

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: EVA ELISE KALISZ, Moving Party

AND:

THOMAS AGNEW ROLFE, Responding Party

BEFORE: ACJ McWatt, Sachs, and Molloy JJ.

COUNSEL: *Avra Rosen*, for the Moving Party

Chelsea Hooper, for the Responding Party

HEARD: In-writing

ENDORSEMENT

[1] The motion for leave to appeal the decision of Nakonechny, J. dated March 21, 2025 is granted in part.

[2] There are conflicting decisions on the extent to which solicitor and client privilege can be a bar to production of documents that constitute evidence of an intent to commit fraud. In particular, there is confusion as to whether the intent to commit a “civil” fraud, as opposed to a “criminal” fraud, is sufficient. Further, the *actus reus* and *mens rea* for both civil and criminal fraud may well be synonymous, with the only real distinction being the proceeding in which the allegation is made and the standard of proof.

[3] The motion judge relied on this Court’s decision in *Sakab Saudi Company v. Al Jabri*, 2025 ONSC 35 (Div.Ct.). The Court of Appeal for Ontario granted leave to appeal from that decision on May 1, 2025, but the appeal has not yet been heard. The outcome here may be affected by the determination of that appeal.

[4] Similar issues arise with respect to photographs of documents found to have been taken by the wife in breach of her husband’s reasonable expectation of privacy. The court on appeal may

consider the same issues with respect to whether an exception applies where the documents provide evidence of fraud or other criminal misconduct, and a weighing of the interests involved.

[5] Leave is not granted on that aspect of the decision dealing with whether the wife's lawyer should be removed as counsel of record.

[6] Costs of the leave application are left to the panel hearing the appeal, with the quantum of such costs fixed at \$5000.00 all inclusive.

ACJ McWatt J.

Sachs J.

Molloy J.

Released: August 22, 2025