TAB 10

of this Court are posted on the Internet and therefore go far and wide for the delectation of anybody who has nothing better to do than read judgments. Some people, of course, have nothing but a prurient interest in matters of this kind. Therefore, in the judgment which is to be released tomorrow and on these reasons, the name of the testator will be given as "A". Whether in the judgment to be released upon the hearing of the appeal there is to be any change in the style of cause that I have now directed to be the style of cause will be for the panel hearing the appeal.

[8] Litigants must remember that the Courts are an open system. We do not exist to satisfy private desires for backdoor justice.

Order accordingly.

General Accident Assurance Company et al. v. Chrusz et al.

[Indexed as: General Accident Assurance Co. v. Chrusz]

Court File No. C29463

Ontario Court of Appeal
Carthy, Doherty and Rosenberg JJ.A.

Heard: December 10, 1998
Judgment rendered: September 14, 1999

Civil procedure — Discovery — Privilege — Insured's premises damaged by fire — Insurer retaining investigator — Investigator's report indicating possibility of arson — Insurer retaining lawyer — Investigator reporting to and taking instructions from lawyer — Insurer advancing partial payment on loss when no longer concerned about arson — Former employee of insured subsequently giving sworn statement to investigator and lawyer alleging fraud by insured — Statement transcribed and copy given to employee — Insurer suing insured for recovery of partial payment and for damages — Insured counterclaiming against insurer and employee for defamation — Seeking production of investigator's reports and employee's statement — Investigator's authority not reaching inside solicitor-client relationship — Reports not protected by solicitor-client privilege — Reports prepared for dominant purpose of litigation protected by litigation privilege — Litigation privilege not applying after insurer no longer concerned about arson and before allegations of fraud — Employee's statement protected by litigation privilege in hands of lawyer — Employee's copy of statement not protected by litigation privilege as employee not contemplating litigation when statement made.

Evidence — Privilege — Solicitor and client — Insured's premises damaged by fire — Insurer retaining investigator — Investigator's report indicating possibility of arson — Insurer retaining lawyer — Investigator reporting to and taking instructions from lawyer — Insurer advancing partial payment on loss when no longer concerned about arson — Former employee of insured subsequently giving sworn statement to investigator and lawyer alleging fraud by insured — Insurer suing insured for recovery of partial payment and for damages — Insured counterclaiming against insurer and employee for defamation — Seeking production of investigator's reports — Investigator's authority not reaching inside solicitor-client relationship — Reports not protected by solicitor-client privilege.

Evidence — Privilege — Litigation privilege — Insured's premises damaged by fire — Insurer retaining investigator — Investigator's report indicating possibility of arson — Insurer retaining lawyer — Investigator reporting to and taking instructions from lawyer — Insurer advancing partial payment on loss when no longer concerned about arson — Former employee of insured subsequently giving sworn statement to investigator and lawyer alleging fraud by insured — Statement transcribed and copy given to employee — Insurer suing insured for recovery of partial payment and for damages — Insured counterclaiming against insurer and employee for defamation — Seeking production of investigator's reports and employee's statement — Reports prepared for dominant purpose of litigation protected by litigation privilege — Litigation privilege not applying after insurer no longer concerned about arson and before allegations of fraud — Employee's statement protected by litigation privilege in hands of lawyer — Employee's copy of statement not protected by litigation privilege as employee not contemplating litigation when statement made.

In 1994, a motel was severely damaged by fire. The motel's owner (the insured) delivered a proof of loss to his insurer. An investigator retained by the insurer reported that the fire might have been deliberately set. The insurer retained a lawyer who gave the investigator further instructions. In January and April, 1995, when the involvement of the insured in arson was no longer a concern, the insurer advanced partial payment on the loss. On May 23rd, an employee of the hotel who had recently been terminated gave a statement under oath to the investigator and the insurer's lawyer, alleging that the owner had fraudulently created the appearance of fire damage to inflate his claim. The statement was transcribed, and the employee was given a copy. The insurer claimed that the employee had agreed to keep the transcript confidential. In June, 1995, the insurer issued a statement of claim against the insured, alleging concealment, fraud, and misrepresentation. The insured counterclaimed for defamation against the insurer, the investigator, and the former employee, alleging that the former employee fabricated his statement and that the insurer relied on the statement. During examination for discovery, the insured sought production of the communications between the lawyer and the insurer and between the investigator and the lawyer, and of the employee's statement; the insurer and the employee resisted production, claiming solicitor-client and litigation

privilege. A judge of the Ontario Court, General Division, held that the communications between the lawyer and the insurer were privileged, that direct communications between the investigator and the lawyer were not protected by solicitor-client privilege, that communications made after arson ceased to be a concern were not protected by litigation privilege, and that communications made after the employee's statement was taken were protected. He held that any privilege in the transcript of the employee's statement had been waived when the insurer's lawyer promised to provide him with a copy and that the employee himself could not claim litigation privilege because he did not anticipate litigation involving himself when he made the statement. The Divisional Court allowed the insurer's appeal, holding that all communications between the investigator and the lawyer were made for the purpose of giving and obtaining legal advice and so were protected by solicitor-client privilege, and that the privilege in the employee's statement was not waived when he was provided with a copy. The insured, though conceding that communications between the lawyer and the insurer were privileged, appealed further.

Held, Doherty J.A. dissenting in part, the insurer should be required to produce those investigator's reports that were not prepared for the dominant purpose of litigation, and the employee should be required to produce his copy of his statement.

Per Carthy J.A.: All communications between the lawyer and the insurer were protected by solicitor-client privilege.

Litigation privilege is not rooted in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel a zone of privacy. But the zone of privacy does not define the outer reaches of protection or the legitimate intrusion of discovery to assure a trial on all of the relevant facts. The modern trend in the direction of complete discovery should not be inhibited so long as counsel is left with sufficient flexibility to adequately serve a litigation client. Litigation privilege is the area of privacy left after the current demands of discovery have been met. Based upon policy considerations of encouraging discovery, the dominant purpose test for litigation privilege should be adopted.

An important element of the dominant purpose test is the requirement that the document in question be created for the purposes of litigation, actual or contemplated. If original documents enjoy no privilege, then copying is only in a technical sense creation. The production of such copies in discovery does little to impinge upon the lawyer's freedom to prepare in privacy and supports fairness in the pursuit of truth.

In some circumstances litigation privilege may be preserved even though the information is shared with a third party where there is a common interest in litigation or its prospect.

An insurance company investigating a policy holder's fire should not be considered to be anticipating litigation. Until something arises to give reality to litigation, the insurer should be seen as conducting itself in good faith in the service of the insured.

The reality of anticipation of litigation arose when arson was suspected and the investigator was retained. Litigation privilege attached to communications between the investigator and the lawyer so long as litigation with the insured was contemplated. These communications were not protected by solicitor-client privilege. The payments to the insured between January and April, 1995, indicated that his involvement in arson was no longer a consideration. The litigation privilege came to an end. On May 23rd, the revelations of the employee brought new litigation into contemplation. Any communications from the investigator after May 23rd, whose dominant purpose was directed to the litigation, were protected by litigation privilege.

The employee's statement was protected by litigation privilege in the hands of the lawyer. The copy delivered to the employee had to be considered separately. The employee did not at that time contemplate litigation and was not sufficiently aligned in interest with the insurer to acquire a common interest privilege. He was merely a witness under no apparent threat of litigation. The fact that he became a party did not change the status of the statement in his hands.

Per Doherty J.A. (dissenting in part): Solicitor-client privilege serves the following purposes: promoting frank communications between client and solicitor where legal advice is being sought or given; facilitating access to justice; recognizing the inherent value of personal autonomy; and affirming the efficacy of the adversarial process. The adjudication of claims to solicitor-client privilege must depend on the evidence adduced to support the claim and the context in which it is made. In the context of litigation, a claim of solicitor-client privilege is a claim for an exception from the most basic principle of evidence which dictates that all relevant evidence is admissible. In the context of an insurer's investigation of a claim, the preexisting relationship of the insured and insurer and the mutual obligations of good faith must be considered in determining the validity of the insurer's assertion that it intended to keep information about the investigation confidential vis-à-vis the insured. The mere possibility of claim does not entitle an insurer to treat its client as a potential adversary.

The insured's concession that all communications directly between the lawyer and the insurer were privileged was accepted for the purposes of the appeal but not endorsed, as the onus was on the insurer to establish that the suspicion of arson continued over the period for which it claimed the privilege.

Solicitor-client privilege can extend to communications between a solicitor or client and a third party. Not every communication by a third party which facilitates or assists in giving or receiving legal advice is protected. Where the third party serves as a channel of communication between the client and solicitor, or where the third party's retainer extends to a function which is essential to the existence or operation of the solicitor-client relationship, the privilege should cover communications to or from the third party which are in furtherance of the function and which meet the criteria for the existence of the privilege. This functional approach allows the client to use third parties to communicate with counsel, promotes access to justice, and does nothing to infringe the client's personal autonomy by opening her personal affairs to others. These policy considerations do not favour extending

solicitor-client privilege to communications with those who perform services incidental to the seeking and obtaining of legal advice.

The investigator was not a channel of communication between the insurer and the lawyer, nor did he translate or interpret information provided by the insurer. He was retained to investigate the fire. After arson was suspected, his retainer changed in only one respect: he was to deliver his reports to the lawyer rather than the insurer. He was not given any authority to seek legal advice or to give instructions on legal matters. His authority did not reach inside the solicitor-client relationship between the lawyer and the insurer. His function was to educate the lawyer as to the circumstances surrounding the fire so that the insurer could receive the benefit of the lawyer's advice and instruct the lawyer as to the legal steps to be taken. The communications between the investigator and the lawyer were not protected by solicitor-client privilege.

For the reasons given by Carthy J.A., the communications between the investigator and the lawyer before May 23rd were not protected by litigation privilege and communications from that date forward were protected by litigation privilege assuming they were not subject to disclosure under the Rules of Civil Procedure. Carthy J.A.'s holding that copies of non-privileged documents placed in a lawyer's brief were never privileged did not arise directly and should be left for a case where the issue was squarely raised and argued.

The employee's statement met the dominant purpose test. From the insurer's perspective, it was a witness statement provided by a non-party which was protected by litigation privilege. Nor was the litigation privilege defeated by the employee's indifference as to whether the statement was disclosed to others at the time he made it, as the concern was with the confidentiality interest of the client and not the third party. But the privilege was a qualified one which could be overridden where the harm to other social interests clearly outweighed any benefit to the interest fostered by applying the privilege in the circumstances.

Litigation privilege claims should be determined by asking whether the material meets the dominant purpose test. If so, it should be determined whether in the circumstances the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production. The judge can inspect the material and provide the party seeking production with a judicial summary. In deciding whether to require production of material meeting the dominant purpose test, the policies underlying the competing interests should be considered. The privacy interest reflects our commitment to the adversarial process in which the parties prepare and present their own cases. But the policies underlying the privacy interest do not include concerns about potential fabrication of evidence by the party seeking discovery, which was to be addressed by judicial control over the timing and order of discovery. The policies underlying the disclosure interest are adjudicative fairness and adjudicative reliability. If the material is potentially probative of a central issue, then non-disclosure can do significant harm to the search for the truth; if the material is unavailable to the other party through any other source, then applying the privilege can cause considerable unfairness.

The employee's statement was best described as an *ex parte* examination for discovery of a friendly party by the insurer. It was admissible against the employee and parts of it might be admissible under the principled approach to hearsay. It was at the root of the insurer's claim and the insured did not have access to the same information from any other source. The goals of adjudicative fairness and adjudicative reliability could suffer significant harm if the statement were not ordered disclosed. The insurer's privacy interest rested in the document and not in the information contained in the document. The insured was entitled on discovery of the insurer and the employee to all information in their possession that was material to the allegations in the pleadings. None of the insurer's legal strategy or opinions of counsel would be revealed if the statement was ordered produced. It was purely informational and purported to be the employee's account of events, not counsel's view of the case. If the statement were produced, the basis upon which the insurer chose to deny coverage and to sue would be revealed. This was not an invasion of counsel's privacy zone. The competing interests tipped the scales in favour of requiring production of the statement by the insurer. The employee's claim of privilege could not be maintained in the face of an order directing production of the statement by the insurer.

Per Rosenberg J.A.: Doherty J.A.'s analysis of solicitor-client privilege should be adopted. Carthy J.A.'s application of those principles to the facts should be adopted, subject to Doherty J.A.'s reservation concerning the communications before May 23rd between the lawyer and the insurer. Carthy J.A.'s analysis of litigation privilege was agreed with. The balancing approach proposed by Doherty J.A. would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation. Although litigation privilege was not absolute, deviations from the general rule should be dealt with as clearly defined exceptions. The question of copies of non-privileged documents should be left open.

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Rule 502

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Rule 26(b)(3)

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APPEAL from an order of the Divisional Court, 37 O.R. (3d) 790, 82 A.C.W.S. (3d) 90, allowing an appeal from an order of Kurisko J., 44 C.C.L.I. (2d) 122, 12 C.P.C. (4th) 150, 34 O.R. (3d) 354, 71 A.C.W.S. (3d) 1100, requiring an insurer to produce investigator's reports and a witness statement.

Paul J. Pape and *J.D. Young*, Q.C., for appellants, Daniel Chrusz, Daniel Chrusz in trust, Catherine Backen, Gary Mitchell, Mike Filipetti, Jane Doe, John Doe, and Poli-Fiberglass Industries (Thunder Bay) Ltd.

Stephen J. Wojciechowski, for respondent, General Accident Assurance Co..

Norma M. Priday, for respondent, Denis Pilotte.

[1] CARTHY J.A.:—This action concerning a fire loss is at the discovery stage and has spawned a variety of questions regarding solicitor-client privilege and litigation privilege, which form the subject matter of this appeal. I have reviewed the reasons of Doherty J.A. and adopt his analysis of the principles underlying solicitor-client privilege, or as he prefers, "client-solicitor privilege".

BACKGROUND FACTS

[2] Daniel Chrusz and others were the owners of the University Park Inn, a motel and bar complex, which was severely damaged by fire on November 15, 1994. General Accident Assurance Company was the lead insurer of the property and immediately retained John

Bourret, an independent claims adjuster, to investigate the incident. On November 16, 1994, Bourret reported to General Accident that the fire may have been deliberately set, and that arson was suspected. General Accident then retained a lawyer, David Eryou, for legal advice relating to the fire and any claim under the policy.

[3] Bourret twice reported to General Accident and then on December 1st, 1994 was instructed to report directly to Eryou and to take instructions from him.

[4] On January 9, 1995, Chrusz delivered a Proof of Loss claiming $1,570,540.61. General Accident advanced $100,000 to Chrusz as a partial payment on the loss and, on April 25, 1995, General Accident agreed to advance a further $505,000.00, being the appraised actual cash value of the motel part of the property. It appears that, at this stage, there was no suspicion of arson on the part of Chrusz.

[5] Between July 1994 and January 1995, Chrusz employed Denis Pilotte as a motel manager on the site. His services were terminated in January 1995, and in May of that year he made allegations against Chrusz to Bourret and Eryou. Judging by what is contained in the pleadings that followed, Pilotte apparently alleged that Chrusz was fraudulently involved in creating the appearance of fire damage, where none existed, in order to inflate the amount of the claim. An example, which points to the potential relevance of the now disputed communications, is the allegation that Chrusz was responsible for moving undamaged furniture into fire damaged areas in order to inflate the claim of loss.

[6] On May 23, 1995, Pilotte gave a statement under oath to Eryou and Bourret that was transcribed at the behest of Eryou. Prior to making the statement Pilotte had not obtained legal advice and willingly proceeded without a lawyer. He said he wanted to make the statement because his conscience was bothering him. Pilotte also brought a videotape he had recorded which was shown and discussed. At the request of Eryou, the videotape was left with Eryou to be returned after making a copy. In due course it was returned.

[7] Pilotte and his counsel were given copies of Pilotte's statement on June 2, 1995 as promised by Eryou. It was not a condition of making the statement that Pilotte be given a copy of the transcript. According to General Accident, Pilotte agreed to keep the transcript confidential at Eryou's request. It is argued that the statement was

given to Pilotte on agreement that it would not be released to anyone without Eryou's prior approval.

[8] On June 2, 1995, General Accident issued a statement of claim against the insured and the insured's employees, alleging, amongst other things, concealment, fraud and misrepresentation during the process of the adjustment of the loss. This claim was launched in partial reliance upon the Pilotte statement.

[9] A statement of defence filed November 14, 1995 included a counterclaim against the plaintiffs and the Pilottes and Bourret. The Pilottes are sued for damages in the amount of $1.5 million allegedly caused by their defamation and slander and injurious falsehoods concerning the defendants to the main action. The essence of the claim against the Pilottes is that Denis Pilotte, motivated by the cancellation of his benefit plan arising from his employment as the night manager at the hotel owned by Chrusz, "intentionally sought out to fabricate, create and publish defamatory statements, untruths and a most incredible alchemy of falsehoods with the stated and intended purpose of interfering with Chrusz's contractual relationships with the insurers". The counterclaim alleges that the plaintiff insurers "relied on reckless, uncorroborated, unsubstantiated and malicious statements made by disgruntled former employees of Chrusz, Denis and Patty Pilotte".

[10] The motion which led to this appeal challenges the claims for privilege to documents listed in Schedule B of the affidavits of documents of certain of the defendants to the counterclaim.

Judgment of Kurisko J.

[11] In extensive reasons now reported at (1997), 44 C.C.L.I. (2d) 122, and (1997), 12 C.P.C. (4th) 150, Kurisko J. divided the communications into six categories.

1. Communications between Eryou and General Accident

[12] Kurisko J. concluded that all communications between these parties were subject to solicitor-client privilege.

2. Communications by Bourret to General Accident or Eryou before May 23, 1995

[13] These communications were derivative and not protected by litigation privilege in that there was no agency relationship between General Accident and Bourret. (The concept of "derivative

communications" was adopted from R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993)).

3. Communications between Bourret or General Accident and third parties prior to May 23, 1995

[14] These were held to be derivative and not subject to litigation privilege.

4. Communications between Bourret and General Accident and Bourret and Eryou after May 23, 1995

[15] At this stage, Kurisko J. concluded that litigation was imminent and thus, these communications were subject to either legal professional privilege or litigation privilege.

5. The Pilotte Statement

[16] The Pilotte statement was, *prima facie*, privileged in the hands of Eryou and General Accident as being prepared in anticipation of litigation, but such privilege was lost in the handing of a copy to Pilotte. The unconditional promise to give the transcript to Pilotte was an unequivocal waiver of control over the confidentiality of the transcript.

6. The Pilotte Videotape

[17] The videotape was not a document over which privilege could be properly claimed as it was not prepared in contemplation of this litigation (i.e.. the Counterclaim) and was ordered to be disclosed to the defendants.

Judgment of the Divisional Court (Smith A.C.J.O.C., O'Leary and Farley JJ.)

[18] The Divisional Court set aside the order of Kurisko J. and directed that the documents he ordered to be produced need not be produced, except for the videotape made by Pilotte. This judgment is now reported at (1998), 37 O.R. (3d) 790. The court concluded that all reports from Bourret to General Accident and/or Eryou made before and after May 23, 1995 were privileged.

[19] With respect to the Pilotte statement, the court found that once recorded by Eryou, it became part of his brief for litigation. Eryou did not waive this privilege by giving a copy to Pilotte. The court held that none of the parties are required to produce this document.

[20] The court did, however, agree with Kurisko J. in concluding that the videotape, the float book and additional time sheets, are not

subject to any privilege as they were in existence before Eryou met with Pilotte and were not subject to any privilege in Pilotte's hands. The court noted that: "[a]n original document that is clothed with no privilege does not acquire privilege simply because it gets into the hands of a solicitor".

ANALYSIS

[21] These facts raise a variety of disclosure issues and, as is often the case, it is helpful to return to fundamentals to identify the appropriate principles before seeking answers to individual questions. There are hundreds of case authorities dealing with litigation privilege but few that discuss the issues comprehensively. This is because in most cases an individual question has been raised in a particular context and receives a specific answer. The range of issues in this appeal justifies a broader analysis.

Litigation privilege

[22] The origins and character of litigation privilege are well described by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at p. 653:

> As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation. Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case. Accordingly, it is somewhat of a misnomer to characterize this aspect of privilege under the rubric, (solicitor-client privilege), which has peculiar reference to the professional relationship between the two individuals. [Footnotes omitted.]

[23] R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at 163. He stated at pp. 164-65:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

RATIONALE FOR LITIGATION PRIVILEGE

Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect — the adversary process — among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.

[24] It can be seen from these excerpts, quoted without their underlying authorities, that there is nothing sacrosanct about this form of privilege. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel what Sharpe calls a "zone of privacy" and what is termed in the United States, protection of the solicitor's work product: See *Hickman v. Taylor,* 329 U.S. 495 (1946).

[25] The "zone of privacy" is an attractive description but does not define the outer reaches of protection or the legitimate intrusion of discovery to assure a trial on all of the relevant facts. The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.

[26] Our modern rules certainly have truncated what would previously have been protected from disclosure. Under rule 31.06(1) information cannot be refused on discovery on the ground that what is sought is evidence. Under rule 31.06(2) the names and addresses of witnesses must be disclosed. A judicial ruling in *Dionisopoulous v. Provias* (1990), 71 O.R. (2d) 547 (H.C.), compelled a party to reveal the substance of the evidence of a witness, demonstrating that it is not just the *Rules of Civil Procedure* that may intrude upon traditional preserves.

[27] Rule 31.06(3) provides for discovery of the name and address and the findings, conclusions and opinions of an expert, unless the party undertakes not to call that expert at trial. This is an example of the Rules Committee recognizing the right to proceed in privacy to obtain opinions and to maintain their confidentiality if found to be unfavourable. The tactical room for the advocate to manoeuvre is preserved while the interests of a fair trial and early settlement are supported. The actual production of an expert's report is required under rule 53.03(1). Similar treatment is given to medical reports under rules 33.04 and 33.06.

[28] In a very real sense, litigation privilege is being defined by the rules as they are amended from time to time. Judicial decisions should be consonant with those changes and should be driven more by the modern realities of the conduct of litigation and perceptions of discoverability than by historic precedents born in a very different context.

[29] One historic precedent that in my view does have modern application but that has been given a varied reception in Ontario is the House of Lords' decision in *Waugh v. British Railways Board*,

[1979] 2 All E.R. 1169. That case concerned a railway inspector's routine accident report. It was prepared in part to further railway safety and in part for submission to the railway's solicitor for liability purposes. It was held that while the document was prepared in part for the purpose of obtaining legal advice in anticipated litigation, that was not its dominant purpose and thus it must be produced.

[30] After considering authorities that had protected documents from production where one purpose of preparation was anticipated litigation, Lord Wilberforce concluded at pp. 1173 and 1174:

> It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it; . . .
>
> . . . . .
>
> It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose, would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly: . . .

This dominant purpose test has contended in Canada with the substantial purpose test. Appellate courts in Nova Scotia, New Brunswick, British Columbia and Alberta have adopted the dominant purpose standard: see *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); *Voth Bros. Construction (1974) Ltd. v. North Vancouver Board of School Trustees* (1981), 23 C.P.C. 276 (B.C.C.A.), and *Nova, an Alberta Corp. v. Guelph Engineering Co.*, [1984] 3 W.W.R. 314, 5 D.L.R. (4th) 755 (Alta. C.A.).

[31] In Ontario, the predominant view of judges and masters hearing motions is that the substantial purpose test should be applied. This, of course, provides a broader protection against discovery than the dominant purpose test and, in my view, runs against the grain of contemporary trends in discovery. These authorities find their root in a decision of this court in *Blackstone v. The Mutual Life Insurance Co. of New York*, [1944] O.R. 328,

[1944] 3 D.L.R. 147, where Robertson C.J.O. said at p. 333:

> I agree with the proposition of the defendant's counsel that it is not essential to the validity of the claim of privilege that the document for which privilege is claimed should have been written, prepared or obtained solely for the purpose of, or in connection with, litigation then pending or anticipated. It is sufficient if that was the substantial, or one of the substantial, purposes then in view.

[32] The real issue in that case was whether the reports in question were prepared in anticipation of litigation. Gillanders J.A. wrote concurring reasons with no mention of "substantial purpose", and similarly there was none in the dissenting reasons of Kellock J.A. Even as an *obiter* remark by Robertson C.J.O. it is not presented as a reasoned conclusion based upon a consideration of the authorities and does not match substantial purpose against dominant purpose. I do not consider the quoted statement binding on this court and, based upon policy considerations of encouraging discovery, would join with the other appellate authorities in adopting the dominant purpose test.

[33] An important element of the dominant purpose test is the requirement that the document in question be *created* for the purposes of litigation, actual or contemplated. Does it apply to a document that simply appears in the course of investigative work? The concept of creation has been applied by some courts to include copying of public documents and protection of the copies in the lawyer's brief. In *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577, the majority of the British Columbia Court of Appeal applied the dominant purpose test but then, relying principally on *Lyell v. Kennedy* (1884), 27 Ch.D. 1 (C.A.), held that copies of public documents gathered by a solicitor's office attained the protection of litigation privilege. In *Lyell v. Kennedy* the protected copies were of tombstone inscriptions and Cotton L.J. upheld the privilege, stating at p. 26:

> In my opinion it is contrary to the principle on which the Court acts with regard to protection on the ground of professional privilege that we should make an order for their production; they were obtained for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required documents, although perhaps *publici juris* in themselves, to be produced, because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might shew

what his view was as to the case of his client as regards the claim made against him.

[34] The majority reasons in *Hodgkinson* were written by McEachern C.J.B.C. who, at p. 578, identified the issue as being:

> . . . whether photocopies of documents collected by the plaintiff's solicitor from third parties and now included in his brief are privileged even though the original documents were not created for the purpose of litigation.

[35] After a thorough analysis of the authorities, the principal one of which is *Lyell v. Kennedy*, the Chief Justice observed at p. 583:

> In my view the purpose of the privilege is to ensure that a solicitor may, for the purpose of preparing himself to advise or conduct proceedings, proceed with complete confidence that the protected information or material he gathers from his client and others for this purpose, and what advice he gives, will not be disclosed to anyone except with the consent of his client.

And at p. 589:

> It is my conclusion that the law has always been, and in my view should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

[36] Craig J.A., in dissenting reasons, put aside the older cases as not manifesting the modern approach to discovery and espoused a rigid circumscribing of litigation privilege. He bluntly concluded at p. 594:

> I fail to comprehend how original documents which are not privileged (because they are not prepared with the dominant purpose of actual or anticipated litigation) can become privileged simply because counsel makes photostatic copies of the documents and puts them in his "brief". This is contrary to the intent of the rules and to the modern approach to this problem. If a document relates to a matter in question, it should be produced for inspection.

[37] I agree with the tenor of Craig J.A.'s reasons. The majority reasons reflect a traditional view of the entitlement to privacy in a lawyer's investigative pursuits. It is an instinctive reflex of any litigation counsel to collect evidence and to pounce at the most propitious moment. That's the fun in litigation! But the ground rules are changing in favour of early discovery. Litigation counsel must adjust to this new environment and I can see no reason to think that clients may suffer except by losing the surprise effect of the hidden missile.