(City) v. Superior Court, 281 P.2d 26 (1951) at 31 (California Supreme Court):

> The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then by *any form of agency* employed or set in motion by the client is within the privilege.
>
> .....
>
> Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed. [Emphasis in original].

[116] In my view, Traynor J. was referring to situations in which the third party's expertise is required to interpret for the solicitor information provided by the client to the solicitor so that the solicitor can understand that information and assess its significance to the legal issues that the solicitor must address. In such a case, the psychiatrist. like the accountants in *Susan Hosiery*, *supra*, assembles and translates information provided by the client so that the solicitor can understand the nature and legal significance of it. Viewed in this way, the role of the psychiatrist or the accountants is akin to that of a translator. Indeed, in the American authority relied on by Major J., Traynor J. analogized, at p. 31, the psychiatrist's role to that of an interpreter, or messenger. In such cases, information is imparted from the client to the solicitor through the assistance of a third party. As Traynor J. said at p. 31, these third parties act as "agents of transmission" of communications between the client and the lawyer.

[117] While the conclusion that Jones' communications with Smith were protected by client-solicitor privilege is sustainable under the line of authority pertaining to third parties who serve as conduits of information from the client to the solicitor, I think one must be careful in assessing whether the dissenting reasons of Major J. have an impact on cases where the claim for client-solicitor privilege involving third parties is raised in circumstances where litigation is neither ongoing nor contemplated. Jones had been charged with sexual assault when he spoke to Dr. Smith and the communications were in aid of Dr. Smith's preparation of a psychiatric report to be used by Jones' counsel in his defence or on sentencing. Similarly, in *R. v. Perron* (1990), 54 C.C.C. (3d) 108 (Que. C.A.), an authority heavily relied on by Major J., the communications with the psychiatrist were made in furtherance of counsel's

preparation of a defence to outstanding charges. In his reasons, Major J. specifically refers on at least two occasions to communications with third party experts by a client or a solicitor made "for the purpose of preparing their defence" (at pp. 209 and 210). While Major J. spoke in terms of client-solicitor privilege, he in fact limited his observations to circumstances in which litigation privilege would apply. It is unclear whether Major J. used the phrase "solicitor-client privilege" in the same sense that I use it or whether he used the term in a way that conflates client-solicitor privilege with litigation privilege. As Watson and Au observe in *Solicitor-Client Privilege and Litigation Privilege in Civil Litigation*, *supra*, at 333-35, there is considerable confusion with respect to terminology in this area of the law.

[118] I would not describe Mr. Bourret as a channel of communication between General Accident and Mr. Eryou. Nor would I characterize him as translating or interpreting information provided by General Accident. Mr. Bourret was not passing information from General Accident on to Mr. Eryou, but rather was gathering information from sources extraneous to General Accident and passing that information on to General Accident and/or Mr. Eryou. Similarly, Mr. Bourret was not a channel of communication from General Accident to Mr. Eryou, but rather was a channel of communication from the outside world to Mr. Eryou. His position was very different from that of the financial advisers/accountants referred to in *Susan Hosiery Ltd.* It was much closer to the position of the surveyors in *Wheeler*. Like the surveyors, he was retained to gather information from sources extraneous to the client and pass that information on to the solicitor so the solicitor could give legal advice to the client.

[119] It remains to be determined whether the communications are protected by client-solicitor privilege even though Mr. Bourret cannot be described as a conduit of information from the client to the solicitor. Kurisko J., taking his lead from the case law, approached the issue by attempting to characterize the legal nature of the relationship between Mr. Bourret and General Accident. He held that if Mr. Bourret's relationship to General Accident were that of an agent, the communications were privileged. He looked to the distinctions drawn in the general law of agency between agents, independent contractors and employers and decided that Mr. Bourret was not an agent for the purposes of the communications with Mr. Eryou.

[120] I agree with the Divisional Court that the applicability of client-solicitor privilege to communications involving a third party should not be determined by deciding whether Mr. Bourret is properly described as an agent under the general law of agency. I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

[121] Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

[122] If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

[123] In drawing this distinction, I return to the seminal case of *Wheeler v. La Marchant, supra.* In distinguishing between representatives of a client or a solicitor whose communications attracted the privilege and those whose communications did not, Cotton L.J. referred to representatives employed by a client "to obtain the legal advice of the solicitor". A representative empowered by the client to obtain that advice stood in the same position as the client. A representative retained only to perform certain work for the client relating to the obtaining of legal advice did not assume the position of client for the purpose of client-solicitor privilege.

[124] I find support for my position in the definition of client-solicitor privilege adopted in Rule 502 of the American Revised Uniform Evidence Rules (1986 amendment). The rule recognizes that in some situations, communications from third parties to the solicitor of a client should be protected by client-solicitor privilege. Rule 502(2) defines "representative of the client" as:

> . . . one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.[5]

[125] The definition ties the existence of the privilege to the third party's authority to obtain legal services or to act on legal advice on behalf of the client. In either case the third party is empowered by the client to perform a function on the client's behalf which is integral to the client-solicitor function. The agent does more than assemble information relevant to the legal problem at hand.

[126] This functional approach to applying client-solicitor privilege to communications by a third party is sound from a policy perspective. It allows the client to use third parties to communicate with counsel for the purpose of seeking legal advice and giving legal instructions in confidence. It promotes the client's access to justice and does nothing to infringe the client's autonomy by opening her personal affairs to the scrutiny of others. Lastly, it does not impair the lawyer's ability to give his undivided loyalty to the client as demanded by the adversarial process. Where the client retains the authority to seek legal advice and give legal instructions, these policy considerations do not favour extending client-solicitor privilege to communications with those who perform services which are incidental to the seeking and obtaining of legal advice.

[127] The position of the Divisional Court provides incentive to a client who has the necessary means to direct all parties retained by the client to deposit any information they gather with the client's lawyer so as to shield the results of their investigations with client-solicitor privilege. The privilege would thus extend beyond communications made for the purpose of giving and receiving legal advice to all information relevant to a legal problem which is conveyed at a client's request by a third party to the lawyer. This view of client-solicitor privilege confuses the unquestioned obligation of a lawyer to maintain confidentiality of information acquired in the course of a retainer with the client's much more limited right to foreclose access by opposing parties to information which is material to

the litigation. Client-solicitor privilege is intended to allow the client and lawyer to communicate in confidence. It is not intended, as one author has suggested, to protect ". . . all communications or other material deemed useful by the lawyer to properly advise his client . . .": Wilson, *Privilege In Experts' Working Papers*, *supra*, at 371. While this generous view of client-solicitor privilege would create what clients might regard as an ideal environment of confidentiality, it would deny opposing parties and the courts access to much information which could be very important in determining where the truth lies in any given case.

[128] I make one further observation. If the Divisional Court's view of client-solicitor privilege is correct, litigation privilege would become virtually redundant because most third party communications would be protected by client-solicitor privilege. To so enlarge client-solicitor privilege is inconsistent with the broad discovery rights established under contemporary pre-trial regimes, which have clearly limited the scope of litigation privilege. The effect of that limitation would be all but lost if client-solicitor privilege were to be extended to communications with any third party who the client chose to anoint as his agent for the purpose of communicating with the client's lawyer.

[129] The true function assigned to Mr. Bourret by General Accident must be determined from the entirety of the circumstances. Mr. Bourret's or General Accident's characterization of his function is not determinative of one of the very issues that the motion judge was called upon to decide: *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (B.C.C.A.) at 259. Mr. Bourret was initially retained to investigate the fire and report to General Accident. On November 16, 1994, after arson was suspected, his retainer changed in one respect only. He was to conduct the same investigation, but he was to deliver his reports to Mr. Eryou instead of General Accident.[6] The affidavits of Mr. Bourret and Mr. Cook indicate that Mr. Bourret was to report the results of his investigations to Mr. Eryou and take instructions from him. The affidavits do not suggest that Mr. Bourret was given any authority to seek legal advice from Mr. Eryou on behalf of General Accident, or any authority to give instructions on legal matters on behalf of General Accident to Mr. Eryou. His authority did not reach inside the client-solicitor relationship between Mr. Eryou and General Accident. Instead, Mr. Bourret's

function was to educate Mr. Eryou as to the circumstances surrounding the fire so that General Accident could receive the benefit of Mr. Eryou's informed advice and could instruct Mr. Eryou as to the legal steps to be taken on its behalf.

[130] As I read the slim evidence provided by General Accident, it does not establish that Mr. Bourret's retainer extended to any function which could be said to be integral to the client-solicitor relationship. I would hold that the communications between Mr. Bourret and Mr. Eryou are not protected by client-solicitor privilege.

The Litigation Privilege Claims

[131] General Accident claims that communications between Mr. Eryou and Mr. Bourret prior to May 23, 1995 are protected by litigation privilege. It relies on the suspected arson to support that claim. General Accident also contends that even if communications prior to May 23rd are not protected by litigation privilege, communications from that day forward are so protected in the light of the fraud allegations revealed by Mr. Pilotte in his May 23rd statement.

[132] The May 23rd statement and the copy provided to Mr. Pilotte are said by General Accident to be protected by its litigation privilege. Mr. Pilotte contends that the copy provided to him is protected by his litigation privilege.

[133] I agree with Carthy J.A. that the communications between Mr. Bourret and General Accident and Mr. Eryou before May 23, 1995 are not protected by litigation privilege and that the communications between those parties from that date forward are protected by litigation privilege assuming they are not subject to disclosure under the applicable *Rules of Civil Procedure*.

[134] I also agree with much of my colleague's analysis of the litigation privilege claim. In particular, I agree with:

- his description of the different rationales underlying client-solicitor privilege and litigation privilege [paras. 22-24];
- his conclusion that litigation privilege exists to provide "a protected area to facilitate investigation and preparation of a case for trial by adversarial advocates" [para. 23];
- his assertion that the reach of litigation privilege must take cognizance of the broad rules of discovery which are aimed at full disclosure of relevant facts by all parties to the litigation [paras. 25-28];

- his adoption of the dominant purpose test as being consistent with contemporary notions of full pre-trial discovery [paras. 29-32];
- his conclusion that any litigation privilege General Accident may have had with respect to communications prior to May 23rd disappeared when General Accident no longer suspected Chrusz of any involvement in arson [paras. 50-54]; and
- his conclusion that communications from or to Mr. Bourret by General Accident and or Mr. Eryou after May 23rd are subject to litigation privilege assuming they are not subject to disclosure under the applicable *Rules of Civil Procedure* [para. 56].

[135] In the course of his analysis of the litigation privilege claim, Carthy J.A. holds that copies of non-privileged documents placed into a lawyer's brief in the course of preparation for litigation are never protected by litigation privilege [paras. 33-41]. I do not concur in that part of his analysis. That issue does not arise directly on this appeal as there is no appeal from the holding of Kurisko J. and the Divisional Court that the copies of the videotape and business records provided to Mr. Eryou by Mr. Pilotte are not privileged. My colleague has addressed the question, however, no doubt because of the Divisional Court's observation at p. 796 that:

> It is true that a copy of an original document incorporated by a solicitor into his litigation brief becomes privileged, but that privilege does not extend to the original.

[136] Carthy J.A., while acknowledging the line of authority which supports the position taken by the Divisional Court, prefers the view of Craig J.A. in dissent, in *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 at 594, where Craig J.A. observed:

> 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".

[137] I do not disagree with the observation of Craig J.A. A non-privileged document should not become privileged merely because it is copied and placed in the lawyer's brief. I would not, however, go so far as to say that copies of non-privileged documents can never properly be the subject of litigation privilege. In *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (N.S.W.S.C.) at 61-62, Wood J. opined:

> In my view, it is incorrect to state, as a general proposition, that a copy of an unprivileged document becomes privileged so long as it is obtained by a party, or its solicitor, for the sole purpose of advice or use in litigation. I think that the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of a solicitor, then I consider privilege should apply [*Lyell v. Kennedy (No. 3)* (1884), 27 Ch. D. 1]. Otherwise, I see no reason, in principle, why disclosure should be refused of copies of documents which can be obtained elsewhere, and in respect of which no relationship of confidence, or legal profession privilege exists.

[138] The review of the case law provided in Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*, at 170-73 suggests to me that Wood J.'s analysis is the appropriate one: see also *Commissioner Australian Federal Police v. Propend Finance Pty. Ltd.* (1997), 141 A.L.R. 545 (H.C.). I would leave the question of when, if ever, copies of non-privileged documents can be protected by litigation privilege to a case where the issue is squarely raised and fully argued.

[139] I turn now to General Accident's claim that it is not required to produce the transcript of Mr. Pilotte's statement of May 23rd because it is protected by litigation privilege. Unlike Carthy J.A., I would hold that the statement is not so protected.

[140] There is no doubt that the statement meets the conditions precedent to the operation of litigation privilege in that it was prepared by counsel in contemplation of litigation and for the purpose of assisting him in that litigation. The dominant purpose test is clearly met. From General Accident's perspective, the statement is the equivalent of a witness statement provided by a non-party. Such statements have been held to be protected by litigation privilege: *Yri-York Ltd. v. Commercial Union Assurance Co. of Can. et al.* (1987), 17 C.P.C. (2d) 181 at 186 (Ont. H.C.); *Catherwood (Guardian ad litem of) v. Heinrichs* (1995), 17 B.C.L.R. (3d) 326 (B.C.S.C.).

[141] Nor, in my view, is litigation privilege defeated by virtue of Mr. Pilotte's indifference as to whether the statement was disclosed to others at the time he made it. I agree with the analysis of Mr. Manes that in the context of litigation privilege, one is concerned with the confidentiality interest of the client and not third parties: R. Manes, *Judging the Privilege*, a paper presented at the Superior Court Judges Education Seminar (Ontario), Spring 1999 at 14-19; see also Manes and Silver, *Solicitor-Client Privilege in Canada*

Law, *supra*, at 100-103; S. Lederman, *Commentary: Discovery-Production of Documents-Claim of Privilege to Prevent Disclosure* (1976), 54 Can. Bar Rev. 422; *Strass v. Goldsack* (1976), 58 D.L.R. (3d) 397 at 402-403, *per* McGillivray C.J.A. (dissenting). General Accident, through Mr. Eryou, expressed a clear intention that the contents of the statement should not be disclosed to its potential adversaries.

[142] I do not think, however, that every document which satisfies the condition precedent to the operation of litigation privilege should be protected from disclosure by that privilege. In my view, the privilege should be recognized as a qualified one which can be overridden where the harm to other societal interests in recognizing the privilege clearly outweighs any benefit to the interest fostered by applying the privilege in the particular circumstances.

[143] It is well established in Canada that no privilege is absolute. As Cory J. said in *Smith v. Jones*, *supra*, at 219:

> Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.

[144] It seems to me that the words of Cory J. apply with even greater force when the privilege in issue is litigation privilege and not client-solicitor privilege. The former has never occupied the same favoured position as the latter.

[145] Recent jurisprudence of the Supreme Court of Canada is replete with cases where confidentiality-based claims have come into conflict with claims based on other individual or societal interests. The defendant who seeks access to a plaintiff's medical records, the Crown's attempt to elicit evidence of an accused's statement to his spiritual adviser and an accused's attempt to introduce evidence of a complainant's previous sexual activity are all examples of situations in which one party relies on a privacy interest to deny access or admissibility and the other party counters with the claim that the just and accurate resolution of the litigation requires that the party have access to or be permitted to introduce that evidence. In resolving these difficult cases, the court has

identified the competing interests and has determined questions of access or admissibility by applying a type of cost-benefit analysis to the competing interests. In the outcome of that analysis, the privacy claim may win out entirely, may fail entirely, or may be given limited effect: see *Slavutych v. Baker*, [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1; *R. v. Gruenke*, *supra*; *Metropolitan Life Insurance Company v. Frenette*, [1992] 1 S.C.R. 647, 89 D.L.R. (4th) 653; *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 (S.C.C.); *R. v. Beharriell*, *supra*; *Smith v. Jones*, *supra*; see also *Cook v. Ip* (1985), 52 O.R. (2d) 289, 22 D.L.R. (4th) 1, (C.A.); *R. v. R.J.S.* (1985), 19 C.C.C. (3d) 115 (Ont. C.A.). This approach produces some uncertainty in close cases; however, it is necessary to take cognizance of voices which have gone unheard in our courts in the past and to permit the law of privilege to adapt to the evolving interests and priorities of the community: see Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*, at 20-23.

[146] The case law dealing with litigation privilege offers some support for applying a competing interests approach to litigation privilege claims. Cases that refuse to apply the privilege to statements made by one party to a representative of the opposing party even when in contemplation of litigation are instructive. These cases recognize that withholding production of the opposing party's statement does nothing to enhance the legitimate privacy expectations inherent in the client-solicitor relationship, but may impair the full, fair and timely resolution of the litigation: see *Flack v. Pacific Press Ltd.* (1970), 14 D.L.R. (3d) 334 at 341 and 350, *per* Robertson J.A., and at 357-58, *per* Nemetz J.A.; *Strass v. Goldsack*, *supra*, at 415-16, *per* Clement J.A., and at 420-21, *per* Moir J.A.

[147] Counsel for Chrusz also referred the court to one authority which expressly recognizes that in particular circumstances the interests of justice can trump an otherwise valid litigation privilege claim. In *Butterfield v. Dickson* (1994), 28 C.P.C. (3d) 242 (N.W.T.S.C.), the applicant sought production of certain adjusters' reports prepared after a fatal boating accident. Vertes J. held that the reports were producible as they did not meet the dominant purpose test. He went on, at p. 252, to hold:

> Finally, there is a further basis for ordering disclosure of these reports.
>
> There is evidence that certain tests and adjustments were made to the boat by the respondents after the fatality. The applicant, therefore, will not be able to inspect the boat in exactly the same condition it was in at the time of the fatality. In the interests of justice, the applicant should have access to these reports so as to assess the effect of any adjustments made to the boat since them.

[148] I read Vertes J. to hold that litigation privilege should give way where it would deny the opposing party access to important information which could not be obtained except through access to the reports over which the privilege is sought.

[149] There is considerable academic support for the view that litigation privilege should be a qualified one which must, in some circumstances, give way to the interests served by full disclosure: see Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*, at 21-22; Watson and Au, *Solicitor-Client Privilege and Litigation Privilege in Civil Litigation*, *supra*, at 344-45; R. Sharpe, *Claiming Privilege in the Discovery Process, in Law in Transition: Evidence*, Law Society of Upper Canada Special Lectures (Toronto: DeBoo, 1984) at 164-65. These authors point to the American experience where the lawyer's work product privilege against production has always been a qualified one: *Hickman v. Taylor*, 329 U.S. 495 (1947) at 511. The statutory manifestation of that qualification is found in Rule 26(b)(3) of the U.S. Federal Rules of Civil Procedure which permits production upon a showing by the party seeking production that there is "a substantial need" for the material and that the party is "unable without undue hardship to obtain the substantial equivalent of the material". This statutory language reflects some of the factors which, in my view, should be considered in determining whether a document should be produced even though it fulfills the conditions precedent to the operation of litigation privilege.[7]

[150] In my opinion, litigation privilege claims should be approached in the same way as other confidentiality-based claims which seek to deny access to or evidentiary use of relevant information. The harm done by non-disclosure to other societal interests must be considered and factored into the decision whether to give effect to the privilege claim.

[151] Litigation privilege claims should be determined by first asking whether the material meets the dominant purpose test described by Carthy J.A. If it meets that test, then it should be

determined whether in the circumstances the harm flowing from nondisclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production. I would put the onus on the party claiming the privilege at the first stage of this inquiry and on the party seeking production of the document at the second stage of the inquiry. I appreciate that the party seeking production will not have seen the material and will be at some disadvantage in attempting to make the case for production. The judge can, of course, inspect the material: rule 30.04(6). She can also provide the party seeking production with a judicial summary of that material to assist in making the necessary submissions as is done where the Crown claims privilege over the contents of an affidavit used to obtain a wiretap authorization: see *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.) at 194.

[152] In deciding whether to require material which meets the dominant purpose test to be produced, the policies underlying the competing interests should be considered. The privacy interest reflects our commitment to the adversarial process in which competing parties control the preparation and presentation of their respective cases. Each side is entitled to and, indeed, obligated to prepare its own case. There is no obligation to assist the other side. Counsel must have a "zone of privacy" where they are free to investigate and develop their case without opposing counsel looking over their shoulder.

[153] The policies underlying the privacy interest on which the litigation privilege is based do not, however, include concerns about the potential fabrication of evidence by the party seeking disclosure. There was a time when that concern featured prominently in the rules governing discovery and production of documents: see Wigram, *Points in the Law of Discovery*, 2nd ed. (1840) at 265-66, referred to by McGillivray C.J.A. in *Strauss v. Goldsack*, *supra*, at 409. Given the present discovery philosophy, however, the desire to avoid the fabrication of evidence cannot be viewed as one of the policies underlying the privacy interest of the party opposing production. Such concern must now be addressed by way of judicial control over the timing of production and the order in which parties are discovered.[8]

[154] The policies underlying the disclosure interest are adjudicative fairness and adjudicative reliability. While we remain committed to the adversarial process, we seek to make that process

as fair and as effective a means of getting at the truth as possible. Both goals are in jeopardy when one party can hide or delay disclosure of relevant information. The extent to which these policies are undermined by non-disclosure will depend on many factors. The nature of the material and its availability through other means to the party seeking disclosure are two important factors. If the material is potentially probative evidence going to a central issue in the case, non-disclosure can do significant harm to the search for the truth. If the material is unavailable to the party seeking disclosure through any other source, then applying the privilege can cause considerable unfairness to the party seeking disclosure.

[155] I turn now to apply the approach I favour to the May 23rd statement. I have read the statement.[9] It is hardly a typical witness statement generated in the course of an investigation. It consists of an exhaustive examination under oath of Mr. Pilotte by Mr. Eryou and Mr. Bourret over a two-day period. The questions asked of Mr. Pilotte are detailed and make extensive reference to documents, some of which appear to have been taken from Chrusz by Mr. Pilotte during his employment. The statement, which covers almost 200 pages, is best described as an *ex parte* examination for discovery of a friendly party by General Accident.

[156] I am satisfied that all or parts of the statement are potentially admissible as substantive evidence. To the extent that it contains admissions against interest, it is clearly admissible against Mr. Pilotte. I am also satisfied, given the circumstances in which the statement was made, that all or parts of it may be admissible under the principled approach to hearsay evidence: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. It would certainly seem arguable that Mr. Pilotte's detailed recollection of events provided under oath a few months after the relevant events is likely to be much more reliable than any recollection he may have on discovery or at trial some 4 or 5 years after the relevant events.

[157] In deciding whether the statement should be ordered produced, it is also significant that the statement is the root of General Accident's claim. In assessing the credibility of the allegations made in that statement, it may be important to examine how the information was first elicited from Mr. Pilotte. The format of the questions and the role played by Mr. Eryou or Mr. Bourret in eliciting answers to those questions could be significant in assessing the merits of the allegations giving rise to this claim.

[158] It cannot be said that Chrusz has access to the same information from any other source. Obviously, Mr. Pilotte will not voluntarily provide the statement to Chrusz. While Chrusz can discover Mr. Pilotte and ask him about his knowledge of the relevant events, he cannot know without a copy of the statement what Mr. Pilotte said when first questioned about those events. To the extent that Mr. Pilotte's statement could be substantive evidence, Chrusz cannot obtain that evidence without an order directing production of the statement.

[159] These considerations lead me to conclude that the goals of adjudicative fairness and adjudicative reliability could suffer significant harm if the statement is not ordered produced at the discovery stage of the proceedings.

[160] It remains to be considered the potential harm to General Accident's legitimate privacy interest which would be caused by an order directing production of the statement. Chrusz's discovery rights must be borne in mind in making this determination. General Accident's privacy interest rests in the document and not in the information contained in the document. Chrusz is entitled on discovery of General Accident and Mr. Pilotte to all of the information in their possession which is material to the various allegations in the pleadings. Even if the statement were not ordered produced, General Accident and Mr. Pilotte must disclose the substance of its contents. Non-production would, in effect, deny access to the primary source, thereby denying Chrusz a means of determining whether the information provided on discovery was full and accurate.

[161] My review of the statement does not indicate that any of General Accident's legal strategy or the thoughts or opinions of its counsel will be revealed if the statement is ordered produced. The statement does not contain anything which comes within the ambit of what is usually referred to as "lawyers' work product". It is not like an expert's report, which may well reflect the theory of the case developed by counsel or reveal the weaknesses and strengths of the case as seen by counsel. This statement is purely informational and purports to be Mr. Pilotte's account of the relevant events. There can be no suggestion that it somehow reflects counsel's view of the case. Indeed, there was no case until this statement was made.

[162] If the May 23rd statement is produced, the basis upon which General Accident chose to deny coverage and sue Chrusz for

fraud will be revealed. This can hardly be described as an invasion of counsel's "privacy zone". I do not think that the policies underlying General Accident's privacy interests in non-disclosure are in any way adversely affected by disclosure of this statement. As I see it, the real risk attendant upon disclosure of the statement in so far as General Accident is concerned is that Chrusz will manufacture or tailor evidence in an effort to respond to the very specific allegations of fraud found in the statement. As indicated above, I do not regard this concern as relevant to the determination of whether litigation privilege should be applied to protect the statement from disclosure.

[163] In summary, production of Mr. Pilotte's May 23rd statement will yield significant benefits to the fair and accurate determination of this litigation. It will not compromise counsel's ability to effectively prepare and present a case for General Accident. When the competing interests are identified and weighed in the context of the facts of this case, the scales tip clearly in favour of requiring production of the statement by General Accident.

[164] I see no basis upon which Mr. Pilotte's privilege claim with respect to the copy of the statement could be maintained in the face of an order directing production of the statement by General Accident. In my view, the copy of the statement in the possession of Mr. Pilotte's lawyer should also be produced.

Conclusion

[165] I would answer the three questions posed at the outset of these reasons as follows:

- Communications between Mr. Bourret and the insurers and/or Mr. Eryou made prior to May 23, 1995 are not protected by either client-solicitor privilege or litigation privilege. Communications between Mr. Bourret and General Accident and/or Mr. Eryou on or after May 23, 1995 are protected from disclosure by litigation privilege unless they are required to be produced under the *Rules of Civil Procedure*;
- The transcript of Mr. Pilotte's May 23rd statement in the possession of the insurers is not protected against production by litigation privilege; and
- The copy of the transcript of Mr. Pilotte's May 23rd statement in the possession of his lawyer is not protected against production by Mr. Pilotte by virtue of litigation privilege.