ross (since retired) were not being sought.

ANALYSIS - WHOSE PRIVILEGE IS IT ANYWAY?

[42] I am satisfied that for the purpose of this litigation, Mr. Asper as litigation guardian "stands in the shoes" of Ms. Ross and as such he is simply seeking to exercise Ms. Ross's constitutionally protected right to solicitor-client privilege in its purest form. This is not a situation where the privilege is being breached, but rather asserted to ensure the legal interests of a vulnerable or incapable person are being protected.

[43] Despite the able arguments of the Executor and the Law Firms, I cannot help but think that they are looking at this matter through the wrong lens. This is not a case where a court-appointed litigation guardian seeks to breach or violate solicitor-client privilege for an exploitive purpose or in order to gain some kind of advantage in the litigation. The litigation guardian in this case is also not a busybody, but rather a party seeking to discharge their fiduciary duty to act in the best interests of a vulnerable person.

[44] Viewing the matter through the lens of fiduciary duty, the actions of the litigation guardian can fairly be described as the enforcement of a legal right Ms. Ross could have exercised had she not suffered the misfortunate of losing her mental capacity. The disclosure request is not being advanced by the litigation guardian as an external third party seeking to interfere with solicitor-client privilege, but rather a court-appointed guardian under a fiduciary duty to act in the best interests of a vulnerable or incapable person.

[45] Erecting impenetrable barriers or imposing strict limitations around solicitor-client privilege in cases such as this would reduce the appointment of Mr. Asper as litigation guardian to an empty ritual. In his capacity as litigation guardian, Mr. Asper has a strict

fiduciary duty to protect the interests of Ms. Ross, which reasonably includes giving fully informed instructions to legal counsel as to how best to protect her interests going forward. In order for the litigation guardian to fully advance and protect the interests of Ms. Ross, he needs to know the complete history of the legal files that were opened by her lawyers with respect to the ***FPA*** Waiver and the Disclaimer.

[46] The absolute enforcement of solicitor-client privilege in these circumstances would fundamentally undermine the fiduciary duty Mr. Asper owes to Ms. Ross, as her litigation guardian, to manage her legal affairs in her best interests, as it would deny him access to the very information he needs to discharge that duty.

[47] The principle of solicitor-client privilege was never intended to function as an absolute barrier between a client and their court-appointed litigation guardian. The protection provided by solicitor-client privilege guards against any efforts by a third party to harm or prejudice the interests of a client seeking advice from a lawyer.

[48] Without access to the legal files relevant to this litigation, Mr. Asper would have no way of knowing what Ms. Ross's state of mind was with respect to, among other things:

- Which works of art belonged to her personally or to the estate;
- What potential witnesses or documents supported or undermined her position;
- What settlement offers were made and why they were made or refused; and
- Any admissions she may have made against her interests and if they are known by the Executor or the Attorneys.

[49] If the Law Firms are correct, it is easy to foresee circumstances whereby a person who loses mental capacity during the course of a lawsuit could be placed at an extreme disadvantage.

[50] If there is an absolute bar to disclosure of an existing legal file following mental incapacity, the court-appointed litigation guardian would have no way to continue the litigation with the same law firm, as any questions about why certain litigation strategies were adopted or declined would be off limits. A review of the existing evidence on the file would also be impossible, as would any discussion as to litigation strategy or whether settlement options were explored or declined. It is also easy to imagine a challenge to a lawyer's fee to be next to impossible in these circumstances.

[51] The litigation guardian, if the Law Firms are correct in their position, would be forced to continue an existing action with a new lawyer, who would be unable to communicate with the litigation guardian in a meaningful way about the file because they would know nothing about what the previous lawyer said or did. The new lawyer would be forced to start their legal representation for a vulnerable person with nothing other than the documents on the court registry and whatever documents opposing counsel would be inclined to gratuitously provide to them.

[52] Even upon the death of the vulnerable person, this shocking state of affairs would continue if the law firms are correct in their position, because there would be no way to force the disgorgement of the legal files without violating solicitor-client privilege, unless the circumstances of the ongoing litigation involved the discovery of the true intentions of a testator or the settlor of a trust.

[53] When I pressed counsel for the Law Firms with this hypothetical scenario, they were candid in saying the litigation guardian would be placed in a difficult situation, but there was no way to escape the protections imposed by solicitor-client privilege in these circumstances. As I have already noted, the strict enforcement of solicitor-client privilege as the Law Firms understand it, would result not only in the misapplication of this fundamental principle but also a grave injustice to their client.

[54] I am satisfied, for these reasons, that the protections offered by solicitor client privilege, as defined in ***Fox***, do not apply on the facts of this case. With respect, I would also decline to follow the decision in ***Brown***, as I am not satisfied that the law ever intended litigation guardians to be forced into contested court applications where they must demonstrate, with granular detail, why they should be allowed to obtain disclosure of a lawyer's file that is relevant to existing litigation, involving a party to whom they owe a fiduciary duty.

[55] A litigation guardian should not be required to do more than satisfy the court that access to a file, protected by solicitor-client privilege, is justified in order to advance or protect the interests of a party to whom they owe a fiduciary duty with respect to ongoing litigation involving the rights or interests of that party.

[56] Satisfying this burden should not require more than meeting the logical relevance or threshold admissibility test for any form of evidence in a contested matter, with necessary modifications. Threshold admissibility is not a legal test, but rather one of common sense, based on ordinary human experience, that the disputed thing proffered as evidence tends to prove or disprove a matter that is at issue in the litigation.

(See The Hon. Mr. Justice David Watt, *Watt's Manual of Criminal Evidence 2018* (Toronto: Thomson Reuters, 2018), at para. 3, p. 28.)

[57] Adapting that commonsense test to cases such as this, should require the litigation guardian to do nothing more than proving that the lawyer's file may reasonably contain information or data that is necessary to advance or protect the interests of the party involved in ongoing litigation, to whom they owe a fiduciary duty.

[58] Counsel for the Executor made a point of emphasizing that there is no case law in Canada, other than perhaps the decision in ***Brown***, which answers the question as to when a litigation guardian for property of a person lacking mental capacity can obtain records subject to solicitor-client privilege.

[59] I think the answer to the question as to why no cases on point could be found does not lie in this being a rare kind of case, but rather because the answer becomes obvious when the circumstances are viewed through the lens of fiduciary duty. The appointment of a substitute decision maker to advance or protect the interests of a party under disability by way of court order, including orders of committeeship or by way of power of attorney, are common and this explains why ***King's Bench Rule*** 7.05 exists in its current form.

[60] It has likely never occurred to anyone to think of these cases as matters involving a potential breach of solicitor-client privilege, because the substitute decision maker is under a fiduciary duty to protect, rather than exploit, a vulnerable person or place their interests at risk.

[61] It is reasonable for the litigation guardian to argue in these circumstances that he requires access to the files created by the Law Firms to understand what particular pieces of art Ms. Ross believed to be her personal property and the advice she received about them when she signed the ***FPA*** Waiver and the Disclaimer. Even though the validity of these documents is not under attack, they are germane to the dispute between the parties as to which pieces of art belong to the estate and which ones belong to Ms. Ross personally.

[62] Even if I am wrong in coming to this conclusion, I note the motion is fully supported and consented to by the Attorneys. The power of attorney executed by Ms. Ross includes a specific provision stating the Attorneys stand in the shoes of Ms. Ross and can do anything she could do, including the appointment of agents and lawyers, which serves as express consent for the authority of the litigation guardian to access the files.

[63] Finally, I cannot agree with the Executor that any information on the files of the Law Firms should be disclosed to all litigants in this action. That kind of outcome would be a classic example of a breach of solicitor client privilege and could place the interests of Ms. Ross at risk.

[64] After completing his review of the files held by the Law Firms, the lawyer for the litigation guardian will advise Mr. Asper about his duty as a litigant to disclose any documents relevant to this litigation to other parties, provided they are not protected by solicitor-client privilege. This will not result in any procedural unfairness to the Executor or undermine the integrity of the trial process.

CONCLUSION

[65] The lawyer for the litigation guardian conceded that the motion was overbroad in seeking disclosure of "all" of Ms. Ross's files and the order should be limited to the files related to the ***FPA*** Waiver and the Disclaimer. I will grant that order accordingly.

[66] I am not inclined to order costs in this matter, given that this case was a novel one and the Law Firms cannot be faulted for zealously guarding the solicitor-client privilege of their client in these unique circumstances. I will therefore order that the parties bear their own costs.

_____

Rempel J.