

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998,
c. 15, Schedule B;

AND IN THE MATTER OF a motion by the Consumers Council of
Canada and Aubrey LeBlanc in relation to section 26.1 of the *Ontario
Energy Board Act, 1998* and Ontario Regulation 66/10.

**BOOK OF AUTHORITIES OF THE INTERVENOR,
THE ATTORNEY GENERAL OF ONTARIO
ON THE MOTION FOR PRODUCTION OF DOCUMENTS**
(Returnable April 21, 2011)

VOLUME II of II
(Tabs 26 to 51)

April 14, 2011

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AND TO: Intervenor of Record

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Indexed as:

Manufacturers Life Insurance Co. v. Dofasco Inc. (Ont. H.C.)

Between

**The Manufacturers Life Insurance Company, North American Life Assurance Company, The Standard Life Assurance Company, National Life Assurance Company of Canada, New York Life Insurance Company, Wellington Insurance Company, Civil Service Superannuation Board, Prudential Assurance Company Limited, Municipal Employees Benefit Board of Manitoba, Co-Operative Superannuation Society, Her Majesty the Queen in the Right of Alberta, Midland Doherty Investment Management Corporation, The Royal Trust Company, Montreal Life Insurance Company, The Laurentian Mutual Insurance, Sun Life Assurance Company of Canada, Ontario Hydro, Sinking Fund Trustees of the City of Winnipeg, Plaintiffs (Appellants), and
Dofasco Inc. and National Trust Company, Defendants
(Respondents)**

[1989] O.J. No. 1456

38 C.P.C. (2d) 47

17 A.C.W.S. (3d) 26

Action No. 19604/87

Supreme Court of Ontario - High Court of Justice
Toronto, Ontario

Montgomery J.

Heard: August 3, 1989
Judgment: September 6, 1989

Practice -- Discovery -- Documentary discovery -- Commercially sensitive material not relevant, not producible.

These were an appeal and cross-appeal from a master's decision on a motion seeking to compel the defendant to produce certain documents in an unedited form. The plaintiffs held numerous sinking

fund debentures given by the defendant company. Part of the redemption provisions of these debentures stipulated that the defendant was not entitled to redeem the debentures where the cost of borrowing to do so was under 17% per annum. The defendant gave notice that it intended to redeem all its debentures outstanding. The plaintiffs alleged that the defendant was intending to borrow to effect the redemption and this was the triable issue. The defendant produced certain financial documents at discovery which were edited. The plaintiffs claimed entitlement to the unedited documents.

HELD: The appeal and cross-appeal were determined. The plaintiffs were not entitled to the unedited financial documents because the edited portions were not relevant to the issue of whether the defendant was going to borrow. Commercially sensitive information should only be produced where it was clearly relevant.

Graham D. Smith, for the Plaintiffs (Appellants).
Jeffrey S. Leon, for the Defendants (Respondents).

MONTGOMERY J.:-- An appeal and cross-appeal from a decision of the Master determining what questions are proper on discovery is a tedious, boring exercise. If the Master gives no reasons, a careful examination of the relevance of each question must be made. If the Master does give reasons, this court should only interfere with the decision where there is a clear error in principle: *Marleen Investments Ltd. v. McBride et al.* (1979), 23 O.R. (2d) 125 (H.C.J.). In the present case the learned Master did not give reasons.

The triable issue is whether Dofasco anticipated borrowing to redeem its debentures.

The issue on this appeal is whether certain questions asked on discovery are relevant to the triable issue.

Background

The plaintiffs are all holders of 17% sinking fund debentures (the "Debentures") issued by Dofasco in April, 1982, and maturing on May 1, 1997. The plaintiffs hold over 40,000,000 of the 60,000,000 Debentures issued. The Debentures were issued at a discount; the effective annual rate of interest is 17.09%.

In June, 1986, Dofasco announced that it intended to redeem all outstanding Debentures on August 15, 1986. On July 10, 1986, formal notice of intention to redeem was given.

The Trust Indenture relating to the Debentures, and the Debentures themselves, provided that Dofasco's right to redeem the Debentures was limited in that it could not redeem the Debentures by "the application, directly or indirectly, of funds obtained through borrowing having an interest cost... of less than 17.09% per annum, or in anticipation of such borrowing". This clause is of the type known as a "financial advantage" clause.

Paragraph 9 of the Statement of Claim states as follows:

(i) Dofasco is obligated to retire \$3,500,000.00 principal amount of the Debentures in each of the years 1985 to 1996 inclusive, through the mechanism of a mandatory sinking fund; and

(ii) Dofasco may otherwise redeem the Debentures, prior to maturity, only where the funds applied to the redemption, directly or indirectly, are not obtained through borrowing (or in anticipation of borrowing) at an interest cost of less than 17.09% per annum.

The plaintiffs plead that as life insurance corporations or managers of pension funds, they provide annuities and other long-term financial products to the public. They allege that they purchased the long-term fixed rate Debentures to match their long-term obligations to the public. They required certainty to develop investment portfolios.

The plaintiffs also rely upon the following pleadings contained in paragraphs 18-25 of the Statement of Claim:

18. As of the time of the proposed redemption, Dofasco had significant borrowing arrangements at an interest cost well below 17.09% per annum. Dofasco also had commitments and plans which would require substantial capital expenditures and financing to fund them.

19. In particular, at the time of the proposed redemption, Dofasco had commitments for the completion of authorized capital projects in the amount of at least \$846,000,000.00 and had further publicly announced its intention to spend approximately \$2,000,000,000.00 on capital expenditures by the early 1990's.

20. Dofasco's anticipated and committed expenditures greatly exceeded its ability to pay for such expenditures through cash on hand or cash likely to be generated by Dofasco's operations. Further, for at least one year preceding the proposed redemption, Dofasco's cash flow, excluding cash derived from financing activities, was negative.

21. The prime interest rate as of the date of the proposed redemption was 7.5% per annum.

22. At the time of the proposed redemption, one of the major sources of debt financing for Dofasco was a long term line of credit obtained from Mitsui & Co. Ltd. in November 1985. Pursuant to this arrangement, Dofasco was extended a line of credit in the amount of \$303,000,000.00 at an average rate of 9.95% per annum. This commitment extends to November 2003.

23. From September 1986 through March 1987, Dofasco has in fact drawn down \$90,728,564.00 under the Mitsui & Co. Ltd. loan.

24. When Dofasco announced its decision to redeem the Debentures, it had also arranged for a revolving bank line of credit in the amount of \$150,000,000.00 (Canadian funds), plus a further \$50,000,000.00 (Canadian or American funds). This financing was also at a rate significantly below 17.09% per annum, and extends to December 31, 1993.

25. Further, at the time of its announcement of the proposed redemption, Dofasco's cash resources partially consisted of the proceeds of an issue of redeemable preferred shares in March 1985, by which Dofasco had received net proceeds of approximately \$315,000,000.00. These redeemable preferred shares in substance and effect constitute debt financing, at an effective interest cost to Dofasco of 8% per annum.

It was argued by the plaintiffs' counsel that any redemption by Dofasco would have been effected by the direct or indirect application of funds obtained by borrowing at less than 17.09%. In defense, Dofasco says the company had approximately \$485,000,000.00 cash as of June 1986, which did not include funds obtained by borrowing. Dofasco further states that it did not anticipate borrowing in the "forecasted future to 1990".

Dofasco says that the Mitsui loan was to be applied to a specific corporate project - the Cast Slab Program. While conceding that it has plans which could result in a \$2,000,000,000.00 capital expenditure, Dofasco contends that it did not, in June 1986, anticipate the need to borrow in the forecasted future.

The Discovery Questions in Issue

Questions 676, 686, 687, 1096 and 1183 all relate to edited financial documents produced by Dofasco. The plaintiffs seek the documents in their unedited form.

Question 676 concerns deletions indicated by asterisks in the following summary:

DOFASCO INC.
SUMMARY OF FINANCIAL AND OPERATING RESULTS
FOR THE FIVE MONTHS ENDED
MAY 31, 1986
(with comparative figures for 1985)
(In Thousands of Dollars)

	Month of May 1986 -----	5 Months Month of Ended May May 31 1985 1986 -----	5 Months Ended May 31 1985 -----
NET INCOME (LOSS)			

Manufacturing	*	*	*

Mines	*	*	*	*
Subsidiaries	*	*	*	*
Inter-company profit adjustment	*	*	*	*
Total net income	13,040	15,854	60,220	71,638
Preferred dividends applicable for the period	2,234	2,691	11,166	6,688
	-----	-----	-----	-----
Consolidated net income after preferred dividends	\$10,806	\$13,163	\$49,054	\$64,950
	=====	=====	=====	=====

INCOME (LOSS) PER COMMON SHARE

Manufacturing (after preferred dividends) *	*	*	*
Mines *	*	*	*
*	*	*	*
National Steel Car Ltd. *	*	*	*
Prudential Steel Ltd. *	*	*	*
Beachville Limited *	*	*	*
Baycoat Limited *	*	*	*
Dofasco Eveleth *	*	*	*
Inter-company profit adjustment *	*	*	*
Net income per common share (after preferred dividends) \$.20	\$.26	\$.90	\$ 1.26
	=====	=====	=====

While Dofasco's financial information is relevant and therefore subject to production, the breakdown within this document of which division produces which income is not relevant. Confidentiality and sensitivity to competitors and the market generally are concerns of Dofasco. Although these factors are important and must be weighed, relevance is the ultimate factor. In a critical situation, if production is found to be relevant, it is the trial judge who must try to safeguard confidentiality where it is possible to do so. In my view, the expunged parts of the document reproduced above are not relevant to the question of intention of borrowing.

Question 686 relates to documents produced showing financial forecasts, where projections for 1988, 1989 and 1990 were deleted. Objection is also taken to the fact that the productions contain information about the conglomerate and not just Dofasco Inc.

Relevance depends on a time frame. The relevance of intention or lack of intention to borrow must relate to the date of the announced intention to redeem. It was as of that date that directors made these decisions and they made them with the documents produced. I view the stricken mate-

rial as having only tangential relevance and in light of the sensitivity issue, I consider that this question should not be answered.

Question 687 was resolved by counsel.

Questions 1096 and 1183 - The document in these questions relates to 1986 forecasts. The plaintiffs say that if projected expenditures exceed projected income there must have been anticipated borrowing to discharge the Debentures. There were back up documents which, I am told, were not before the Board of Directors in June 1986 when they made their decision to redeem. In my view, again, what is relevant to the triable issue are the income totals, not their finite breakdown. Production has been made of relevant documents. It is not the function of the court to attempt to test the reasonableness of those documents or to enquire into corporate strategy. That goes far beyond the purview of this pleading.

Question 759 - The learned Master said this question need not be answered. The question referred to diversification outside the steel industry. This type of sensitive information, if it existed, goes far beyond what can be expected on discovery. To compel production would be unfair, in my opinion.

Question 830 requested all information relating to the agenda for a directors' meeting for October 25, 1985.

Whether Dofasco's forecasts were correct is not in issue. There is no claim based on fraud or negligence. I agree with the Master that this question need not be answered as it is not relevant.

Question 992 - This question asks whether the amounts spent for authorized capital projects in 1986, 1987 and 1988 exceeded by a significant amount the approved capital projects sum of \$846,000,000.00.

This is not relevant. All that is relevant after June 1986 is whether borrowing was anticipated at that date. Question 992 need not be answered.

Question 1030 relates to projects that were not proceeded with in the ten year period prior to 1985. Production of all summaries going back to 1985 was requested, to enable the plaintiffs to do an analysis.

There must be some restriction imposed by the court on such broad enquiry. There is no relevance to this question. Production of material of this sensitive nature can only serve to embarrass the defendant. It need not be produced.

Question 1126 - Here the plaintiffs ask for forecasts dating back to 1981, before the Debentures were even issued. None of these forecasts is relevant to redemption of the Debentures. This question need not be answered.

For these reasons, none of the disputed questions - 676, 686, 1096, 1183, 759, 830, 992, 1030, and 1126 - are to be answered.

Costs to Dofasco in the cause.

MONTGOMERY J.

Case Name:

O'Neill v. Canada (Attorney General)

Between

**Juliet O'Neill and Ottawa Citizen Group Inc.,
applicants, and
The Attorney General of Canada, respondent, and
Toronto Star Newspapers Limited, The Globe and Mail,
CTV Television Inc. and The Canadian Broadcasting
Corporation, interveners, and
Canadian Civil Liberties Association, intervener**

[2006] O.J. No. 106

26 C.P.C. (6th) 109

68 W.C.B. (2d) 302

2006 CarswellOnt 139

Court File No. 11828

Ontario Superior Court of Justice

L.D. Ratushny J.

Heard: December 9, 2005.

Judgment: January 16, 2006.

(28 paras.)

Civil procedure -- Discovery -- Production and inspection of documents -- Privileged documents -- Solicitor-client privilege -- Relevancy contested -- Respondent Attorney General provided disclosure pursuant to order, but withheld certain information based on irrelevance or privilege -- Applicants and interveners sought disclosure of the redactions and withheld documents -- Attorney General's claims of irrelevancy and privilege upheld in part, but Attorney General ordered to make further disclosure of certain specified information.

Statutes, Regulations and Rules Cited:

Canada Evidence Act s. 38, s. 38.01

Counsel:

David M. Paciocco, Richard G. Dearden and Wendy J. Wagner for the Applicants

Eugene Williams, Q.C. and Marian Bryant for the Respondent Respondent

Edith Cody-Rice, for the Intervener, The Canadian Broadcasting Corporation and as agent for the other Interveners

Stuart Svonkin, for the Intervener, the Canadian Civil Liberties Association

RULING ON DISCLOSURE APPLICATION 2

L.D. RATUSHNY J.:--

1. Overview

1 By my ruling (the "Ruling") dated May 26, 2005, I made a disclosure order (the "Order") requiring the respondent to disclose and produce certain information as set out in paragraphs 58 and 59 of the Ruling. The Order is subject to recognized forms of privilege.

2 The respondent has provided disclosure of information (the "Disclosure") to the applicants and the interveners but has withheld certain information (the "Redactions") on the basis that it is "clearly irrelevant" or subject to a privilege.

3 The Redactions have been delineated in the Disclosure as blank portions on a page. The respondent has provided an explanation for each of the Redactions by way of three tables (the "Tables") that explain the nature of each Redaction in a general way and categorize each Redaction as withheld on the basis of being "clearly irrelevant" or subject to solicitor-client privilege or ongoing investigation privilege.

4 The applicants and the interveners now seek an order for disclosure of certain of the Redactions. They also seek an order for disclosure of eighteen documents referred to but not included in the Disclosure.

5 For the purposes of determining the applicants' motion, the respondent has provided me with a copy of the unredacted Disclosure (the "Unredacted Disclosure") that includes each of the respondent's justifications for the Redactions. The Unredacted Disclosure is categorized as "Top Secret" and is provided to this Court only for my review so as to determine the applicability of the respondent's claims of relevance and privilege.

6 The respondent also informs the Court that the Unredacted Disclosure contains sensitive or potentially injurious information, the further disclosure of which is not authorized and if ordered, will lead to a notice being sent pursuant to section 38.01 of the Canada Evidence Act. The applicants have been given a copy of a table indicating which of the Redactions, in addition to the other claims regarding relevance and privilege, are also subject to a potential claim under section 38.01. None of the applicants, the interveners, or their counsel has received the Unredacted Disclosure.

7 This ruling is a review of the respondent's decisions regarding disclosure according to the Order. It only deals with the applicant's requests for disclosure and the respondent's claims related to relevance and privilege. The issues under section 38 of the Canada Evidence Act form no part of this ruling.

8 All parties agree and I certainly also agree that the respondent's disclosure to me of the Unredacted Disclosure does not constitute a waiver by it of the applicability of its claims regarding relevance and privilege.

2. The Issues

(a) The Scope of the Order

9 The first issue is whether by the terms of the Order the respondent is able to "second-guess" relevancy, as the applicants contend the respondent has done by justifying some of the Redactions as "clearly irrelevant".

10 This issue has largely dissipated as one of semantics. The respondent agrees for those Redactions it has categorized as "clearly irrelevant" that it is not second-guessing my determination of relevancy under the Ruling but is simply claiming that these Redactions do not fall within the scope of the Order.

11 I think this is a correct adjustment by the respondent, away from its submission in paragraph 15 of its Memorandum that the respondent must perform a review of the information ordered disclosed to determine relevancy.

12 By the terms of the Ruling as summarized in its paragraph 55, this Court has already determined the issue of threshold relevancy. The information ordered disclosed by paragraphs 58 and 59 of the Ruling has already been found to be relevant enough to be produced. The only remaining decisions to be made by the respondent in complying with the Order should have been to determine whether the information falls within the scope of the Order or is justified on the basis of a recognized privilege.

13 The applicants urge a robust interpretation of the scope of the Order so that they can have the fullest of information upon which to prepare their "case to make."

14 I hesitate to risk a reformulation of the Order by commenting on its scope. The Order speaks for itself. However, the parties are entitled to understand my approach to its scope when reviewing, as the applicants have requested on this motion, certain of the Redactions that have been categorized by the respondent as "clearly irrelevant" because of falling outside that scope and also when reviewing the applicants' request for additional disclosure of eighteen documents.

15 When I have considered the scope of the Order, I have taken into account the temporal parameters of November 8, 2003, to January 21, 2004, both inclusive, obviously referring to the date of the publication of Ms. O'Neill's newspaper article and the date of the execution of the search warrants, respectively. I have also been guided by the parameter that the information ordered to be disclosed is only that which is in the possession or control of the respondent or the RCMP. Finally, I have considered whether the information could relate to the "course of action" taken and to be taken regarding the leak of secret information, whether it could relate to the issue of who was responsible for the leak and whether it could relate to the "focus" of the RCMP investigation regarding the publication of the November 8, 2003, newspaper article.

(b) The Privileges Claimed

16 The respondent claims the "class privilege" of solicitor-client privilege and the "case-by-case" privilege of ongoing investigation. Regardless of the category of the privilege, the burden of persuasion falls on the respondent as the party claiming these privileges to justify its non-disclosure on the ground of privilege: *Carey v. Ontario* [1986] S.C.J. No. 74 at para. 78.

17 Solicitor-client privilege attaches to communications between a client and his lawyer where, 1. The client seeks legal advice from a lawyer; 2. The lawyer provides his/her advice in his/her professional capacity; 3. The communications between the client and lawyer relate to legal advice; and 4. The communications were made in confidence: *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 at 288-289 (S.C.C.) as referred to in *R. v. Chan* (2002), 164 C.C.C. (3d) 24 at para. 66 (Alta. Q.B.).

18 "Ongoing investigation" privilege is recognized as a common law privilege or immunity belonging to a category of privileges that are subject, on a case by case basis, to review and balancing by the court of the public interest served by the privilege against the importance of the information to the right of the accused to make full answer and defence: *Chan* at paras. 124-127. For the applicants, the balancing they request I perform in respect of the Redactions made on the basis of ongoing investigation privilege is between the public interest served by that privilege and the importance of their being able to establish as correctly as possible their "case to make."

(c) The Evidentiary Record

19 The evidentiary foundation relied upon by the respondent to justify the Redactions and relied upon by the applicants in support of their request for eighteen additional documents is the Unredacted Disclosure, the three Tables summarizing the general nature of the Redactions and the parties' submissions on this motion.

20 I have reviewed each page of this evidentiary record as requested by the applicants in their Memorandum of Fact and Law at paragraphs 64 and 65. I have considered the scope of the Order, the scope and nature of the privileges claimed and all submissions from the parties. I have come to the following conclusions and make the following disclosure orders.

3. Conclusions

Regarding the Redactions

21 All references refer to the location of the document as indicated in the applicable Table. Where no order is made, I have concluded that I agree with the respondent's exercise of its discretion in withholding the Redactions on the bases claimed.

22 For a few of the Redactions, a comment is required as follows:

- For Tab 5, new page 106 in the "Clearly Irrelevant" Table and the Remark: "SOIA investigation details," this particular Redaction has been erroneously categorized as information not within the scope of the Order. Instead, my review of the Unredacted Disclosure indicates it has been justifiably withheld as part of the ongoing investigation privilege as indicated in the section 38 Canada Evidence Act table;

- For Tab 5, new page 112 in the "Clearly Irrelevant" Table, the Unredacted Disclosure indicates that the document is not headed "SOIA Investigation" as the applicants submit is the case at paragraph 64, subparagraph 28 of their Memorandum of Fact and Law, but appears to be, instead, a continuation of the last bulleted note on the previous page 111;
- For Tab 8, new page 140 in the "Solicitor-Client Privilege" Table, the Unredacted Disclosure indicates that Legal Services issues take up a total of 5 lines and all are regarding a matter that is not within the scope of the Order, as indicated correctly in the "Clearly Irrelevant" Table for this page. Therefore, the proper categorization of this Redaction is as being outside the scope of the Order and not as part of solicitor-client privilege which should only be applicable to information within the scope of the Order;
- For Tab 8, new page 156 in the "Solicitor-Client Privilege" Table, the Unredacted Disclosure indicates that all 10 lines of the Redactions for that page are not within the scope of the Order so that, as for page 140 mentioned above, the claim of solicitor-client privilege is not applicable;
- For Tab 9, new page 312 in the "Ongoing Investigation" Table, the Unredacted Disclosure indicates that the 1/2 page is part of the SOIA ongoing investigation and is withheld on that basis, however the Table indicates that it is "Not related to SOIA investigation." I have assumed this to be a categorization error and that this page's Redactions are justified as not being within the scope of the Order;
- For Tab 10, new page 316 in the "Ongoing Investigation" Table, while I agree that the Redaction is protected by the ongoing investigation privilege, I can't understand from my review of the Unredacted Disclosure that there is any "police technique" referred to as the Remark in this Table indicates;
- For Tab 10, new page 317 in the "Ongoing Investigation" Table, the Unredacted Disclosure indicates that the two line Redaction is outside the scope of the Order. This is the appropriate categorization of this Redaction rather than as being part of the ongoing investigation privilege.

23 I order the respondent provide disclosure and production to the applicants and the interveners of the following Redactions referred to in the "Clearly Irrelevant" Table:

1. Under Tab 2, new page 36, the one line Redaction at "1100" is omitted from any of the Tables. It is indicated in the Unredacted Disclosure as being outside the scope of the Order, however its context indicates otherwise. I order this one line be disclosed;
2. Under Tab 5, new page 122, the five-line Redaction that is indicated as being outside the scope of the Order is not, from my review of the Unredacted Disclosure, clearly outside that scope. I order these five lines be disclosed;
3. Under Tab 8, new page 165, the middle, 1/2 line Redaction indicated as being outside the scope of the Order is not outside that scope and I order this 1/2 line be disclosed;

4. Under Tab 8, new page 217, the entire page has been redacted as being outside the scope of the Order. Except for the last line on that page that starts the sentence continued on the following new page 218 that has been disclosed, I agree the Redactions on new page 217 are outside the scope of the Order. I only order the last line on new page 217 be disclosed;
5. Under Tab 8, new page 250, the Unredacted Disclosure indicates that this page contains a media log and the information is within the scope of the Order as potentially part of the focus of the investigation. I disagree with its categorization as being outside the scope of the Order. I order the Redactions on new page 250 be disclosed;
6. Under Tab 10, new page 321, the Unredacted Disclosure indicates that the last five lines on this page forming part of the Redactions are not clearly outside the scope of the Order. I order the last five lines on this new page 321 be disclosed, beginning with the word "we" and ending with "H.Q."

24 I also order disclosure of the following Redaction referred to in the "Solicitor/Client Privilege" Table:

7. Under Tab 5, new page 106, the Unredacted Disclosure indicates that the two-line Redaction made on the basis of solicitor-client privilege refers to a legal question raised by Dan Killam. I don't understand that legal counsel are still present at this meeting and on that understanding, I find that the privilege has not yet attached according to the parameters set out in Chan as referred to above. I order disclosure of these 2 lines on new page 106.

Regarding the Undisclosed Documents

25 With respect to the eighteen undisclosed documents requested by the applicants in paragraph 65 of their Memorandum of Fact and Law, the respondent is ordered, subject to the ordered documents (the "Additional Disclosure") falling within the scope of the Order and also subject to recognized forms of privilege, to provide the applicants and the interveners with disclosure and production of the Additional Disclosure as set out below.

26 The basis for this order for Additional Disclosure is the same as set out in the Ruling. The numbering used below is the same numbering used by the applicants in paragraph 65 of their Memorandum of Fact and Law and reflected in the tabbing of their Compendium of Argument regarding undisclosed documents.

27 I make the following orders and comments with respect to the eighteen undisclosed documents:

1. The e-mail referenced on new page 70 of the Disclosure is ordered disclosed;
2. With respect to the "A-5" document, I find the respondent has satisfied its disclosure obligation in this regard and I make no disclosure order for this document;
3. With respect to the records relating to the "high level briefing," I find the respondent has satisfied its disclosure obligation in this regard and I make no disclosure order for these records;

4. The "file on the interviews w/ senior officers on the same issue" referred to at new page 124 of the Disclosure is ordered disclosed;
5. The "page 184 not typed" referred to at new page 103 of the Disclosure is ordered disclosed;
6. The parties agree this request has been satisfied;
7. The "timeline" referred to at new page 12 of the Disclosure is ordered disclosed;
8. The "detailed time line" referred to at lines 11-15 of new page 71 of the Disclosure is ordered disclosed;
9. The respondent has agreed to provide the requested "response";
10. My review of the Unredacted Disclosure indicates that the respondent has satisfied its obligation to disclose this document and the Redactions with respect to the forwarded message requested by the applicants are justified on the basis of ongoing investigation privilege. I make no disclosure order for this forwarded message;
11. The respondent has agreed to look into the missing page of a Situation Report found at new page 146 of the Disclosure and this missing page is ordered disclosed;
12. With respect to a "PCO assessment" referred to at new page 16 of the Disclosure, I find the information is not within the scope of the Order and the respondent has satisfied its disclosure obligation in this regard. I make no disclosure order for this PCO assessment;
13. The "analysis of all the released information" referred to at new page 18 of the Disclosure is ordered disclosed;
14. With respect to the "update from Communications -- media lines" referred to at new page 21 of the Disclosure, I find the respondent has satisfied its disclosure obligation in this regard. I make no disclosure order for this update;
15. With respect to the "message" to be left on a blackberry, referred to at new page 18 of the Disclosure, I find the respondent has satisfied its disclosure obligation in this regard. I make no disclosure order for this message;
16. With respect to the "overall findings" referred to at new page 45 of the Disclosure, I find the respondent has satisfied its disclosure obligation in this regard. I make no disclosure order regarding these "overall findings";
17. The "notification has gone to DFAIT, Sol. Gen, CSIS about the SOIA investigation" referred to at new page 108 of the Disclosure is ordered disclosed;
18. The "Operational Review" referred to at new page 349 of the Disclosure is ordered disclosed.

28 If the respondent withholds disclosure of any of the Additional Disclosure on the basis of it falling outside the scope of the Order or being protected by a recognized privilege, I would accept written submissions on any further issues in accordance with the procedure followed on December 9, 2005, including the disclosure to me of further Unredacted Disclosure, if the applicants and the interveners agree to deal with these further issues in this way.

L.D. RATUSHNY J.

cp/e/qw/qlmxf

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John Labatt Ltd. v. Molson Breweries, A Partnership

John Labatt Limited and Labatt Brewing Company Limited (Plaintiffs) (Defendants by Counterclaim) v. Molson Breweries, A Partnership (Defendant) (Plaintiff by Counterclaim)

Federal Court of Canada — Trial Division

Strayer J.

Ottawa: December 7, 1993
Ottawa: December 13, 1993
Docket: T-2105-93

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Counsel: *Thomas R. Kelly* for plaintiffs.

Elizabeth G. Elliott for defendant.

Subject: Intellectual Property; Civil Practice and Procedure; Property

Practice --- Discovery — Discovery of documents — Affidavit of documents.

Practice — Discovery — Production of documents — Application for order requiring delivery of unexpurgated copies of documents listed in plaintiffs' affidavits of documents — Documents listed in affidavits of documents delivered containing deletions — Plaintiffs asserting deletions irrelevant to litigation, but relating to confidential matters of great commercial value — Application dismissed — Obligation under R. 448 to disclose in affidavit of documents only documents "relevant to any matter in issue" — Once whole of document without exception described as relevant in affidavit of documents, prima facie duty to produce whole of document pursuant to R. 452(3), unless Court persuaded to exercise discretion in interest of justice when application for enforcement made — Affidavit of documents can be corrected as long as correction made without delay (R. 451) — Plaintiffs to file revised affidavit describing as precisely as possible portions of documents considered irrelevant — Appropriate procedure for defendant to question plaintiffs about deletions on examination for discovery and, if appearing relevant, should demand production as part of discovery — Although successful, plaintiffs to pay costs of motion as responsible for difficulties herein.

CASES JUDICIALLY CONSIDERED

REFERRED TO:

Kimberly-Clark Corp. v. Proctor & Gamble Inc. [\(1990\), 31 C.P.R. \(3d\) 207](#) (F.C.T.D.)

1993 CarswellNat 247, [1994] 1 F.C. 801, 52 C.P.R. (3d) 478, 72 F.T.R. 156

United States Surgical Corporation v. Downs Surgical Canada Ltd., [1982] 1 F.C. 733; (1981), 129 D.L.R. (3d) 209, 62 C.P.R. (2d) 67 (T.D.)

Amfac Foods Inc. v. C.M. McLean Ltd., [1981] 2 F.C. 9; (1980), 48 C.P.R. (2d) 143 (T.D.)

Janhevich et al. v. Thomas (1977), 15 O.R. (2d) 765; (1977), 76 D.L.R. (3d) 656, 3 C.P.C. 303 (H.C.)

Collins v. Beach (1988), 24 C.P.C. (2d) 228, [1988] 1 C.T.C. 261 (Ont. H.C.)

Manufacturers Life Insurance Co. v. Dofasco Inc. (1989), 38 C.P.C. (2d) 47 (Ont. H.C.).

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Federal Court Rules, C.R.C., c. 663, RR. 407(2), 448 (as am. by SOR/90-846, s. 15), 451 (as am. *idem*), 452(3), (4) (as am. *idem*), 453(2) (as am. *idem*).

Application for order requiring delivery of unexpurgated copies of documents listed in plaintiffs' affidavits of documents. Application dismissed.

The following are the reasons for order rendered in English by Strayer J.:

Relief Requested

1 The defendant seeks an order requiring the plaintiffs to deliver copies, in their entirety, of the documents listed in the plaintiffs' affidavit of documents. Incidental relief is also requested.

Facts

2 The reason that this matter is before the Court is that the plaintiffs each filed affidavits of documents listing what they described as the "relevant documents" as required by Rule 448 [*Federal Court Rules*, C.R.C., c. 663 (as am. by SOR/90-846, s. 15)]. When called upon to deliver copies of these documents, as they are obliged to do under Rule 452(3) [as am. *idem*], they delivered what are in some cases expurgated versions of the documents. It is apparent that there have been deletions although in some cases the existence or the extent of such deletions is unclear. The defendant, realizing that there were deletions from the documents delivered, immediately filed this motion.

3 The plaintiffs resist the motion on the basis that the deleted material is not relevant to this litigation and is of great commercial value to the plaintiffs. The confidentiality order agreed to by the parties and issued by Joyal J. on November 8, 1993 permits the disclosure of documents marked confidential not only to the solicitors of record and in-house solicitors and trademark agents of the defendant, but also to its "officers". An affidavit filed on behalf of the plaintiffs states that certain of the deleted information is "highly sensitive and confidential to Labatt" and, the beer business being very competitive, disclosure of information in the deleted portions "relating to the other beer concepts", particularly to any officer of Molson, would be highly prejudicial to the plaintiffs.

Conclusions

4 Counsel were unable to produce any jurisprudence from this or any other Court dealing precisely with this situation.

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5 I have no doubt that the obligation under Rule 448 is to disclose in the affidavit of documents only such documents as are "relevant to any matter in issue", to use the words of paragraph 448(2)(a) of the Rules. It may well be that the plaintiffs were not obliged to list all of these documents in their entirety, as they did, without specifying any exceptions or deletions of material pertaining to irrelevant matters. But the fact remains that the plaintiffs did list these documents without qualification in their affidavits of documents. The question then arises: if a party in his affidavit of documents once describes the whole of a document without exception as being relevant, is he automatically bound to produce the whole of that document to an opposing party on request pursuant to Rule 452(3)? In my view he is unless he can persuade the Court, when an application for enforcement is made by the opposite party, to exercise its discretion in his favour in the interest of justice.

6 Rule 453(2) [as am. *idem*] provides as follows:

Rule 453. ...

(2) Where a party fails to comply with Rules 448 to 452, the Court may make such order as it considers just, including an order in the nature of the order described in Rule 461.

While that Rule clearly would permit me to order literal compliance with the requirements of Rule 452(3), I am also empowered to make such order as I consider "just". In the present case I think I should make an order which best carries out the spirit of the Rules pertaining to discovery of documents, namely to ensure that only relevant documents need be produced. There is no jurisprudence directly on point concerning enforcement of the right to have documents produced once they have been listed in an affidavit of documents. I note, however, that in some of the jurisprudence under Rule 407(2) which requires that "[a] copy of every document referred to in a pleading shall be served on each party", there is some indication that this may be enforced only with respect to the relevant portions of documents. Even though that Rule does not limit the documents required to be produced to those relevant to the claim and requires that if a *document* is *referred to* in a pleading it must be produced, there seems to be some authority at least for limiting the required production to the relevant portions of such documents.[\[FN1\]](#) More directly on point, in the field of examination for discovery, it has been held on various occasions that parties need produce, in response to requests at examination for discovery, only the relevant portions of documents sought.[\[FN2\]](#)

7 Therefore although the plaintiffs seemingly admitted in their affidavit of documents that all of these documents in their entirety were relevant and therefore *prima facie* had a duty to produce those documents pursuant to Rule 452(3), this was an admission from which they could resile. Just as admissions on discovery are deemed to be informal admissions and can be later qualified or negated by other evidence of the same party, so it appears to me an affidavit of documents can be corrected. Rule 451 [as am. *idem*] so provides, as long as the correction is made "without delay". In the present case the defendant moved with such speed that the plaintiffs have not had an opportunity to seek to correct their affidavit. The documents were produced by the plaintiff on November 30. The reaction of counsel for the defendant, upon realizing that certain documents as produced were not complete, was immediately to file this notice of motion two days later on December 2. That notice set the matter down for hearing on December 6 or less than one week after the production of documents. The plaintiffs replied with an affidavit which does not deal with all of the documents in question but does assert the irrelevancy of deleted portions of certain documents. The plaintiffs by letter of December 3 in fact inquired if what the defendant wanted was a revised Schedule I to their affidavits and counsel for the defendant confirmed on the same day that they did not request such an amendment. Instead they pressed ahead with the notice of motion for an order requiring production of all documents as listed in the affidavit.

8 It appears to me that in these circumstances it would not be just to insist that the plaintiffs be bound by Schedule I in its entirety. Instead they should be given time to file a revised affidavit describing as precisely as possible the portions of the documents listed in Schedule I that they do not consider to be relevant. It further appears to me

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that the appropriate procedure is for the defendant, if it so wishes, to question the representatives of the plaintiffs on examination for discovery with respect to the deletions and if it should appear that omitted materials are relevant then the defendant should demand their production as part of the examination for discovery. If production is refused then the matter can be dealt with as any other matter involving refusal to answer on discovery. I cannot of course preclude the defendant from bringing a motion prior to examination for discovery for an order pursuant to Rule 453(2) alleging, if it believes such to be the case, that the plaintiffs have failed to produce some relevant portion of some document. But it appears to me that such a procedure will not allow the defendant to question representatives of the plaintiffs as to the nature of the materials in question. If instead the defendant seeks to bring the matter directly before the Court on an application under Rule 452(4) [as am. *idem*] or Rule 453(2) the more likely procedure would involve an *in camera* hearing with only counsel for the plaintiffs present.

9 The action will be stayed until the plaintiffs have filed a revised affidavit of documents, except that the examination for discovery of the defendant should be allowed to proceed unless the parties agree otherwise.

10 Certain documents which have been produced by the plaintiffs to the defendant were handed to the Court at hearing. It emerged that document number 4, marked confidential, actually contains material which the plaintiffs had intended to delete. I am directing that that document be returned under seal to counsel for the plaintiffs without becoming part of the record, on condition that within one week of this order the plaintiffs provide counsel for the defendant with a copy of this document expurgated as they intended. Counsel appearing for the defendant on the motion is directed to return any copy of the passages intended to be expurgated and to ensure that they receive no further dissemination in her office or that of the defendant.

11 I will direct the plaintiffs to pay the costs of this motion although they have largely succeeded. The plaintiffs are responsible for their own difficulties in this matter, their officers having sworn affidavits that all of the documents listed in Schedule I of each affidavit were relevant to these proceedings. These affidavits were sworn after the confidentiality order, consented to by the plaintiffs, had been issued permitting disclosure of confidential documents to the officers of Molson. The deponents on behalf of the plaintiffs should have been fully aware of the possible consequences of such action. I think I may take judicial notice from the litigation in this Court that neither the plaintiffs nor the defendant are strangers to litigation. The present case was commenced on the initiative of the plaintiffs and they must be taken to have accepted the risks to confidentiality which go with such litigation. A party receiving an affidavit of documents is *prima facie* entitled to rely on it as representing the position of the party of the deponent as to the relevance of documents. While I consider it in the interest of justice to allow the plaintiffs to resile from their original positions in this respect they should at least be responsible for the costs of this motion which the plaintiffs had a legitimate right to bring.

Solicitors of record:

Smart & Biggar, Ottawa, for plaintiffs.

Macera & Jarzyna, Ottawa, for defendant.

[FN1](#) See, e.g., *Kimberly-Clark Corp. v. Proctor & Gamble Inc.* (1990), 31 C.P.R. (3d) 207 (F.C.T.D.); also suggested in *obiter dicta* in *United States Surgical Corporation v. Downs Surgical Canada Ltd.*, [1982] 1 F.C. 733 (T.D.), at p. 736. But see *Amfac Foods Inc. v. C.M. McLean Ltd.*, [1981] 2 F.C. 9 (T.D.), at p. 10.

[FN2](#) See, e.g., *Janhevich et al. v. Thomas* (1977), 15 O.R. (2d) 765 (H.C.); *Collins v. Beach* (1988), 24 C.P.C. (2d) 228 (Ont. H.C.); *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47 (Ont. H.C.).

END OF DOCUMENT

1993 CarswellNat 247, [1994] 1 F.C. 801, 52 C.P.R. (3d) 478, 72 F.T.R. 156

Indexed as:

**Nova Scotia (Attorney General) v. Royal & Sun Alliance
Insurance Co. of Canada**

Between

**The Attorney General of Nova Scotia representing Her Majesty
the Queen in Right of the Province of Nova Scotia,
plaintiff, and**

**Royal & Sun Alliance Insurance Company of Canada, Guardian
Insurance Company of Canada, the Halifax Insurance Company,
Wellington Insurance Company, General Accident Assurance
Company of Canada and Quebec Assurance Company, defendants**

[2000] N.S.J. No. 404

189 N.S.R. (2d) 290

102 A.C.W.S. (3d) 52

S.H. No. 149142

Nova Scotia Supreme Court
Halifax, Nova Scotia

**Wright J.
(In Chambers)**

Heard: October 11, 2000.

Judgment: December 14, 2000.

(71 paras.)

*Practice -- Discovery -- Production and inspection of documents -- Circumstances when available
-- What documents must be produced -- Documents relating to matters in issue -- Privileged
documents, attorney-client communications -- State or public documents.*

This was an application by the insurers for production of documents in the possession of the auditor general. The province had entered into an agreement to provide compensation to victims of abuse in

provincial institutions. The province then sought indemnification from its liability insurers. The insurers now sought copies of documents held by the auditor general in preparation of an audit of the compensation program. Among the documents that the province had provided to the auditor general were communications with the provincial Cabinet and its Priorities and Planning Committee regarding the investigation and the development of the compensation program. The documents also included communications between the province and its legal advisors. The province claimed that the documents it refused to provide were irrelevant and subject to Cabinet privilege and solicitor-client privilege. It argued that the confidentiality of these communications was essential to the candid and effective communication and consideration by the Cabinet. The insurers argued that any solicitor-client privilege had been waived once the documents were turned over to the auditor general, a third party.

HELD: Application allowed in part. Each document was assessed individually. Although the level of decision-making was at the highest level of government and involved a subject of considerable public interest, the claim for Cabinet privilege could not succeed in the context of this litigation. The arguments in favour of non-disclosure were significantly outweighed by the necessity for the proper administration of justice that the insurers had access to these documents to enable them to make full answer and defence and to ensure the fair disposition of the issues arising in this litigation. The documents were highly relevant to the defences raised by the insurers and also bore on any claim for relief from forfeiture. However, the province's claim of solicitor-client privilege was upheld in principle, but each document was considered individually. Although the province voluntarily provided the documents to the auditor general, there was no waiver of solicitor-client privilege when it did so, either express or implied.

Statutes, Regulations and Rules Cited:

Auditor General Act, ss. 8, 10(1), 14.

Nova Scotia Civil Procedure Rules, Rule 20.01.

Public Inquiries Act.

Counsel:

Robert Purdy, Q.C., Peter Rogers and Dale Darling, for the plaintiff.

Robert Bell and Augustus Richardson, for the defendants, Royal & Sun Alliance and Quebec Assurance Company.

George MacDonald, Q.C., Deborah Smith and Jane O'Neill, for the defendants, Guardian Insurance, The Halifax Insurance Company and Wellington Insurance.

Michael Dunphy, Q.C., and Dan Ingersoll, for the defendant, General Accident Assurance Company.

DECISION ON PRODUCTION OF DOCUMENTS (RE: AUDITOR GENERAL)

WRIGHT J. (orally):--

INTRODUCTION

1 This decision pertains to the second branch of an application made by the defendants under Civil Procedure Rule 20.01 for the production of documents in the possession of the Province in which they seek complete and unexpurgated copies of all documents submitted to or reviewed by the Auditor General in the preparation of Chapter 13 of his 1998 Annual Report. Chapter 13 is entitled JUSTICE - ALTERNATIVE DISPUTE RESOLUTION PROGRAM FOR COMPENSATION OF VICTIMS OF ABUSE AT PROVINCIAL YOUTH INSTITUTIONS.

2 The proceeding in which this application is made is one whereby the Province seeks to invoke the duties of its various liability insurers to defend and indemnify it in respect of a multitude of claims for compensation of victims of institutional abuse spanning some 50 years. A relatively small number of these claims resulted in civil lawsuits, but the vast majority of them were resolved through an ADR program created by the Province in response to the alleged incidents. Several millions of dollars in compensation have thereby been expended by the Province to date.

BACKGROUND

3 The background to Chapter 13 of the Auditor General's Annual Report, and indeed to this application, is concisely summarized in its opening paragraphs which can be conveniently extracted as follows:

13.1 On November 2, 1994 government announced three goals to deal with allegations of sexual abuse at Provincial youth institutions, which it wanted to accomplish in a reasonable amount of time at reasonable public expense.

Government's three goals were to:

- ensure abuse could not recur;
- determine what happened and who was responsible; and
- provide fair compensation to victims.

13.2 The first goal was addressed by an institutional audit that looked at the safety of children within Provincial institutions. The audit was conducted in early 1995 and the report In Our Care (Samuels-Stewart) was produced in March 1995. The second goal was addressed in June 1995 when an investigation and report by

retired Judge Stuart G. Stratton, Q.C. documented a number of conclusions related to allegations of abuse at five Provincial institutions. The investigation identified 89 victims of abuse at three of the institutions. In July 1995 the Department of Justice announced an Alternative Dispute Resolution (ADR) process which would focus on goal three: the compensation of victims.

13.3 In February 1996 government began negotiations with the lawyers representing claimants. A Memorandum of Understanding (MOU) outlining a process for resolution of claims was finalized on May 3, 1996 and became effective on June 17, 1996. At the time the MOU was finalized, the estimated number of claimants had increased to 500. In 1996 government allocated \$33.3 million for claims. In 1997, an additional \$15.4 million was approved to provide funding for an increased number of claims.

13.4 The ADR Program was developed and approved by government. It does not derive any of its mandate from legislation passed by the House of Assembly. Most of the costs of the program were not included in the Annual Estimates of the government, but rather were established by way of Additional Appropriations approved by the Executive Council.

13.5 On November 1, 1996 the ADR process was put on hold by government and the MOU was revised. The number of claimants had increased significantly, program staff could not achieve the 45 day turnaround required by the MOU, documents thought to have been destroyed were discovered, there was increasing evidence that a number of claimants' statements were unreliable, and fraudulent claims had been detected. When the process restarted on December 19, 1996 there were 1,457 claimants. Later, in November 1997, the Department released a new set of guidelines to govern the assessment of claims, the administration of the ADR Program, and the process used for appeals of Program decisions.

13.6 Upon release of the new guidelines, the claims process became the operation that was in place at the time of our audit ...

13.7 As of September 1998, 1,248 demands, totaling \$71.4 million had been received by the Program, and 812 had been settled with offers totaling \$25.0 million... It is anticipated that the Program's claims assessment process will be completed by July 1999, but payment of claims may continue for another four

years.

4 As noted in the following paragraphs of the Report, the audit was conducted in accordance with s. 8 of the Auditor General Act which confers a general power on the Auditor General to examine the accounts of public money received or expended by or on behalf of the Province. The focus of the audit here was on Departmental operations with respect to the ADR program.

5 Section 10(1) of the Act confers upon the Auditor General broad rights of access to information. Its full text reads as follows:

Notwithstanding the provisions of any other Act, every officer, clerk or employee of an agency of government shall provide the Auditor General with such information and explanation as the Auditor General requires and the Auditor General shall have free access, at all times, to the files, records, books of account and other documents, in whatever form, relating to the accounts of any agency of government.

6 In providing the Auditor General with its documentary information for purposes of the audit, the Province included communications to and from Cabinet and its Priorities and Planning Committee pertaining both to the commissioning of the Stratton investigation and the development, implementation and administration of the ADR program through the Department of Justice. It also included communications between the Province and its legal advisors, both external and in-house, which would ordinarily attract the protection of solicitor-client privilege.

7 Although the Auditor General has, in the performance of his duties, the same powers, privileges and immunities as a Commissioner appointed under the Public Inquiries Act (by virtue of s. 14 of the Auditor General Act), there is no indication on this application that the Auditor General ever resorted to the exercise of such powers. All that is known is that these documents were provided by the Province to the Auditor General and in the absence of any evidence to the contrary, it is to be inferred that such documentation was provided by the Province voluntarily. As to the scope of the documentation, the Auditor General did say, in his letter to plaintiff's counsel dated March 15, 1999 that:

"our audit of the Compensation for Institutional Abuse Program only addressed the policies, systems and practices of the Department of Justice and did not address issues or audit documentation outside of the Department. Thus, the only documents we collected in support of our audit findings came from Justice, and should be accessible by you in your role as government's legal counsel. To assist you in this matter, we are prepared to provide you with a list of all documents that we copied from the files of the Department."

8 In the course of this lawsuit, the Province provided to the defendants in July, 1999 four volumes of documents, copies of which were obtained from the office of the Auditor General and which

were referred to as "Documents from Files of Department of Justice - Copied for Audit Files". Withheld from production by the Province were certain documents over which claims of irrelevance, Cabinet privilege, and solicitor-client privilege are asserted. It is those documents in respect of which this application for production is made by the defendants. A more detailed description of these documents, and the privilege claims pertaining thereto, is set out in Exhibit "I" of the affidavit of Peter Rogers deposed to on September 26, 2000 and he has provided for the convenience of the court a separate bound volume containing these documents correlated under 41 tabs.

POSITIONS OF THE PARTIES

9 With respect to the Cabinet privilege claim, the Province acknowledges that having moved away from the concept of absolute Crown privilege in this country, the onus is upon it to demonstrate to the court that production of the subject documents would be injurious to the public interest such that it outweighs the interest of disclosure in the administration of justice. It is further acknowledged by the Province that the Cabinet communications over which privilege is claimed clearly do relate to matters at issue in this proceeding, namely, the Province's identification and response to legal liability with respect to allegations of abuse in provincial youth residential facilities, including its initiation of the Stratton investigation and the ADR Compensation Program. It is nonetheless argued that the confidentiality of these communications is essential to the candid and effective communication and consideration by Cabinet in a situation where this matter continues to attract the attention of the current Cabinet and the public at large. The Province further points out that in November of 1999, retired Justice Fred Kaufman was appointed to conduct an independent review of its response to these claims of institutional abuse.

10 With respect to the documents expressly identified as being subject to solicitor-client privilege, the Province argues that these should not be disclosed to the defendants, whether they be related to (a) advice from lawyers (external or in-house); (b) communications within a continuum for the purpose of obtaining such advice, or (c) a restatement of the contents of that legal advice by others in government. They are generally categorized by counsel as relating to the Province's response to legal liability for alleged institutional abuse at the youth institutions in question, including communications concerning insurance matters. The Province refutes any suggestion that it waived either Cabinet privilege or solicitor-client privilege by reason of having provided these documents to the Auditor General under s. 10(1) of the Auditor General Act for purposes of his statutory audit.

11 The defendants point with particular emphasis to paragraph 13.43 of the Auditor General's 1998 Annual Report which reads as follows:

Insurance - In July 1995 the Department located insurance policies which might have provided coverage for the compensation awarded for abuse and injuries inflicted on former youth centre residents. The Department retained an

independent lawyer to determine whether the policies covered risks relating to sexual assaults, and whether the coverage might be voided by entering into agreements with claimants before the matter was resolved with the insurance providers. Planning documents indicated the ADR process would take two years and eight months, but the process was expected to be delayed by up to two years if the Province's insurance coverage for each individual case had to be assessed. A February 1996 review of options for the compensation process acknowledged that the ADR process might void insurance policies. The decision was made to proceed with the ADR Program without first ascertaining the validity of any insurance claims so as not to delay the process. We understand that the Province is considering legal action against its insurers to recover some compensation costs.

12 In the face of these public statements, the defendants argue that no public interest immunity should attach to the underlying documents and that the administration of justice requires that they now be produced in order to fairly dispose of this proceeding. It is pointed out that a key defence pleaded by the defendants is that the Province breached the terms and conditions of the various insurance policies at risk by initiating the Stratton investigation and the ADR Compensation Program which offended the insured's obligation not to make any admission of liability nor any voluntary payments to claimants. The defendants therefore argue that they are entitled to production of the documents underlying these Cabinet decisions and the apparent political choice to proceed with the ADR program without first ascertaining the validity of any insurance claims so as not to delay the ADR Process.

13 The defendants further argue that in any event, the Province waived any Cabinet privilege claims that might have been available to it by reason of having provided the subject documents voluntarily to the Auditor General, who is independent of the executive branch of government, for purposes of his 1998 audit. Similarly, the defendants argue that although some documents appear from their description to have been entitled to the protection of solicitor-client privilege initially, that too has been waived by the Province by virtue of its provision of the subject documents to the Auditor General for purposes of his 1998 audit.

CABINET PRIVILEGE CLAIMS

14 The seminal case on the law of Cabinet privilege (now more properly called a public interest immunity) in this country is *Carey v. Ontario* [1986] 2 S.C.R. 637. After tracing the evolution of the law on this topic in various common-law jurisdictions, La Forest J. summarized the present state of the law as follows (at pages 670-671):

The foregoing authorities, and particularly, the Smallwood case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure

would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.

15 Keeping these principles in mind, it is now for this Court to weigh the competing interests in this case to determine whether the public interest of disclosure of documents in the administration of justice should prevail over the public interest in non-disclosure of high level government decisions. As noted earlier, the onus of establishing the claim for Cabinet privilege here rests with the Province.

16 The principal argument made for non-disclosure is that the confidentiality of these communications is essential to the candid and effective communication and consideration by Cabinet in a matter of keen public interest. It is argued that disclosure of such documents would detrimentally affect government policy and the public interest. The government policy with which we are here concerned is, of course, its response to allegations of institutional abuse through the initiation of the Stratton investigation and the subsequent development, implementation and administration of the ADR Program for compensation of victims of institutional abuse.

17 Wherever high level documents are involved, it is clear from the Carey case that the court should first inspect the documents to balance the competing interests in disclosing or producing them. I have completed that inspection in reaching the following conclusion.

18 Although the level of decision-making with which we are here concerned was at the highest level of government and involved a subject of considerable public interest, I find that the claim for Cabinet privilege cannot succeed in the context of this litigation. The arguments in favour of non-disclosure are significantly outweighed by the necessity for the proper administration of justice that the defendants have access to these documents to enable them to make full answer and defence and to ensure the fair disposition of the issues arising in this litigation. These documents are highly relevant to the defences raised by the insurers and also bear on any claim for relief from forfeiture. Furthermore, it is to be noted that the government policy in question is far beyond the developmental and implementation stages. The Stratton investigation was completed with the filing of a report on June 30, 1995 and the ADR Program has now pretty much run its course.

19 The fact that the Province has appointed retired Justice Fred Kaufman to conduct an independent review of the Province's response to allegations of institutional abuse does not warrant non-disclosure of the subject documents. I am satisfied that their disclosure would not amount to interference with the public interest of any significance, especially where the Auditor General has already publicly reported his conclusions from a review of these documents as set out in paragraph 13.43 of his 1998 Annual Report above recited. Accordingly, the documents over which Cabinet privilege has been claimed must be produced by the Province to the defendants. To avoid any uncertainty, the required production of each document or subgroup of documents will be specified, tab by tab, later in this decision. In light of this ruling, the question of waiver of Cabinet privilege over the subject documents by reason of their release to the Auditor General for purposes of his statutory audit has become moot.

SOLICITOR-CLIENT PRIVILEGE CLAIMS

20 The Province's claims for solicitor-client privilege generally relate to its response to potential legal liability for alleged incidents of institutional abuse. The subject documents also contain content of solicitors' advice or related communications concerning insurance matters. As such (and I have reviewed these documents along with the documents over which Cabinet privilege was claimed), these documents were clearly privileged communications when originally created. The question for determination is whether or not there has been an implied waiver of privilege by virtue of the provision of these documents to the Auditor General in 1998 for purposes of his statutory audit.

21 The defendants maintain that because the Auditor General is independent of the executive branch of government, his office must be looked upon as a third party vis-à-vis the government entities which he has been called upon to audit. Accordingly, it is argued that in turning the subject documents over to the Auditor General voluntarily, and with the full knowledge that they would be reviewed and utilized in the fulfillment of the Auditor General's statutory mandate, the Province has thereby waived solicitor-client privilege. In support of this argument, the defendants rely on the decision of the Federal Court of Canada - Trial Division in *Professional Institute of the Public Service of Canada v. Director of the Canadian Museum of Nature* [1995] 3 F.C. 643.

22 In that case, the court was concerned with a forensic accounting report prepared by Peat Marwick and Thorne following the recommendation of the Museum's solicitor to determine the prudence of taking a defamation action against a union for allegations of mismanagement and mishandling of funds. Although the forensic accounting report apparently cleared the Museum of any wrongdoing, it refused the union's Access to Information Act application for disclosure of the report on the ground that it was subject to solicitor-client privilege. Along the way, however, a copy of the forensic report was voluntarily provided by the Museum to the federal Auditor General at its request so that the Auditor General would be prepared to answer any questions. The Auditor General is by law the auditor of the Museum and the forensic report was referred to in the Auditor General's financial audit of that year.

23 Noël J. likened the responsibilities and functions of the Auditor General to those of external auditors. He ruled that solicitor-client privilege over the forensic report was waived by its voluntary disclosure to the Auditor General. His analysis is found in paragraph 14 as follows:

Keeping the foregoing in mind, I believe that the Auditor General must be looked upon as a third party vis-à-vis the government entities that he is called upon to audit. In terms of the privilege, it is also apparent that the disclosure of an otherwise privileged document to the Auditor General in the course of an audit is wholly inconsistent with an intent to maintain the privilege and as such amounts to a waiver. The mere fact that the Auditor General cannot be confined by a privilege belonging to the entity which he is called upon to audit, and that he must indeed make use of relevant and material information that comes to his attention in the fulfilment of his statutory mandate clearly establishes that the voluntary release of information to the Auditor General must be understood as a waiver of privilege by all those concerned.

24 Counsel for the Province advances the twin arguments that this case was wrongly decided and/or that it should be distinguished from the present case on the basis that the documents in question here cannot be said to have been voluntarily provided to the Auditor General in light of the statutory provisions and powers conferred under sections 10(1) and 14 of the Auditor General Act. It is argued that it does not constitute a waiver by providing documents to facilitate the conduct of a statutory audit where the Auditor General has the power to compel production of documents like that of a Commissioner appointed under the Public Inquiries Act.

25 The difficulty with that aspect of the Province's argument is that the Auditor General's power to compel production of documents does not extend to those protected by solicitor-client privilege. Moreover, if a request by the Auditor General for right of access to certain information is denied, his recourse is not to the courts, but only that of a reporting remedy to the Legislature where the issue is left to be resolved politically. Such was the analysis of the Supreme Court of Canada in its interpretation of the counterpart federal legislation in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)* [1989] 2 S.C.R. 49.

26 There is virtually no evidence in the present case as to the circumstances under which the documents over which solicitor-client privilege is claimed were provided to the Auditor General for purposes of his statutory audit. There is only the vague reference in the Auditor General's letter of March 15, 1999 earlier referred to that the only documents collected by his office in support of the audit findings came from Justice. All that is really known is that the Auditor General received these documents and in the absence of any evidence to the contrary, it is to be inferred that they were voluntarily provided by the Province to facilitate the statutory audit.

27 That, however, is not the end of the analysis in determining whether or not the claim of solicitor-client privilege should be upheld. As further argued on behalf of the Province, when it comes to solicitor-client privilege, in order for waiver to be implied the court must be satisfied that the client's conduct demonstrates an intention to waive privilege. I refer to the following passage from the well-known text on Solicitor-Client Privilege In Canadian Law (Butterworths, 1993) by the authors Manes and Silver at page 191:

1.03 Generally, waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

One of the best expressions on implied waiver of solicitor-client privilege is that of McLachlin J. (as she then was) in *S & K Processors*, [1983] B.C.J. No. 1499, (1983) where she said:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

28 This passage was recently cited with approval by the Nova Scotia Court of Appeal in *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd. et al.*, [2000] N.S.J. No. 258, 2000 NSCA 96.

29 What happened in the present case is that the Province, as I have already found, voluntarily provided copious documents to the Auditor General (including those documents over which solicitor-client privilege is now claimed) to facilitate his statutory audit, the focus of which was on Departmental operations with respect to the ADR Program. There was certainly no express waiver given when it did so, nor does an objective consideration of its conduct demonstrate any intention to

waive privilege. Having inspected the subject documents, I find it inconceivable that there was any intention on the part of the Province to waive solicitor-client privilege in releasing the documents as it did. Fairness is said to be the touchstone and the touch of fairness here defeats the argument of implied waiver of privilege over these documents.

30 I recognize that Justice Noël came to a different conclusion in the Museum case where it was apparent to him that the disclosure of an otherwise privileged document to the Auditor General in the course of an audit is wholly inconsistent with an intent to maintain the privilege and as such amounts to a waiver. It is to be remembered, however, that Justice Noël there was dealing with a solicitor-client claim of privilege over an external forensic accounting report, prepared on the recommendation of the Museum's solicitor, which arose in the context of a judicial review from a denial of access under the federal Access to Information Act. In my view, the finding in that case should not extend to solicitor-client communications such as are involved in this litigation, in the absence of any semblance of intention to waive that privilege. Accordingly, the Province's claim of solicitor-client privilege over the subject documents is upheld in principle, subject to the specific document rulings addressed below.

SPECIFIC DOCUMENT RULINGS

31 I now turn to a document by document (or subgroup of documents) review to set out my specific rulings in light of the applicable legal principles and findings which I have made. These documents have been organized by the Province's counsel in a separate bound volume containing 41 tabs. In setting out my ruling under each tab of documents, I have for expedience simply copied by way of introduction the descriptions prepared by counsel as found in Exhibit "I" of the affidavit of Peter Rogers sworn on September 26, 2000.

32 I should add that it was acknowledged by defence counsel at the outset of the hearing that they are not seeking production, at least on this application, of documents generated by or emanating from the office of the Auditor General itself. Rather, the focus of this application is on the production of documents submitted to or reviewed by the Auditor General in the preparation of Chapter 13 of his 1998 Annual Report.

33 It is also to be noted that the Province has withheld production of certain documents on the ground of irrelevance. I have, of course, reviewed those documents as well and they will be included in the following rulings.

34 I will begin by dealing collectively with the documents under Tabs 1-4 inclusive, the descriptions of which are as follows:

35

Tab 1	Auditor General Page Removed - Fax cover sheet with attached notes from Steve Lacusta, Office of the Auditor General, to Clarence Guest dated February 11, 1998 requesting financial information related to Compensation Program.
Tab 2	Auditor General Page Removed - Fax cover sheet from Steve Lacusta, Office of the Auditor General, to Clarence Guest dated February 12, 1998 requesting budget and financial information.
Tab 3	Auditor General Note Deleted - Irrelevant hand-written note and query attributed to S. Lacusta, Office of the Auditor General, regarding content of document.
Tab 4	Auditor General Note Deleted - Irrelevant hand-written query/comment attributed to S. Lacusta, Office of the Auditor General, regarding content of document.

Each of these documents or notes was generated by the office of the Auditor General and hence is not in issue on this application. I would add, parenthetically, that each of them is immaterial to this action.

36

Tab 5	Irrelevant Page Deleted - Directory of treatment and other services in Nova Scotia 1996, prepared by the Department of Health, Drug Dependency - Policy and Planning Branch - Public Document.

The Directory referred to is a public document. Its particulars are not relevant and it need not be produced by the Province.

37

Tab 6	Irrelevant Page Deleted - Mailing/Membership List: The Canadian Association of Financial Planners, Atlantic Chapter Membership Report, 1996.

Similarly, particulars of the Mailing/Membership List of Financial Planners are not relevant and the document need not be produced.

38

Tab 7	Auditor General Note Deleted - Irrelevant hand-written working notes and queries attributed to S. Lacusta, Office of the Auditor General, and hand-written reply of L. MacPhee, Department of Justice Executive Assistant.

The only deleted material here is a marginal note attributed to Mr. Lacusta. It is hence outside the scope of this application and is immaterial to this action in any event.

39

Tab 8	Auditor General Note Deleted - Hand-written note attributed to S. Lacusta, Office of the Auditor General, related to content and historical context of document.

Similarly, this document is outside the scope of this application and is immaterial to this action in any event.

40

Tab 9	Auditor General Page Removed - two pages of hand-written notes attributed to Clarence Guest to Steve Lacusta, (Office of the Auditor General) containing comments concerning analysis of Department of Justice financial statistics, including inter alia Compensation Program, IIU and Civil Litigation.

This two page note is attributed to Clarence Guest, Director of Finance, and is not protected by Cabinet privilege. It is to be produced by the Province along with the attached data sheet from the office of the Auditor General which merely recounts financial data obtained from Mr. Guest and adjusted figures annotated from Mr. Guest's two page memo.

41

Tab 10	Cabinet Privilege - Draft Memorandum from Alan Mitchell to Priorities and Planning Secretariat, prepared by Michael Dempster, dated October 16, 1997 - contains reporting background, updates and recommendations for Cabinet with respect to revisions to Compensation Program including inter alia communications strategy.

More specifically, this document sets out the main elements of the new compensation program guidelines recommended by the Minister of Justice as of October 16, 1997 designed to give the Province greater protection from fraudulent claims while at the same time providing a fair process for legitimate claimants. There is no public interest immunity in this document and it is to be produced by the Province.

42

Tab 11 Cabinet Privilege - Minutes of meeting prepared on October 5, 1994 attended by: Gordon Gillis, Deputy Minister of Justice; Ramsay Duff, Policy Analyst for Priorities and Planning Committee of Cabinet; Alison Scott, Senior Solicitor for the Department of Justice; Peter Spurway, Communications Officer, Department of Justice; Kit Waters, Director of Policy, Planning and Research, Department of Justice. Minutes include notes of discussion and intended action arising from MacDougall convictions and receipt of Notices of Intended Action, including inter alia planning for recommendations to Cabinet.

There is no public interest immunity in this document and it is to be produced by the Province.

43

Tab 12 Edited for Cabinet Privilege - Reference to memo to Priorities and Planning Committee of Cabinet; Document also contains solicitor and client communications from Douglas J. Keefe, Executive Director of Legal Services, inadvertently disclosed.

There is no public interest immunity in the two sentences on the first page of this letter that have been edited out and the full document is to be produced by the Province.

44

Tab 13 Editing for Solicitor/Client Privilege - Letter from Jay Abbass, Minister of Justice, to William Gillis, Minister of Finance, edited at page 2 for solicitor and client privilege containing information and advice received from Patterson Palmer Hunt Murphy with respect to insurance issues.

The edited portion on page 2 of this letter recites the content of legal advice obtained from outside counsel and is entitled to the protection of solicitor-client privilege. This therefore need not be produced by the Province.

45

Tab 14 Solicitor/Client Privilege - Memorandum from Doug Keefe, Executive Director of Legal Services, Department of Justice to William MacDonald, containing information and advice with respect to insurance matters and associated legal services.

More accurately, this memorandum does not contain legal advice but rather recommends to the Deputy Minister of Justice that expert legal advice be obtained to deal with the insurance companies on coverage issues in anticipation of their denials of liability. Accordingly, this document does not

fall within the purview of solicitor-client privilege and it is to be produced by the Province.

46

Tab 15 Irrelevant/Cabinet Privilege/Solicitor-Client Privilege - Partial letter from office of the Minister of Justice to the Honourable James A. Smith, Minister of Community Services containing information and advice with respect to insurance issues related to claims involving the Lunenburg Family and Children's Services Agency, as well as irrelevant communications of Cabinet involving the same.

This document bears no relevance to this litigation and it need not be produced by the Province.

47

Tab 16 Cabinet Privilege/Solicitor-Client Privilege - Extract from memorandum to Cabinet containing unidentified analysis of insurance considerations related to institutional abuse, July 1995.

This document is part of the larger document found at Tab 34 and is dealt with there.

48

Tab 17 Cabinet Privilege - Letter for Robert MacKay, Secretary to the Executive Council to the Honourable William Gillis, Minister of Justice communicating Executive Council decision in response to request and recommendations for action by Cabinet from the Department of Justice concerning compensation for victims of institutional abuse.

This document has no public interest immunity and it must be produced by the Province.

49

Tab 18 Editing for Solicitor/Client Privilege - Memo from Alison Scott to William Gillis regarding follow-up to Stratton Report. Edited portion at page 3 contains solicitors advice received from Patterson Palmer Hunt Murphy concerning insurance claims.

The edited portion contains legal advice from outside counsel concerning insurance matters and is entitled to the protection of solicitor-client privilege. It therefore need not be produced.

50

Tab 19 Cabinet Privilege/Solicitor-Client Privilege - Draft document for inclusion in memorandum to Cabinet describing proposed options for response to claims for compensation by survivors of institutional abuse; contains content of solicitor's advice with respect to insurance matters at page 2.

These two pages are part of the larger document found at Tab 35 and will be dealt with there.

51

Tab 20 Cabinet Privilege - Letter from Robert MacKay, Secretary to the Executive Council to the Honourable William Gillis dated March 22, 1996, communicating decision of Executive Council regarding compensation for survivors of institutional abuse, as well as irrelevant hand-written note from William Gillis to Paula Simon concerning filing.

This document does not have public interest immunity and is to be produced by the Province. If it wishes, however, the Province is at liberty to delete the hand-written note by William Gillis which is irrelevant and immaterial.

52

Tab 21 Solicitor/Client Privilege - E-mail from Douglas Keefe to Clarence Guest, Director of Finance - Department of Justice, including preceding e-mail from Clarence Guest to Douglas Keefe containing reference to advice and inquiry related to insurance matters.

This document contains a reference to the content of legal advice obtained on insurance matters and is entitled to the protection of solicitor-client privilege. It therefore need not be produced by the Province.

53

Tab 22 Irrelevant - Department of Justice Business Plan for Year 1997/1998 - contains no express reference to compensation for institutional abuse.

Tab 23 Irrelevant - Attached to B18.1 (see above).

Tab 24 Irrelevant - Department of Justice Business Plan for Year 1998/1999.

Each of the three documents last above mentioned is irrelevant and need not be produced by the Province.

54

Tab 25 Auditor General Page(s) Removed/Irrelevant Page(s) Removed/Claimant Names Deleted - Includes miscellaneous materials containing hand-written and other communications between S. Lacusta, Office of the Auditor General with Clarence Guest, Director of Finance, Department of Justice and others, including comments, queries and replies concerning financial information related to Compensation Program.

There are a number of documents found under this Tab, some of which should be produced and others not. Those not requiring to be produced are those generated or created by the office of the Auditor General, being outside the scope of this application. The one exception is the Auditor General's data sheet containing financial data obtained from Mr. Guest which is a duplicate of the document from Tab 9 which I have already ordered to be included in the document production.

Those documents found under Tab 25 which are to be produced, having no public interest immunity, are listed as follows:

- (a) e-mail reply from Karen Tannahill to Mr. Lacusta dated October 29, 1998;
- (b) internal memorandum from Michael Dempster to Mr. Lacusta dated October 27, 1998;
- (c) hand-written memorandum (2 pages) from Clarence Guest to Mr. Lacusta (undated);
- (d) e-mail reply from Clarence Guest to Mr. Lacusta dated October 21, 1998.

Lastly, I am unable to identify which office created the computer printouts entitled "Ordinary Expenditure Detailed Report" pertaining to Cost Centre 150002 (compensation for victims of institutional abuse). If these printouts were generated by the office of the Auditor General, they need not be produced. If, on the other hand, they were generated by the Province, they are to be produced.

55

Tab 26 Cabinet Privilege Page Removed - Excerpt from Memorandum to Cabinet related to options for payment of legal fees in respect of Compensation Program; includes content of Department of Justice solicitor's advice.

The first page of this document appears to be an earlier draft of page 6 of the document found at Tab 38. It relates to legal fees not in respect of this lawsuit, but rather in the context of compensation to be paid to victims of institutional abuse under the ADR Program for legal assistance. It does not have public interest immunity and it is to be produced by the Province.

56

Tab 27 Cabinet Privilege - Memo from Doug Keefe to Brian Norton, Paula Simon and Bill Wilson attaching draft Memorandum to Priorities and Planning Committee, containing information, analysis, and recommendations submitted by the Honourable Jim Smith, Minister of Community Services, and prepared by Martha Crow, Consultant, Legislation/Policy for the Department of Community Services, related to compensation scheme for victims of institutional abuse.

This document, with covering memo, reviews options for claims of victims of institutional abuse and does not have public interest immunity. It therefore must be produced by the Province.

57

Tab 28 Cabinet Privilege - Memo from Patricia Ripley, Deputy Minister of Community Services to Gordon Gillis, Deputy Minister of Justice concerning recommendations for content of Memorandum to Priorities and Planning Committee of Cabinet related to compensation for victims of institutional abuse, including inter alia, legal issues relevant to advice to Priorities and Planning Committee.

This document does not have public interest immunity and it is to be produced by the Province.

58

Tab 29 Cabinet Privilege - Memorandum to Priorities and Planning Committee from William Gillis, Minister of Justice, prepared by Gordon Gillis, Deputy Minister of Justice containing legal and policy considerations with options and recommendation for response to incidence of sexual abuse at the Shelburne Youth Centre; contains irrelevant hand-written notation attributed to Auditor General and attaches Memorandum from Alison Scott, Senior Solicitor, to Gordon Gillis, Deputy Minister concerning action against the Province of Nova Scotia and Patrick MacDougall by Peter Felix Gormley, subject to solicitor and client privilege.

The purpose of this memorandum was to evaluate and develop appropriate responses to incidents of sexual abuse at the Shelburne Youth Centre. It sets out the various options and recommendations of the Minister of Justice to the Priorities and Planning Committee of Cabinet. It does not have public interest immunity and must be produced, with one exception. That exception is the memorandum attached as Schedule A from Alison Scott to Gordon Gillis which is protected by solicitor-client privilege and need not be produced.

This document (along with some others) make reference to the issue of the Province's legal obligations in response to claims of victims of institutional abuse. However, that does not pose a disclosure problem in this action against its insurers which is predicated on the existence of such legal obligations.

59

Tab 30	Cabinet Privilege - Memorandum to Executive Council submitted by William Gillis, Minister of Justice and prepared by Kit Waters, Director of Policy, Planning and Research, in follow-up to B24.5 containing a detailed proposal for recommended action addressing proposed process, time frame, budget and communication plans, as well as a recommendation for action.

This is a sequel to the document found at Tab 29 providing further details regarding the recommended option. It likewise does not have public interest immunity and must be produced by the Province.

60

Tab 31	Cabinet Privilege - Staff Memo to Priorities and Planning Committee prepared by Ramsay Duff, Policy Analyst for Priorities and Planning Secretariat addressing background and policy considerations arising from B24.5, and recommending follow-up related to B24.6.

This document is a further sequel to the documents found at Tabs 29 and 30 containing the staff assessment for the Priorities and Planning Committee of the recommended option. It likewise does not have public interest immunity and must be produced by the Province.

61

Tab 32	Editing for Cabinet Privilege - Letter from Gordon Gillis to Honourable Stuart Stratton dated November 29, 1994 regarding details of engagement to conduct investigation - edited portion contains restatement of communications from Cabinet;

Cabinet Privilege Page Removed is Memorandum to Priorities and Planning Committee regarding appointment of Stuart Stratton, November 30, 1994.

The two sentences edited out on page 1 of this document do not have public interest immunity and therefore the full document is to be produced by the Province. Also to be produced, having no public interest immunity, is the memorandum to the Priorities and Planning Committee from William Gillis dated November 30, 1994 regarding the appointment of Stuart Stratton.

62

Tab 33 Editing for Cabinet Privilege/Claimant Names Deleted - Edited portion contains content of communications intended for Priorities and Planning Committee of Cabinet.

The edited portion of this document does not have public interest immunity and the document is therefore to be produced in its entirety.

63

Tab 34 Cabinet Privilege/Solicitor Client Privilege - Letter from Robert MacKay, Secretary to the Executive Council, to Hon. William Gillis dated July 7, 1995 communicating Cabinet's decision in response to attached Memorandum to Cabinet dated July 1995 submitted by William Gillis, Attorney General and James Smith, Minister of Community Services and prepared by Paula Simon, Director, Victim Services Division and Alison Scott, Senior Solicitor, Department of Justice contains information and advice related to preparation of a response to assist victims of abuse, including, inter alia, communications concerning legal advice related to insurance at page 3.

These documents, consisting of a detailed memorandum to Cabinet by the Ministers of Justice and Community Services and Cabinet's response, documents the Province's decision following the Stratton investigation into claims of institutional abuse, whereby the ADR option was approved in principle. These documents do not have public interest immunity in this case and are to be produced by the Province with one exception, namely, the Province is at liberty to delete the comments under "INSURANCE CONSIDERATIONS" contained on page 3 of the memorandum to Cabinet. That section of the memorandum refers to specific legal opinions requested from outside counsel and the Province's anticipated action. Because of the specific communications therein referred to, this document is to be contrasted with the document found under Tab 14. Accordingly, the Province need not produce the commentary under the "INSURANCE CONSIDERATIONS" section which is to be found under both Tabs 34 and 16.

64

Tab 35 Cabinet Privilege/Solicitor Client Privilege - Draft materials for Memorandum to Cabinet regarding options for compensation for victims of abuse, including, inter alia, contents of Solicitor's advice related to insurance, and unidentified hand-written notes - appears to be related to B24.19 (Tab 38).

This document appears to be the foundation for the February, 1996 review of options for the compensation process referred to in paragraph 13.43 of the Auditor General's 1998 Annual Report (the first two pages only of which are found at Tab 19).³ This document does not have public interest immunity and must be produced in its entirety. In respect of the pertinent solicitor-client claim, this document does no more than make bare mention of the fact that the proposed ADR process may void insurance policies, which is hardly a revelation and is already recited in the Auditor General's report aforesaid. There is no valid solicitor-client claim for privilege pertaining to this document.

65

Tab 36 Cabinet Privilege/Solicitor Client Privilege - Staff Memo prepared by Ramsay Duff, Policy Analyst - Priorities and Planning Secretariat to Priorities and Planning Committee concerning compensation for victims of institutional abuse; includes at page 2 information related to Solicitor's advice concerning insurance matters.

This document addresses the continuation of the ADR Program and does not have public interest immunity. However, paragraph 5 on page 2 of the document implicitly refers to the content of legal advice obtained from counsel and may be edited out on the ground of solicitor-client privilege. The remainder of the document, however, must be produced by the Province.

66

Tab 37 Cabinet Privilege - Memo from Bill MacDonald to Robert MacKay, Executive Assistance to Executive Council et al. dated March 12, 1996 attaching and related to Memorandum to Cabinet concerning proposed action with respect to compensation for victims of institutional abuse and related considerations.

This document does not have public interest immunity and it must be produced by the Province.

67

Tab 38 Cabinet Privilege/Solicitor Client Privilege - copy of Memorandum to Cabinet

dated March 8, 1996 submitted by William Gillis, Minister of Justice and prepared by Paula Simon, Program Manager - Compensation for Survivors of Institutional Abuse and Alison Scott, Senior Solicitor - Department of Justice, related to approval to move forward with compensation for survivors of institutional abuse; includes inter alia background information related to previous Cabinet communications, report on status of discussions with lawyers representing survivors of abuse, report concerning engagement of Patterson Palmer Hunt Murphy related to insurance issues and analysis of options, including solicitor's advice with respect to insurance.

This memorandum to Cabinet from the Minister of Justice requests approval to move forward with the compensation for survivors of institutional abuse through the ADR Program. It does not have public interest immunity and should be produced with two exceptions. Those exceptions are found at page 3 of the document, being the paragraph under the subtitle "INSURANCE COVERAGE" and the later paragraph under the subtitle "CONS". Both these paragraphs implicitly refer to the content of legal advice obtained from outside counsel and accordingly, may be edited out on the ground of solicitor-client privilege.

68

Tab 39 Auditor General Noted Deleted - Irrelevant hand-written note attributed to Leanne Robinson, Department of Justice Solicitor and Claims Assessor to S. Lacusta accompanying document requested.

This hand-written note is irrelevant and need not be produced.

69

Tab 40 Auditor General Note Deleted - Hand-written note attributed to S. Lacusta concerning treatment of information contained in document for audit purposes.

Tab 41 Auditor General Note Deleted - Irrelevant hand-written notes attributed to S. Lacusta concerning interpretation of statistical information contained in document.

The last two documents contain marginal hand-written notes attributed to Mr. Lacusta of the Auditor General's office and hence are not in issue in this application.

EFFECTIVE DATE OF ORDER AND COSTS

70 I will leave it amongst defence counsel to prepare the necessary Order to give effect to the rulings I have made in both this decision and my earlier decision dated October 31, 2000 in respect of production of documents from the Stratton investigation. The effective date of that Order should be delayed for a period of ten days in the event that there is an appeal therefrom under Civil

Procedure Rule 62.02(1).

71 I am also prepared to hear submissions from the parties on the subject of costs pertaining to both branches of this application, having reserved on that aspect of the matter in my earlier decision so that they could be dealt with all at once. Submissions on costs should be submitted to my attention on or before January 12, 2001.

WRIGHT J.

cp/e/qlkcd/qlhcs

Case Name:
R. v. Ahmad

Between
Her Majesty the Queen, Respondent, and
Fahim Ahmad, Zakaria Amara, Asad Ansari, Shareef Abdelhaleem,
Mohammed Dirie, Jahmaal James, Amin Durrani, Steven Chand and
Saad Gaya, Applicants

[2009] O.J. No. 6156

Court File No. CRIMJ(F)2025/07

Ontario Superior Court of Justice

F. Dawson J.

Heard: May 21, 25-28, June 1-5, 12, 17, 24
and July 2-3, 2009.
Judgment: July 6, 2009.

(203 paras.)

[Editor's note: An addendum was released by the Court August 11, 2009. See [2009] O.J. No. 6155.]

Counsel:

Clyde Bond and Gene Assad, for the Respondent.

Raymond Motee, as agent for Dennis Edney, for Fahim Ahmad.

David Kolinsky, for Zakaria Amara.

Breese Davies, for Asad Ansari.

Peter Martin and William Naylor, for Shareef Abdelhaleem.

Judyth Rekai, for Ali Mohammed Dirie.

Raymond Motee, as agent for Paula Seymour, for Jahmaal James.

Peter Martin, as agent for Manuel Azevedo, for Amin Durrani.

Raymond Motee, as agent for Michael Moon, for Steven Chand.

Paul Slansky, for Saad Gaya.

RULING NO. 16

National Security Privilege

1 F. DAWSON J.:-- The accused are charged with terrorism-related offences. This pretrial motion requires me to make rulings with respect to roughly 1,375 claims of injury to interests said to be protected by national security privilege (NSP). These claims are made by the Crown in respect of approximately 787 redactions in hundreds of documents. More than one form of injury has often been claimed in respect of a single redaction. It took approximately nine days to review these redactions in open court in the presence of the accused. The balance of the motion was used for general submissions. Much of the material I am working with is classified as "Top Secret".

The Documents in Question

2 I have been provided with two secure laptop computers which I use only in the courtroom or in a well secured location. One laptop is used to view the RCMP documents that bear such redactions. The other contains all of the CSIS documents that bear such redactions plus some other CSIS documents. The documents are numbered in accordance with the disclosure provided to the accused. I can view the entirety of most documents. Coloured shading, which I can see through, has been applied to the electronic documents. All redactions in the copies provided to the accused are completely blacked or whited out. The transparent shading that I see is colour coded to correspond to four areas of alleged injury to national security that it is said would result from the disclosure of the redacted information. While the accused were advised of the basis for the Crown's claims of potential injury to national security as we reviewed each redaction, only the Crown and myself are aware of the nature of the colour coding.

3 A representative of the Royal Canadian Mounted Police (RCMP) and Canadian Security Intelligence Service (CSIS) have each provided an affidavit and been cross-examined about the four areas of concern represented by the coloured shading. In summary terms the areas have been described as a CSIS "Service Interest", referring generally to information which would identify the Service's interest in individuals, groups or issues; information tending to identify methods of operation and investigative techniques; the protection of human sources; and the protection of information shared by police forces and intelligence agencies of other nations subject to "caveats" or what is referred to as "the third party rule." This last category is cast broadly to protect the identity of the foreign police service or intelligence agency and the fact and nature of the relationship between such foreign sources and the RCMP or CSIS, as well as the content of the information conveyed. The third party rule is well recognized internationally and provides that an entity of one country receiving information from an entity of another country will not disclose the information received without the sender's permission.

4 The documents have many redactions that do not fall within the class of redactions I am dealing with on this motion. Although those redactions fall within the same protected interests they have been determined by the Crown to also fall outside certain categories that counsel for the accused have advised they are interested in.

5 The documents known as the "Osage I" documents stem from the police investigation (known as Project Osage) but include a series of Disclosure Letters and Advisory Letters provided to the RCMP by CSIS. Osage I therefore includes some CSIS information. The prosecuting Crown has been directly involved in redacting this information to protect NSP as part of the disclosure process pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

6 The documents known as the "Osage II" documents are CSIS documents related to CSIS's Project Claymore. That project started before Project Osage, was broader and focused on gathering intelligence in relation to Sunni Islamist extremism. The Osage II documents were compiled through a laborious process undertaken by CSIS counsel, counsel for the Attorney General of Canada and, to some extent, Crown counsel prosecuting this case. I explained that process in detail in *Ruling No. 14*, at paras. 66 to 71. There I determined that in the circumstances of this case CSIS information that was not provided to the police is third party material, the disclosure of which is governed by *R. v. O'Connor*, [1995] 4 S.C.R. 411.

7 The process of compiling the documents contained within the Osage II material commenced with CSIS agreeing that they would search their holdings, which are primarily in electronic form, for information in five areas of likely relevance. Those areas included the anticipated *Garofoli* application to challenge the "wiretap" authorizations, anything that could bear on the credibility of the two police agents (both of whom started out as CSIS human sources), and entrapment issues. All five areas of likely relevance are described in detail in *Ruling No. 14*.

8 Counsel for the accused have identified the following categories of information for the Crown, over which the Crown has claimed NSP, which remain of interest to them in relation to the assembled documents containing NSP claims:

- (a) information that could assist in challenging the admissibility of communications intercepted pursuant to authorizations issued pursuant to Part VI of the *Criminal Code* (*Garofoli* application);
- (b) information that could be used to challenge the credibility or reliability of the two police agents, including issues related to their compensation;
- (c) information relevant to a claim that the accused were entrapped;
- (d) information which would disclose any illegal conduct by either of the police agents and state knowledge of or involvement in such conduct;
- (e) information which would disclose the legal basis upon which CSIS gathered information which was ultimately given to the RCMP and the predominant purpose of the investigations at any given point in time; and
- (f) information which would be useful in arguing that any evidence ought to be excluded under s. 24(1) of the *Charter*, including information affecting the admissibility of the statement of the accused Mr. Gaya.

9 Counsel for the accused have also advised the Crown that they are not interested in information in the following categories:

- (a) solicitor-client privileged information;
- (b) information covered by informant privilege;
- (c) police data and information system information;
- (d) personal information of third parties unrelated to Project Osage;
- (e) information related to the location of police agents or their family members;
- (f) information related to security measures for police agents and their families;
- (g) contact information for the police;
- (h) information that would tend to identify police vehicles.

10 Based on my detailed review of the redacted material it appears to me that the Crown has taken a careful approach that tends to be over-inclusive. If something might fall within a category of defence interest it has been included in the material assembled for my review of the NSP claims.

11 Once the Crown identified something within a category of interest to the accused a red or beige box was placed around the colour coded redaction. Red boxes have been used in relation to the Osage I (RCMP) documents and beige boxes in relation to the Osage II (CSIS) documents. It is only the redactions in these red or beige boxes that constitute the redactions in issue on this motion, although there are many other redactions in the material that do not fall within areas of interest to the accused.

12 For the great majority of documents I can see the full document beneath the redactions whether in issue or not. However, there are a handful of documents that have redactions I cannot see beneath. Some of those documents are Counter Terrorism Weekly Bulletins. I have been assured that Crown counsel has recently been permitted to see beneath the redactions in the Bulletins and has determined that they do not relate to this case. There are parts of other documents, that I can readily determine are of the utmost sensitivity, that remain partially redacted from my view. When I expressed a concern about this some such redactions were lifted for my private viewing in order to help me better assess the situation. I am at the moment satisfied that I have the information I need with respect to such documents to make the determinations I must. From the nature, organization and other content in the unredacted portions of this small number of documents I can infer the general nature of the redacted information. At the moment I am satisfied that the obviously highly sensitive information I am not able to view goes beyond what I need know to properly address the issues before me.

Why this Court is Dealing with National Security Privilege

13 I am dealing with the claims to NSP that arise in this case by virtue of my Ruling No. 9 in these proceedings titled "Constitutional Validity of ss. 38-38.16 of the *Canada Evidence Act*", which was released January 15, 2009. In that ruling I held that those provisions are unconstitutional and of no force and effect to the extent that they deprive a provincial superior court of its ability to apply the Constitution, including the *Charter*. I held that by purporting to vest exclusive jurisdiction to decide questions of NSP in the Federal Court the impugned legislation deprived this court of the ability to apply the Constitution to determine important disclosure questions under s. 7 of the *Charter*, and unconstitutionally impinged upon this courts "court of competent jurisdiction" function derived from s. 24 of the *Charter* and the judicature sections of the *Constitution Act*, 1982.

14 Although the Crown has been granted leave to appeal that ruling directly to the Supreme Court of Canada pursuant to s. 40 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, the Crown has been content to continue the process before me on the basis that the Attorney General of Canada has consented to the release of the information to me, subject to the Supreme Court of Canada's decision, for the purpose of conducting the trial in this case.

15 It is important to point out that I did not strike down the *Canada Evidence Act* (CEA) sections I have referred to in their entirety. Nothing in my Ruling No. 9 purports to affect Parliament's determination in enacting ss. 38-38.16 of the CEA that "sensitive information" or "potentially injurious information", as defined in s. 38, shall not be disclosed until a judge, applying the provisions of s. 38.06 of the CEA, decides it should be disclosed. This means that if the judge finds that disclosure of the information would be injurious to international relations, national defence or national

security, the judge must engage in the balancing process described in s. 38.06(2) of the CEA. As I said repeatedly in Ruling No. 9, the question I was dealing with there was whether, in the context of a criminal trial proceeding in this court, the balancing called for by s. 38.06 should take place in the Federal Court or the Superior Court of Ontario.

16 In Ruling No. 9 at paras. 154-155 I also concluded that the special procedures available in the CEA, such as the *ex parte* hearing provided for in s. 38.11, would not be available to this court. Subsequent to that ruling all counsel had input into the procedure we are now following.

The Procedure Adopted

17 It was the preference of counsel for the accused to have as much of the hearing as possible conducted on the record in the presence of the accused. That is how we have proceeded. The question of NSP is being considered by me in the context of a criminal trial and the presence of the accused is governed by s. 650 of the *Criminal Code*. In the event I order disclosure the Crown will have the opportunity to raise a further objection pursuant to s. 37 of the CEA. That would open up the possibility of *ex parte* proceedings as a s. 37 hearing is a separate proceeding from the trial to which s. 650 of the *Criminal Code* does not apply: *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 (Ont. C.A.). While I have already heard some submissions on how we should proceed if a s. 37 hearing becomes necessary, I will leave that issue to future consideration should the need arise.

18 I wish to add that I have raised with defence counsel the possibility that their interests might be better protected if I was able to have full *ex parte* communication with Crown counsel. For example, I would then be in a position to ask direct questions of the Crown about matters concerning me and receive direct answers. Section 650(2)(b) of the *Criminal Code* would permit me, on application by the accused, to allow the accused and their counsel to be absent from the courtroom in order that I might further explore issues that have the potential to lead to the accused receiving more disclosure. I raised this at the commencement of this motion and canvassed the issue again in detail during Ms. Davies' submissions on the afternoon of June 24, 2009.

19 The accused do not wish to avail themselves of such a procedure. However, all of the accused did periodically agree during the course of the hearing to my posing brief questions to the Crown in writing in circumstances where I expressed the need for specific information or clarification. The accused all agreed that the Crown could respond in brief written form. My questions and the Crown's responses were then placed in sealed envelopes and marked as lettered exhibits.

20 The accused have also all agreed to my having a 42 page document referred to as the "Secret Index" which provides me with certain very limited specific information about what category of protected interest a redaction is said to fall into, as well as any sub-category within that protected interest. I have also received on consent some similar *ex parte* charts designed to provide me with a minimal amount of specific factual information in relation to the documents and redactions in order to assist me in resolving the privilege question.

21 The procedure we have followed is akin to a *Garofoli* procedure: *R. v. Garofoli*, [1990] 2 S.C.R. 1421. The Crown and I can see the documents in their entire unredacted form. The accused and their counsel cannot. We have gone through the redactions one by one. Occasionally I have been able to give the accused some information about the redacted information when certain that doing so would not impinge on a protected interest. Crown counsel has done the same thing. For example, the Crown might advise that a redaction contained "tombstone information" on persons

other than current or past accused in Project Osage, or that certain information was about a particular general subject area of little or no relevance to the case.

22 The accused then had an opportunity to make submissions. They were often able to make very helpful submissions based on the nature of the document in which a redaction was found and by referring to the surrounding unredacted information.

23 Unfortunately, in some cases so much of a document is redacted that it was very difficult for the accused to make meaningful submissions. I often concluded by looking at the redacted material that to disclose any of it, even by way of a summary, was impossible without harming a protected interest. Many, if not most, of these redactions contain very detailed information that does not lend itself to being summarized in a way which would not violate the protected interest.

24 Even in these circumstances, however, occasionally the accused were able to make general submissions that were helpful. For example, if such a heavily redacted document had been included in an appendix to an affidavit in support of an application for an authorization to intercept private communications, or was referred to directly in such an affidavit, submissions were advanced concerning the way such a document should be considered in the balancing process in relation to the privilege claim having regard to such use, or about how the presence or absence of certain information in such a document might be useful to the defence in attacking the wiretaps.

25 As we went through the redactions I sometimes expressed my opinion to the Crown that I felt a summary could be prepared for a redaction, or that a particular redaction should be reconsidered. As the motion progressed into the second week the Crown responded by either completely or partially lifting some redactions or by providing a form of summary. These revised documents have been passed out to counsel for the accused. Approximately 40 redactions in the Osage I documents were modified by this process (see Exhibit 20). A similar process took place with respect to the Osage II documents (see Exhibit 21). Pages containing these written changes have been inserted into two large binders marked "Osage I" and "Osage II". These binders do not contain complete documents but do contain the pages of all documents where the redactions appear. These binders will be preserved as sealed exhibits together with the electronic documents and all charts and information I received on a consent *ex parte* basis.

Other Matters

26 A number of other matters should be mentioned. The charts I have received demonstrate that CSIS is often claiming protection for information in an RCMP document when the RCMP is not claiming such protection. This is related to the fact that certain information was passed to the RCMP by CSIS in the form of Disclosure Letters and Advisory Letters. I have discussed the difference between these two forms of disclosure by CSIS to the RCMP and the difference between the mandates of CSIS and the RCMP in Ruling No. 14, titled "CSIS Disclosure Motion: Stinchcombe or O'Connor", released May 8, 2009. The fact of the matter is that CSIS may have an interest in protecting information it gathered even though the police do not. As well, CSIS may have an interest in preventing disclosure of their interest in certain people, groups or subject matters even when the police investigation of those same matters has become public knowledge. CSIS investigates for intelligence gathering purposes not criminal prosecution and its interests may be broader, more open ended and of a longer term nature than police investigations. This is well developed in the evidence on this motion and was also discussed in Ruling No. 14.

27 Mr. Bond on behalf of the Crown also points out that it is the Attorney General of Canada that claims the protection, not CSIS or the RCMP *per se*. The Attorney General is aware that CSIS's interests in information may need to be protected in the interests of national security even when a police investigation of the same matter is well known and the same information sought to be protected has already been disclosed from another source.

The Governing Legal Principles

28 Before commencing the redaction by redaction review on the record I received comprehensive submissions concerning the governing legal principles. Both Crown and defence counsel made reference to judgments of the Federal Court and Federal Court of Appeal decided under s. 38 of the CEA. While there is considerable agreement between the Crown and defence there are also some areas of disagreement.

29 Everyone agrees there is a three stage process with three issues to be determined. The first is whether the information in question is relevant. Counsel agree that relevance is to be determined by reference to the *Stinchcombe* standard of whether there is a reasonable possibility the information will be useful to the defence: *R. v. Chaplin*, [1995] 1 S.C.R. 727. If the information sought is not relevant in this sense there is no need to proceed further.

30 There is authority in the Federal Court of Appeal that the onus to demonstrate relevance rests on the party seeking disclosure: *R. v. Ribic*, [2005] 1 F.C.R. 33, at para. 17. Although I find the balance of that judgment to be persuasive and of considerable assistance, I respectfully decline to accept this proposition as applicable in the course of a criminal trial. In any event, the Crown concedes that it must bear the burden of establishing that the information in a redaction is clearly irrelevant before it can succeed at this first stage. This is consistent with both *Stinchcombe* and *Chaplin* in the context of disclosure in a criminal case.

31 The accused contend that once the Crown or CSIS counsel have identified a document as falling within a defence category of interest, that determines the relevance question in their favour. Having read all of the redacted material I have no hesitation in saying that some of it is clearly irrelevant. As I mentioned, the Crown has taken an inclusive approach in vetting these documents. As Mr. Assad submits on behalf of the Crown, the test the Crown used in identifying information for potential disclosure was applied at the document level. Many of the redactions apply only to particular items of information within a document. Consequently, there is still some scope for me to conclude that particular items of information are irrelevant.

32 The second issue involves determining whether the disclosure of the information would be injurious to national security, national defence or international relations. It is common ground that the party seeking to protect the information from disclosure bears the burden of proving on an evidential basis that disclosure would probably result in such an injury: *Ribic*, at paras. 18-20; *Canada (Attorney General) v. Khawaja*, 2007 FC 490 at para. 65. A mere assertion of injury is insufficient.

33 A number of Federal Court and Federal Court of Appeal judgments suggest that at this stage of the process deference is to be afforded to the Attorney General's position by virtue of the Attorney General's expertise and special access to information, and that a reasonableness standard must be applied: *Ribic*, paras. 18-19; *Khawaja*, para. 66; *Khadr v. Canada (Attorney General)*, 2008 FC 549 at paras. 31, 33. Counsel for the accused have seized upon this language as problematic. They submit that to the extent this jurisprudence suggests that deference is to be afforded to the executive, "it is incompatible with the established framework for analysing claims of privilege under *R. v.*

Stinchcombe" (Ansari Factum, para. 15). As I understand the submission, it is to the effect that the form of deference described in the cases I have referred to is not compatible with the requirement that courts conducting a *Stinchcombe* review make a "correct" determination of whether a legal privilege applies.

34 Mr. Slansky submits on behalf of the accused Mr. Gaya that by the use of such language the Federal Court and Federal Court of Appeal are effectively treating the determination of NSP questions as a form of judicial review of an executive decision that information should not be disclosed on the basis of national security.

35 In my view neither concern is established on a reading of these cases. In addition, I would point out that the determination of whether or not national security privilege applies is made at the third stage of the process where the balancing of interests occurs. Prior to that the legal question of whether the material is privileged has not been addressed *per se*. The determination of whether disclosure will probably lead to an injury to a potential interest, while necessary to the overall process, takes place before the privilege is upheld or set aside at the balancing stage. Furthermore, it appears to me that the reference to "reasonableness" in this jurisprudence is made in the context of assigning weight to the evidence, which these cases all recognize must reasonably support the concern for injury raised by the Attorney General. I will make brief references to specific portions of the cases to support my conclusions.

36 In *Ribic* at para. 15 the Federal Court of Appeal addressed some of the accused's concerns directly.

15 It is important to remind ourselves that proceedings initiated pursuant to section 38.04 of the Act for an order regarding disclosure of information are not judicial review proceedings. They are not proceedings aimed at reviewing a decision of the Attorney General not to disclose sensitive information. The prohibition to disclose sensitive information is a statutory one enacted by paragraph 38.02(1)(a) of the Act which reads:

* 38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

* (a)

Information about which notice is given under any of subsections 38.01(1) to (4);

* * *

* 38.02 (1) Sous réserve du paragraphes 38.01(6), nul ne peut divulguer, dans le cadre d'une instance:

* (a)

Les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) to (4);

The application to a judge of the Trial Division is an application whereby the judge is required to make an initial determination, i.e., to determine whether the statutory prohibition of disclosure should be confirmed or not: see subsection 38.06(3) which says that if the judge does not authorize disclosure, he or she shall, by order, confirm the prohibition of disclosure. In proceedings under section 38.04, the judge is required to make his own decision as to whether the statutory ban ought to be lifted or not and issue an order accordingly.

37 The principles contained in the above quote were acknowledged and applied by Mosley J. at para. 61 of *Khawaja*, and para. 27 of *Khadr*.

38 In *Ribic* at para. 18 the Federal Court of Appeal stated that the second stage involves an examination or inspection of the information sought from the perspective of the question posed at this second stage of the analysis: "The judge must consider the submissions of the parties and their supporting evidence. He must be satisfied that executive opinions as to potential injury have a factual basis which has been supported by evidence [citation omitted]." In the next paragraph the court continued: "The Attorney General assumes a protective role *vis-à-vis* the security and safety of the public. If his assessment of the injury is reasonable, [I would read in "based on the evidence"], the judge should accept it." I would read in the words I have indicated having regard to the judgment as a whole.

39 I wish to add that I find the sentence found in para. 18 of *Ribic*, after the portion I have already quoted, somewhat problematic and potentially out of keeping with what I understand to be the court's main message. That sentence is as follows: "It is a given that it is not the role of the judge to second-guess or substitute his opinion for that of the executive." I wish to make it clear that I see my role at the second stage of this process as to make an independent determination whether there is evidence, which I accept, that reasonably supports the injury claimed by the Attorney General. If I cannot reach that conclusion on an evidentiary basis then the claim of privilege will fail at the second stage. Even if I conclude the Attorney General's position is reasonable, I do not regard myself bound by it. However, if it is reasonable I should carefully consider it and probably accord it considerable weight in making my decision.

40 In making my determination it must be remembered that the contents of the redactions which I have seen form part of the evidence I must consider. Speaking generally, I must say that the contents of many of the redactions make out the nature of the injury claimed.

41 On the question of establishing an injury to national security there is considerable disagreement between the Crown and the accused on the effect of the "third party rule" in the circumstances of this case. This is a rule that is recognized internationally and applies when there is a sharing or exchange of information between police forces or intelligence agencies in different countries. As stated in *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, [2006] F.C.J. No. 1969, 2006 FC 1552, at para. 25: "Put simply, the receiving agency is neither to attribute the source of the information nor to disclose its contents without the permission of the originating agency."

42 In the case before me the evidence establishes that the RCMP has made substantial efforts to contact the foreign third party agencies that provided the RCMP with information, in order to determine whether such agencies will now agree to the disclosure of the information provided. In many cases the foreign agency has agreed to such disclosure and those redactions were lifted. In some cases the foreign agency refused to do so. The RCMP documents that remain subject to a cur-

rent third party rule claim have been listed in a two page document marked as Exhibit 2 in these proceedings. Consequently, when a third party claim has been advanced in relation to information provided to the RCMP by a foreign agency I know that the third party claim is current.

43 I am not in the same position with respect to information from foreign agencies that is found in the CSIS documents. Martin Dengis, currently the Deputy Director General of the Intelligence Assessment Branch of the Service, testified that prior to commencement of this motion CSIS had made no efforts to obtain consent from foreign agencies to the disclosure of the information they provided. In cross-examination by Ms. Davies he said he was unaware of a series of cases in the Federal Court that suggest it is at least advisable, and may be a requirement, that such inquiries be made before the Attorney General can succeed in establishing an injury to national security based on the third party rule. Following Mr. Dengis' testimony I was advised that CSIS has now contacted some third parties and is waiting for a response.

44 Based on Mr. Dengis' evidence the accused submit that probable injury has not and cannot be established where the claim of injury rests solely on the third party rule asserted in relation to a CSIS document.

45 I will deal with this issue more completely when I resolve the claims for privilege in relation to CSIS documents based on the third party rule. Speaking generally, I can indicate that there are a few redactions where, having seen the underlying information, I cannot conceive that the foreign agency would ever release their claim. In such circumstances it seems to me that it would be wrong to dismiss a privilege claim at the second stage of the analysis. There are also some such redactions where the Crown has provided me with convincing evidence that the information has already been disclosed to the accused from another source. In such circumstances there is little to be gained by insisting that CSIS or the Attorney General go back to the foreign source, unless it is apparent that the fact that the information also came from the foreign agency is in itself somehow of relevance in the particular circumstances of the case.

46 This question represents an emerging area of importance in the Federal Court jurisprudence. I have been referred to: *Arar*, per Noel J. at para. 73; *Khawaja* at para. 146 and *Khadr* at para. 93, per Mosley J.; *Charkaoui (Re)*, [2009] F.C.J. No. 555, per Tremblay-Lamer J. Reference may also be had to the Federal Court of Appeal's decision in *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589, at paras. 101, 103, 110 and 111, varied on appeal, but not on this point: [2002] 4 S.C.R. 3.

47 As I said previously, this jurisprudence suggests that the Attorney General may not be able to discharge his or her onus to establish an injury on this basis if inquiries of the third party have not been pursued. However, no clear rule emerges that such an inquiry is a prerequisite to establishing an injury under this category. I adopt the comments of Mosley J. in *Khadr* at para. 93 as a correct statement of law:

The Attorney General takes the position that such inquiries should not be considered to be a prerequisite to a determination by the Court that injury would result from a breach of the principle. In my view, however, the failure to make such inquiries may undermine the claim particularly where, as is often the case, on its face the information appears to be innocuous.

From this I take it that the failure to make such inquiries may, but will not necessarily, result in failure of the privilege claim. Other circumstances may have a bearing. Consequently, I will deal with this issue in the context of making my decisions on particular redactions.

48 The third issue to be addressed is the balancing provided for in s. 38.06(2) of the CEA. That subsection provides as follows:

- (2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

49 A helpful summary of the Federal Court jurisprudence in this area can be found in the judgment of Mosley J. in *Khadr* at paras. 35-39. I accept his description as an accurate statement of the applicable legal principles. As he points out at para. 35: "In assessing this balance, the threshold is neither the low strict relevancy test of *Stinchcombe* nor the stringent innocence at stake exception which applies to informer privilege." Justice Mosley goes on to point out that the relevant factors to be considered in the balancing process will vary from case to case. The judge is charged with the responsibility of assessing those factors which the judge considers necessary in order to "find the delicate balance between competing public interests" (para. 36).

50 At para. 37 Justice Mosley lists the factors previously cited with approval by Rothstein J.A. (as he then was) in *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470, [2002] F.C.J. No. 1658 (C.A.), as follows:

- (a) the nature of the public interest sought to be protected by confidentiality;
- (b) whether the evidence in question will "probably establish a fact crucial to the defence";
- (c) the seriousness of the charge or issues involved;
- (d) the admissibility of the documentation and the usefulness of it;
- (e) whether the applicants have established that there are no other reasonable ways of obtaining the information;
- (f) whether the disclosures sought amount to general discovery or a fishing expedition;

51 At para. 38 Justice Mosley listed the factors utilized by Simon Noël J. in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2007] F.C.J. No. 1081, at para. 98, as follows:

- (a) the extent of the injury;
- (b) the relevancy of the redacted information to the procedure in which it would be used, or the objectives of the body wanting to disclose the information;

- (c) whether the redacted information is already known to the public, and if so the manner by which the information made its way into the public domain;
- (d) the importance of the open court principle;
- (e) the importance of the redacted information in the context of the underlying proceeding;
- (f) whether there are higher interests at stake, such as human rights issues, the right to make a full answer and defence in the criminal context, etc.;
- (g) whether the redacted information relates to the recommendations of the commission and if so whether the information is important for comprehensive understanding of the said recommendation.

52 I will utilize these factors, to the extent they are applicable in the context of the criminal trial I am dealing with, to make my determination in this case. I will keep in mind that other factors of a similar nature may also emerge from the material and the context I am dealing with. I would add that the extent to which individual factors will play a role in my decision making will be affected by the nature of the injury at issue with respect to a particular redaction. For example, when dealing with the potential disclosure of the identity of a human source the weight given to certain factors will likely be different than when I am dealing with the protection of an investigative method or technique in circumstances where it appears that the availability and use of such techniques is known or surmisable.

53 With respect to the consideration of such factors I wish to indicate that I have taken into account the fact that some of the information subject to the NSP claims has been relied upon in applications to obtain authorizations to intercept private communications. I have kept this carefully in mind, particularly at the balancing stage. In fact I have gone through the exercise of looking at all of the Disclosure Letters and Advisory Letters and tracking the information to see how any information CSIS provided to the RCMP has been used in the various Part VI applications. I have examined each of the affidavits in support of the Part VI authorizations, which have been provided to me in unredacted form.

54 The information in the Disclosure Letters was not to be used to obtain warrants. Only information in an Advisory Letter was to be used for that purpose. I am satisfied from my review that this distinction was respected. Speaking generally, information that was provided by CSIS in Advisory Letters played a substantial role in the first affidavit for an authorization dated December 19, 2005. Such information played a less significant but still significant role in the second such application where the affidavit was dated February 9, 2006. In the third application, where the affidavit was dated April 12, 2006, such information seems to appear only in the appendices where copies of the earlier applications are found. There are no redactions in the affidavits in support of the fourth and fifth Part VI applications. I spent many hours involved in this tracking exercise.

55 In respect of the balancing, in connection with any such information used in wiretap applications I have kept the teachings of cases such as *R. v. Durette*, [1994] 1 S.C.R. 469 firmly in mind.

A General Comment on What Follows

56 Because there are so many redactions with overlapping claims of privilege based on different claims of injury I have found it extremely difficult from a logistical point of view to come up with a format for meaningful reasons. One redaction may contain two, three or four overlapping claims.

Sometimes I have concluded that the redaction should stand on more than one basis, or should not stand on one basis but is supportable on another basis.

57 All of this is made more difficult by the need to ensure that the "mosaic effect" does not result in persons or groups with knowledge of the case being able to piece together information in such a way as to learn the identity of a human source or other protected interest. I have found that from an examination of the many documents and the way in which a piece or type of information is repeated or used, or where it appears in documents of a certain type, it sometimes becomes apparent what the underlying information or protected interest is. For example, I was able to determine the name of a confidential human source on my own in this fashion. My conclusion was subsequently verified in a consent *ex parte* communication with the Crown. I also found that some information that I felt upon first evaluation could be summarized, could not be after I viewed the structure of the wiretap affidavits. Parts of those affidavits have been redacted but portions of the affidavits still include in unredacted form the affiant's description of the source documents for the redacted information. What I initially thought could be summarized, when combined with this other information, would allow someone to piece things together and identify the protected interest.

58 I have also concluded that it simply is not feasible to give 1,375 separate brief rulings. I will proceed by category where I can. However, in order to prevent the identification of protected interests by the mosaic effect I will have to be somewhat cryptic and obtuse while trying to ensure that an appellate court will be able to follow my reasons when armed with the Secret Index and *ex parte* charts that have been provided to me with the consent of the accused. Again, however, due to the number of redactions and the way the information contained in them tends to repeat in other documents, direct reference to the titles used to describe categories and subcategories in those secret documents could lead to the disclosure of protected information. After spending many hours on the matter I have formed the view that there is a particular danger in this regard with respect to information which might identify certain human sources.

59 I have concluded that with respect to some aspects of the claim for protection of the identity of human sources I will have to supplement a portion or portions of my judgment with private reasons that will be sealed for review by an appellate court. There are certain things that I believe I must say to explain some of my conclusions that simply cannot be included in these public reasons.

60 All counsel have also agreed that my public reasons should be provided to Crown counsel for review prior to their general release. This will allow the Crown to take any steps it wishes to invoke s. 37 of the CEA to further protect the information in question.

Analysis and Rulings

61 I will deal first with protection sought for information which would identify or tend to identify human sources.

Human Sources - Osage I and Osage II Documents

62 The Secret Index I have been provided with lists a number of human sources and then lists the documents where their information appears by document and page number. If one goes to a document and page number mentioned in the Secret Index under the sub-heading for a particular source, and looks for the colour that corresponds to human sources on the page being viewed, the information provided by that source will be found. The colour that correspond to a category of injury, such as human source, is written beside the item where it appears in the Secret Index. As mentioned, the

colour coding system has not been disclosed to counsel for the accused. Counsel were, however, advised of the nature of the injury when each redaction was considered. It must be kept in mind that there may be other injuries claimed with respect to the same information, although that will not appear in the human source section of the Secret Index.

63 Due to concerns for the mosaic effect the documents were not examined in order within these categories. I will nonetheless attempt to do so, but must do so in most cases without identifying particular documents. However, there is at least one sub-category within the human sources category where I have concluded that specific documents can be identified.

64 Before moving on something must be said about the distinction between informant privilege and NSP, and about the distinction between informants and agents.

65 The Crown seeks to protect confidential human sources who provided information to CSIS. CSIS is an intelligence gathering agency and it is common ground that in its work CSIS does not distinguish between informants and agents; CSIS simply refers to utilizing confidential human sources. The evidence before me from Mr. Dengis is that CSIS assures all of its human sources of confidentiality. There is also evidence before me within the redactions that it is emphasized to those human sources who are effectively "in the field" or providing information on any sort of regular basis, that they must not break the law. However, human sources, many of whom are paid and tasked by their CSIS handlers, are not advised in any way that their conduct could lead to the loss of their confidential status.

66 This is in marked contrast to the practices of modern law enforcement agencies. The evidence in this case highlights that the RCMP were acutely aware of the significance of the distinction between police informants and agents when it comes to protection of these sources. The identity of informants is highly protected under the police informer privilege. That privilege will only be set aside where the innocence of the accused is at stake and there is no other way the accused can raise a reasonable doubt: *R. v. Leipert*, (1997), 112 C.C.C. (3d) 385 (S.C.C.); *Application to Proceed in Camera (Re)* (2007), 224 C.C.C. (3d) 1 (S.C.C.); *R. v. Brown* (2002), 162 C.C.C. (3d) 257 (S.C.C.).

67 In law enforcement operations police informer privilege does not apply to an informant who effectively becomes an agent of the police: *Application*, para. 29; *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.), at p. 303; *R. v. Babes* (2000), 146 C.C.C. (3d) 465 (Ont. C.A.), at para. 10. It remains an open question whether this principle applies to a human source working for an intelligence agency, when criminal prosecution is not the purpose of collecting information by means of the source.

68 The evidence I have heard in the course of pretrial motions indicates that the RCMP explain the distinction between informants and agents to their human sources. Before a human source is permitted to go into the field and become an agent by actively participating in an investigation the RCMP require the agent to sign a "letter of acknowledgement" (LOA) in which they agree to have their identity disclosed. I am aware that by the time Mubin Shaikh was turned over to the police by CSIS, some RCMP officers were concerned that Mr. Shaikh had already crossed the threshold (while acting as a CSIS human source) and became an agent whose identity could not be protected by police informer privilege: *R. v. N.Y.* (March 24, 2009), Brampton, YC-07-1587 (S.C. sitting as Youth Court).

69 The distinction between the police and CSIS, of course, is that the police are engaged in the process of investigating and collecting evidence in a forensic setting for the purpose of prosecution.

CSIS, on the other hand, is a civilian intelligence gathering agency with the primary mandate of collecting and analysing information for the purpose of predicting future events and advising the government on matters of national security. Nonetheless, where terrorism is involved, the evidence I heard on a previous motion was that CSIS is usually developing relevant information before the police become involved. As in this case, CSIS may determine that some such information should be turned over to the RCMP so the police can perform their function of ensuring public safety and protecting national security.

70 These circumstances raise intriguing legal issues of general importance. However, due to the task before me and the need to move this case forward, I must resist the temptation to examine these issues beyond the extent necessary to the resolution of this motion.

71 In the context of this case the question arises as to whether the human sources employed by CSIS are protected by informer privilege. If they are their identity will be protected because, at this stage, none of the accused are suggesting they can meet the exigencies of establishing the innocence at stake exception. It must be remembered that informer privilege protects the identity of the informant. It does not protect the information unless the information would tend to identify the informant.

72 The accused correctly point out that it is the Crown who must provide the court with evidence to establish on a balance of probabilities that a human source qualifies for the protection of informer privilege. The Crown acknowledges its burden in this regard and submits that there is ample evidence within the redacted material to support that conclusion with respect to all human sources.

73 The accused have raised speculation with respect to who some of the confidential human sources may be. They point to evidence in Crown disclosure with respect to certain such individuals (one in particular) and suggest that the activities referred to in that disclosure show that if that person is one of the human sources, they had surely become an *agent provocateur*, and therefore fall outside the scope of informant privilege.

74 I asked counsel for supplementary submissions on the informant/agent distinction and with respect to the relevant factors to be considered in making the distinction. When counsel returned they made excellent submissions but also advised me they were somewhat surprised the law was not clearer in setting out tests for determining this question.

75 All counsel agree, and so do I, that even if informant privilege does not apply NSP may still protect information which would tend to identify human sources, provided the release of the information would harm national security. However, that protection is not as unyielding as informer privilege because NSP determinations require a balancing of interests.

76 The accused emphasize that if I conclude that informant privilege is not applicable I need to be mindful of the stage two issue of proof of probable harm to a protected interest. They emphasize that there must be some clearly identifiable harm to national security before the balancing of interests at the third stage can result in protection of the information. NSP protects against the release of information that would harm national security. Unlike informant privilege, it does not protect the identity of the human source *per se*.

77 It seems to me that the disclosure of the identity of a human source will often, in itself, have an obvious or demonstrably negative impact on national security. This could flow from the loss of the source's information in the future and/or the negative impact of such disclosure on the willing-

ness of other sources to come forward. However, where I have relied solely on NSP to prevent disclosure of information that could identify a human source, it is clear from the content of the redactions that there are aspects of that disclosure (aside from the disclosure of identity) that would harm national security.

78 Against this general background I now turn to my decision with respect to the various human sources or categories of human sources. At the outset I would mention that the Crown has stipulated that neither Mr. Shaikh (agent 6450) nor Mr. Elsohemy (agent 6508) are human sources in the Secret Index.

79 In the Secret Index sub-category B commences at the bottom of p. 6. It is titled "Information Provided in Confidence by A Named Private Sector Individual." Generally speaking, I will not be so specific in my references to other sources. This sub-category lists 40 redactions in 22 documents. Ten of those documents are CSIS documents and twelve are RCMP documents. All of the claims are made on behalf of CSIS.

80 The information in the CSIS documents obviously came from community members who were approached to provide background information on the accused and other persons of interest. The sources generally were involved in business in one way or another. Based on Mr. Dengis' affidavit and the content of the redacted information it would seem to me that the persons who supplied this information to CSIS would qualify as informants. They were promised confidentiality. They were not tasked to go into the field. They are not witnesses. There are a number of persons involved. The information given would tend to identify them and is protected by informer privilege.

81 If I am wrong in concluding that these sources are informants, at the balancing stage of considering the NSP claim, I would uphold the privilege. The release of the information would tend to identify the sources. This could lead to these sources or other such persons declining to provide information in the future. That would be harmful to national security. This is the kind of information that is not highly significant to anyone at this stage of a prosecution but which is very important to piecing things together at the early stages of an investigation. On balance, I conclude it should be protected.

82 As for the RCMP documents in this sub-category, the first such document is number 5,000,155. The Crown has recently provided a brief summary at my suggestion. In my view this is adequate and revealing more would tend to identify the source. The next two redactions are in document 5,000,160 at p. 3 and document 5,000,206 at p. 23. The information in these redactions should be provided to the accused with the name of the source removed. I am satisfied that providing this general information will not identify the source.

83 All of the other RCMP documents in this sub-category contain redacted information which could be summarized without revealing the identity of the human source. However, when the documents are viewed it can be seen that other potential claims of injury are made in relation to these redactions. There are claims that disclosure would reveal a Service interest or investigative methods and techniques. I would uphold the privilege on the basis of these alternate claims. Summarizing the information would disclose a current Service interest and reveal investigative methods or techniques. The information is of little relevance to Project Osage. However, revealing the Service interest in particular would be harmful to national security. On balance these redactions must stand for that reason.

84 Sub-category C commences at p. 7 of the Secret Index. The information in these documents comes from personal interviews CSIS conducted with named individuals. Some of this information made its way into some RCMP documents including the Advisory Letter dated December 9, 2005.

85 These sources do not appear to be paid informants but simply people who volunteered information to CSIS. I would infer from the contents of the information together with Mr. Dengis' affidavit that they expected the information provided would remain confidential. There is no indication that they were acting as agents or had gone actively out of their way to collect information. I conclude informer privilege applies. It is my conclusion that no meaningful or useful summary could be provided that would not tend to identify these human sources. This information remains protected on that basis.

86 Should I be wrong in my conclusion that informant privilege applies I would protect this information on the basis of NSP. The information would tend to identify the source resulting in a loss of future information from these or other sources. The information is of little relevance in the prosecution or defence of the accused. The portion of the information that appears in the Advisory Letter is only indirectly related to any accused, and could not in any way be considered central to obtaining the wiretap authorizations. I would also point out that the portions of this information that are in the Advisory Letter would also identify a current Service interest, and that alternate claim of injury appears to me to be well founded. Balancing favours protection for this reason as well.

87 The next category appears at p. 6 of the Secret Index. It is the category immediately preceding sub-category B. This source provided information to CSIS which does not appear to have been provided to the RCMP. It does not show up in a wiretap application. It has only slight relevance to this case. There is no indication this source is an agent. The information seems to be generally limited to one narrow subject matter. Based on a review of all of the information I can see I conclude informant privilege applies. Disclosure of the information, even in summary form, would tend to identify the source. Alternatively, I would protect the information on the basis of NSP. The information is obviously significant from the point of view of CSIS's mandate, but not very relevant to this case. Revealing the source's identity would harm national security by neutralizing this source and by discouraging such sources generally. At the balancing stage I would uphold the redactions in relation to this source on the basis of NSP.

88 Next I will deal with the first source listed at p. 6 of the Secret Index. This relates to only one document, although there are a number of redactions. The information is specific and would tend to identify the source if released. It is also more in the nature of background information and has nothing to do with Project Osage. I am unable to say whether the source is an agent or an informant and therefore I will not consider informant privilege. The information appears to be irrelevant but, in any event, I would uphold the redaction at the balancing stage as disclosure would clearly have a negative impact on national security interests by removing this source's future usefulness and generally discouraging other sources.

89 I will deal next with the second human source listed at p. 6 of the Secret Index. This source provided detailed information about some of the accused and their activities. The information cannot be usefully summarized without almost certainly identifying the source. I have no information to indicate the source was an agent, and based on what I do have I conclude that informant privilege applies. If I concluded otherwise I would nonetheless protect the information on the basis of NSP. Under the NSP claim the potential injury is obvious from the redacted information. This source is in

a good position to provide information in the future. At the balancing stage I would uphold the privilege. This information was not utilized in relation to obtaining the wiretap authorizations.

90 At p. 8 of the Secret Index is sub-category D, titled "General Reference to Human Source." This is a collection of CSIS and RCMP documents where information is being compiled or summarized. For example, one of the CSIS documents is a Counter Terrorism Weekly Bulletin. The RCMP documents include more than one Disclosure Letter, but no Advisory Letters. This is information that has been dealt with in the human source category above or below in this judgment. As none of that information is discloseable neither is this. The information contains specifics which would tend to identify (almost certainly in some cases) the sources involved. This could neutralize the sources and would discourage other sources. With the exception of one document within this category I would uphold the NSP claim at the balancing stage.

91 RCMP document 5,000,227 can be distinguished from the other documents in this group. It contains some information about one of the two police agents who will testify. I would order that a summary of the information in the redactions in this document be provided to the accused. The information in the first and fourth bullet points at the top of p. 2 shall remain protected. In this instance I conclude the public interest in disclosure of the information I would release outweighs the competing interests. This information could prove useful to the accused in cross-examining the agent. I would also exclude from this disclosure order the specifics of any code words or coded identifiers that appear in the document.

92 I now turn to the headings that appear at pp. 1 and 3 of the Secret Index. The Crown urges me, on the basis of the information contained in the redactions, to treat these human sources as informants. Some redactions that prevented me from seeing certain things were lifted for my private viewing to help me in evaluating whether these sources are informants. It is arguable that there is a reasonably good basis upon which to conclude that they should be considered as informants, but there are also factors present which auger against that conclusion. However, it is unnecessary for me to determine this issue as it is abundantly clear from what I have seen that the information is, in any event, protected by NSP and must not be disclosed.

93 A review of the documents in question reveals that very detailed information has been provided by these sources. It is highly relevant to this investigation. The sources have also provided other information not directly relevant to this investigation that is very important from a national security standpoint and which further demonstrates the injury to national security that would result from their identification. In my carefully considered view there is no way in which to usefully summarize this information that would not strongly tend to identify these sources. Identifying these sources would have an obvious negative impact on national security. I am well aware that information from these sources was included in affidavits in support of Part VI authorizations to wiretap. That is of considerable interest and importance to the defence. However, having regard to the totality of the information available to me I conclude the balancing of the public interests involved on both sides very clearly requires that this information must be protected from disclosure. I conclude this information is protected by NSP. I will briefly address further specifics of my decision in relation to these two sources in private reasons which will be sealed and available to an appellate court.

Other Claims of Injury - Osage I Documents

94 I will now move on from human source considerations. I will make extensive reference to a chart that is a public exhibit - Exhibit 12. I have an expanded version of that chart which is not part

of the public record. It will be available for the assistance of any appellate court that may be reviewing these reasons.

95 Exhibit 12 has various categories identified by letters of the alphabet from A to UUU thereby establishing 73 categories. This chart of categories attempts to collect together by document and page number the items of information that are repeated in various RCMP documents (Osage I). It does not deal with the CSIS documents (Osage II) except to the extent CSIS released information to the RCMP. When we reviewed the redactions in open court we used the categories in Exhibit 12 to minimize the amount of time that would have to be spent reviewing repeats of information. For example, a piece of information may have come to the RCMP in a Disclosure Letter or Advisory Letter from CSIS. It might then have been picked up and repeated in internal RCMP documents and reports, briefing notes, police officers' notes, and in affidavits and informations to obtain warrants.

96 As Exhibit 12 does not contain the CSIS documents beyond those found in the RCMP file I will deal with the bulk of the CSIS documents later. A number of those documents have, of course, already been dealt with under the human source category of the Secret Index. As previously mentioned, the Secret Index does make reference to all of the documents.

97 My private expanded version of Exhibit 12 has written subheadings which give a cryptic description of the content or nature of the information repeated within the documents listed in the category. It also contains the colour coding which denotes single or overlapping claims of injury.

98 A number of categories can be eliminated on the basis of my previous determination in respect of human sources. The following categories can be eliminated on that basis: B, L, CC, MM, QQ, RR, SS, TT, UU, VV, WW, XX, YY, ZZ, AAA, III and QQQ. I would observe that occasionally Exhibit 12 will refer to a redaction as occurring only on one page when the redaction clearly continues onto the next page.

99 I will now deal with category Z on Exhibit 12. It will be recalled that when I dealt with sub-category B at pp. 6-7 of the Secret Index in relation to human sources, I said that all but three of the RCMP documents mentioned there could be summarized but for the fact that there were other claims of injury in respect of those redactions. Almost all of those redactions appear in category Z. I am referring to the RCMP documents in the 7,000,000 series that appear in Z. Consequently, those have been dealt with. The CSIS documents that appear at the end of category Z have also been dealt with under the human source category, as has the first RCMP document in the category where a summary was provided. The only remaining document in category Z is 5,000,228. I am satisfied that redaction should stand. Release of the information would reveal a Service interest and would be of no assistance to the defence.

100 I now propose to deal with the categories in Exhibit 12 in the same order they were dealt with in court. This should assist any reviewing court by coordinating my approach to the transcript. However, we did not adopt the use of the category approach based on Exhibit 12 until June 1, 2009. By that time a number of documents had been reviewed over the course of May 27 and 28, 2009. Nonetheless, when we commenced using Exhibit 12 on June 1, 2009, Crown counsel Mr. Bond described the categories already covered. I will start there.

101 Category K had effectively been covered on earlier days. It is apparent from those redactions that the content relates to someone named Mr. Green. There is disclosure to the effect that Mr. Green may have been a superior to Fahim Ahmad. Evidence was filed on the motion that Sgt. George Davies testified at the preliminary inquiry that the investigators never did determine who

Mr. Green was. I am aware from my review of the entirety of the redactions in other categories that there was more than one theory about who Mr. Green was. The information in the category K redactions was before the authorizing judge, but does not appear to me to be highly significant. CSIS claims a current interest in the redacted information. I conclude there is a potential injury and would uphold the privilege claim at the balancing stage.

102 Category P can be dealt with on the same basis as category K. the information in the redactions strongly supports the claim of a CSIS interest. The potential injury is obvious. The information was used to obtain a wiretap authorization and, while not central to establishing the grounds, I would say it was not insignificant. Nonetheless, at the balancing stage I would uphold the privilege. The information was primarily useful to the authorizing judge as evidence of context and association.

103 Categories Q and R on Exhibit 12 can be dealt with together. A review of the redacted information demonstrates why CSIS claims to have a current interest, and why it is worthy of protection. The evidence relates to linkages and associations that would have been of value in obtaining a Part VI authorization, but this information was not likely highly significant in that regard in the sense that it does not go to the core requirements for a Part VI authorization. It is difficult to see how disclosure of this information could assist the defence. On balance I would uphold the privilege.

104 Category W deals with associates of the accused Mr. Ahmad. I see no relevance to the redacted information. There is potential injury in my view. If I am in error on the relevance issue I would uphold the privilege at the balancing stage.

105 The category X redaction demonstrates an obvious CSIS interest. The information appears to me to have no relevance to this case.

106 The redactions in category Y demonstrate an obvious CSIS interest. The information was before the authorizing judge and could not be described as insignificant, although again I would say not central to the grounds for an authorization. At the balancing stage I conclude the interest in non-disclosure prevails.

107 I have already dealt with category Z which was the next category dealt with on the record.

108 The information in category DD that is redacted has been disclosed in other places. It is a comment about the strength of Mr. Ahmad's commitment to jihad that is often repeated in the material. I am satisfied that to disclose the details would interfere with a Service interest and reveal an investigative method or technique. At the balancing stage I would uphold the privilege.

109 Category EE redactions reveal an obvious CSIS interest and a concern about techniques and methods of investigation. The information as described in this category is of little relevance. I would uphold the privilege at the balancing stage.

110 Category II has redactions of information that originated in a Disclosure Letter, was contained in a subsequent Advisory Letter, and was included in an affidavit in support of a wiretap authorization. It is not central to the grounds but relevant to them. The information would clearly reveal both an important CSIS interest and a method or technique of investigation. I would uphold the privilege at the balancing stage. This information would be of little to no value to the accused.

111 Category CCC redactions contain information about a service interest. The information appears to me to be irrelevant to this prosecution.

112 The information in the redactions in category HHH is of little relevance to project Osage or this prosecution. Its disclosure would reveal a CSIS interest. These redactions stand.

113 The information contained in the redactions in category A has been effectively disclosed from another source. These particular redactions would disclose an investigative method or technique or in one case a Service interest, and in another touch upon the third party rule. With respect to the third party rule I would point out that this is in relation to an RCMP document. The evidence establishes that the RCMP went back to all third party sources. Consequently, it is apparent that the third party stands on its claim for protection of the information. I would uphold the privilege claim at the balancing stage.

114 I have already dealt with category B as a result of my conclusions concerning human sources. Category L was the next one dealt with on the record and it has also been disposed of under human sources.

115 It is obvious from an examination of the documents in category N of Exhibit 12 that it deals with charts with photographs showing linkages. As a result of the in court submissions and discussions the Crown has agreed to lift one redaction. I have considered all of counsels' submissions carefully at the balancing stage. It is apparent that lifting the other redactions would reveal CSIS interests as described in the evidence of Mr. Dengis. Two of the redactions are covered by my conclusions on human sources. In the other cases I conclude that the privilege should be upheld at the balancing stage. The protected information is of little relevance to this prosecution and there are a number of Service interests that would be affected.

116 The redactions in category O are supported on the basis of Service interest. Mr. Bond notes that the RCMP may have released some of this information but CSIS nonetheless has its own interests here. The claims in this category are similar to some dealt with elsewhere. The information for which protection is sought here is of little significance to this prosecution. I would uphold the privilege at the balancing stage.

117 I have already dealt with category P.

118 Category S reveals an obvious Service interest. The information is of no relevance to this case. It should remain redacted.

119 The redactions in category V relate to Mr. Ahmad's associations with persons who are not present or past accused in this case. Although some of this information made its way into an affidavit in support of a wiretap authorization it is of little overall relevance. CSIS claims a current Service interest. At the balancing stage I would uphold the privilege.

120 One of the documents in category AA is protected under my conclusion regarding human sources. The redaction found in CSIS document 234 in the second beige box on p. 4 explains the importance of the issues related to the method or technique concern that arises in this category. The information is of little to no value in defending this case but the public interest in protecting this information is self-evident. I would uphold the privilege at the balancing stage.

121 Next I will deal with category BB. The potential injury is disclosure of a technique or method of investigation. The source document that is most revealing of the technique is CSIS document 092, at pp. 1-2. This document establishes the alleged injury. However, it seems to me that the information gathered by this technique, which was used in the wiretap affidavit, can be summarized in a very general fashion with respect to its appearance in the wiretap affidavits without

damaging the protected interest. The Crown should prepare such a summary for my approval, which need not be highly specific.

122 Categories C and D of Exhibit 12 may be dealt with together. Category C is a situation where one piece of information that originated from a foreign third party is repeated a number of times. The information has already been disclosed from another source but the foreign third party has recently confirmed its position to insist on confidentiality. This remains protected. The category D claims are supported by the information in the redactions. A Service interest would be revealed and a foreign source insists on the third party rule. The information is only peripherally relevant. I would uphold the privilege at the balancing stage. One document in this category is protected by virtue of my determination in relation to human sources.

123 The information contained in the documents in category E is sensitive information. Much of it comes from a human source and is protected by virtue of my earlier ruling. Its disclosure would also identify a Service interest of obvious concern to national security and a foreign third party source maintains its claim under the third party rule. The information is of little relevance to this investigation. I conclude at the balancing stage that it is subject to NSP on all of the bases claimed.

124 Protection should also be maintained for category G. The information is of no relevance. Its disclosure would reveal a technique. If I reached a different conclusion on relevance I would protect it at the balancing stage.

125 I agree with the Crown's submission that the human source information in category H is such that its disclosure would tend to identify the source. The information would also identify current Service interests and it is subject to a claim for protection by a foreign agency that shares information with Canada. Some of the information is available to the accused from another source. At the balancing stage I conclude NSP applies.

126 Category J deals with a matter of almost no relevance or probative value. However, it would reveal a technique and allow someone to take countervailing steps. At the balancing stage I conclude it is protected by NSP.

127 Category M deals with sensitive information of little to no relevance to this case, the disclosure of which would identify a CSIS interest and violate a current request for protection from a foreign agency that shares information with Canada. I conclude it is protected by NSP.

128 Category CC was dealt with next. I have already dealt with all but one of the documents in this category in the context of my human source ruling. Document 5,000,422 at p. 17 is the only redaction in this category where a claim of injury other than identification of a human source is made. The injury claimed is formulated on the ground of disclosure of a CSIS interest. However, I am concerned that the information in this redaction, together with other information, could be used to assist in identifying a human source. Perhaps this is what the claim for Service interest was meant to reflect. The information has little relevance to this case. I would protect it at the balancing stage.

129 The redactions in category JJ seek to protect an investigative method or technique. CSIS document 80 at pp. 2-3 establishes the technique. The gist of the information is repeated in brief form in a number of these documents. The information did form part of the wiretap affidavit. However, the information itself is of modest significance and the substance of it has been disclosed from another source. I conclude this information is protected by NSP.

130 Category MM has already been dealt with in my conclusions regarding human sources, as have QQ, RR, VV, WW, XX, YY and ZZ. It is important to note that the Crown advised everyone on the record in response to my inquiry that neither of the two police agents, Mr. Shaikh or Mr. Elsohemy, is a human source involved in these redactions.

131 Category FF involves various claims of injury. The public part of the documents demonstrates that the subject matter is travel to Pakistan by the accused Mr. James. The source document is CSIS document 156. The claim of injury in that document is based on relationship with foreign agencies and the third party rule. As I indicated earlier, CSIS has not gone back to most third parties. However, some of this information is reproduced in RCMP documents. RCMP document 5,000,206 is listed on Exhibit 2 as a situation where the RCMP checked and the third party was insisting on its position. The matter is further complicated by the fact that two foreign agencies seem to be involved. The information is fairly detailed but the details are not important to the case. The fact that Mr. James travelled to and from Pakistan and how and where is in the public domain and is of course well known to Mr. James. There is no relevant information beyond what would already be known to Mr. James contained in this redaction. There is no information about training in Pakistan. Consequently, there is not much to favour the release of details which might create pressure on a cooperative arrangement Canada has with the foreign agencies involved. In these circumstances I conclude the claim of injury on this basis is adequately established. I also note that human sources were involved. In all the circumstances I would uphold the claim of NSP at the balancing stage.

132 After we dealt with category KK on the record the Crown provided two very brief summary statements in relation to these redactions. In my view that is adequate. The information in the redactions is really irrelevant, and to disclose it would reveal a Service interest.

133 The relevance of the information in category LL is low to nonexistent. To reveal the information would disclose a Service interest. The redaction remains.

134 Categories SS, TT, UU and VV have all been determined by my decision concerning human sources.

135 NN and OO may be dealt with together. In my view the sole redaction referred to in NN should be lifted. I simply do not see how a method or technique would be disclosed by the release of the information in the redaction itself. With respect to the sole redaction in OO, the claim based on method or technique has been lifted by the Crown. The balance of the redaction is based on the third party rule. This is in an RCMP document but in any event the information is of a type where I would not expect the foreign agency to lift its claim. That portion of the redaction will stand as balancing favours that it remain in place.

136 Despite my comments regarding category PP made when this was reviewed on the record, I have concluded this redaction should stand. The general information in the redaction would not be news to anyone, and the specifics of the brief redaction, including timing, could disclose a method or technique.

137 Category AAA has been dealt with in my conclusions on human sources.

138 There is one redaction in category BBB. It should remain in place. This item of information is irrelevant.

139 Category EEE deals with Mr. Elsohemy, a police agent expected to testify. After this category was reviewed in court the Crown changed its initial position and lifted the redaction in docu-

ment 5,000,496. I am assuming that the redaction in document 5,000,422 (the only other redaction in the category) relates to information provided by Mr. Elsohemy. If that is so then that redaction should also be lifted given that he will be testifying. If I am wrong and Mr. Elsohemy is not the source, the redaction will stand.

140 Category III has already been dealt with in connection with human sources. Some of the documents in this category have a secondary claim with respect to method or technique, but that is secondary in importance.

141 After categories JJJ and KKK were discussed in court the Crown agreed to provide summaries. These have now been provided and in my view adequately address a balancing of concerns. No more is required to be disclosed.

142 The redactions in category LLL are related to a threat assessment made in mid December 2005, at the early stages of Project Osage. CSIS wishes to protect the level at which the threat was assessed. The Crown points in particular to paras. 36-38 of Mr. Dengis' affidavit. It seems to me that the information for which protection is claimed is simply not relevant. It amounts to someone's opinion at a point in time.

143 Categories MMM, NNN and OOO were dealt with together. They are similar to LLL in that they deal with assessments in relation to the terrorist group alleged to be operating in this case. This really represents someone's opinion and is a form of conjecture. The information in the redactions is not relevant. If I were to conclude otherwise I would grant protection at the balancing stage. The information is not useful to the accused and its release could reveal approaches to the assessment of intelligence information.

144 I turn to category PPP. After this was dealt with on the record the Crown determined that the redactions in document 5,000,203 at pp. 12 and 37 do not relate to this case and the red boxes were removed. They are no longer in issue. The first two redactions on p. 50 were lifted. In my view the balance of the redacted information on that page must remain protected. The injury claims are established by the content of the information, the information would be of little value to the accused and on balance should remain protected. A summary has been provided with respect to p. 54. I conclude it is adequate. The redaction at p. 61 in my view should remain protected, but not on the basis of the injury claimed which is in relation to methods and techniques. In my view information in the redaction could by a process of elimination assist in identifying human sources. While the information may be of some use to the accused this consideration tips the scales against disclosure at the balancing stage.

145 Document 5,000,206 contains information that would reveal a CSIS interest. I conclude the information in the redaction is irrelevant.

146 Since the balance of the documents in this category were considered in court the Crown has provided complete or partial lifts of redactions for many of the documents, as well as a number of brief summaries. This is helpful and adequate. The balance of the redacted information is of little relevance but deserving of protection.

147 On the morning of June 3, 2009 the Crown made extensive submissions about category I which has been described as the "Legat Letters". These are letters from the United States Embassy in Ottawa to the Commissioner of the RCMP sharing certain information. The United States is maintaining its claim of confidentiality under the third party rule. The Crown has demonstrated how

the bulk of the information in these documents has already been disclosed from other sources. Much of that was done on the record. I have also been provided with a set of the Legat Letters and related documents that have notations upon them to show where the information is available to the accused from other sources. These documents were received by me with the consent of the accused on an *ex parte* basis and will form part of the private record.

148 In the circumstances I am satisfied that the accused already have disclosure from other sources and that the documents in this category should remain protected under the third party rule. The evidence in this case generally establishes the importance to Canada of maintaining favourable relationships with foreign governments and their police and intelligence agencies. Canada is a net importer of intelligence information and does not have the resources to do all that is necessary on its own to detect threats and protect the nation. It is essential to maintain respect for the wishes of foreign governments and intelligence agencies who assist Canada when that can be done without any real detriment to the fair trial interests of accused persons. The redactions in this category stand. I reach this determination at the balancing stage. Mr. Bond has demonstrated that the RCMP requested that the United States reconsider its position. It is clear that the United States does not want these documents released.

149 With respect to category U the Crown has now lifted the redactions in question.

150 With respect to category HH the Crown has now lifted the redactions.

151 Category GG deals with redactions where the injury claimed is a relationship with a foreign agency where the third party rule is in issue. These are RCMP documents and Mr. Bond advises the RCMP has checked and the third party continues to insist that the information not be released with respect to all but one document. That, of course, is not determinative, but it does in the context of this evidence establish the claim of injury. My decision in relation to these redactions is accordingly made at the balancing stage.

152 After these matters were dealt with in court the Crown did lift a few redactions in category GG in whole or in part. In terms of what remains redacted some of the information is available to the accused from other sources. The information is such that it is readily understandable why the foreign agency wishes to protect much of it. Linkages and relationships are involved. For the most part that information is not relevant to this case and would not be of much use to the accused. I conclude the public interest in protecting this information outweighs the public interest in its disclosure.

153 Category FFF also relates to a third party rule claim by a foreign agency. The document reveals that some of the information originated in Canada and was reported out to the foreign agency. Mr. Bond advises that the foreign agency has a current interest in the matter the information is related to and does not want it to become known that they obtained this information. Much of the information in the redaction appears to be irrelevant. At the balancing stage I conclude that this information must remain protected.

154 Category GGG contains document 5,000,701. The entire document is located on a separate disc of three documents added to the Osage I collection. The claim for injury is based on the third party rule.

155 The first part of the electronic document is a letter from the Consulate of the United States to the RCMP responding to a request from the RCMP for assistance in obtaining business records from a US business called VistaPrint.ca. The accused in the bomb plot allegedly ordered business

cards from this business as part of their cover for the delivery of bomb making material. The purpose of the RCMP's request was obviously to gather evidence for use in a criminal prosecution. An affidavit and business records were obtained from a representative of the company who was located in Lexington, Massachusetts for use in court. The FBI assisted.

156 With respect to the US Consulate, this is not a situation where the third party rule applies. This is not the covert sharing of information of an intelligence nature but international assistance in the prosecution of crime in the nature of alleged terrorist activity. That is something of interest to both Canada and the United States. Cooperation is provided for in various international treaties. As the third party rule does not apply, there is no injury to national security. This information should be disclosed.

157 Category QQQ has already been dealt with as a result of my conclusion on human sources.

158 In my response to the review of category RRR in court the Crown has either lifted or partially lifted the redactions in this category. I am satisfied this is a correct and sufficient approach. The disclosure of the remaining information would disclose a Service interest or a method or technique and is of little to no relevance.

159 The information contained in the redaction covered in category SSS is irrelevant to this case.

160 The information covered by the redactions in category TTT must be disclosed. This information is relevant to the credibility and reliability of Mr. Shaikh who was police agent 6450 and who is a central witness in this case. I see little to no basis to the claim for injury advanced. Balancing strongly favours disclosure. No conditions need be imposed on such disclosure. Counsel are expected, of course, to abide by the usual implied undertakings as to the restricted use of all Crown disclosure.

161 The Crown has lifted the redaction referred to in category UUU.

162 I have not yet dealt with category F or T. The information in the redactions in F clearly establishes a CSIS interest and is of no real relevance in this case. This information remains protected. The same reasoning applies with respect to category T.

163 The only remaining category is DDD. These are entries in investigators' notes where the injury claimed is CSIS interest. The entry at p. 28 of document 7,001,754 makes the nature of CSIS interest clear, although this redaction is in an RCMP document. I would note that multiple claims of injury could probably have been made. However, I will deal with it strictly on the basis of Service interest.

164 In my view the contents of the redaction clearly establish that the claim of injury is established on a balance of probabilities. At the balancing stage I am well satisfied that the public interests in nondisclosure predominate over the public interests in disclosure, having regard to a host of factors of the nature discussed earlier in this judgment. These redactions stand.

Other Claims of Injury - Osage II Documents

165 I now turn to the CSIS documents in the Osage II collection. All of these documents are listed, together with some descriptive information, on Exhibit 13. Unfortunately, these documents are not organized into categories as the Osage I documents are on Exhibit 12.

166 Exhibit 13 lists 284 documents. It can be seen from Exhibit 13 that not all of the documents have beige boxes. Those that do not are not in issue. However, many of the documents listed on Exhibit 13 have multiple beige boxed redactions.

167 Some of the CSIS documents were dealt with in the Osage I review. CSIS documents 1-11 are CSIS Disclosure or Advisory Letters that were transmitted to the RCMP and so were also found in the RCMP file. A number of source documents were also considered in the Osage I review. Those are CSIS documents 13, 19, 74, 79, 80, 92, 115, 116, 117, 127, 156 and 236. Documents 108 and 234 were partially considered in Osage I.

168 To the extent any of the Osage II material contains redactions based on potential disclosure of the identity of human sources, that has already been dealt with. Reference to the Secret Index will provide the specifics of all such documents. Those parts of CSIS documents 108 and 234 that were not dealt with in Osage I fall under that umbrella.

169 Given the large number of redactions in the Osage II material I have reached the conclusion that it is simply not practicable to give reasons for every redaction. However, I have spent many hours over several days going back over each of them with the general principles described earlier in this judgment in mind. I propose to limit my specific reasons to those redactions that appear to be controversial or not clearly in one camp or the other in terms of disclosure.

170 At the outset it is important to understand that as counsel and I reviewed the documents in open court, I expressed my tentative views that information contained in a number of the redactions should be summarized or disclosed. The Crown often responded favourably by reconsidering its initial position. This has resulted in the disclosure of a number of important items of information in the form of complete or partial lifts of redactions or of summaries ranging from substantial to very brief in nature. In all such cases pages have been inserted into the Osage II binder at the appropriate page to reflect that disclosure. Such inserts can be found in the Osage II binder tabs for the following CSIS documents: 28, 42, 57, 61, 81, 110, 141, 148, 151, 177, 179, 181, 186, 193, 194, 200, 273, 279 and 284.

171 With respect to the documents that I have just listed, I went back over them and I have concluded that with this additional disclosure the correct balance has been achieved in relation to those documents from the perspective of the purpose of this motion.

172 There are a number of other documents where I conclude some further disclosure must be provided. In respect of those documents my decision is reached at the balancing stage.

173 The information I am referring to is in some of the documents in a series of documents that were provided to me in court to supplement the contents of the Osage II collection. Some of those documents have numbers for which there are no corresponding tabs in the Osage II binder. However, they can be viewed on the CSIS laptop computer.

174 One of the documents provided in this fashion was a completely unredacted version of CSIS document 248 which was included in the Osage II documents, but with redactions which prevented me from seeing all of the information. I had earlier expressed some concern about having information redacted from the court's view in some of those documents which seemed to contain information related to the credibility and reliability of the two police agents who will testify in this case. In response to my concern the Crown provided me with a completely unredacted copy of document 248. When I reviewed that document I formed the opinion that some limited portions of the infor-

mation that had been originally redacted from my view should be disclosed to the accused on the basis that a balancing of all public interests favoured that conclusion.

175 As a result I quickly concluded I could not properly discharge my responsibilities in respect of documents potentially related to the assessment of the credibility and reliability of the two police agents without receiving completely unredacted copies of such documents. On June 29, 2009 I issued an "Interim Order" to that effect which was faxed to counsel. The Crown responded promptly on June 30, 2009 by providing me with completely unredacted copies of documents 171-182 and 246. These documents form part of the private record. I have placed the redacted copies (as provided in court during the motion) and the unredacted documents together with an unredacted copy of document 247 in a clearly labelled binder that will form part of the private record. The unredacted version of document 248 has been placed in the Osage II binder at tab 248 with the document as originally redacted.

176 After reviewing these documents in chambers I formed tentative conclusions that some portions of them should be disclosed. When we returned to court on July 2, 2009 I reviewed my concerns on the record. The Crown wanted an opportunity to reflect on the matter. I heard further submissions from the Crown on July 3, 2009. Mr. Bond indicated that the Crown agreed with most of my points. He provided a summary as I had suggested with respect to one area. He made his position clear on all matters. Based on his submissions I understand that the Crown is in agreement with all but one of the decisions I will now set out. That one area of disagreement manifests itself in two redactions where the same information arises. I will flag the Crown's concern as I proceed.

177 In document 177, at p. 1 in the last redaction, the four words following "Request to provide financial information to the source" should be disclosed. To the extent this deals with a method or technique it is outweighed by the accused's interest in having full disclosure about the agent's compensation.

178 In document 179 at p. 5 the redaction coded for "method or technique" at para. 17 should be disclosed. In my view this information is really already known. This is not a technique which merits much protection. This is factual information related to events connected to Mr. Shaikh's evidence.

179 In document 182 at p. 2 there is a redaction close to the end of para. 6 after the words, "had been searched prior to the meeting by his former CSIS controller." The response should be provided without identifiers.

180 In document 246 at the bottom of p. 1, (4 lines from the bottom of the page), the words "has approved" appear. The three preceding words should be disclosed but the two following words on that line should not. All of the words on the next line, with the exception of the second and fifth words, should be disclosed. My decision is made at the balancing stage. Exactly the same result applies where this redaction is repeated at p. 6 of the document. However, the dollar amount included in that redaction should also be disclosed.

181 Also in document 246, at p. 5, some of the contents of the large redaction at the bottom of the page should be disclosed. That disclosure is limited to para. 11 within the redaction. Para. 11 should be disclosed subject to the following exceptions. The surname that appears in the first line of para. 11 should not be disclosed. It is unrelated to Project Osage. Internal CSIS coding or reference numbers need not be disclosed. This information may not be admissible in evidence but it seems to me that it would be useful to the defence. There is little to no force to the argument that disclosure of this information would harm national security interests. This is the only redaction within this group

of documents where the Crown took any issue. The Crown objected that part of what is included is irrelevant. I disagree for the reasons I stated on the record when this redaction was discussed on July 3, 2009.

182 The same reasoning applies to para. 15 within the redaction at the top of p. 6 of document 246. It should be disclosed.

183 In document 248, at p. 2, the first five lines of the colour coded redaction in para. 3 should be disclosed, but with the exception of any coded identifiers. The last two lines should not be disclosed. It is the last two lines that relate to a method or technique. What is above it is relevant factual information that on balance I conclude must be disclosed. With respect to the colour coded redactions at pp. 3 and 4 I reach the opposite conclusion at the balancing stage. Those redactions must stand.

184 I also conclude that a summary of the contents of the redaction at the top of p. 5 of document 248 should be prepared. This should include the nature of the concern addressed without names or code words or numbers. In my view this is relevant to assessing the agent's motivation. I am satisfied with the proposed summary provided by the Crown on July 3, 2009, which I have placed in the Osage II binder.

185 The colour coded redaction at the bottom of p. 5 of document 248 should be lifted. In my view this falls squarely within an area of defence interest. I am not persuaded that any potential injury is established.

186 The information in the colour coded redaction at p. 6 of document 248 should be disclosed. This is factual information relevant to the case. In my view the injury claimed is not established.

187 At p. 7 of document 248 the contents of the redaction at para. 23 should be disclosed. This information would be useful to the defence in relation to the agent's motivation and compensation.

188 The colour coded portions of the original redactions at p. 8 of document 248 should be partially disclosed. The other contents of what is included in the beige box need not be disclosed. No coded identifiers or internal tracking information shall be disclosed. The disclosure is limited to what is in paras. 28 and 29 within the redaction. The names within para. 29, other than of an accused, need not be disclosed. This information goes directly to the agent's motivation and compensation. The agent is in the witness protection program and negotiated a substantial compensation package. Balancing requires this disclosure. The same balancing process leads to a different conclusion for all of the other information within the redaction.

189 I should say that this is the second place where the Crown maintains that some of the information is irrelevant. I disagree for the reasons expressed when this matter was discussed on July 3, 2009.

190 I will also address claims for protection of information in the CSIS documents that are based on the third party rule. As previously mentioned, that is an area of some controversy given that CSIS did not check back with the third parties. I will deal with this aspect of the matter by again referring to the Secret Index. Pages 40 to 42 of the Index deal with such claims. Most of the documents are RCMP documents but I am only addressing the CSIS documents at this stage.

191 I turn first to document 8 at p. 2 (see p. 41 of the Secret Index). This redaction is also covered by a Service interest which I have upheld elsewhere, rendering the matter academic. I would also say that due to the nature of the information and the current interest in this information, (having

regard to recent notorious world events), I cannot imagine that the foreign agency will release its claim on this information anytime soon. On this basis, in conjunction with the CSIS interest claim, this redaction must stand.

192 With respect to document 165 at p. 2, the same information is covered by a claim of injury based on CSIS interest that I have already upheld.

193 With respect to document 184, I have been advised that CSIS has recently gone back to the third party and is awaiting a response. I would observe that some of the information has been disclosed from other sources. To the extent there is other information in the redaction which has not been disclosed, I would maintain the protection at this time. CSIS has made efforts to have the third party release its claim. If the third party relents, then I expect the Crown to disclose any information not otherwise protected. On balance, at the moment I conclude this protection should remain in place.

194 With respect to document 69 at p. 2, the information is covered by a claim of CSIS interest which has been upheld. Document 143 at p. 4 is also covered by a CSIS interest claim, and the information is really irrelevant. The same can be said about document 223 at p. 8 and document 230 at p. 3

195 Turning to document 102 at p. 2, the information is relevant although not admissible as it seems to be non-expert opinion evidence. Due to the reference to another organization or group, the source agency involved and recent notorious world events, it seems to me to be most unlikely that the third party will release its claim. However, I would direct that a request be made to the foreign agency. If the claim is lifted I expect disclosure to be made. For the time being I conclude that on balance the privilege prevails and the information remains protected.

196 Document 136 contains information about a specific person. The Crown has stipulated on the record that this is not a present or past accused in this case. Based on that stipulation the information is of little value or relevance to this case. Again, due to groups mentioned and notorious world events I conclude that it is unlikely in the extreme that the third party will lift its claim in the foreseeable future. There are clear negative national security implications to the release of this information. On balance it must remain protected.

197 Document 154 contains information from more than one foreign agency. In my view it is irrelevant to this case and need not be disclosed.

198 That leaves document 156 at p. 2. That has already been dealt with in my review of Osage I. This relates to Mr. James' travel arrangements, which as I previously mentioned are well known to Mr. James. The information is not otherwise relevant.

199 I do not propose to give further specific reasons. I have examined every redaction in every document. The CSIS information that was not dealt with in the Osage I review was not provided to the RCMP. Nonetheless, I have kept in mind that anything that could tend to undermine the Part VI authorizations would be of considerable value to the accused.

200 Large parts of the Osage II material are at the boundaries of relevance or beyond insofar as the prosecution and defence of this case are concerned, and would be of little to no usefulness to the defence. On the other hand, the implications for national security are often obvious. In such circumstances I have concluded that the national security concerns generally prevail at the balancing stage.

201 My conclusions in such circumstances are influenced by the fact that it is obvious that CSIS's mandate requires it to covertly collect and analyze information on an ongoing and often non-specific basis in order to detect threats to Canada and Canada's allies. One must not lose sight of the fact that counter-terrorism activities are of vital importance to public safety and our way of life.

202 The fair trial interests of the accused are also vitally important. Whenever it has seemed to me that they are truly at stake, if anything, I have leaned in favour of their protection and ordered disclosure of the information at the balancing stage.

Conclusion

203 In conclusion, I have ordered the disclosure of all that I feel is properly discloseable. The balance is either irrelevant or would impinge on a protected interest and on a balancing of interests must remain protected.

F. DAWSON J.

cp/e/qlafr/qlmxj/qljxr/qlana

Cited as:
Mannesman Dematic Rapistan Ltd.

**International Association of Bridge, Structural, Ornamental
and Reinforcing Iron Workers, Local 721, Applicant v.
Mannesman Dematic Rapistan Limited, Responding Party
International Association of Bridge, Structural, Ornamental
and Reinforcing Iron workers, Local 721, Applicant v.
Mannesman Dematic Rapistan Limited, Accu-Line Conveyor Inc.,
and The Gap Inc. Responding Parties v. Millwright Regional
Council of Ontario, Intervenor**

[2001] O.L.R.D. No. 2821

File Nos. 1646-00-G, 0258-01-R

Ontario Labour Relations Board

**BEFORE: Harry Freedman, Vice-Chair, and Board Members J.G.
Knight and G. McMenemy**

July 16, 2001

(18 paras.)

DECISION OF THE BOARD

1 The Board, in its decision in this matter dated May 30, 2001 directed the parties to make submissions with respect to the production order sought by the applicant. The applicant sought a number of documents falling into eight categories as set out in the applicant's letter of May 29, 2001. These two applications relate to a claim by the applicant that Mannesman Dematic Rapistan Limited ("Rapistan") and Accu-Line Conveyor Inc. ("Accu-Line") carry on associated related activities or businesses under common control and direction or that there was a sale from Rapistan to Accu-Line. The Gap Inc. (the "Gap") to the extent it took on responsibility for the installation of a conveyor system at the Old Navy Distribution Centre in Brampton (the "Distribution Centre") that it owns is also alleged to have carried on a related activity or business under common control and direction with Rapistan and Accu-Line.

2 The relevance of documents that the applicant seeks to have produced can only be determined at the pre-hearing stage by reviewing the pleadings of the parties and the basis for the applicant's case. The documents requested by the applicant in its letter of May 29, 2001 are:

1. All written material in any form whatsoever describing the manner in which the work pertaining to the installation of the conveyor system at the Old Navy Distribution Centre in Brampton, Ontario was obtained, the manner in which it was to be performed, the amount of compensation for performing the work and the actual amounts paid by The Gap to Rapistan and/or AccuLine for the purchase and installation of the equipment. This should include but not be limited to all invitations to tender or price, tenders, all bids or prices received, all contracts, purchase orders, invoices and subcontracts.
2. The building permits for the project, any change orders and minutes of site meetings.
3. A list of all jobs performed by Accu-Line in Ontario.
4. All contracts or purchase orders for all jobs performed by Accu-Line for The Gap prior to the Old Navy Distribution Centre job regardless of where the contracts were performed.
5. All contracts or purchase orders for all jobs performed by Accu-Line prior to the Old Navy Distribution Centre job in which Rapistan was involved either as the manufacturer of a material handling system or as a contractor if such documents are not already subsumed within the documents described in paragraph (4) above.
6. The dates on which the work in this matter was performed, the names of all persons directing the work, and a detailed description of the scope of work if not already described in a document referred to in paragraph (1) above.
7. Copies of all time cards, time sheets, applications for employment, work diaries, records of employment, cheques and cheque stubs, all documents pertaining to Revenue Canada Taxation Division, Employment Insurance Commission and all other related and supporting documents or writing pertaining to matters with respect to those persons employed at the Old Navy Canada Distribution Centre in Brampton, Ontario, involved with the installation of any material handling or storage system, whether or not they were employees of Ellis-Don, Rapistan or Accu-Line.
8. Any Workers' Safety and Insurance Board clearance for the employer of persons installing material handling systems at the Old Navy Distribution Centre.

3 Counsel for Accu-Line, Rapistan and the Gap submit that the applicant's request for production is far too broad. They suggest it is a fishing expedition to determine whether the applicant can establish a case. They also argue that much of what is requested is irrelevant. The applicant points out that its theory of the case, as set out in its applications, is that Accu-Line was incorporated in 1994 and operates as a non-union installer of material handling equipment manufactured or sold by Rapistan. The applicant claims that one of Accu-Line's principals was the manager of construction operations of Rapistan and that since its inception, Accu-Line has performed installation work for Rapistan. The applicant's allegations at paragraphs 8(viii), 8(ix) and 8(x) of its application in Board

File No. 0258-01-R are specific about the relationship it alleges exists among the responding parties.

4 There is no doubt that documents arguably relevant to an application can be the subject of a pre-hearing production order. Responding parties in a proceeding under sections 69 and 1(4) of the LABOUR RELATIONS ACT, 1995, S.O. 1995, c. 1, as am. are not, however, obliged to answer questions prior to the hearing or create documents. In our view, there is a difference between directing production of documents and directing a party to provide information. Certainly, the hearing of this type of application could be shortened if the responding parties provide information and documents that are relevant to the issues in dispute well before the hearing. Indeed, both sections 1 (5) and 69 (13) require the responding parties to disclose the evidence that is relevant to the issue of whether the responding parties are under common control or direction (in the case of section 1 (5)) and whether a sale of a business has occurred (in the case of section 69 (13)) and to that end are required to disclose relevant documents.

5 One of the differences between the parties is whether the documents sought exist or are in the possession or control of the parties. In that regard we note that counsel for the Gap, in her letter to the Board dated June 11, 2001 indicated that a number of documents were delivered to counsel for the applicant without prejudice to her client's position that the documents sought are irrelevant, or at best marginally relevant. The letter also seemed to suggest that a number of documents had been delivered to the Board as well as to counsel for the applicant as the letter refers to documents found at certain tab numbers. The Board did not receive a book of documents from counsel for the Gap.

6 With respect to item 1 of the applicant's request, counsel for the Gap submits that the "documentation enclosed with this letter fully addresses this issue and that nothing further should be required." Aside from nothing being enclosed with the letter, if there are other documents in existence and in the possession of the Gap that come within the description of the documents the applicant described in item 1, they are to be produced. Accu-Line objects to production of all documents because the description of documents sought is too broad and it does not want to disclose the monetary amounts. It is prepared to provide some of the contract and tender documents with the pricing deleted. In our view, based on the applicant's theory of the case all of the documents described in category 1 of the applicant's request are relevant. The applicant has also indicated why the prices or dollar amounts in those documents are relevant. The Board notes the applicant's undertaking "that all confidential information obtained as a result of this request or otherwise through this proceeding will not be shared with any of the responding parties commercial competitors".

7 Rapistan submits that it was not involved in the sale or installation of the material handling system at the Distribution Centre and does not have any documents in its possession that the applicant describes in item 1. The applicant contends that Rapistan was involved in some manner with the equipment that was installed at the Distribution Centre. It will be up to the applicant to demonstrate Rapistan's role in the installation of the Distribution Centre conveyor system at the hearing, but in the face of Rapistan asserting that it has no knowledge of or possession of the documents requested in item 1, the Board is in no position to make the production order the applicant seeks in respect of Rapistan with respect to the documents described in item 1.

8 The Board therefore directs the Gap and Accu-Line, to the extent that such documents have not been produced, to produce for inspection:

All written material in any form whatsoever describing the manner in which the work pertaining to the installation of the conveyor system at the Old Navy Distribution Centre in Brampton, Ontario was obtained, the manner in which it was to be performed, the amount of compensation for performing the work and the actual amounts paid by The Gap to Rapistan and/or AccuLine for the purchase and installation of the equipment. This should include but not be limited to all invitations to tender or price, tenders, all bids or prices received, all contracts, purchase orders, invoices and subcontracts.

Despite the applicant's undertaking, the Board directs the applicant not to disclose any information about the costs or pricing of work done by Accu-Line and any document obtained as a result of the Board directing production of documents to any person who is not involved in these applications and further directs the applicant not to disclose or use such information or document for any purpose other than in connection with these applications.

9 The applicant seeks the building permits, change orders and minutes of site meetings. The Gap and Accu-Line submit the request is too broad and Rapistan submits that it has no knowledge of or possession of such documents. In our view, the request for building permits is specific, as is the request for minutes of site meetings. As for change orders, the change orders in respect of items not related to the installation of the conveyor system could not, in our view, be relevant to this case. Therefore the Board directs the Gap and Accu-Line to produce for inspection:

The building permits and minutes of site meetings in respect of the construction of the Distribution Centre (including, of course, the installation of the conveyor system) and any change orders relating to the conveyor system at the Distribution Centre.

10 Item 3 of the applicant's request is a list of all of jobs done by Accu-Lines in Ontario. Accu-Line submits that the request is too broad and as Accu-Line was incorporated in 1994 and carried on business before being incorporated, the request for information is simply too far reaching over an extended period of time. In our view, given the theory of the applicant's case, that list, if it exists, is clearly relevant. Accu-Line's relationship with Rapistan is in issue. When that relationship started is a matter that Accu-Line and Rapistan would have to disclose to meet their obligations under section 69(13) and 1(5) of the Act. Rapistan submitted that it has asked Accu-Line for that list. That list, if it exists should be produced. Therefore the Board directs Accu-Line to produce for inspection:

A list of all jobs Accu-Line has performed in Ontario.

11 The applicant in item 4 wants production of contracts and purchase orders for any jobs done by Accu-Line for the Gap prior to the Distribution Centre, regardless of the location of those jobs. Obviously, if Accu-Line has been doing work for the Gap directly for many years at locations around the world, the applicant may have more difficulty in proving its case. Nevertheless, based on the applicant's theory of the case, those documents are relevant. Accu-Line does not object to producing such documents provided the pricing information is deleted. The Gap submits such documents are either irrelevant or at best, marginally relevant. Rapistan has no knowledge or possession of any such documents. In our view, the pricing information about previous jobs has far less significance than the pricing information about the job at the Distribution Centre. Therefore, the Board directs the Gap and Accu-Line to produce for inspection:

All contracts or purchase orders for all jobs performed by Accu-Line for The Gap prior to the Old Navy Distribution Centre job regardless of where the contracts were performed, with pricing information deleted at the option of the Gap and Accu-Line.

12 The applicant in item 5 seeks documents that specifically relate to any installation work done at any time prior to the installation work at the Distribution Centre by Accu-Line in which Rapistan was either the manufacturer of the equipment being installed or a contractor. In our view, that request is far too broad, since it can encompass jobs around the world after Accu-Line started in business. The applicant is not just looking for a list, but rather is seeking purchase orders and contracts for any job Accu-Line did that involved equipment manufactured by Rapistan. If the applicant had sought just a list of jobs in Ontario in which Rapistan was the equipment supplier and Accu-Line was the installer, then that request would clearly be relevant and contracts or purchase orders for such jobs would have to be produced. The Board is not prepared to require Accu-Line to review records to determine whether a particular installation included a piece of equipment manufactured by Rapistan and to then produce the contracts and purchase orders for the installation work. The Board is prepared to order some limited production in respect of item 5. The Board therefore directs Rapistan and Accu-Line to produce:

All purchase orders and contracts for work done in Ontario by Accu-Line in which Rapistan supplied equipment and Accu-Line installed such equipment.

13 The production requested by the applicant in item 6 is in the nature of information, as opposed to documents. The Board is not prepared to direct the responding parties to answer questions about who was employed and what work those employees performed prior to the hearing.

14 The applicant seeks comprehensive information about the persons who performed the conveyor system installation work at the Distribution Centre, regardless of who was the nominal employer of those persons. In our view, it would be sufficient, as Accu-Line has submitted, for the responding parties to produce documents establishing an employment relationship with those individuals who did the actual installation work at the Distribution Centre. In our view, Revenue Canada TD-1 Forms, applications for employment, time sheets and payroll records for those persons would be adequate. Rapistan submits it did not employ anyone to do that work at the Distribution Centre. The Gap submits that information relating to its client's employees would not be relevant. We disagree. If any of the Gap's employees performed work in relation to the installation of the conveyor system at the Distribution Centre, then the information sought by the applicant is relevant with respect to such persons. Therefore, the Board directs the Gap and Accu-Line to produce for inspection:

All TD-1 forms, applications for employment, time sheets and payroll records in respect of any employee performing work in relation to the installation of the conveyor system at the Distribution Centre.

15 The applicant, in item 8 seeks WSIB clearance certificates in respect of the employer of employees doing the conveyor installation work at the Distribution Centre. The Board notes that Accu-Line does not object to producing evidence of its standing with the Workers Safety and Insurance Board while the Gap submits that its standing with that Board is irrelevant. In our view, given that Accu-Line is prepared to voluntarily produce that information and that the Gap's objection on the

basis of relevance appears to be well founded, the Board declines to make any order, but simply notes that Accu-Line submitted that it is prepared to provide that evidence. The Board assumes that Accu-Line will produce that material to the applicant within the time stipulated by the Board to produce those documents.

16 In summary, in our view, based on the applicant's theory of the case, the Board is satisfied that the applicant is entitled to have the documents described earlier produced for its inspection. The Board directs the responding parties who have been order to produce documents to produce for inspection to the applicant within 15 days of the date of this decision (or such further time as the parties agree) the documents described in paragraphs 7, 8, 9, 10, 11 and 13 of this decision.

17 These matters are referred back to the Manager of Field Services to have a Labour Relations Officer meet with the parties to continue settlement efforts.

18 This panel of the Board is no longer seized with this matter.

cp/e/qlamc

Case Name:

**Bakhtiyari v. British Columbia Institute of
Technology**

**IN THE MATTER OF the Human Rights Code
R.S.B.C. 1996, c. 210 (as amended)
AND IN THE MATTER OF a complaint before the
British Columbia Human Rights Tribunal
Between
Leila Bakhtiyari, complainant, and
British Columbia Institute of Technology,
respondent**

[2006] B.C.H.R.T.D. No. 494

2006 BCHRT 494

File No. 2754

British Columbia Human Rights Tribunal
Vancouver, British Columbia

J. Parrack (Member)

October 6, 2006.

(54 paras.)

Appearances:

On her own behalf: Leila Bakhtiyari

Counsel for the Respondent: Allen Soltan

REASONS FOR PRELIMINARY DECISION
APPLICATION FOR DOCUMENT DISCLOSURE

INTRODUCTION

1 Leila Bakhtiyari filed a complaint against the British Columbia Institute of Technology ("BCIT") alleging that it discriminated against her in the provision of a service customarily available to the public because of her mental and physical disabilities contrary to s. 8 of the Human Rights Code. BCIT denies it discriminated. The background to this complaint was set out in *Bakhtiyari v. BCIT*, 2006 BCHRT 122 and will not be repeated in this decision.

2 BCIT filed an application for document disclosure and an order adjourning the hearing of the complaint, scheduled to start on November 20, 2006.

3 I held a pre-hearing conference on August 4, 2006, during which I set a schedule for submissions on BCIT's application for disclosure and a date by which Ms. Bakhtiyari was to disclose her relevant documents. Ms. Bakhtiyari was given until August 30, 2006 to complete these tasks, a date that she requested. I directed that if, after Ms. Bakhtiyari had responded to the application and provided her document disclosure, BCIT continued to seek further disclosure, Ms. Bakhtiyari was to provide copies of the documents she had disclosed to the Tribunal by September 12, 2006. Ms. Bakhtiyari complied with these directions.

4 A pre-hearing conference was scheduled for September 13, 2006. At my direction, this pre-hearing conference was cancelled as I was out-of-town at a two week hearing. After canvassing dates with the parties, the case manager rescheduled the pre-hearing conference to September 27, 2006. The Tribunal confirmed this in writing to the parties on September 12, 2006.

5 On September 13, 2006, Ms. Bakhtiyari filed an application for document disclosure. Given that a pre-hearing conference was imminent, I directed the case manager to advise the parties that I would decide how Ms. Bakhtiyari's application would be dealt with at the pre-hearing conference. This direction was confirmed in a letter sent to the parties on September 25, 2006. Although the letter referenced a pre-hearing conference on October 27, this was a typographical error. The parties were aware that the pre-hearing conference was proceeding on September 27.

6 Ms. Bakhtiyari sought to have the pre-hearing conference adjourned as, in her view, it was a waste of the Tribunal's resources. However, there remained a number of issues to be dealt with and I decided to proceed with the pre-hearing as scheduled.

7 Mr. Soltan, counsel for BCIT attended on September 27, 2006 with his associate, Ingrid Otto. Subsequent to the pre-hearing conference, Ms. Bakhtiyari took issue this Ms. Otto's participation. Ms. Otto is assisting Mr. Soltan in his representation of BCIT, and, in particular, she was dealing with issues related to document disclosure. In the circumstances, it was appropriate that she attend. It was a more efficient way of dealing with some of the document issues that arose during the pre-hearing conference. Ms. Otto is not required to add herself to the complaint or to advise that she is assisting in this manner in a more formal way, for example by sending correspondence to the Tribunal indicating that she is now counsel of record. Although it would have been helpful to the process if Mr. Soltan had advised Ms. Bakhtiyari prior to the pre-hearing conference that Ms. Otto was assisting him, and would attend the conference call, his failure to do so was not inappropriate.

8 I advised the parties during the pre-hearing conference that I would not adjourn the hearing. I was not persuaded that, in all of the circumstances, an adjournment was necessary. This decision does not foreclose any party from filing an application to adjourn the hearing in the future on appropriate grounds.

9 The balance of this decision will deal with BCIT's application for disclosure.

ANALYSIS AND DECISION

10 The test to be applied in determining if a document should be disclosed is whether the document is relevant or arguably relevant to the issues raised in the complaint: *Tannis v. Calvary Publishing Corp. and Glen Robbins*, 2000 BCHRT 26; *Watt v. Foster/Hestia*, 2001 BCHRT 20; *Brady v. Interior Health Authority*, 2005 BCHRT 200.

11 It is the complaint and the response to the complaint that determine the issues before the Tribunal. In my view, the issues raised in this complaint are straightforward and do not require the extensive disclosure being sought by BCIT. Ms. Bakhtiyari alleges that BCIT failed to accommodate her because of her physical and mental disabilities. BCIT takes issue with the fact that Ms. Bakhtiyari has a disability and/or disabilities that require accommodation. The law is clear that the onus lies with Ms. Bakhtiyari to establish that she has a disability that is captured by the Code. Further, there is no question that BCIT may challenge the fact that Ms. Bakhtiyari has a disability at the hearing and it is entitled to take this position. It is also entitled to all documents that are relevant to this issue and to the issue of whether BCIT met its duty to accommodate Ms. Bakhtiyari.

12 Ms. Bakhtiyari requested certain accommodations, including with respect to the taking of exams. This case is significantly different from *Brady*. I am not persuaded that there is a movement towards greater disclosure at the pre-hearing stage as was suggested by BCIT. The issue of disclosure and what is arguably relevant is complaint specific and is to be carefully considered in each case.

13 In its reply to the application, BCIT suggests that since Ms. Bakhtiyari has not made a claim for "privilege" over the documents being sought and further, since she has disclosed documents in each category of documents, she has conceded that each category of documents is relevant, and by inference, the breadth of documents sought in each category are relevant to the issues before the Tribunal and should be ordered disclosed. In my view, this conclusion is not supported by Ms. Bakhtiyari's submissions. She is clearly concerned about the nature and breadth of the documents sought by BCIT and the resulting invasion of her privacy.

14 BCIT set out its request for documents in a document attached to its application for disclosure. That document sets out the style of cause and then states: "BCIT seeks the following Orders". I propose to address each category of documents as they have been identified in that summary. I have reviewed all the materials before me, including the documents sent by Ms. Bakhtiyari to the Tribunal, in coming to my decision in this application.

Medical Records

15 BCIT seeks the following in paragraph 1(a):

1. ... copies of all medical, clinical, or counselling records in her possession or under her control, created between January, 1999 and the present, which relate to any physical, mental, psychiatric, psychological, or other health condition she currently suffers from or may have suffered from, the nature and extent of such condition, and the assessment, advice, prognosis, treatment (including recommended or prescribed medication), and/or assistance provided by physicians, counsellors, or other health care providers with respect to such condition or conditions, including:

- (a) all medical and clinical records of physicians, psychologists, psychiatrists, counsellors, or other health care providers concerning the aforementioned issues (including, without limitation, clinical notes, assessments, treatment records, consultation reports, and correspondence with any other treating health care providers), including, in particular, all medical and clinical records in the possession or control of:
 - (i) Dr. D.A. Fung;
 - (ii) the BCIT Medical Services Clinic or its personnel or agents;
 - (iii) the "doctor" referred to in Ms. Bakhtiyari's complaint; and
 - (iv) the "doctor", "hospital", and specialist" referred to in paragraph A of Ms. Bakhtiyari's letter of March 22, 2006 to the Tribunal.

16 Ms. Bakhtiyari says that she was diagnosed with anxiety and depression in 2000. She says that she became a full-time student at BCIT in 2002. She remained a full-time student during the school years 2002/2003 and 2003/2004. She has continued to take courses up to the summer of 2006. It appears from the pleadings that she sought accommodations towards the end of 2003, in May 2004 for her final exams and again in February 2005. All of these dates have assisted me in my determination of the temporal scope of the relevant documents that should be disclosed.

17 Ms. Bakhtiyari identified a number of doctors that have provided her with medical care. A number of those doctors provide medical services to students through BCIT Medical Services Clinic (the "Clinic"). Those doctors include Dr. Fung, Dr. Kelly, Dr. Martz, Dr. Earmme, Dr. Essak, and Dr. Montgomery. Ms. Bakhtiyari says that there is one medical file for all the doctors she has seen at the Clinic except for Dr. Fung. There is a separate file for Dr. Fung.

18 In response to this application, Ms. Bakhtiyari contacted Dr. Fung, Dr. Martz, and Dr. Kelly and requested that they provide a medical report setting out, among other things, when they saw her, what were her presenting symptoms, and the medications that were prescribed. These doctors responded to her requests and those reports have been provided to BCIT.

19 Ms. Bakhtiyari has also provided copies of the Student Medical Certificates which were signed by Dr. Fung on May 18, 2004 and February 15, 2005. In Ms. Bakhtiyari's view, given that this is what is required by BCIT faculty in assessing whether to reschedule her exams, this should be sufficient for the purposes of this complaint.

20 Ms. Bakhtiyari says that she had provided sufficient information for BCIT to defend this complaint. She argues that the nature and extent of her disabilities is not the issue in this complaint; the issue is the failure of BCIT to provide her with the accommodations she sought. She says that the continued request for more disclosure is an attempt by BCIT to intimidate her and to attack her privacy.

21 In my view, Ms. Bakhtiyari has taken significant steps to comply with the requests being made by BCIT. However, BCIT is still entitled to receive copies of the medical files of those that have seen her and treated her for anxiety and depression. In this respect, Ms. Bakhtiyari must produce the file of Dr. Fung and the one other file at the Clinic, from January 2004 forward, subject to the conditions I will set out below.

22 With respect to Dr. Tomaszewski, Ms. Bakhtiyari has requested a report from him as well as copies of the relevant parts of her file. She advised during the pre-hearing conference that Dr. Tomaszewski has been away and she has not been able to obtain the information she requested. Dr. Tomaszewski was Ms. Bakhtiyari's physician in 2000 when she was initially diagnosed with depression. The parts of his file that relate to this issue, from January 2000 forward are arguably relevant to the issues in this complaint and must be produced, again subject to the conditions I will set out below.

23 The medical files that are being sought by BCIT are highly personal and Ms. Bakhtiyari's privacy must be protected, whether or not she has made formal legal arguments in this respect. Ms. Bakhtiyari is not represented by counsel and therefore does not have someone to assist her in determining which part of those files may be relevant to the issues before the Tribunal. In order to balance the issues of privacy and the need for disclosure of arguably relevant documents, I make the following orders:

1. Ms. Bakhtiyari will obtain copies of the files, referred to above, and send them to the Tribunal.
2. I will then review those files and delete any information that is not relevant to the issues raised in this complaint. Those files will then be sent to BCIT.
3. BCIT is to use these medical files and reports for purposes of this complaint process only. BCIT, or its counsel, are not to share this information with any person except as is necessary for the purposes of this litigation, including its instructing BCIT personnel and any expert witness that it might retain. Any person reviewing these documents is not to disclose the contents to any other person.

24 BCIT seeks disclosure of Heather Hyde's file. Ms. Hyde is a Counsellor at BCIT Counselling and Student Development Centre. Ms. Hyde has provided a letter indicting that she spoke with Ms. Bakhtiyari five separate times between January and March 2004. According to Ms. Bakhtiyari's letter to Ms. Hyde, it was Ms. Hyde who referred Ms. Bakhtiyari to a physician for "depression treatment". I am not persuaded based on the materials before me, and the information that is already to be disclosed, that Ms. Hyde's file is arguably relevant to the issues to be determined in this complaint. BCIT takes issue with whether or not Ms. Bakhtiyari has mental and/or physical disabilities captured by the Code and what accommodation was necessary and/or provided as a result. I do not see how the counselling sessions between Ms. Bakhtiyari and Ms. Hyde are relevant to these issues. I am not prepared to order Ms. Hyde's file disclosed at this time.

25 I note that Ms. Bakhtiyari says in her letter to Ms. Hyde that she may call her as an "expert" witness at the hearing. If Ms. Bakhtiyari intends to call Ms. Hyde to speak to any issue in this complaint, then Ms. Hyde's file may have to be produced, subject to the conditions I have placed on the disclosure of her other medical files.

26 With respect to the issue of Ms. Bakhtiyari's nose-bleeds, she has provided a copy of the Emergency/Ambulatory Care Clinic Record from Burnaby Hospital as well as a follow-up consultation letter from Dr. Samad. In my view, this satisfies the request for medical disclosure of this information. Ms. Bakhtiyari is not required to provide any further information with respect to this medical issue.

27 The balance of the requests made in paragraph (1)(a) are dealt with in this section or in other parts of this decision.

Documents related to the claim for Compensation for Injury to Dignity

28 BCIT seeks all medical and clinical records related to any loss, damage, or injury suffered by Ms. Bakhtiyari and including the alleged injury to her dignity, feelings and self-respect.

29 Ms. Bakhtiyari says that no such documents exist.

30 I accept that no independent documents exist that speak to this issue and, as a result, make no order under this category.

British Columbia Medical Services Plan ("MSP") and Insurance Claims

31 BCIT seeks a number of documents related to any billing and/or claims that Ms. Bakhtiyari may have made regarding medical coverage and/or for reimbursement of any prescription medications. This request is set out in paragraph 1(d) to (i) of the summary.

32 Ms. Bakhtiyari says that she is not seeking, as a remedy in this complaint, reimbursement for the costs of any medical services she has obtained nor is she seeking reimbursement for the costs of any prescription drugs that she been prescribed. She did provide copies of detailed drug summaries and copies of the drugs that she has been issued by various pharmacies.

33 There is nothing in the materials that persuades me that the documents being sought by BCIT are arguably relevant to the issues before the Tribunal.

34 For these reasons, BCIT's application for disclosure of any further information is denied.

Documents with respect to other Educational Institutions

35 BCIT seeks all documents related to Ms. Bakhtiyari's academic standing and/or performance at any other education institution from January 2000 to date. It also seeks information and/or any documents that relate to Ms. Bakhtiyari's request for accommodation and, any accommodation that may have been provided by that educational institution. This request is set out in paragraph 2 of the summary.

36 Ms. Bakhtiyari wrote to the other educational institutions and requested the information being sought by BCIT. Subsequent to these requests being made, Ms. Bakhtiyari provided the information to BCIT. In its reply, BCIT says that it seeks no further information from Ms. Bakhtiyari under this category.

37 Given that BCIT seeks no further information from Ms. Bakhtiyari with respect to this issue, I make no orders under this category. However, I would note that BCIT suggests in its reply filed in support of its disclosure application that:

BCIT will rely on these documents (Doc. #158 to 161), and her letter to the Tribunal of August 30, 2006, as an admission that other than BCIT, Ms. Bakhtiyari has never previously sought or received any accommodation from any educational institution on the basis of a physical or mental disability, or for any other medical or health related reason". (BCIT's letter dated September 8, 2006 at para. 2)

38 It does not appear from the materials that Ms. Bakhtiyari intended to, or has made such an admission. She has responded to a request for document disclosure and, given that she is unrepresented, she is unlikely to understand the import of this paragraph. If BCIT seeks certain admissions from Ms. Bakhtiyari it should set those out in a form that is separate from this application so that it can be properly and fully considered by Ms. Bakhtiyari.

All Other Communications

39 BCIT seeks the following comprehensive order, which is set out in paragraph 3 of the summary:

... copies of all documents, including emails, notes, or any other form of communication, passing between Ms. Bakhtiyari and BCIT, or passing between Ms. Bakhtiyari and any third party or parties, relating directly or indirectly to the matters in the complaint or the response to the complaint, including, without limitation, all communications passing between Ms. Bakhtiyari and BCIT's Disability Resource Centre, BCIT's Medical Services Clinic or its personnel or agents, Noel Brennan, Dick Dolan, Debbie Dye, Tim Edwards, Ralph Gioia, Dr. Bill Graham, Dr. Tony Knowles, Bob Lee, Gerry O'Brien, Randy Robinson, Gary Sagar, David Salzano, and Douglas Yee.

40 In a letter dated May 1, 2006, Ms. Bakhtiyari provided BCIT with a "selection of [her] correspondence with BCIT" that she would be referring to at the hearing of the complaint. In the face of this application, I understand that Ms. Bakhtiyari has now disclosed all documents containing any communications that she has had with all of BCIT's faculties that are in her possession. The only documents that she says she no longer has are the emails she exchanged with Randy Robinson.

41 Both parties have an obligation to disclose arguably relevant documents. The requirement to disclose all arguably relevant documents is a broader requirement than the only providing copies of documents that will be relied on at the hearing. It seems that Ms. Bakhtiyari has disclosed further documents and continues to do so; in the face of these steps, I am not prepared to make any further orders under this category.

42 The documents that relate to the Clinic have been dealt with above.

Communications referred to in Ms. Bakhtiyari's letter dated March 22, 2006

43 In *Bakhtiyari*, the Tribunal ordered Ms. Bakhtiyari to provide further particulars in support of her complaint against BCIT. Those particulars were provided in Ms. Bakhtiyari's letter to the Tribunal dated March 22, 2006.

44 Much of the information sought under this category has been dealt with above. Further, BCIT indicated during the pre-hearing conference of September 27, 2006, that it was no longer seeking further documents under this category. As a result, no further order is required from the Tribunal.

Documents related to Tuition Fees, Books and Student Loans

45 BCIT says that Ms. Bakhtiyari is seeking compensation for expenses incurred with respect to tuition fees, books and student loans in the amount of \$50,000. At the hearing of the complaint, the onus is on Ms. Bakhtiyari to establish that she has incurred those expenses.

46 Ms. Bakhtiyari has provided BCIT with duplicate receipts for her tuition fees, which she requested from BCIT in the face of this application. She has provided copies of receipts for the purchase of books that she has in her possession. She could not find all of her book-purchase receipts. She has also provided copies of the documents related to her student loans.

47 In my view, Ms. Bakhtiyari has disclosed all those documents in her possession and has taken steps to obtain documents that were not in her possession but that were relevant to the issue of this aspect of her remedy.

48 As I indicated above, the parties have an ongoing obligation to disclose relevant documents. Other than this general order, I do not propose to make any further orders with respect to the disclosure of documents related to tuition fees, books or student loans.

Consent Forms

49 BCIT seeks a number of orders requiring that Ms. Bakhtiyari sign consent forms so that BCIT can receive certain documents directly from third parties. These consent forms are more fully described in paragraphs 7 to 10 of the summary and copies of sample forms were attached.

50 In my view, and given the significant attempts that Ms. Bakhtiyari has made to obtain the information being sought by BCIT, I am not prepared to make order that Ms. Bakhtiyari sign these consent forms. Further, it seems to me that such a blanket request is inappropriate in circumstances where a party is unrepresented. An unrepresented party is unlikely to understand the full implications of providing his or her consent and the significant intrusion into their personal privacy.

51 The request for these orders is denied. If Ms. Bakhtiyari fails to abide by my orders with respect to the disclosure of the medical files set out above, I will entertain a further application from BCIT on this issue.

CONCLUSION

52 In conclusion I make the following orders:

1. Ms. Bakhtiyari is to produce a copy of Dr. Fung's file, subject to the conditions set out in sub-paragraph (4) below;
2. Ms. Bakhtiyari is to produce the one other file at the Clinic, from January 2004 forward, which contains the notations of the doctors she saw there, subject to the conditions set out in sub-paragraph (4) below;
3. Ms. Bakhtiyari is to produce Dr. Tomaszewski's file from January 2000, subject to the conditions set out in sub-paragraph (4) below;
4. the following conditions apply to the disclosure of the medical files:
 - (a) Ms. Bakhtiyari will obtain copies of the files and send them to the Tribunal;
 - (b) I will then review those files and delete any information that is not relevant to the issues raised in this complaint. Those files will then be sent to BCIT; and
 - (c) BCIT is to use these medical files and reports for purposes of this litigation only. BCIT, or its counsel, are not to share this information with any person except as is necessary for the purposes of this litigation.

tion, including its instructing BCIT personnel and any expert witness that it might retain. Any person reviewing these documents is not to disclose the contents to any other person.

5. the balance of BCIT's application is dismissed; and
6. both parties are to disclose all relevant documents; this disclosure obligation is an ongoing obligation.

53 As indicated above, Ms. Bakhtiyari has filed an application for disclosure. During the pre-hearing conference, I set the following schedule for submissions:

1. BCIT will respond to the application by October 5, 2006; and
2. Ms. Bakhtiyari will have until October 10, 2006 to file her reply.

54 Ms. Bakhtiyari suggested that the some of the documents she had received did not appear to be copies of the original documents but "cut and paste" versions of the documents. Ms. Bakhtiyari is to provide examples of those documents that she takes issue with and I will deal with that issue when I render my decision on her application.

cp/e/qlsmw

1999 CarswellBC 2064, 71 B.C.L.R. (3d) 72, 36 C.P.C. (4th) 395



1999 CarswellBC 2064, 71 B.C.L.R. (3d) 72, 36 C.P.C. (4th) 395

North American Trust Co. v. Mercer International Inc.

North American Trust Company and Westlaco Investment Company, Plaintiffs and Mercer International Inc., Arbatax International Inc., Prada Holdings Ltd. and Loewen, Ondaatje, McCutcheon & Company Limited (now called Forbes & Walker Securities Limited), Defendants

British Columbia Supreme Court

Lowry J.

Heard: April 29, 1999

Judgment: September 22, 1999

Docket: Vancouver C966209

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Counsel: *Gordon R. Johnson*, for Plaintiffs.

James F. Dixon, for Defendants.

Subject: Civil Practice and Procedure

Practice --- Discovery — Discovery of documents — Resisting production

Assignment agreement was listed in plaintiffs' affidavit of documents — Plaintiffs produced part of agreement during discovery process — Defendants applied for disclosure of full agreement — Application adjourned — Where litigant lists document as relating to matter in question without qualification, disclosure of document in its entirety is generally required — Plaintiffs ordered to file affidavit stating with greater precision why certain parts of agreement should not be disclosed — Further argument could be submitted if defendants wished to contest plaintiffs' position — Court required time to review document.

Cases considered by *Lowry J.*:

Carroll v. Passant ([November 22, 1996](#)), [Doc. Vancouver B916799](#) (B.C. S.C.) — referred to

Cie Financière du Pacifique v. Peruvian Guano Co. ([1882](#)), [11 Q.B.D. 55](#), [52 L.J.Q.B. 181](#) (Eng. Q.B.) — referred to

Collins v. Beach, [24 C.P.C. \(2d\) 228](#), [\[1988\] 1 C.T.C. 261](#) (Ont. H.C.) — referred to

Glaxo Group Ltd. v. Novopharm Ltd. ([1996](#)), [122 F.T.R. 192](#), [70 C.P.R. \(3d\) 300](#) (Fed. T.D.) — considered

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Goddard v. Shoal Harbour Marine Service Ltd. [\(1958\), 24 W.W.R. 166](#) (B.C. S.C.) — considered

Halliday v. McCulloch [\(1986\), 1 B.C.L.R. \(2d\) 194, 14 C.P.C. \(2d\) 70](#) (B.C. C.A.) — referred to

Jervis Court Development Ltd. v. Ricci [\(October 7, 1992\), Doc. Vancouver C913115, C916016, C922494](#) (B.C. S.C.) — applied

John Labatt Ltd. v. Molson Breweries, A Partnership [\(1993\), 52 C.P.R. \(3d\) 478, \[1994\] 1 F.C. 801, 72 F.T.R. 156](#) (Fed. T.D.) — applied

Kimberly-Clark Corp. v. Procter & Gamble Inc. [\(1990\), 31 C.P.R. \(3d\) 207](#) (Fed. T.D.) — considered

Lazin v. Ciba-Geigy Canada Ltd., [\[1976\] 3 W.W.R. 460, 66 D.L.R. \(3d\) 380](#) (Alta. C.A.) — not followed

Manufacturers Life Insurance Co. v. Dofasco Inc. [\(1989\), 38 C.P.C. \(2d\) 47](#) (Ont. H.C.) — referred to

V. (K.L.) v. R. (D.G.) [\(April 5, 1993\), Doc. Vancouver C921471](#) (B.C. S.C.) — considered

Vernon & District Credit Union v. Cue Datawest Ltd. [\(February 18, 1999\), Doc. Vancouver C970096](#) (B.C. S.C.) — considered

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 26(1) — referred to

R. 26(1.2) [en. B.C. Reg. 95/96; am. B.C. Reg. 161/98] — considered

R. 26(7) — referred to

R. 26(9) — referred to

R. 26(12) — considered

APPLICATION by defendants for further disclosure of document.

Lowry J.:

1 The rules that govern discovery in an action require that, in response to a demand, a litigant must list, and then disclose, all documents in its possession or control that relate to any matter in question. There is no provision in the rules for disclosing only parts of such documents. Here application is made to compel the production of the whole of an agreement where only parts of it have been disclosed. The remainder is said to be irrelevant and to have no bearing on the issues.

2 North American Trust Company ("NAT") and Westlaco Investment Company ("Westlaco") sue as the assignor and assignee respectively of certain debentures held to secure \$5 million in loans advanced to a company

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presently named Prada Holdings Ltd. ("Prada"). The circumstances that give rise to the action are complicated, but it suffices for present purposes to say that it is alleged the plaintiffs have been wrongly deprived of the rights of repayment under the debentures by the conduct of Prada and the other defendants by which it is controlled.

3 The assignment of the debentures was part of a larger transaction whereby NAT's assets were purchased by Westlaco under what is referred to as the "Asset Purchase Agreement." The plaintiffs have listed and produced what is described as the "Assignment Agreement" under which the debentures were actually assigned, but they have not listed the Asset Purchase Agreement and have been willing to produce only an expurgated copy of that document. Broadly, they accept that the clauses which relate specifically to the sale of the debentures that are the subject of the action must be disclosed, but they refuse to disclose any more of the agreement and in particular the price paid for all of the assets acquired.

4 The question then is whether a litigant is entitled to disclose only part of an agreement that relates to a matter in question, and, if so, whether the plaintiffs are entitled to disclose only those parts of the Purchase and Sale Agreement that they say may be relevant.

5 Despite the wording of the rules, this court has, in some circumstances, been disposed to relieve a litigant from disclosing parts of producible documents which are clearly not relevant to the pleaded issues. I am referred first to *Goddard v. Shoal Harbour Marine Service Ltd.* (1958), 24 W.W.R. 166 (B.C. S.C.) where discovery was limited to only those pages of a company's minute book that bore directly or indirectly on what was at issue in the action. The remaining pages were to be "sealed up" following what was described as the English practice. *Goddard* was applied in *Jervis Court Development Ltd. v. Ricci* (October 7, 1992), Doc. Vancouver C913115, C916016, C922494 (B.C. S.C.) at para. 24 with respect to personal notes passing between a mother and her daughter. In *V. (K.L.) v. R. (D.G.)* (April 5, 1993), Doc. Vancouver C921471 (B.C. S.C.) a litigant was not required to produce portions of medical records nor parts of a personal diary that were not relevant to the issues. Indeed, I understand that in personal injury litigation, expurgated copies of medical records are commonly produced, although when the withheld disclosure is challenged it appears that the court will order full production except in the clearest cases: *Carroll v. Passant* (November 22, 1996), Doc. Vancouver B916799 (B.C. S.C.) at para. 10 (S.C.), a decision arising out of a *Halliday* order (*Halliday v. McCulloch* (1986), 1 B.C.L.R. (2d) 194 (B.C. C.A.)).

6 The English practice of sealing up irrelevant parts of a document requires a litigant to state in its list of documents that only certain parts of a document are being produced and on what basis it is said that certain parts of the document are not relevant: *Halsbury's* 4th. Vol. 13 para. 42.

7 There are decisions of the courts of Ontario and Alberta where litigants have not been required to disclose some parts of documents that are clearly irrelevant: *Collins v. Beach* (1988), 24 C.P.C. (2d) 228 (Ont. H.C.) (tax returns); *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47 (Ont. H.C.) (financial statements), and *Lazin v. Ciba-Geigy Canada Ltd.* [1976] 3 W.W.R. 460 (Alta. C.A.) (a personal diary). In *Lazin*, at p. 463, it was held that the term "documents relating to the matters in question" found in the rules governing discovery in Alberta meant only the relevant portions of what might physically be called a document.

8 The decisions of the Trial Division of the Federal Court of Canada in intellectual property litigation to which I have been referred have both permitted and precluded litigants from disclosing only part of documents that relate to the matters in issue in an action. In *Kimberly-Clark Corp. v. Procter & Gamble Inc.* (1990), 31 C.P.R. (3d) 207 (Fed. T.D.), a case upon which the plaintiffs here specifically rely, one party was permitted to withhold disclosure of certain parts of an agreement that, on inspection, the court considered to have a commercial value to the other party but to be of no relevance to the resolution of the issues. In *John Labatt Ltd. v. Molson Breweries, A Partnership* (1993), 52 C.P.R. (3d) 478 (Fed. T.D.), a plaintiff who had listed commercially sensitive documents as related to the matters in issue without qualification was relieved from having to produce the whole of each document. However, the plaintiff was required to file affidavit evidence describing precisely the portions of the documents withheld with

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a view to a subsequent application if, after cross-examination, the non-disclosure was to be further challenged.

9 By contrast, in *Glaxo Group Ltd. v. Novopharm Ltd.* (1996), 70 C.P.R. (3d) 300 (Fed. T.D.) it was held that a party was required to produce all of the documents listed as related to the matters in issue in their entirety. There it was said at pp. 303-305:

In short, I know of no rule, doctrine or jurisprudence which would free a party, as a general rule, from its obligation to list and provide Schedule I documents in their entirety.

Rule 448 requires the listing of *all documents* relevant to any matter in issue. The Rule does not limit documentary discovery to *only those extracts of a document* which may be relevant to any matter in issue. If that had been the intention, the Rule would be so worded.

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The purpose of documentary discovery is to obtain disclosure of all relevant documents. Many portions of those documents may not be relevant to the issues. Indeed, Rule 448(5) assures the parties that the disclosure of the document in an affidavit of documents and its production is not to be taken as an admission of its admissibility in the action.

If a party were permitted to disclose and produce only the unilaterally redacted version of a Schedule I document, our motions court would be inundated with requests for more complete disclosure. What information is the party hiding in the expurgated portion of a document? The costs and time involved in such a process are contrary to everyone's interest in the good administration of justice. This cannot be the process which was contemplated in Rule 448. Counsel for the plaintiff candidly acknowledges that he knows of no instance, except his own efforts in this action and in three immediately related actions, where a party served an affidavit of documents with redacted Schedule I documents.

If a portion of a document is relevant, the document must be disclosed and its unexpurgated version must be made available for inspection, unless the parties agree otherwise. Very rarely, if at all, will all the documents disclosed in an affidavit of documents be produced at trial. With complete disclosure of all relevant documents, counsel can then decide which will be necessary for the resolution of the issues in the litigation. While there may exist exceptional situations which would warrant the Court's intervention in allowing the party to deviate from the general rule of unedited documentary disclosure under Schedule I, this is not one.

10 In *Vernon & District Credit Union v. Cue Datawest Ltd.* (February 18, 1999), Doc. Vancouver C970096 (B.C. S.C.), I held that various corporate directors minutes and managerial reports which had, without qualification, been listed as related to the matters in question were to be disclosed in their entirety. The contention there which I rejected was that one party's determination of what was relevant in a document was beyond challenge. No authority was cited to me in that case but, having regard for the wording of the rule, my view of the matter was much the same as what was said in *Glaxo*. I observed that, generally, the whole of a document is relevant if any part of it is relevant. My meaning may have been clearer if I had said that the whole of a document is discoverable if any part of it relates to a matter in issue.

11 In the cases to which I have been referred, litigants have been relieved from disclosing the whole of a document related to a matter in question where, but only where, the part withheld has been clearly not relevant to the issues *and*, because of its nature, there has been good reason why that part should not be disclosed. With reference to the decisions of this court specifically, good reason is apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings, or the personal sensitivity of a person's medical records, diary notations, or familial communications, and much the same can be said where expurgated disclosure of a document has

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been upheld in the cases cited from other jurisdictions. Statements to the effect that only the relevant parts of a document need be produced, such as in *Jervis Court Development* at para. 24 and *Vickers* at para. 10, must be read in the context of what was decided.

12 I consider the rules that govern discovery in this court to be quite clear. Documents within the possession or control of a litigant must be listed and produced if they relate to any matter in question. What relates to a matter in question is governed by the *Peruvian Guano* rule (*Cie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (Eng. Q.B.) per Brett L.J. at 63) the applicability of which has been frequently endorsed. As noted in *Jervis Court Developments* at para. 20, this court has given the word "documents" employed in the rules governing discovery a very broad interpretation. I am concerned that accepting the narrow meaning the Alberta Court of Appeal attached to that word in *Lazin* would serve to invite litigants to engage in editing out substantial parts of a document production believed to be irrelevant and, in larger commercial cases where there can be hundreds if not thousands of documents relating to the matters in issue, that could serve to make discovery even more contentious, time-consuming, and costly than it is now. A narrow interpretation of the word is not necessary to affording the kind of protection that the plaintiffs seek in this case.

13 Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant is by its nature such that there is good reason why it should not be disclosed, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.

14 On this application, the defendants contend that a contract is a unique kind of document that must be disclosed in its entirety -- it is not a divisible document. Certainly, it is well recognized that the provisions of a contract are to be interpreted with reference to all of its terms. And *Kimberly-Clark* stands alone as the only case counsel have been able to cite where a litigant was permitted to limit discovery to an expurgated copy of an agreement. But that said, I can see no reason in principle why some provisions of a contract to which only one of two litigants adverse in interest is a party might not be irrelevant to the issues being tried and of sufficient commercial sensitivity to justify relieving that litigant from having to disclose them. Indeed, the Asset Purchase Agreement to which the plaintiffs were party does not appear to be at issue in this case. Given that both assignor and assignee sue on the debentures, it is difficult to see how the agreement could bear on the resolution of the issues.

15 It follows that the plaintiffs may not be required to disclose more than they have of the Asset Purchase Agreement, but to preserve the position they have taken, they must establish that the parts of the document they seek to withhold from disclosure are both clearly irrelevant and that there is good reason why they should not be disclosed.

16 Where a litigant has good reason to withhold disclosure of parts of a discoverable document that are not relevant, the proper procedure (originating in the English practice) would appear to be to make an appropriate note to that effect when the document is listed under Rule 26(1). The document should then be produced in expurgated form for copying with the other listed documents under Rules 26(7) and (9). If the withheld disclosure is challenged, the litigant should seek the exercise of the court's discretion for which Rule 26(1.2) provides:

Court may excuse performance

(1.2) The court may order that a party be excused from compliance with subrule (1), (7) or (9), either generally or in respect of one or more documents or classes of documents.

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The exercise of the court's discretion may require that the document be inspected in its entirety by the court as provided by Rule 26(12).

17 Where a litigant has listed a document as relating to any matter in question without qualification, it should generally be required to disclose the document in its entirety (but see [*John Labatt Ltd.*](#) at p. 480).

18 However, as indicated, the Asset Purchase Agreement is not a document the plaintiffs listed as it appears they should have. In line with what was ordered in [*John Labatt Ltd.*](#), they should now file an affidavit stating with some precision the nature of the clauses of the agreement they say are not relevant and why they should not be disclosed. Should the defendants not then accept that the plaintiffs are to be excused from disclosing the whole of the document, I will hear further argument as to how my discretion should be exercised and I would expect to review the document before finally disposing of the matter.

19 The application will be adjourned generally and the plaintiffs ordered to file the affidavit described within seven days time.

Application adjourned.

END OF DOCUMENT

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McGee v. London Life Insurance Co.

Barbara McGee and Pauline McCallum (Applicants / Moving Parties)

London Life Insurance Company Limited (Respondent / Responding Party)

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: January 29, 2010

Judgment: March 8, 2010

Docket: 07-CV-327818CP

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Counsel: Howard Goldblatt, Christine Davies for Moving Parties

Jeff Galway, Ashley Richards for Respondent

Subject: Corporate and Commercial; Estates and Trusts; Evidence; Civil Practice and Procedure; Insurance

Pensions --- Surplus funds — Termination of plan

Class of former employees terminated in 1996 brought action against employer insurance company — Action was for portion of surplus assets attributable to partial wind-up of staff pension plan, to which they said they were entitled — Class asserted surplus assets were impressed with trust in favour of plan members — Judge subsequently ordered action be converted to application and parties filed affidavits, produced documents and began examinations — Class requested documents on examination of Insurance company's affiant — Insurance company produced relevant documents with redacted portions — Insurance company said redacted portions were not relevant to issues on application — Class brought motion to compel Insurance company to produce unredacted documents — Motion granted — Impermissible for party to redact portions of relevant documents simply on basis of assertion that redacted portions are not relevant — Whole of relevant document must be produced except to extent it contained information that would cause significant harm to producing party or would infringe public interests deserving protection — Party seeking to redact had onus of establishing redaction was necessary to protect public interest or avoid harm — Insurance company did not identify aspect of any of documents at issue that gave rise to interest requiring protection — Insurance company ordered to produce for inspection copies of all relevant documents in unredacted form.

Evidence --- Documentary evidence — Miscellaneous

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Redacted documents — Class of former employees terminated in 1996 brought action against employer insurance company — Action was for portion of surplus assets attributable to partial wind-up of staff pension plan, to which they said they were entitled — Class asserted surplus assets were impressed with trust in favour of plan members — Judge subsequently ordered action be converted to application and parties filed affidavits, produced documents and began examinations — Class requested documents on examination of Insurance company's affiant — Insurance company produced relevant documents with redacted portions — Insurance company said redacted portions were not relevant to issues on application — Class brought motion to compel Insurance company to produce unredacted documents — Motion granted — Impermissible for party to redact portions of relevant documents simply on basis of assertion that redacted portions are not relevant — Whole of relevant document must be produced except to extent it contained information that would cause significant harm to producing party or would infringe public interests deserving protection — Party seeking to redact had onus of establishing redaction was necessary to protect public interest or avoid harm — Insurance company did not identify aspect of any of documents at issue that gave rise to interest requiring protection — Insurance company ordered to produce for inspection copies of all relevant documents in unredacted form.

Cases considered by *G.R. Strathy J.*:

Albrecht v. Northwest Protection Services Ltd. (2005), 2005 CarswellOnt 2142 (Ont. S.C.J.) — considered

Bouchard Paradis Inc. v. Markel Insurance Co. (2000), 2000 CarswellOnt 4964 (Ont. Master) — considered

Collins v. Beach (1988), 24 C.P.C. (2d) 228, [1988] 1 C.T.C. 261, 1988 CarswellOnt 915 (Ont. H.C.) — referred to

Goddard v. Shoal Harbour Marine Service Ltd. (1958), 1958 CarswellBC 8, 24 W.W.R. 166 (B.C. S.C.) — considered

Guelph (City) v. Super Blue Box Recycling Corp. (2004), 2004 CarswellOnt 4488, 2 C.P.C. (6th) 276 (Ont. S.C.J.) — considered

Janhevich v. Thomas (1977), 3 C.P.C. 303, 76 D.L.R. (3d) 656, 15 O.R. (2d) 765, 1977 CarswellOnt 226 (Ont. H.C.) — referred to

Jervis Court Development Ltd. v. Ricci (1992), 1992 CarswellBC 2650 (B.C. S.C.) — referred to

John Labatt Ltd. v. Molson Breweries, A Partnership (1993), 1993 CarswellNat 247, 1993 CarswellNat 247F, 52 C.P.R. (3d) 478, [1994] 1 F.C. 801, 72 F.T.R. 156 (Fed. T.D.) — referred to

Kimberly-Clark Corp. v. Procter & Gamble Inc. (1990), 31 C.P.R. (3d) 207, 1990 CarswellNat 1111 (Fed. T.D.) — referred to

Lazin v. Ciba-Geigy Canada Ltd. (1976), [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380, 1976 CarswellAlta 80 (Alta. C.A.) — referred to

Manufacturers Life Insurance Co. v. Dofasco Inc. (1989), 38 C.P.C. (2d) 47, 1989 CarswellOnt 433 (Ont. H.C.) — referred to

McGee v. London Life Insurance Co. (2008), 2008 C.E.B. & P.G.R. 8295, 70 C.C.P.B. 249, 2008 CarswellOnt 2534, 63 C.P.C. (6th) 107 (Ont. S.C.J.) — referred to

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North American Trust Co. v. Mercer International Inc. (1999), 36 C.P.C. (4th) 395, 71 B.C.L.R. (3d) 72, 1999 CarswellBC 2064 (B.C. S.C.) — followed

P.I.P.S.C. v. Canada (Attorney General) (2005), 51 C.C.P.B. 307, 2005 CarswellOnt 7981, 22 E.T.R. (3d) 238 (Ont. S.C.J.) — followed

Schmidt v. Air Products of Canada Ltd. (1994), (sub nom. *Stearns Catalytic Pension Plans, Re*) 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re*) 73 W.A.C. 81, 1994 C.E.B. & P.G.R. 8173, 1994 CarswellAlta 138, [1995] O.P.L.R. 283, 1994 CarswellAlta 746, 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re*) 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631 (S.C.C.) — referred to

Shooting Star Amusements Ltd. v. Prince George Agricultural & Historical Assn. (2009), 2009 CarswellBC 2930, 2009 BCSC 1498 (B.C. S.C.) — considered

Shooting Star Amusements Ltd. v. Prince George Agricultural & Historical Assn. (2009), 2009 BCCA 452, 2009 CarswellBC 2796 (B.C. C.A. [In Chambers]) — referred to

St. Elizabeth Home Society v. Hamilton (City) (2004), 2004 CarswellOnt 1491, (sub nom. *St. Elizabeth Society v. Hamilton-Wentworth (Regional Municipality)*) 50 C.P.C. (5th) 199, (sub nom. *St. Elizabeth Society v. Hamilton-Wentworth (Regional Municipality)*) 43 B.L.R. (3d) 313 (Ont. S.C.J.) — considered

Straka v. Humber River Regional Hospital (2000), 2000 CarswellOnt 4114, 1 C.P.C. (5th) 195, 51 O.R. (3d) 1, 137 O.A.C. 316, 193 D.L.R. (4th) 680 (Ont. C.A.) — referred to

United States Surgical Corp. v. Downs Surgical Canada Ltd. (1981), [1982] 1 F.C. 733, 62 C.P.R. (2d) 67, 129 D.L.R. (3d) 209, 1981 CarswellNat 126, 1981 CarswellNat 126F (Fed. T.D.) — referred to

V. (K.L.) v. R. (D.G.) (1993), 1993 CarswellBC 2892 (B.C. S.C.) — referred to

Vernon & District Credit Union v. Cue Datawest Ltd. (1999), 1999 CarswellBC 310 (B.C. S.C.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 30.04(6) — considered

MOTION by plaintiff to compel defendant to produce unredacted copies of documents requested on examination of defendant's affiant.

G.R. Strathy J.:

1 This is a pension surplus dispute that was certified by Lax J. as a class action: *McGee v. London Life Insurance Co.* (2008), 63 C.P.C. (6th) 107, [2008] O.J. No. 1760 (Ont. S.C.J.). The primary issue in the action is whether class members, former employees of the respondent ("London Life"), whose employment was terminated in 1996 as a result of a reorganization, are entitled to the surplus attributable to the partial wind-up of the staff pension plan (the "Plan"). The common issues certified by Lax J. include whether the surplus assets of the Plan were impressed with a

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trust in favour of Plan members, the quantum of the partial wind up surplus and whether London Life committed breaches of trust. Justice Lax subsequently ordered that the action be converted into an application. Affidavits have been filed, cross-examinations have taken place and documents have been produced.

2 The issue on the motion before me is whether London Life can be compelled to produce unredacted copies of documents that were requested on the examination of its affiant and which it has produced in redacted form, disclosing only those portions that it considers relevant. The applicants maintain that the documents at issue relate to the central issues in the application, particularly the creation, design, funding and maintenance of the Plan, the registration of the Plan with federal tax authorities and London Life's understanding of its legal obligations under the Plan. They say that London Life must produce all relevant documents and that it is not entitled to redact those portions that it considers irrelevant.

3 The documents at issue on this motion fall into the following general categories:

- (a) minutes of various London Life committees involving pensions, including the Management Committee, the Pension Committee, and the Management Development and Compensation Committee;
- (b) minutes of Board of Directors Meetings and Annual General Meetings of Shareholders;
- (c) various documents related to the Plan; and
- (d) material submitted to the Board of Directors of London Life.

4 Where copies of these documents have been delivered to the applicants, portions have been redacted on the basis that they are irrelevant to the issues before the court on the application. In some cases, entire documents have been redacted, or not produced, on the basis of relevance. In a few cases, redactions have been made for privilege. The applicants do not take issue with redactions for privilege.

5 For the purpose of hearing the motion, counsel for London Life provided me with unredacted copies of the documents at issue. Copies were not provided to counsel for the applicants but an "aide memoire," containing one sentence summaries of the nature of the redactions, was provided to counsel for the applicants. While a procedure of this kind is contemplated for the inspection of privileged documents under Rule 30.04(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, no such provision is made for the examination of redacted documents. Counsel for the applicant was understandably concerned, as was I, that this procedure put him at a material disadvantage in the argument of the motion.

6 In most cases, London Life admits that the document at issue is relevant, in the sense that it contains information relevant to the issues, but it says that the irrelevant portions should be redacted and should not even be disclosed to counsel for the applicants.

7 In determining whether a trust was created, the court will be required to consider all the surrounding circumstances concerning the establishment, amendment, funding, structure and operation of the Plan: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, [1994] S.C.J. No. 48 (S.C.C.); *P.I.P.S.C. v. Canada (Attorney General)* (2005), 22 E.T.R. (3d) 238, [2005] O.J. No. 5775 (Ont. S.C.J.). I agree with the observation of Panet J. in the latter case, at para. 53, that a "narrow, highly technical approach to the issue of relevance" would not be appropriate in a case of this kind. There should be a generous approach to production in this case.

8 It is impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions are not relevant. I respectfully agree with the observations of Corbett J. in *Albrecht v. Northwest Protection Services Ltd.*, [2005] O.J. No 2149, 139 A.C.W.S. (3d) 644 (Ont. S.C.J.) at para. 11 and *Guelph (City) v.*

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Super Blue Box Recycling Corp. (2004), 2 C.P.C. (6th) 276, [2004] O.J. No. 4468 (Ont. S.C.J.). In the former case Corbett J. observed that there may be some cases where it would be appropriate to redact for relevance, referring to his decision in the latter case, but he declined to make any general observations in the absence of argument on the point. In the latter case he observed that redaction is common in the case of privileged documents and also referred to *Bouchard Paradis Inc. v. Markel Insurance Co.*, [2000] O.J. No. 5210, 103 A.C.W.S. (3d) 32 (Ont. Master) where Case Management Master MacLeod had approved redaction of certain information on the basis of relevance where the parties were business competitors. The Master stated, at para. 4, that: "[t]he right to redact information from documents which are otherwise relevant should *only* be given in circumstances such as these where the parties are business competitors and the information which is not relevant may be sensitive in nature." [emphasis added]

9 The whole of a relevant document must be produced except to the extent it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection. I respectfully adopt as applicable in Ontario the statement of Lowry J., as he then was, in *North American Trust Co. v. Mercer International Inc.* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (B.C. S.C.) at para. 13:

Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant *is by its nature such that there is good reason why it should not be disclosed*, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. *In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.*

[emphasis added]

10 Lowry J. referred to a number of authorities, some of which were referred to by London Life in the motion before me, and observed, at para. 11:

In the cases to which I have been referred, litigants have been relieved from disclosing the whole of a document related to a matter in question where, but only where, the part withheld has been clearly not relevant to the issues and, because of its nature, there has been good reason why that part should not be disclosed. *With reference to the decisions of this court specifically, good reason is apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings*, or the personal sensitivity of a person's medical records, diary notations, or familial communications, and much the same can be said where expurgated disclosure of a document has been upheld in the cases cited from other jurisdictions. Statements to the effect that only the relevant parts of a document need be produced, such as in *Jervis Court Development [Jervis Court Development Ltd. v. Ricci]*, [1992] B.C.J. No. 2932 at para. 24 and *[K.L.V. v. D.G.R.]*, [1993] B.C.J. No. 1662 at para. 10, must be read in the context of what was decided.

[emphasis added]

11 In that case, the defendants sought production of an asset purchase agreement that was part of a transaction whereby the plaintiff North American Trust Company had acquired the assets of the other plaintiff, Westlaco Investment Company. One of the assets was the debenture that was the basis of the plaintiff's claim against the defendants. The defendants asked for production not only of the assignment agreement pertaining to the debenture, but also the entire asset purchase agreement. The plaintiff was only prepared to produce a redacted version of the asset purchase agreement. Lowry J. held, at para. 15, that in order to maintain that position, the plaintiffs would have to establish that the redacted portions "are both clearly irrelevant and that there is good reason why they should not be disclosed."

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12 I will return shortly to the comments of Lowry J. in the quotation above, regarding corporate minutes.

13 Irrelevance alone is not a sufficient ground on which to redact portions of a document. The party seeking to do so bears the onus of establishing that redaction is necessary to protect an important interest. Some of the cases referred to by the parties include:

(a) patents or trade secrets: *Kimberly-Clark Corp. v. Procter & Gamble Inc.* (1990), 31 C.P.R. (3d) 207, [1990] F.C.J. No. 451 (F.C.T.D.); *United States Surgical Corp. v. Downs Surgical Canada Ltd.* (1981), [1982] 1 F.C. 733, [1981] F.C.J. No. 164 (Fed. T.D.);

(b) personal income tax information: *Janhevich v. Thomas* (1977), 15 O.R. (2d) 765, [1977] O.J. No. 2227 (Ont. H.C.); *Collins v. Beach* (1988), 24 C.P.C. (2d) 228, [1988] O.J. No. 43 (Ont. H.C.);

(c) commercially sensitive financial information: *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1989), 38 C.P.C. (2d) 47, [1989] O.J. No. 1456 (Ont. H.C.); *John Labatt Ltd. v. Molson Breweries, A Partnership* (1993), [1994] 1 F.C. 801, [1993] F.C.J. No. 1343 (Fed. T.D.); *North American Trust Co. v. Mercer International Inc.*, above, at paras. 11, 13-16 (S.C.); *Bouchard Paradis Inc. v. Markel Insurance Co. of Canada*, above;

14 The additional cases referred to by Lowry J. give rise to another possible category:

(d) records of a purely private and personal nature and not relevant to the issues, such as notes between parties: *Jervis Court Development Ltd. v. Ricci*, [1992] B.C.J. No. 2932 (B.C. S.C.) and personal diaries: *Lazin v. Ciba-Geigy Canada Ltd.*, [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.); *V. (K.L.) v. R. (D.G.)*, [1993] B.C.J. No. 1662, 39 A.C.W.S. (3d) 424 (B.C. S.C.) or irrelevant and sensitive medical information.

15 Lowry J. also referred to *Goddard v. Shoal Harbour Marine Service Ltd.* (1958), 24 W.W.R. 166, [1958] B.C.J. No. 23 (B.C. S.C.). In that case, the plaintiff had been granted an equitable mortgage on all the shares of the corporate defendant in order to secure a loan to two of the directors. He claimed that the directors had fraudulently diluted his security by allotting further shares to others. He was able to become registered as the owner of the hypothecated shares and sought to have the share register rectified by having the allegedly fraudulent allotment struck out. Brown J. held that the plaintiff was entitled to production of the minutes of meetings of directors and shareholders of the corporation and copies of books and accounts of the company, but only insofar as the documents had to do "directly or indirectly" with the allotment of the disputed shares. He ordered that anything in the minute books that had nothing to do with the action "may be sealed in accordance with the English practice" (at para. 16). As far as I am aware, this decision has never been considered in Ontario.

16 I do not regard *Goddard v. Shoal Harbour Marine Service Ltd.* as authority for a general proposition that corporate minutes enjoy any special status in terms of production and discovery. Nor do I consider the observations that I have highlighted in the reasons of Lowry J. at para. 11 of *North American Trust Co. v. Mercer International Inc.* to stand for such a broad proposition. In *Shooting Star Amusements Ltd. v. Prince George Agricultural & Historical Assn.*, 2009 BCSC 1498, [2009] B.C.J. No. 2166 (B.C. S.C.), leave to appeal refused, 2009 BCCA 452 (B.C. C.A. [In Chambers]), Bruce J., held that minutes of board meetings and executive meetings, for which privilege had not been established, were required to be produced in an unredacted form. In *St. Elizabeth Home Society v. Hamilton (City)* (2004), 50 C.P.C. (5th) 199, [2004] O.J. No. 1428 (Ont. S.C.J.), Harris J. of this court found that directors' minutes did not attract privilege, noting, at para. 12, that "confidentiality alone, 'no matter how earnestly desired and clearly expressed,' does not confer privilege on a communication: *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1, 193 D.L.R. (4th) 680 (Ont. C.A.), at 698."

17 The issue was also considered by Lowry J. in *Vernon & District Credit Union v. Cue Datawest Ltd.*, [1999]

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[B.C.J. No. 364](#) (B.C. S.C.). In that case, the plaintiff had sued for a declaration that a commitment letter that it had signed in favour of the defendant did not result in a binding contract. The defendant sought production of various reports generated by the plaintiff, which had been produced by the plaintiff in redacted form. These included operations reports, a report of the general manager, a report of the board of directors and minutes of a meeting of the board of directors. The plaintiff took the position, as does London Life in the case before me, that it was only required to produce those portions of the reports that were relevant to the issues and that the balance, which it considered of no relevance, could be redacted. The plaintiff in that case went farther than London Life because it took the position that the court could not be asked to inspect the documents to determine whether the claim for relevance was sound.

18 Lowry J. firmly rejected this contention, at para. 7:

In my view, there is simply no merit in what the plaintiff says. The position it takes is not based on any claim of privilege or commercial confidentiality. Were that the case, the court might well be required to examine the documents and rule on whether the claim to privilege was sound or whether some terms of confidentiality in an order for production would be appropriate. But otherwise, a litigant is generally not entitled to refuse to produce portions of relevant documents. The whole of a document is relevant and producible if any of its contents are relevant. The documents produced in almost every commercial law suit contain much that can be said to be irrelevant to the issues. The discovery of documents would take on a whole new meaning if litigants could go through their listed documents (minutes, reports, and correspondence) and redact those portions that they did not consider bore on the pleaded issues.

19 He held that each of the documents was producible, in its entirety, subject to a claim for privilege in the case of one document.

20 It seems to me that corporate minutes, like a personal diary, may contain some information that is irrelevant but innocuous and some information that is irrelevant and very sensitive - sensitive in the sense that the party resisting production would suffer damage or real embarrassment if the irrelevant information were to be disclosed. Very often these issues are resolved between counsel. Where they are not, the court has a duty to ensure that relevant information is produced and also to ensure that the process is not being used for oppressive or collateral purposes.

21 In this case, London Life has identified no aspect of any of the documents at issue that gives rise to an interest requiring protection, other than the general interest that every company would have in the confidentiality of minutes of board and committee meetings and other corporate records. Nothing has been identified that could be in any way harmful to the commercial interests of London Life or that would cause embarrassment or prejudice to any third party.

22 For these reasons, I order that London Life produce for inspection copies of all relevant documents in their unredacted form. Counsel should be able to agree on a procedure for inspection, but if they are unable to do so an appointment may be scheduled through Judges' Administration. I would also expect that counsel will be able to agree on a record that does not contain irrelevant material, for filing with the court. If, following production of the documents, the parties are unable to agree on the record, and London Life wishes to bring a motion to exclude materials from the record, a motion may be brought.

23 Counsel may make brief written submissions as to costs, addressed to me care of Judges' Administration.

Motion granted.

END OF DOCUMENT

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Case Name:

Araujo v. Jews for Jesus

**RE: Marcello Araujo, and
Jews for Jesus/Juifs Pour Jesus**

[2010] O.J. No. 4739

2010 ONSC 5820

Court File No. 06-CV-309783

Ontario Superior Court of Justice

Master R. Dash

Heard: October 19, 2010.

Judgment: November 5, 2010.

(40 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Range of examination -- Objections and compelling answers -- Motion by employer, defendant to wrongful dismissal action with counterclaim against employee, for order compelling employee to answer questions refused at examination for discovery dismissed -- Counterclaim related to employee's alleged misuse of employer's confidential donor list after he started working for competitor -- Identity of employer's workers who sent employee emails about non-solicitation policy and donor list not relevant to issues between parties -- Workers would not have knowledge of alleged misuse of information they provided -- Workers at risk of disciplinary action by employer of identified -- Ontario Rules of Civil Procedure, Rules 30.1.01, 31.06.

Motion by Jews for Jesus for an order compelling Araujo to answer questions refused on examination for discovery. Jews was an evangelical society that recognized Jesus as Messiah. Araujo worked for Jews as a student and was ordained a minister and Tenured Minister until he was dismissed on November 28, 2005. Jews claimed Araujo breached provisions in its Workers' Covenant and Lifestyle and Ethical Conduct Policy by getting married without advising Jews and seeking counsel from Jews, and by breaching Jews' courtship and dating guidelines. In December 2006, Araujo commenced employment with a competitor of Jews, Chosen People Ministries. In

January 2007, Araujo sent a letter on Chosen People's letterhead to persons who had donated to Jews, informing them of his new position, and soliciting donations. Jews sought a declaration Araujo breached his contractual and fiduciary duties, as well as an injunction. The Covenant provided that employees would refrain from initiating contact with Jews' donors for 12 months from the date they left Jews' ministry. Araujo did not sign the covenant because he disagreed with other sections dealing with courtship and marriage. He took the position the covenant was not binding on him. The questions refused at examination for discovery dealt with the identity of a person with which Araujo communicated by email after he left Jews. Araujo had provided redacted copies of emails in which this unidentified person provided Araujo with a copy of Jews' non-solicitation policy. He refused to identify the person because the person's identity was irrelevant and because the person might face disciplinary action from Jews. Araujo also refused to identify the person working for Jews who provided him with donor names. Araujo denied he had ever seen a donors' list and claimed he only solicited donations for Chosen People after 14 months had passed from his dismissal, and only approached those donors he had cultivated himself during his time with Jews. He admitted that, during his employment with Hews, the office administrator had provided him with an electronic copy of his own donor list, but claimed he left this on his hard drive at Jews and never had access to it afterwards. Araujo denied he had a copy of an email he received from an unidentified Jews worker, providing him with the list of his donors' names. He refused to identify this person for the same reasons. Jews admitted it had never searched its archives for the emails in question because this task would be too onerous and because some of its archives were no longer available.

HELD: Motion dismissed. Araujo was not required to answer Jews' questions. The person who sent Araujo the non-solicitation policy had no knowledge or involvement in any use Araujo made of the information. Similarly, the person who sent Araujo the donors' list could not be expected to have knowledge of any transaction or occurrence in issue, such as Araujo's alleged misuse of Jews' confidential information. Identifying the person who sent the policy would in no way serve to resolve the issues between the parties. There was a real risk Jews might discipline this person. This was a good reason not to order Araujo to provide an unredacted copy of the email. Araujo was awarded costs of the motion of \$5,000. The amount he claimed of \$17,656 was reduced because he consented to answer three other questions refused at examination for discovery after the parties had prepared for the motion and spent a significant amount of time arguing it. The court also considered the hours Araujo's lawyers expended to prepare for the motion excessive.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 30.1.01(3), Rule 30.1.01(5), Rule 30.1.01(8), Rule 31.06, Rule 31.06(1), Rule 31.06(2), Rule 34.12(2), Rule 39.02(4)(b), Rule 57.01(1)

Counsel:

Barry Goldman, for the Plaintiff.

Ranjan Agarwal, for the Defendant.

REASONS FOR DECISION

1 MASTER R. DASH:-- The plaintiff's action is for wrongful dismissal and the defendant has counterclaimed as a result of the plaintiff soliciting the defendant's donors following termination. On this motion the defendant seeks to compel the plaintiff to answer questions refused on his examination for discovery that would require him to reveal the name of other employees of the defendant who sent him a copy of the non-solicitation agreement and a list of donors.

BACKGROUND

2 The plaintiff was employed with the defendant Jews for Jesus ("JFJ") from 1993 as a student, then as an ordained minister and Tenured Missionary until he was terminated on November 28, 2005. JFJ describes itself as a Jewish evangelistic society that acknowledges Jesus as Messiah. The defendant asserts that the plaintiff was terminated for cause by breaching provisions in the Jews for Jesus Worker's Covenant ("the Covenant") and the Jews for Jesus Lifestyle and Ethical Conduct Policy ("the Policy") when he got married without advising the defendant and seeking the defendant's counsel and by breaching the defendant's courtship and dating guidelines. Questions initially refused respecting pre-marital sex with his wife and production of his marriage certificate were resolved between the parties shortly before the hearing of the motion.

3 In December 2006 the plaintiff commenced employment with a competitor of the defendant, Chosen People Ministries Canada ("CPM"), and in January 2007 sent a letter on CPM letterhead to persons who had been donors to JFJ informing them of his new position and soliciting donations. The defendant counterclaims for a declaration that the plaintiff breached his contractual and fiduciary duties by soliciting its donors and an injunction.

4 Paragraph E3 of the Covenant provides that the employee is obligated to build donor relationships for JFJ and understands "that if I were to leave Jews for Jesus and join or form another ministry it would be unethical for me to seek to win donor or church income away from Jews for Jesus. Therefore if I do leave this ministry, for a period of 12 months I will not initiate contact with individuals or churches who are Jews for Jesus' donors except those I knew before my service." The plaintiff never signed the Covenant because he disagreed with the section of the Covenant respecting courtship and marriage which he asserted was cultish. He claims the Covenant is not binding on him.

THE REFUSALS

5 In Schedule A to his affidavit of documents, the plaintiff listed at Tab 13 a document he referred to as "Excerpt from Jews for Jesus Policy Manual - Undated." The document itself produced at tab 13 was actually an email from the plaintiff with the name of the recipient, date and subject redacted, the text of which partly reads: "Thanks so much, I thought it was one year, but I was not sure." The balance of the text was redacted as it contains information that could identify the recipient.

6 The email from the plaintiff was in response to an email received by the plaintiff from the same unnamed person dated December 20, 2006¹. The original email from the unnamed source continues as part of the same document at Tab 13, the text of which partly reads: "Dear Marcello, below is the text from the policy manual. I remembered correctly-one year after leaving JFJ.": Identifying information is then redacted and at the bottom of the email the referenced text from the policy manual appears as follows:

NON-SOLICITATION AFTER TERMINATION

Upon termination of employment with Jews for Jesus, the Missionary agrees, for a period of one year, not to call upon, solicit donations from or contact, any person or organization that is or was a donor or donor church of Jews for Jesus during the Missionary's employment with Jews for Jesus, except for persons or organizations that were friends or financial supporters of the Missionary prior to the beginning of his or her employment with Jews for Jesus.

Both parties agree that this section of the policy as excerpted in the email was the non-solicitation policy in force at the time of the plaintiff's dismissal.

7 During his examination for discovery, at question 695, the plaintiff was asked to produce an unredacted copy of the email. He refused for two reasons. Firstly he submits that the identity of the sender is irrelevant. Secondly, he confirms that the mail was sent to him by an individual who is an employee of JFJ and he is concerned that the individual will face disciplinary action by JFJ for assisting the plaintiff in this litigation.

8 The second refusal concerns identifying the person at JFJ who provided names of donors to the plaintiff. The defendant had pled in its counterclaim that the plaintiff during his employment with JFJ had access to a list of JFJ Canada's donors, which was confidential information which the plaintiff was contractually bound not to disclose, that in January 2007 the plaintiff distributed a letter to persons on JFJ's donor list soliciting donations to his new employer CPM and that the plaintiff disclosed JFJ's donor list to CPM. In his defence to counterclaim the plaintiff denies he was bound by the Covenant, denies he had access to JFJ's donor list, denies he has ever seen such a list and states that the only names of donors he had access to were those donors that the plaintiff himself cultivated over his years with JFJ. He pleads that the letters sent were to announce his new

relationship with CPM, offer prayers and tangentially to ask for financial support. Finally he pleads that even if he did send a donor solicitation letter to any former JFJ donors, they were sent approximately 14 months after he was terminated, beyond the one year prohibition in the Policy Manual.

9 At his examination for discovery, the plaintiff stated that during his employment the office administrator had sent him an electronic copy of his own donor list containing approximately 5,000 names but he left it on the hard drive on his former JFJ work station, never had access to it, never transferred it and never printed a hard copy.² He claims he does not have a list of JFJ donors. He did however subsequently receive from a co-worker at JFJ an email containing names of donors cultivated by the plaintiff at JFJ and the plaintiff in turn provided those names (but not a "contact list" or contact information) to CPM. Those persons were among the individuals to whom the plaintiff sent a letter in January 2007 that included a request for donations on behalf of CPM. The plaintiff testified that he no longer has a hard copy of that email and that it is no longer accessible on his computer as a result of a routine reformatting of his hard drive.

10 At question 893 the plaintiff was asked who sent him the email containing the names of donors. He refused. Again he refuses to provide the name for two reasons. Firstly he submits that the identity of the sender is irrelevant. Secondly, he confirms that the mail was sent to him by an individual who is an employee of JFJ and he is concerned that the individual will face disciplinary action by JFJ for assisting the plaintiff in this litigation. The defendant refused to undertake in writing that the individual would not be disciplined or terminated.

11 With respect to both emails, the plaintiff's evidence is that only 10 individuals at JFJ had computer access to the information. The defendant concedes it has never searched its email archives or the computers of its employees to locate the emails. It claims searching its archive would be disproportionate work (without setting out the work or costs required) and that its servers were updated in November 2008 making some of its archives no longer available or difficult to search. It has apparently not tried.

ANALYSIS

The Test for Relevance

12 In determining relevance the court must consider rule 31.06(1) which provides: "A person shall answer ... any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) ..." The defendant relies particularly on subrule 31.06(2) which provides:

A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise.

13 The defendant submits that the person or persons who sent the two emails might reasonably be expected to have knowledge of occurrences in issue, namely the sending of the donor solicitations.

14 The test under rule 31.06 before the recent amendments to the rules of civil procedure which came into effect on January 31, 2010 required a person under examination to answer any questions "relating to" any matter in issue in the action. This was judicially interpreted as meaning any question with a "semblance of relevance" to any issue in the action.³ A "wide latitude" was permitted in questioning.⁴ The effect of the change in the rules is "to discard the 'semblance of relevance' test and replace it with a simple relevance test."⁵ The test of semblance of relevance has therefore been replaced "with a stricter test of 'relevance'."⁶ Although in many cases it will be difficult to separate what is relevant from what has a semblance of relevance, and while "the recent change in wording ought not to deprive parties of a meaningful discovery, nevertheless the changed wording must be given some meaning."⁷

15 Although this examination for discovery took place in February 2008, before the rule amendments came into effect, and although there is conflicting case law with respect to whether the pre-2010 test or the new test applies to questions refused at an examination for discovery conducted prior to January 1, 2010, I share the view expressed by Master Muir in *Noble* that the new test applies.⁸

16 Under the prior rule, even though a wide latitude was permitted, there were limits. "Semblance of relevance" was not an "open door to harass a party by exploring all dealings he may be involved with."⁹ With the new stricter test of simple relevance, this admonition is of at least equal, if not greater, import.

17 It "is well settled law that the pleadings determine whether a particular question is relevant and must be answered."¹⁰ The appropriate standard is therefore whether the question asked is "relevant to any matter in issue *as defined by the pleadings*."¹¹ (emphasis in original).

Is the Identity of the Sender of the Emails Relevant to the Issues in the Action?

18 What is the issue as defined by the pleadings to which the identity of the sender of the emails is relevant? The defendant's counterclaim pleads that the plaintiff was bound "to maintain and not disclose JFJ Canada's confidential information", the plaintiff during his employment "had access to a list of JFJ Canada's donors (the 'Donor List')", the "Donor List is confidential information" belonging to JFJ, in January 2007 the plaintiff sent a "Donor Solicitation Letter" to "persons on JFJ Canada's Donor List and requested they donate money to CPM" and "the plaintiff disclosed JFJ Canada's Donor List to CPM." In his Defence to Counterclaim the plaintiff denies "that he had access to a list of JFJ Canada's donors", that the only names of donors that he had access to were donors that the plaintiff himself "cultivated over his years" with JFJ, the plaintiff has never seen a list of JFJ Canada's donors, denies that the letters sent in January 2007 were donor solicitation letters, denies that the letters were "addressed to persons on JFJ Canada's Donor List", states that if any such persons were previously donors to JFJ it is a coincidence as they were also on the CPM

mailing list. Finally the plaintiff pleads that in any event any such solicitation or contact with donors was outside of the one year non-solicitation period set out in the JFJ Policy Manual.

19 The issues therefore relating to the solicitation letters as defined by the pleadings are (1) Did the plaintiff solicit donations from persons who had been donors of JFJ and (2) If so, did he violate any contractual or fiduciary duties owing to the plaintiff? That would involve the trial court answering the following questions. (a) when did the plaintiff send the letters? (b) to whom were the letters sent? (c) were such persons on the JFJ donor list? (c) did the letters solicit donations? and (d) what are the contractual requirements binding the plaintiff to not solicit or contact JFJ donors? It appears that the answers to all of those questions would come from the plaintiff and from documents in the possession of the plaintiff, CPM and JFJ. It does not appear that the answers to those questions, from a factual perspective, are in dispute.

20 It is difficult to imagine what relevant information the persons who sent to the plaintiff a copy of the non-solicitation policy and names of the plaintiff's former donors might have. What "transactions or occurrences in issue in the action" might the senders of these emails be expected to have knowledge of? The "transactions or occurrences in issue in the action" are the sending of the letters to potential donors on behalf of CPM.

21 The sending of the non-solicitation policy from the Policy Manual in the first email is not a transaction or occurrence in issue. The plaintiff has admitted he received the policy in the email of December 2006 and was aware of it before he sent the letters in January 2007. The person who sent him the policy provision cannot be expected to have knowledge of transactions in issue. That person sent him the policy. What he did as a result of receiving it is what is in issue and that information will come from the plaintiff.

22 The events surrounding disclosure to the plaintiff of the names of persons that he cultivated as donors while he was with JFJ is not an occurrence in issue in this action. While I appreciate that the defendant would justifiably want to know which of its employees sent to the plaintiff, a former employee bound by a non-solicitation agreement, the names of any of its donors and while that employee may have independently breached some duty owing to JFJ, that is not what is in issue in this action. What is in issue in this action is what the plaintiff did once he received those names. Again, that information will come from the plaintiff and from documents in the possession of the plaintiff and CPM, not from the person who supplied the names. In my view the person who sent him those names cannot be expected to have knowledge of any transaction or occurrence in issue in the action, and in particular would not have relevant information on the misuse *by the plaintiff* of the defendant's confidential information.

23 Furthermore, if the defendant is interested in ascertaining the names of its employees who may have assisted the plaintiff, whether for purposes of this action or for disciplinary purposes, there is nothing to prevent the defendant from attempting to search its email archives to the extent that it is available or from making enquiries of its employees. The defendant has failed to satisfy me

with proper evidence that such search would result in disproportionate costs.

May the Identifying Information be Redacted from the Email Produced?

24 There is a further issue with respect to the email produced that enclosed the non-solicitation policy. The general rule is that the entirety of a relevant document must be produced. While redactions are common on the basis of privilege, "it is impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions are not relevant."¹² That rule however is not absolute: "The whole of a relevant document must be produced except to the extent it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection."¹³ Often the harm is that resulting from the disclosure of sensitive commercial information¹⁴, but it can include "records of a purely private and personal nature and not relevant to the issues."¹⁵

25 The following passage best sets out the exception to the rule and in my view is particularly apposite of what I must determine:

Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant *is by its nature such that there is good reason why it should not be disclosed*, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. *In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.*¹⁶ [emphasis already added in citing case]

26 The email was produced for the purpose of establishing the non-solicitation policy from the defendant's Policy Manual and that the plaintiff was aware of it before he sent the solicitation letters. I have already determined that the identity of the person who sent him the policy is not relevant to any issue in the action. Identifying the source "will in no way serve to resolve the issues."

27 The person who sent the email is an employee of the defendant. In my view, there is a genuine concern that the defendant may, if it is told the identity of the source, discipline that person. The plaintiff offered to identify the senders of the emails if the defendant confirmed in writing that the person would not be disciplined or terminated, but the defendant refused to do so. While of course the defendant is under no obligation to give a written undertaking to the plaintiff, its refusal to do so speaks volumes. As further evidence of such possibility, the defendant in its factum, does not deny that it will take disciplinary action, but to the contrary states "JFJ's treatment of another employee, especially where that employee may have breached his or her contractual or fiduciary obligations, is irrelevant to whether Araujo is required to produce or disclose information to JFJ."

28 While the defendant's lawyer admitted during his submissions that the defendant would be bound by the deemed undertaking in rule 30.1.01(3) not to use that information, which was revealed as part of the discovery process, "for any purposes other than those of the proceeding in which the evidence was obtained" and that using the information to discipline the employee who sent the email would be a prohibited use under the rule, that was not an admission given in the defendant's written material but was a response to pointed questioning from the court. Further, should the evidence identifying the source be filed with the court in any interlocutory proceeding or given at trial, then under rule 30.1.01(5) the deemed undertaking ceases to apply. Finally, the defendant would not be prohibited from seeking relief from the deemed undertaking under rule 30.1.01(8) by establishing to the court that the interest of justice outweighs any prejudice to the party who disclosed the evidence, for example in future proceedings by or against the employee.

29 In the result, the employee who sent the plaintiff the policy could be at risk of discipline if his or her identity were revealed. In my view this constitutes "good reason why it should not be disclosed." Disclosing the identity "could cause considerable harm but serve no legitimate purpose in resolving the issues." In my view the information redacted from the email may stay redacted.

30 The same issue does not arise with respect to the email from an employee disclosing the names of donors cultivated by the plaintiff while at JFJ since the plaintiff has no copy of the email and as a result no document was produced. Since no email was produced there is no issue with respect to redacting a part of it.

Is the Test for Confidentiality Met?

31 If I am wrong with respect to the relevance of the identity of the sender of either or both emails, then the identity could only be withheld on the basis of confidentiality. There is of course no free standing privilege for withholding relevant but confidential information. I was referred to my decision in *Cadillac Fairview v. Standard Parking* where I held that requests to withhold the identities of non-police informants' identities "should be dealt with on a case-by-case basis so that the factors in the Wigmore test can be considered in the context of the particular circumstances of each situation."¹⁷ What is similar with the situation here and in *Cadillac* is that an employee of a defendant provided information to a plaintiff, but what is different is in *Cadillac* the employee was providing evidence of fraudulent activity of co-employees of the defendant to the plaintiff who was the victim of that fraud, in other words a "whistle blower". Although the employee herein could also be considered an "informant" in the broadest sense, he or she does is not disclosing evidence of wrongdoing on the part of the defendant or its employees. These employees could perhaps be categorized more as a "mole" than a "whistle blower." In my view however the same test should apply to withhold the identity of the informant given that fear of retaliation against the informant is key to protecting confidentiality in both situations.

32 The Wigmore test that would apply for withholding the identity of the employee informant is as follows:

The Wigmore test for determining the applicability of common-law privilege on a case-by-case basis was summarized by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at p. 260 where Spence J., speaking for the court, outlined the "four fundamental conditions as necessary to the establishment of a privilege against the disclosure of communications" as follows:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.¹⁸

33 The plaintiff has not filed his own affidavit. He has provided no information whatsoever that the communication from either or both informants originated in a confidence that they would not be disclosed. A fear that there could be reprisals against the employee is not evidence that the communication was given in confidence. The onus is in the plaintiff to provide an evidentiary framework for the four Wigmore conditions, including the first condition - that the communication originated in a confidence. While the communications may well have been made in confidence, the plaintiff has provided no evidence to that effect. Without evidence of this essential element it is unnecessary to consider the other conditions since all depend upon proof that the communications were given in confidence. I am therefore not in a position to decide if confidentiality is essential to the maintenance of the relationship of the parties, nor am I satisfied that the relationship of an employee informing an ex-employee of donor sources of his employer should be sedulously fostered. On the other hand, if the first three had been satisfied, the balancing in the fourth condition would not have been difficult since in my view disclosure would have little or no benefit to the correct disposal of the litigation.

Conclusion

34 In conclusion, if the identity of the employee(s) who sent the two emails were relevant to any issue in this action I would conclude that the plaintiff has not satisfied the test for protection of confidential sources. I have however determined that the identities of those individuals are not relevant to any issue as defined by the pleadings in this action and those employees would not be expected to have any information about any transaction or occurrence that is in issue in the action. Therefore questions 695 and 893 need not be answered.

COSTS

35 The plaintiff has submitted a costs outline for \$17,656 and the defendant for \$10,533 both on a partial indemnity scale and inclusive of disbursements and HST. The plaintiff was entirely successful on the two questions argued on October 19. The motion record however originally listed five questions refused. In two of those questions the defendant's lawyer asked the plaintiff when he and his wife first had sex and whether it was before their marriage. The questions were apparently asked in support of cause for termination, given specific courtship rules set out in the Covert and the Policy. The plaintiff refused to answer on the basis that the questions were irrelevant as well as improper and offensive. The third question asked for a copy of the plaintiff's marriage registration and certificate also in support of cause respecting marriage requirements. On October 15 the plaintiff agreed to answer those questions and did so on October 18. He answered on a "without prejudice" basis and on the understanding that that he does not admit the propriety of the questions and strenuously maintains his position that all three questions were properly refused on the basis of lack of relevance and with respect to the sex questions also on the basis of their being improper and offensive. It appeared, without specifically referring to the rule, that Mr. Goldman was relying on rule 34.12(2) that permits a question that has been objected to, to be answered with the objector's consent but a ruling must be obtained from the court "before the evidence is used at a hearing." However in an email later the same day Mr. Goldman stated that they "were not contesting the admissibility of those questions and answers for the purpose of trial." The plaintiff therefore cannot rely on rule 34.12(2) and is not entitled to a ruling on admissibility based on relevance. Whether or not the questions were irrelevant, improper or offensive, the plaintiff chose to answer them without condition and the defendant is to be taken as successful in obtaining answers to those questions as a result of bringing the motion.

36 The three questions that were answered were kept "live" until the day before the return of the motion. Both parties addressed all five questions extensively in their motion materials and preparation was done for all questions. The vast bulk of the work was done prior to the time that the plaintiff answered the three questions. Both sets of questions seem equally important and I am unable to separate whether more time was spent on one set rather than the other before October 18. I am therefore of the view that there has been an equal division of success with respect to the preparation work prior to October 18. The plaintiff was entirely successful with respect to work done after that time and at the hearing. In my view the plaintiff should have his costs of the motion but with an appropriate reduction to account for the defendant's partial success.

37 In terms of quantum and in considering the factors in rule 57.01(1) I am of the view that the motion was of moderate complexity. Both sets of questions were obviously important to both parties given the amount of work they each invested in it. The informer identification questions were important to the plaintiff given the real concern over reprisals against a non-party. The questions respecting the plaintiff's pre-marital sex with his wife were clearly personal and offensive and thus were important to the plaintiff, but their relevance has not been determined given the plaintiff's agreement to answer the questions. I am unwilling to speculate as to why the information

sought in both sets of questions was so important to the defendant to justify the extensive costs expended in pursuing them. The amounts claimed in the action are not large, with the plaintiff's claim of approximately \$111,000 just over what would now be simplified procedure limits in addition to punitive damages. The counterclaim does not seek damages, only declaratory and injunctive relief. Two lawyers for the plaintiff have claimed for 63.4 hours in total for preparation for the motion and materials in addition to attendances at the hearing and an earlier adjournment. The plaintiff's responding motion record consisted solely of excerpts from discovery transcripts and a supplementary affidavit consisted of a short affidavit attaching correspondence. The plaintiff however reviewed the defendant's more extensive materials and prepared a detailed factum. I take no issue with the partial indemnity rates charged by plaintiff's lawyers. The hours claimed in my view however exceed what the court finds reasonable given the nature of the motion, although even the defendant's lawyers spent 43.7 hours preparation in addition to counsel fee, albeit at lower partial indemnity rates.

38 The plaintiff's time includes cross-examination of Carlton Cunningham, the lawyer for the defendant and its affiant on this motion. Rule 39.02(4)(b) provides that a party who cross-examines on an affidavit filed on a motion¹⁹ is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination regardless of the outcome of the proceeding unless the court orders otherwise. Although there are a number of references to the Cunningham affidavit in the plaintiff's factum there is but one reference to the cross-examination, and on a minor point. Cross-examining a lawyer affiant on an interlocutory motion is rarely necessary or helpful to the outcome of the motion and this is no exception. I am not satisfied that there is any reason to order otherwise and the presumptive provisions of rule 39.02(4)(b) shall apply. I would not allow the plaintiff to claim any portion of the costs of the cross-examination and the costs of the defendant in respect thereto shall be set off against the costs otherwise payable to the plaintiff.

39 Taking into account all of the circumstances as discussed and making an appropriate reduction for the partial success of the defendant and the set-off for the costs of the cross-examination, I am of the view that \$5,000 inclusive of disbursements and HST would be fair and reasonable costs of the motion to be awarded to the plaintiff. Given the defendant's own costs outline this amount would be well within their reasonable expectations.

ORDER

40 This court hereby orders as follows:

- (1) The plaintiff need not answer questions 695 and 893 that were refused at his examination for discovery.
- (2) The defendant shall pay to the plaintiff his costs of this motion within 30 days fixed in the sum of \$5,000.00.

MASTER R. DASH

cp/e/qlafr/qlvxw

1 That date was originally redacted, but a second copy with the date included was forwarded at a later date.

2 A previous partial list of approximately 130 names had been printed but it was returned to the office administrator as it was incomplete.

3 *Kay v. Posluns* (1989), 71 O.R. (2d) 238 at paras.19-20

4 *Kay v. Posluns*, supra at para. 20

5 *Justice Reform Project Summary of Findings and Recommendations*, the Honourable Coulter Osborne, November 2007, recommendation 29

6 *Civil Justice Reform Project* supra, p. 58.

7 *Brand Name Marketing v. Rogers Communications Inc.*, 2010 ONSC 1159, [2010] O.J. No. 978 at para. 81

8 *Noble v. York University Foundation*, 2010 ONSC 399, [2010] O.J. No. 794 at para. 14

9 *Kay v. Posluns*, supra at para. 20

10 *Noble v. York University*, supra at para. 17

11 *Brand Name Marketing*, supra at para. 81

12 *McGee v. London Life Insurance Co.*, 2010 ONSC 1408, [2010] O.J. No. 898 (SCJ) at para. 8

13 *McGee*, supra at para. 9

14 *McGee*, supra at para. 13

15 *McGee*, supra at para. 14

16 *McGee*, supra at para. 9 adopting the passage in *North American Trust Co. v. Mercer International Inc.* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (BCSC)

17 *Cadillac Fairview Corp. v. Standard Parking of Canada Ltd.*, [2004] O.J. No. 37, 50 C.P.C. (5th) 72 at para.18.

18 *Cadillac Fairview Corp.*, supra at para. 20.

19 Other than a motion for summary judgment or contempt.

Case Name:

McDermott v. Rebuck

Between

**Kevin McDermott and Robin McDermott, Plaintiffs, and
Steve Rebuck and Colleen Rebuck, Defendants**

[2008] B.C.J. No. 1092

2008 BCSC 766

71 C.L.R. (3d) 297

2008 CarswellBC 1222

169 A.C.W.S. (3d) 297

Docket: S072424

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

Master G. Taylor

Heard: June 9, 2008.

Judgment: June 13, 2008.

(29 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Relevancy -- Scope -- Production by non-parties -- Jurisdiction -- British Columbia -- Application by the plaintiffs in a breach of contract action for disclosure of income information of the male defendant contained in a mortgage loan application that was made by the defendants, allowed -- Defendants failed to show that the information was irrelevant -- They also failed to show there was a good reason beyond alleged irrelevance why the information should not be disclosed -- Income information of the two defendants was therefore to be disclosed -- Bank to whom application was made was also ordered to provide a certified copy of the banking records related to the mortgage

loan and to a line of credit.

Contracts -- Proceedings in contract -- Practice and procedure -- Discovery -- Jurisdiction -- British Columbia -- Application by the plaintiffs in a breach of contract action for disclosure of income information of the male defendant contained in a mortgage loan application that was made by the defendants, allowed -- Defendants failed to show that the information was irrelevant -- They also failed to show there was a good reason beyond alleged irrelevance why the information should not be disclosed -- Income information of the two defendants was therefore to be disclosed -- Bank to whom application was made was also ordered to provide a certified copy of the banking records related to the mortgage loan and to a line of credit.

Application by the plaintiffs for disclosure of income information of the male defendant that was contained in a mortgage loan application that was made by the defendants. The plaintiffs originally applied for the third party Bank of Nova Scotia to provide them with certified copies of documentation and banking records related to the mortgage application. The notice of motion arose out of an action against the defendants for breach of contract in regard to the purchase of a building lot and the construction of a house on that lot. The plaintiffs claimed that the information sought from the mortgage loan application was relevant to the matters in issue. The defendants submitted that the information requested was of a personal and confidential nature such that the information requested was beyond the scope of the pleadings. At the hearing the defendants provided 36 pages of material to the plaintiffs. This represented the Bank's file regarding the mortgage application. The stated income of the male defendant on the application form had been redacted.

HELD: Application allowed. The defendants failed to show that the information was irrelevant. They also failed to show there was a good reason beyond alleged irrelevance why the information should not be disclosed. The income information of the two defendants was therefore to be disclosed. The Bank was also ordered to provide a certified copy of the banking records related to the mortgage loan and to a line of credit.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 57, Rule 57(3), Appendix B

Counsel:

Counsel for the Plaintiffs: G.J. Lecovin, Q.C.

Counsel for the Defendants: P.W. Schwartz.

Reasons for Judgment

1 MASTER G. TAYLOR:-- By notice of motion dated May 20, 2008, the plaintiffs seek an order that a third party, the Bank of Nova Scotia or Scotiabank, provide counsel for the plaintiffs certified copies of documentation and banking records related to a mortgage loan application made by the defendants in 2005.

2 The notice of motion arises out of an action against the defendants for breach of contract in regard to the purchase of a building lot and the construction of a house on the building lot.

3 The plaintiffs claim the information sought from the mortgage loan application is relevant or possibly relevant to the matters in issue.

4 The defendants submit that the information requested is of a personal and confidential nature such that the information requested is beyond the scope of the pleadings.

5 At the hearing of this matter, counsel for the defendants provided approximately 36 pages of material to counsel for the plaintiffs which, it was said, represents the bank's file with regard to the mortgage application made by the defendants at the relevant time. I was then told that the only issue with respect to the mortgage application was with regard to the stated income of the male defendant on the mortgage application form. In fact, while I had been told that the male defendant's social insurance number was also redacted from the provided documents, it turns out that was no longer in issue and, accordingly, the said social insurance number was read into the record.

6 So, the only issue left to be determined on the application for the mortgage application file is whether or not the male defendant's gross monthly income and other monthly income on both the application dated September 15, 2004 and the application dated February 7, 2005 should be disclosed to the plaintiffs. The defendants submit that this information is not relevant to the issues as it is not needed by the plaintiffs either to advance their claim, to test the defence of the defendants, to test the counterclaim of the defendants, nor to advance their defence to the counterclaim.

7 The plaintiffs submit that the defendant's financial position is relevant to show that he needed the extra income to support getting a mortgage.

8 As a result of the defendants' position in this matter, I believe it is necessary to examine the pleadings, as they currently exist, to determine if they provide a sufficient framework for the disclosure of Mr. Rebuck's income particulars. Accordingly, I set out portions of the Statement of Claim below:

7. Pursuant to the Contract of Purchase and Sale dated July 23, 2004, the parties agreed as follows:

- a. The Defendants would acquire a building lot and pay all costs of construction of a home thereon.
 - b. The Defendants would hire the Plaintiff, Kevin McDermott, to construct the home upon the said lot in accordance with local building codes.
 - c. The Defendants would sell, and the Plaintiff would be entitled to purchase, the property for the sum of \$25,000 above the Defendants' costs of construction.
 - d. The Defendants would provide all receipts to the Plaintiff to verify their costs of construction.
 - e. The Defendants would pay the Plaintiff Kevin McDermott, a management fee of \$15,000 for the construction of the new home.
8. In accordance with their agreement, the Defendant, Steve Rebuck, purchased the lands at 7295 196A Street, Langley, BC, by means of down payment and a construction loan.
9. The Plaintiff, Kevin McDermott, commenced construction of the home on those lands and substantially completed construction on or about January 21, 2005.
10. The plaintiff provided services to the Defendants, in addition to the management of the project, to a value of \$14,475.
11. The Plaintiffs paid the Defendants the sum of \$25,000 towards the purchase price of the property and paid various construction costs of approximately \$135,551.53 for a total of \$160,551.53, of which the defendant repaid only a portion.
12. The Plaintiffs were ready, willing, and able to purchase the property.
13. The Defendants provided the Plaintiff with a figure for the purchase price but refused or neglected to provide the receipts verifying this figure.
14. The Plaintiffs, to the knowledge of the Defendants, had always intended to live in the house for one year before selling it. The Defendant, Steve Rebuck, offered to leave title to the property in his name and change the construction loan into a conventional home mortgage, and transfer it at a later date to a third party that the Plaintiffs would sell to. This was agreeable to the Plaintiffs because it would save them from paying property purchase tax, associated closing costs, and they could assume payment of Steve Rebuck's mortgage payments, which was at an interest rate which was lower than what they had obtained.
15. On or about February 12, 2005, the Defendants prevailed upon the Plaintiffs to enter into a lease on the property. The Defendant, Steve Rebuck, advised the Plaintiffs that he required a "lease" document to show his lender.

16. On or about March 1, 2005, the Defendant Steve Rebuck prevailed upon the Plaintiffs to sign a document entitled McDermott Sales Contract Option to Purchase Real Estate on the pretext that it offered the Plaintiff's protection while they resided in the home. The Defendants did so on the understanding that the price set out in the document would be substantiated by the Defendants.
17. The Plaintiffs moved into the home and paid the mortgage payments, insurance and property taxes on the property, in accordance with the terms of the mortgage obtained by the Defendant Steve Rebuck.
18. On October 13, 2005, the Defendant, Steve Rebuck, delivered to the Plaintiffs another written agreement by which he proposed to modify the terms of the Option to Purchase. The Plaintiffs did not agree to the terms therein and did not sign the written agreement.
19. By letter dated October 29, 2005, the Defendants threatened to list and sell the property unless the terms of the proposed written agreement were agreed to.
20. The Defendants sold the property to a third party.

9 In response the defendants filed a statement of defence on September 20, 2007 portions of which read as follows:

3. In response to paragraphs 5 and 6 of the Statement of Claim, Mr. and Mrs. Rebuck state that in the [sic] July 2004 they entered into a written agreement dated July 23, 2004 titled "Contract of Purchase and Sale," ("the Agreement"), with the Plaintiff Kevin McDermott, ("Mr. McDermott"). The McDermotts were identified as "Buyer" and the Rebucks as "Seller." Under the terms of that agreement, Mr. McDermott agreed to build a house at 7295 - 196 A Street, Langley, British Columbia, (the "First House"). All terms of that agreement were set out in writing in the text of the Agreement only.
4. In specific response to paragraph 7 of the Statement of Claim, Mr. and Mrs. Rebuck note in addition that the Agreement also states:

"It is understood that should the buyer for any reason not be able to purchase the house upon completion, the buyer will forfeit all claims of payment for work completed, management fee's or otherwise, until which time the seller can find a buyer for the home and profits in excess of \$25,000 to the seller."

5. In response to paragraph 8 of the Statement of Claim, Mr. Rebuck states

that he provided, through obtaining a builder's loan, the sum of \$191,764.49, (one hundred and ninety-one thousand, seven hundred and sixty-four dollars and forty-nine cents), for the purchase of the property on which the First House was to be built as well as paying for approximately \$199,386.00, (one hundred and ninety-nine thousand, three hundred and eighty-six thousand dollars) in house construction expenses. Mr. Rebuck states that sum as approximate because although he has receipts for \$179,386.00 of that amount, approximately \$20,000.00 of the that amount is unaccounted for by Mr. McDermott, despite Mr. Rebuck's repeated requests for receipts to show on what that approximate amount was spent. Of the \$179,386.00 spent by Mr. Rebuck on construction costs, \$147,385.00 were direct payments to Mr. McDermott to purchase permits, supplies, and labour.

6. Including interest on the builder's loan, loan fees, and mortgage insurance, Mr. Rebuck's total expenditure on the First House was \$419,800.00, (four hundred and nineteen thousand, eight hundred dollars),
7. Construction of the First House was completed by end of November 2004.
8. In response to paragraphs 9 and 12 of the Statement of Claim, Mr. Rebuck notes that in January, 2005 Mr. McDermott informed Mr. Rebuck that Mr. McDermott and the Plaintiff Robin McDermott, ("Mrs. McDermott"), were not financially able to purchase the First House. The McDermotts did not purchase the First House.
13. In response to paragraph 12 of the Statement of Claim Mr. Rebuck specifically denies that Mr. and Mrs. McDermott were "ready, willing and able to purchase the property" in January 2005 or subsequently that year. Had they been able to purchase the First House then they could have enforced the Agreement term allowing them to do so and proceeded to purchase the house from Mr. Rebuck in January, 2005. The facts are that the McDermotts breached the Agreement by not buying the First House upon its completion.
14. In response to paragraph 13 of the Statement of Claim, Mr. Rebuck states:
 - (a) it was Mr. McDermott who built the house and thus who should have, or be able to access, the receipts necessary to determine the costs of construction. While Mr. Rebuck can show, and has, shown to Mr. McDermott what Mr. Rebuck's payments have been, except for the minority of costs for which Mr. Rebuck paid directly all the over construction costs were supposed to have been paid for directly by Mr. McDermott and it is Mr. McDermott who should be able to provide the receipts for those costs;
 - (b) In a March 1, 2005 "Option to Purchase Real Estate" agreement Mr.

McDermott and Mrs. McDermott freely agreed with Mr. Rebuck that the purchase price for the First House if purchased in accordance by the McDermotts, would be \$419,800.98, (four hundred and nineteen thousand, eight hundred dollars and ninety-eight cents).

- (c) in February 2005, Mr. Rebuck obtained an independent written appraisal of the house from a qualified appraiser. The appraisal set the market value of the house at \$421,000.00, (four hundred and twenty-one thousand dollars). A copy of the appraisal was provided by Mr. Rebuck to Mr. McDermott,

15. In response to paragraphs 14 and 15 of the Statement of Claim, Mr. Rebuck states that in February 2005 Mr. Rebuck agreed to rent on a permanent basis the First House to Mr. McDermott and Mrs. McDermott for them to live in so that the McDermotts could have time to try to improve their financial situation and hopefully be able to buy the First House in the near future. (The McDermotts had been living in the First House since the end of November, 2004). The parties entered into a written lease of the property in February 2005 using the standard form for residential tenancies provided by the Residential Tenancy Office, ("the Residential Tenancy Agreement."). The monthly rent payable by the McDermotts was set by agreement with Mr. Rebuck at \$2,747.25. Mr. Rebuck had obtained a building loan a year previously in respect of this property and did not require "a lease document to show his lender," (nor did Mr. Rebuck tell the McDermotts that is why he wanted a written tenancy agreement). Mr. Rebuck did not "prevail" upon the McDermotts to enter into the residential tenancy agreement. It was Mr. McDermott who proposed renting the First House from Mr. Rebuck.
16. In response to paragraph 16 of the Statement of Claim, Mr. Rebuck notes that the failure of the McDermotts to purchase the First House upon its completion gave Mr. Rebuck the right to sell that property, initially as early as January 2005, and to keep any profits from such sale.
17. In further response to paragraph 16 of the Statement of Claim, Mr. Rebuck elected to enter into the new Option to Purchase Real Estate agreement, (the "Option Agreement"), at the beginning of March, 2005 to give the McDermotts a second opportunity to purchase the First House by having time to save money or arrange financing during the 2005-06 rental term of the Residential Tenancy Agreement. Mrs. Rebuck was not a party to this agreement.
18. In further response to paragraph 16 of the Statement of Claim, Mr. Rebuck notes that the proposed sale price in the Option Agreement, \$419,800.00 was agreed to freely by the McDermotts and Mr. Rebuck. That price

turned out to be slightly lower than the appraised value of the house the following month.

20. In response to paragraph 17 of the Statement of Claim, Mr. Rebuck states that Mr. and Mrs. McDermott moved into the First House in November, 2004 before the Residential Tenancy Agreement had been signed by them in February, 2005.
21. In further response to paragraph 17 of the Statement of Claim, Mr. Rebuck states that what the Plaintiffs were to pay to him was the monthly rental amount as set out in the Residential Tenancy Agreement.
22. In further response to paragraph 17 of the Statement of Claim, Mr. Rebuck states that the McDermotts did not make mortgage payments, pay for insurance nor pay property taxes in respect of 7295 - 196 A Street, Langley, nor were they required to do so "in accordance with the terms of the mortgage" obtained by Mr. Rebuck. What their monthly rent payments did do was to offset most, if not all, of such costs being incurred by Mr. Rebuck as the owner and landlord of the First House.
23. In further response to paragraph 17 of the Statement of Claim, the facts are that the McDermotts paid their rent late on several occasions and failed to pay any rent at all for the final month of the rental term, February, 2006. The McDermotts also breached their rental agreement with Mr. Rebuck by moving out of the First House without notice in late January 2006 and also by having damaged the First House during their tenancy beyond what would be considered reasonable wear and tear.

10 The defendants argue that the only paragraphs from the statement of claim that could reasonably be said to require information from the defendants' banking documents are paragraphs numbered 14, 15 and 17. Similarly, the defendants say that the only paragraphs from the statement of defence that could require information from the defendants' banking documents are paragraphs 15, 20, 21, 22, and 23.

11 The plaintiff relies on the decision of Lowry, J. (as he then was) in *Vernon & District Credit Union v. Cue Datawest*, [1999] B.C.J. No. 364, Vancouver Registry no. C970096, February 18, 1999 at paragraph 17 where he said:

... a litigant is generally not entitled to refuse to produce portions of relevant documents. The whole of a document is relevant and producible if any of its contents are relevant. The documents produced in almost every commercial law suit contain much that can be said to be irrelevant to the issues.

12 By September of the same year, Lowry, J. was saying much the same thing in *North American Trust Co. v. Mercer International*, [1999] B.C.J. No. 2107, 71 B.C.L.R. (3d) 72 where at paragraph 13 he said:

Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant is by its nature such that there is good reason why it should not be disclosed, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues.

13 He then went on to say at paragraph 15:

If follows that the plaintiffs ... must establish that the parts of the document they seek to withhold from disclosure are both clearly irrelevant and that there is good reason why they should not be disclosed.

14 The defendants have already claimed the income information is irrelevant to the issue, but as well, also claim that that information should be privileged in that to reveal the defendants' income to the plaintiffs would reveal to the plaintiffs what resources the defendants have to retain counsel. I don't think this submission was pursued with any vigour and, accordingly, I give it no weight or credence.

15 I am obliged to give weight to the speeches of Lowry, J. in the above-noted cases. Whilst he says in both cases that a litigant doesn't have the right to avoid producing a whole document merely because some parts of it may be irrelevant, (not the case at bar), he also says the onus is on the party litigant who seeks to withhold information to show that the information sought to be withheld is clearly irrelevant and that there is good reason why they should not be disclosed. (my emphasis).

16 In this case, while the submissions of the defendants may be compelling, I am of the view that the defendants have not shown that the information is not clearly irrelevant, nor have they shown there is a good reason beyond alleged irrelevance why the information should not be disclosed. Accordingly, I order the income information of the defendants in the two mortgage applications dated September 15, 2004 and February 7, 2005 be disclosed. The plaintiffs are also entitled to an order that the Bank of Nova Scotia dba Scotiabank Group or Scotiabank provide the solicitor for the plaintiffs a certified copy of the entire banking records relating to Mortgage Loan No. 691861-2 and the preceding line of credit as set out in the notice of motion dated May 20, 2008 and such documents in certified form are to be provided to the plaintiffs' solicitor within 21 days of the date of these reasons.

17 The defendants also seek costs for preparation to defend against an earlier notice of motion brought by the plaintiffs in much the same wording as the notice of motion dated May 20, 2008 I heard today. The earlier notice of motion was dated May 12, 2008. Unfortunately, a typographical error occurred on that document which showed the notice of motion being brought by the solicitor for the defendants rather than the solicitor for the plaintiffs. Mr. Lecovin even signed the document where counsel would sign but as solicitor for the defendants.

18 Rather than contacting Mr. Lecovin to advise him of the error, Mr. Schwartz wrote this letter dated May 19, 2008 to Mr. Lecovin as follows:

The Notice of Motion says that it is an application being brought by the defendants. Your name appears in the signature line as the solicitor signing for the defendants. The second page of the Notice of Motion identifies Lecovin & Company as the solicitors for the defendants. All of this is not the case. We act for the defendants. The defendants are not bringing the application.

Consequent to the forgoing, please confirm with us that the Notice of Motion dated May 12, 2008 is a nullity and that you are no longer proceeding with it.

19 Apparently, Mr. Lecovin did not respond to that letter as quickly as Mr. Schwartz thought he should have done, and subsequently wrote a letter to Mr. Lecovin on May 20:

My letter of May 19 faxed to you yesterday asked you to confirm that the Notice of Motion dated May 12 would not be proceeding. Your above-referenced letter of this afternoon does not state whether or not your prior Notice of Motion, dated May 12, 2008 has been withdrawn, although I cannot see how it would not have to be, both by reason of its own defects and also the nature of the "new" Notice of Motion dated today. That said, if you do not confirm with us in writing by the close of business tomorrow, May 21, that the Notice of Motion dated May 12 has been withdrawn our clients shall then be compelled by the time limits set by the Rules, to deliver a Response and an affidavit(s) in reply to it to your office by 4:00 p.m., Thursday, May 22. If you do not then proceed to set a hearing, on a date confirmed in advance to be agreeable to both of us, of the May 12 Notice of Motion, I expect our clients shall seek the payment to them by your clients of the actual costs of their responding to same.

20 There was further correspondence between respective counsel but on May 22, 2008 at 2:56 p.m., Mr. Lecovin wrote a letter to Mr. Schwartz in the following terms:

We will not be proceeding with the first Notice of Motion dated May 12, 2008, but will with the second Notice of Motion dated May 20, 2008.

21 The defendants now submit that the plaintiffs and their solicitor caused needless work by and costs to the defendants by their conduct and submit they are entitled to an award of costs in the lump sum amount of \$1250 for each of the two defendants.

22 In my view, this matter would have been easily resolved had the defendants' solicitor merely allowed the plaintiffs' solicitor to amend the notice of motion. Surely, the defendants' solicitor could not think that the plaintiffs' solicitor would bring an application on behalf of someone who was not

his client. Whatever work done was of his own doing based on his incorrect assumption that Mr. Lecovin would represent himself as the defendants' solicitor, rather than allowing for the typographical error and a subsequent amendment to correct it. Accordingly, I find the defendants are not entitled to any costs for this portion of the hearing.

23 The defendants also seek "exemplary costs" in the lump sum amount of \$2000 for each of the two defendants for a total of \$4000 as a result of what is alleged to be a misrepresentation of the bank's position regarding disclosure of the sought-after documents. This occurred when Mr. Lecovin wrote to Mr. Schwartz in a letter dated May 20, 2008 and accompanying the same-dated notice of motion where he stated: "As the Bank of Nova Scotia is agreeable to producing the documents, I am sending you the Consent Order as per the practice in such instances."

24 Mr. Schwartz then responded in his first letter of May 20 as follows:

Turning back to your letter of today's date accompanying the Notice of Motion dated May 20, 2008, we have had no word from the Bank of Nova Scotia as to what its position is with respect to either the Notice of Motion dated May 12 or the Notice of Motion dated May 20. In fact we understand that Mr. Gary Johnson to whom the May 12 Notice of Motion was in part directed, has been away until tomorrow, May 21. If the bank was served with a copy of the Notice of Motion dated May 20 and has already responded to it by agreeing completely with the relief sought in that motion, as your the [sic] sentence "As the Bank of Nova Scotia is agreeable to producing the documents, I am sending you the Consent Order as per the practice in such instances" suggests to us, that is a remarkably fast, (and agreeable), turnaround time for a bank. ... Please provide us in writing by no later than 4:00 p.m., tomorrow, May 21, 2008 with the name and the telephone number of the officer of the Bank of Nova Scotia who told you that the bank is agreeable to an Order on the terms set out in your clients' Notice of Motion of today's date.

25 Mr. Lecovin then wrote a letter to Mr. Schwartz on May 21st presumably responding to Mr. Schwartz's letter of May 15th. This letter was not responsive to Mr. Schwartz's correspondence of May 20th. That then prompted a letter from Mr. Schwartz to Mr. Lecovin dated May 21st, 2008 some of which is as follows:

First off I regret that your letter did not acknowledge nor discuss my second letter to you of yesterday. I had asked you to confirm with me by today that the Notice of Motion dated May 12, 2008 has been withdrawn and also requested that you provide to me today with the name and contact information for the person at the Bank of Nova Scotia who told you they agree to the relief your clients seek in their May 20 Notice of Motion. As of this evening you have done neither.

I spoke this morning with Mr. Gary Johnson, the manager of the bank of Nova Scotia's Cloverdale Branch, who has returned from holiday today. He informs me neither he, nor, he suspects, anyone else with the Bank of Nova Scotia has seen your clients' Notice of Motion dated May 20. He says that the bank's position with respect to any such motion request remains just as it was expressed in his April letter to you: the bank will comply with what parties agree to or with what a court orders. They will not agree with the particular wording of the relief sought in a draft order unless all parties to the Action also agree to it as well. I have provided a copy of your May 20 letter to Mr. Johnson.

In this particular case, Mr. Johnson confirmed with me that the Rebucks have requested their 2005 mortgage file with respect to the first house but it takes a while for the branch to get it from the bank's archives. Those copies, when they do come, will be provided to the Rebucks so that I may review them for any privileged materials and then pass them along to you. That is the proper sequence for this to occur and is one of the reasons the Rebucks are opposing the May 12 and May 20 Notices of Motion on the terms for order(s) which those pleadings currently propose.

26 I was not referred to any case law that would suggest, in these circumstances, that "exemplary costs" would be appropriate.

27 Unless the defendants can show that the plaintiffs' solicitor knowingly tried to mislead the defendants' solicitor I would in no way contemplate anything other than ordinary costs. Indeed I am unaware of the concept of exemplary costs as Rule 57 provides that where costs are payable to a party they shall be assessed as party-and-party costs under Appendix B, unless the court orders that they be assessed as special costs. Rule 57(3) sets out how special costs are to be assessed. I note that in the case of *Patriquin v. Laurentian Trust of Canada Inc.* (2002), 96 B.C.L.R. (3rd) 318 (BCCA) that unproved allegations against lawyers of fraud, dishonesty or incompetence will attract an order for special costs. Such is not the case here but it comes dangerously close to an allegation that Mr. Lecovin for some reason was dishonestly making a misrepresentation to Mr. Schwartz that the bank had agreed to provide the information requested.

28 Again, in my view, a misunderstanding occurred between the parties and/or their solicitors and/or the bank such that Mr. Lecovin wrote the letter in the manner in which he did. No doubt he regrets writing the letter in the manner in which he did but that in and of itself does not attract special costs.

29 For all of the foregoing reasons all the costs related to this application should be costs in the cause.

MASTER G. TAYLOR

cp/e/qlmxm/qlclg/qlbrl/qlrxg/qlaxw

Indexed as:
Carey v. Ontario

H. Rod Carey, appellant,
v.
Her Majesty The Queen in right of Ontario, the Ontario
Development Corporation, the Northern Ontario Development
Corporation, Claude Bennett and Allan Grossman, respondents.

[1986] 2 S.C.R. 637

[1986] S.C.J. No. 74

Also reported at 35 D.L.R. (4th) 161

File No: 18060.

Supreme Court of Canada

1985: October 2 / 1986: December 18.

Present: Beetz, McIntyre, Chouinard, Lamer, Wilson, Le Dain
and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence -- Crown privilege -- Production of cabinet and cabinet committee documents necessary to legal case -- Low level policy matter several years old and of little public interest -- Crown privilege claimed because of class of documents -- Whether court should inspect documents to decide whether Crown's claim valid -- Whether Crown's claim to immunity should be upheld.

The Government of Ontario increasingly became financially involved with Minaki Lodge, a resort in northwestern Ontario, and eventually became owner. Its dealings with appellant, the principal and later controlling shareholder of the lodge, gave rise to this action. On examination for discovery, the defendants' witnesses claimed an absolute privilege respecting all documents that went to or emanated from Cabinet and its committees. The claim was not based on the contents of the documents but on the class to which they belonged. Production, it was alleged, would breach confidentiality and inhibit Cabinet discussion of matters of significant public policy. An application to quash the subpoena duces tecum was granted, notwithstanding the judge's assumption that the documents

would be relevant to the matters in issue. Both the Divisional Court and the Court of Appeal upheld that decision. At issue was whether to claim to refuse production of Cabinet documents as a class was valid, and whether it was necessary for the appellant to prove not only that the documents were relevant but also would assist his case.

[page638]

Held: The appeal should be allowed.

The importance of withholding production on the basis of a public interest must be weighed against the public interest in the proper administration of justice. Protection of documents as a class was generally not favoured. There was public interest in the confidentiality of Cabinet deliberations in developing public policy, but this was only one of a number of variables to be taken into account in considering whether the interest in disclosure for the administration of justice was outweighed by other public interests. Among the variables to be weighed was the nature of the policy, whether it was contemporary or not, and the nature and importance of the action. In the present case, the information sought to be revealed concerned a particular transaction involving a low level policy matter that had taken place some thirteen years before.

Because high level documents were involved, the court should first inspect the documents to balance the competing interests in disclosing or producing them. The documents here were obviously relevant, and it was not necessary for appellant to further establish that they would assist his case.

Cases Cited

Considered: *Robinson v. State of South Australia* (No. 2), [1931] A.C. 704; *Conway v. Rimmer*, [1968] A.C. 910; *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624; *Burmah Oil Co. v. Bank of England*, [1979] 3 ALL E.R. 700; *Smallwood v. Sparling*, [1982] 2 S.C.R. 686; *United States v. Nixon*, 418 U.S. 683 (1974); *Attorney-General v. Jonathan Cape Ltd.*, [1975] 3 ALL E.R. 484; *Sankey v. Whitlam* (1978), 21 A.L.R. 505; *Air Canada v. Secretary of State for Trade* (1983), 2 W.L.R. 494; *Fletcher Timber Ltd. v. Attorney-General*, [1984] 1 N.Z.L.R. 290; referred to: *R. v. Snider*, [1954] S.C.R. 479; *Gagnon v. Commission des valeurs mobilières du Québec*, [1965] S.C.R. 73; *Re Grosvenor Hotel, London* (No. 2), [1964] 3 All E.R. 354; *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1; *Goguen v. Gibson*, [1983] 2 F.C. 463; *Rogers v. Home Secretary*, [1973] A.C. 388; *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146; *R. and Vanguard Hutterian Brethren Inc.* (1979), 97 D.L.R. (3d) 86; *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705; *R. in Right of Alberta v. Mannix*, [1981] 5 W.W.R. 343; *Gloucester Properties Ltd. v. R.* (1981), 24 C.P.C. 82; *Lanyon Pty. Ltd. v. Commonwealth of Australia* (1974), 129 C.L.R. 650.

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Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1970, c. E-10, ss. 36.1(2), 36.2(1) [both en. 1980-81-82-83, c. 111, s. 4, sch. III].

Evidence Act, R.S.O. 1980, c. 145, s. 30.

Authors Cited

Williston, W.B. and R.J. Rolls. *The Law of Civil Procedure*, vol. 2. Toronto: Butterworths, 1970.

APPEAL from a judgment of the Ontario Court of Appeal (1983), 43 O.R. (2d) 161, 38 C.P.C. 237, 1 D.L.R. (4th) 498, 7 C.C.C. (3d) 193, affirming a judgment of the Divisional Court (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 146 D.L.R. (3d) 684, 4 C.C.C. (3d) 83, affirming a judgment of Catzman J. (1982), 38 O.R. (2d) 430, 28 C.P.C. 310, granting an application to quash a subpoena duces tecum. Appeal allowed.

J.L. McDougall, Q.C., and R.L. Armstrong, for the appellant.
T.H. Wickett for the respondents.

Solicitors for the appellant: Fraser & Beatty, Toronto. Solicitor for the respondents: Archie Campbell, Toronto.

The judgment of the Court was delivered by

1 LA FOREST J.:-- This case involves a conflict between the public interest that a person who asserts a legal claim be afforded access to all information relevant to prove that claim, and the public interest against disclosure of confidential communications of the executive branch of government.

2 The immediate issue is whether the appellant Carey is entitled to compel production in an action against the Crown in right of Ontario and the other respondents of Cabinet documents in the possession of the executive government of the province which, he contends, would support his claim. In Ontario, this issue falls to be decided under common law.

3 The plaintiff's claim arises against the following background.

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Factual Background

4 The Minaki Lodge is a tourist resort complex of some note located on the Winnipeg River a few miles north of Kenora and Lake of the Woods. In the early 1960s, Carey became associated with the controlling group then operating the lodge as a shareholder. There is dispute among the parties about the financial health of the lodge during the late 1960s, but no one questions that the tourist industry in the area was adversely affected when mercury contamination was discovered in

the adjoining river system. As a result the lodge, which had operated only in the summer months, did not open in the summer of 1971 and was not scheduled to open for the summer of 1972.

5 By the fall of 1971, the Government of Ontario had become concerned about the damage resulting to the economy of northwestern Ontario from the closing of the lodge and took steps to keep it operating. Its dealing with Carey in attempting to effect this purpose is what gave rise to this action.

6 Carey alleges that in the fall of 1971, the Government offered to make good all losses of the operators through forgivable or interest-free loans if the lodge was re-opened. The Government, however, denies such an offer formed part of the loan assistance it was willing to extend. Carey further alleges that he accepted the alleged offer and, in reliance on it, acquired control of the lodge from his associates and re-opened it in the summer of 1972. What is more, he adds, he kept it open at the Government's encouragement during the whole of the following winter and thereby incurred considerable losses for which the Government did not fully reimburse him. He claims he then advised the Government the lodge would be closed for the winter of 1973-1974 but the Government asked him to keep it open pending the completion of a feasibility study. The Government denies making any such request.

7 According to Carey, in November 1973 the Government told him it wished to continue the operation of the lodge and to invest a large sum [page641] of money in it so as to make the resort a centerpiece for the resort industry in the area. However, he adds, since it would be politically inexpedient to provide funds to a private owner, the Government proposed to become his partner. Carey says he agreed to this proposal and accordingly continued to operate the lodge, incurring very substantial monthly operating losses which were not absorbed by the Government except to the extent necessary to enable him to meet current payments. These allegations are also denied by the Government, which claims that all financial assistance provided to the appellant from 1971 to 1973 was through loans arranged with the Ontario Development Corporation.

8 In late 1973 or early 1974, a meeting was held between Carey and the Minister of Industry and Tourism and a number of officials including some of the Northern Ontario Development Corporation. Carey claims he was told the Government had decided to invest over \$5 million in the lodge, and that he could either have it go into receivership and see its staff and creditors go unpaid or assign his interest to the Ontario Development Corporation. The Government agrees that there was a discussion of the financial difficulties of the lodge and of the available options. At all events, the appellant accepted a written offer from the Ontario Development Corporation for the transfer of his shares on the understanding that the Corporation would assume all the owners' outstanding indebtedness, except shareholders' loans. Apparently as part of these arrangements, the appellant later signed a three-year consulting contract with the resort company for which he was to be paid some \$15,000 a year. Carey asserts that he assigned his interests under the threat of receivership and its consequences. The Government, however, denies that he acted under any duress or compulsion.

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The Action and Demand for Production

9 Some two years later in March 1976 Carey brought the present action seeking damages, including exemplary damages, for breach of the alleged agreement, deceit and damage to reputation, the

setting aside of the transfer on the grounds of duress and compulsion and as an unconscionable transaction, and a declaration that the appellant is the beneficial owner of the shares transferred by him. The action against the individual defendants was subsequently dismissed with consent, so only the Government and the two corporations remain as defendants.

10 On examination for discovery, the defendants, witnesses claimed an absolute privilege respecting all documents that went to Cabinet and its committees and all documents that emanated from it. When, in June of 1982, a date was fixed for trial, a subpoena duces tecum was served on the Secretary of the Cabinet for Ontario, Dr. E.E. Stewart, requiring him to attend at trial and bring all documents relating to the proceedings described in the subpoena. The Government then applied to quash the subpoena, and in support of the application filed an affidavit sworn by Dr. Stewart in which he acknowledged that he had relevant documents under his control but objected to their production on the basis that "it would not be in the public interest to produce these documents, or to make them available for inspection, even for the limited purposes of this litigation." By s. 30 of the Ontario Evidence Act, R.S.O. 1980, c. 145, such objection has the like effect as if it were made by a member of the Executive Council of the Province.

11 Dr. Stewart listed the documents in two schedules to his affidavit. The first schedule lists documents in the possession of his office at the time the subpoena was served on him. The second lists those formerly in his office but now in the possession of the archives where they would normally be kept confidential and unavailable for public access for a period of thirty years.

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12 The affidavit claims privilege against disclosure of all these documents except a few orders in council and formal minutes of the Management Board. The claim of privilege is not based on the contents of these documents, which are not revealed, but on the class to which they belong, i.e., documents prepared for Cabinet, or that emanated from Cabinet, or that record its proceedings or those of its committees. These may compendiously be described as "Cabinet documents", although there may in some circumstances be ground for making a distinction between them.

13 The basis of the claim for the privilege against production of the documents is set forth in the following excerpts from the affidavit:

... it is my firm opinion that it has consistently been assumed and taken for granted at all material times by all members of the Executive Council, and by all members of the staff of the Cabinet office, that all of the discussions in the Executive Council are private and confidential, and will not be published or revealed to any persons who are not members of the Council. It has also been consistently realised and appreciated by all members of the Council that the decisions taken by it are collegial or group decisions, for each of which they all share responsibility.

It is also my firm opinion that it has consistently been assumed by the members of the Executive Council, and by the staff of the Cabinet office and the

various government ministries, that documents prepared by sub-committees of the Cabinet for use by the Cabinet, and documents prepared by ministries or other government organizations for use by the Cabinet are privileged and confidential and will not be made public.

I have read and reviewed the documents listed in Exhibit 1 for which privilege is claimed. In my considered opinion, for the reasons set out below, it would not be in the public interest to produce these documents, or to make them available for inspection, even for the limited purposes of this litigation.

The notes kept by members of Cabinet staff of the discussions at Cabinet meetings do not purport to be complete, and do not indicate the basis upon which any individual member, or the Executive Council itself, formed a decision. They indicate certain points raised by individual members of Cabinet, and more importantly, they record the decisions reached by Cabinet....

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It is my firm opinion that if these notes of the discussions in the Executive Council were to be produced, it would almost necessarily lead to a distorted, incomplete and inaccurate impression of the nature of the actual discussion which took place. It is also my opinion that if these notes were produced, it would in future affect the nature of the discussions in Cabinet, and would inhibit the freedom of the members of Cabinet to discuss matters of significant public concern and policy, to the detriment of the public interest.

The Courts Below

14 Catzman J. of the Supreme Court of Ontario (1982), 38 O.R. (2d) 430, 28 C.P.C. 310, assumed without deciding that the documents in question would be relevant to the matters in issue between the parties to the litigation. However he ordered that the subpoena duces tecum be quashed and set aside largely on the basis of the Ontario Court of Appeal decision in *Smerchanski v. Lewis* (1981), 31 O.R. (2d) 705 where it was stated, at p. 711, that documents relating to Cabinet proceedings are by their nature generally acknowledged to be privileged. For this and other reasons, he also rejected the suggestion that he inspect the documents privately so as to determine where the balance of public interest lay.

15 An appeal to the Divisional Court for Ontario was dismissed: (1982), 39 O.R. (2d) 273, 31 C.P.C. 34, 146 D.L.R. (3d) 684, 4 C.C.C. (3d) 83. White J., who gave the judgment of the Court, held, citing *inter alia*, *Smerchanski v. Lewis*, that Cabinet documents are presumed to be privileged under the doctrine of Crown privilege or public interest immunity in the absence of special circumstances, such as an allegation of criminal activity, malfeasance, misfeasance, nonfeasance, irregularity or other improprieties in the conduct of the members of the Cabinet or those reporting to the Cabinet, of which the documents in issue would be proof. In his view, the onus of establishing such

circumstances is on those who seek production of the documents. Carey would have to discharge this onus before the court would look at the documents and embark on the process of weighing the interest in the confidentiality of executive or Cabinet deliberations [page645] against the interest in making available all relevant evidence to a court.

16 On the appeal to the Court of Appeal of Ontario (1983), 43 O.R. (2d) 161, 38 C.P.C. 237, 1 D.L.R. (4th) 498, 7 C.C.C. (3d) 193, that court rejected the "very special circumstances" rule propounded by the Divisional Court. It, however, dismissed the appeal for reasons set forth in the judgment of Thorson J.A. After an extensive examination of the case law, he concluded that the Crown (i.e., the provincial Government) had no absolute privilege or immunity from disclosure of documents based on either their content or class. The Crown could, however, claim protection of certain documents from disclosure on the basis of a specified public interest. Where such a claim is properly made, he stated, it will prevail unless the party seeking their production can persuade the court that there are cogent and concrete grounds that will substantially assist his case, that the issue to which the documents are relevant is one of real substance and is not raised merely to gain access to the documents, and that it is unlikely that the facts sought to be established by the documents can be otherwise proved. Only after this is done will the court proceed to examine the documents with a view to balancing the competing interests. In the case at hand, concrete and cogent grounds had not been presented. Nor had sufficient time elapsed to remove concern about the publication of the documents.

17 Although it did not have to deal with the issue in view of the conclusion it had arrived at, the Court thought it desirable to comment on the submission made on behalf of the Government that where a court decided to order an inspection, the Government should have a right to appeal before the court proceeded to act on that order, and if the Court of Appeal made such an order, the Government [page646] should be given an opportunity to seek leave to appeal to this Court. The Court of Appeal disagreed with this contention on the ground that it knew of no procedure by which this could be done and because of the practical consequences that could ensue from allowing this argument to prevail.

18 Leave to appeal to this Court was granted on December 3, 1983, [1983] 2 S.C.R. vi.

Grounds of Appeal

19 Counsel for Carey contends that the Court of Appeal erred

- (a) in finding that Dr. Stewart's affidavit was sufficient to support the claim for non-disclosure despite the fact that it did not specify any special circumstances or particular damage to the public interest;
- (b) in its formulation of the test to be applied in determining the circumstances in which the Crown will be obliged to produce Cabinet and other important documents at trial;
- (c) in that it established the requirements to be met by a party seeking production of Crown documents relying, in large part, upon the English authorities which in turn relied upon the English rules of practice which have no equivalent in the provinces or territories of Canada.

20 Counsel for the respondents specified that the claim of privilege was put forward solely on the basis of the class of documents in issue and not on the basis of content. He further contended that

the Court of Appeal erred in stating that the Government did not have a separate right to appeal from an order that the documents be inspected.

21 I do not propose to enter into the latter point in any detail, but I shall only make the following brief remarks. Appeals are creatures of statute, and counsel did not draw our attention to any [page647] statute permitting an appeal to the Court of Appeal from an order for inspection. He simply relied on English and New Zealand cases, which as Thorson J.A. remarked may rest on a different statutory basis. So far as the jurisdiction of this Court is concerned, it is premature to discuss the issue until it arises. I might say, however, that I am impressed with the practical implications mentioned by Thorson J.A. militating against permitting appeals to be heard on issues of this kind until the final disposition of the action. This is especially true in view of the fact that a special procedure has been provided for dealing with the really sensitive issues such as international relations and national defence and security; see Canada Evidence Act, R.S.C. 1970, c. E-10, ss. 36.1(2), 36.2(1), as enacted by S.C. 1980-81-82-83, c. 111, s. 4, sch. III.

General Legal Background

22 It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest. The general balance between these two competing interests has shifted markedly over the years. At times the public interest in the need for government secrecy has been given virtually absolute priority, so long as a claim to non-disclosure was made by a Minister of the Crown. At other times a more even balance has been struck.

23 This difference in emphasis resulted in part from the manner in which the interests collided in particular cases. The need for secrecy in government operations may vary with the particular public interest sought to be protected. There is, for example, an obvious difference between information relating to national defence and information relating to a purely commercial transaction. On the other side of the equation, the need for disclosure may be more or less compelling having regard [page648] to the nature of the litigation (e.g., between a criminal and civil proceeding) and the extent to which facts may be proved without resort to information sought to be protected from disclosure.

24 The shift in the balance between the two interests has also been affected by changing social conditions and the role of government in society at various times. When the early cases were decided, the activities of government were restricted to larger political issues. There was no general right to sue the Crown. The issue, therefore, did not frequently arise and when it did, it was often in the context of a suit between private litigants. In that period, it would appear, the tendency of the Crown was to produce evidence requested by litigants in the absence of some compelling reason that could not be disregarded; see the authorities cited by Lord Blanesburgh in *Robinson v. State of South Australia* (No. 2), [1931] A.C. 704 (P.C.), at p. 714.

25 With the expansion of state activities into the commercial sphere, different attitudes to suits against the Crown developed and statutes were enacted to make these possible. The general social context also affected attitudes towards government secrecy. One can scarcely expect the views on this issue to be the same in wartime conditions when the total energy of the nation must be concentrated on winning the war, and an era of peace in which government activity impinges on every aspect of our lives and there is in consequence increased demands for more open government. The

question, as Lord Upjohn noted in *Conway v. Rimmer*, [1968] A.C. 910 at p. 991, is one that invites periodic judicial reassessment. Not surprisingly, conflicting dicta can scarcely be reconciled.

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26 The widely divergent views on the subject may conveniently be illustrated by the two cases that first gave rise to the modern debate on the subject, *Robinson v. State of South Australia*, just cited, before the Privy Council, and *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, before the House of Lords.

27 In *Robinson's* case, Robinson sued the State of Australia for the amount of damage that had resulted to his wheat in the possession of the State under wheat marketing legislation. The damage, it was alleged, resulted from the negligence of the agents of the State who handled the wheat. To establish his case, Robinson sought and obtained an order to obtain full discovery of all documents in the possession of the State relating to the matters in controversy. By affidavit, however, the State claimed that 1,892 State documents were privileged since their disclosure would be contrary to the interests of the State. The documents were said to comprise communications between officers administering the departments concerned.

28 The Privy Council decided against the State's claim for non-disclosure. The documents claimed, it said, were vital to the plaintiff's case. Besides, the privilege claimed was a narrow one to be exercised sparingly, and no further than was necessary for the protection of public interests. Lord Blanesburgh noted that the documents did not relate to the political activities of the State, but to its trading, commercial or contractual activities. While documents relating to the latter might properly not be disclosed in order to safeguard genuine public interests, the increasing extension of state activities into the spheres of business and commerce coupled with the apparently free use of the claim of privilege in relation to claims arising out of these activities, made it imperative for the courts to see to it that the scope of the privilege in such litigation should not be extended. The fact that production of the documents might prejudice the Crown's case or assist the plaintiff's did not justify the claim of privilege. "In truth", he added, [page650] "the fact that the documents, if produced might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production -- one only to be overborne by the gravest considerations of State policy or security" (p. 716).

29 The Board noted that a court has always had the power to inquire into the nature of the document for which protection is sought and to require some indication of the injury the State would suffer from its production. In performing this task, it added, the court may inspect the documents privately, particularly in cases where the State itself is a party. In the result, the Board concluded that the proper course there was to remit the matter to the court that heard the case with directions that it was a proper one for exercising its power to inspect the documents.

30 Eleven years later, in 1942, the House of Lords refused to follow the *Robinson* case in *Duncan v. Cammell, Laird & Co.*, *supra*. There the submarine *Thetis*, which the respondents had built for the Admiralty, sank while undergoing its submergence test, and an action in negligence was brought by representatives and dependents of those who had died in the mishap. The Crown objected to the production of several documents which revealed the structural specifications of the submarine and

its condition when raised. The objection having been made in proper form, the House upheld it without any inspection of the documents.

31 The case was undoubtedly correctly decided. A properly framed affidavit by a Minister of the Crown objecting to giving information about the structure of equipment intended for the defence of the country must surely be treated with the utmost deference, especially in wartime. Lord Blanesburgh in Robinson's case had noted that the documents should not be inspected where this could [page651] have the effect of itself defeating the reasons for which a privilege was claimed.

32 What puts the Duncan case at odds with its predecessor, however, was the view taken of the respective roles of the courts and of the Crown in dealing with claims for the production of state documents. In Robinson's case the court's role was given pre-eminence. In Duncan by contrast, the House made it clear that a ministerial objection, properly made, was conclusive. The House expressly disapproved of the order for inspection granted in Robinson's case.

33 No longer bound by English authority, this Court soon began to dissociate itself from some of the more absolute statements in Duncan's case. In *R. v. Snider*, [1954] S.C.R. 479, the Court, at the request of the prosecution, allowed production of, and oral evidence respecting, the income tax returns of the accused despite the objection of the Minister of National Revenue. The Court there clearly reiterated "the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions" in the absence of a public interest recognized as overriding it (see Rand J. at p. 482).

34 A similar approach was taken in *Gagnon v. Commission des valeurs mobilières du Québec*, [1965] S.C.R. 73. There the Attorney General of Quebec objected on the basis of public interest to the Secretary of the Commission's divulging in the course of bankruptcy proceedings a letter written to the Commission by the bankrupt regarding the business of the bankrupt, but the Court refused to uphold this objection. By this time, the English courts themselves had begun to move away from the approach adopted in Duncan's case; see *Re Grosvenor Hotel, London (No. 2)*, [1964] 3 All E.R. 354 (C.A.) Fauteux J., who gave the judgment of the majority of this Court, referred to the [page652] latter case in concluding that the courts had the final say in deciding between the conflicting demands of the litigant and the state, or at least in determining whether a ministerial objection is well founded. He conceded that such objection would obviously be well founded in the case of military secrets, diplomatic relations, Cabinet papers and high level political decisions. But the courts' power, though it must be prudently exercised, remained nonetheless. The facts, he added, will vary from case to case; each must be determined on its own merits.

35 It was left to the House of Lords in *Conway v. Rimmer*, *supra*, in 1968, to dispose of the more excessive views in Duncan's case and to bring English law in line with that of Canada and other parts of the Commonwealth as well as that of Scotland; for the latter, see *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1. In *Conway*, a probationary constable brought action for malicious prosecution against his former superintendent. In the course of discovery, the latter revealed relevant documents in his possession which included four reports made by the defendant during the plaintiff's probationary period and a report by him to his chief constable for transmission to the Director of Public Prosecutions in connection with the prosecution of the plaintiff on a criminal charge, on which he was acquitted and on which the civil action was based. The Secretary of State for Home Affairs objected in proper form to the production of these documents on the ground that they fell within a class of documents the production of which would be injurious to the public interest. The House of Lords held that the documents should be produced for inspection and if it

was found that disclosure would not be prejudicial to the public interest or that the possibility of such prejudice was insufficient to justify their being withheld, disclosure should be ordered.

[page653]

36 The House firmly rejected the notion that the Minister's statement was final and conclusive. It was the courts that must determine the balance to be struck between the public interest in the proper administration of justice and the public interest in withholding certain documents or other evidence. Proper deference should, of course, be given to the Minister's views, particularly in relation to objections to production of particular documents on the basis of their contents, or where the Minister's reasons involve considerations that cannot properly be weighed on the basis of judicial experience. But class documents are often not of this character. For example, it noted, a court is certainly able to assess whether candour in making a report would likely be lessened by the possibility of its revelation in judicial proceedings.

37 In assessing whether documents should be produced or not, the court could in some cases come to a decision one way or the other on the basis of the Minister's statement alone, but in case of doubt the judge could inspect them.

38 The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh. The court may itself raise the issue of its application, as indeed counsel may, but the most usual and appropriate way to raise it is by means of a certificate by the affidavit of a Minister or where, as in this case, a statute permits it or it is otherwise appropriate, of a senior public servant. The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case.

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39 In the end, it is for the court and not the Crown to determine the issue. This was recently re-affirmed by this Court in *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, to which I shall return. The opposite view would go against the spirit of the legislation enacted in every jurisdiction in Canada that the Crown may be sued like any other person. More fundamentally, it would be contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country.

The Affidavit

40 In making a claim of public interest immunity, the Minister (or official) should be as helpful as possible in identifying the interest sought to be protected. Examples of how this should be done appear in *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700 (H.L.), and *Goguen v. Gibson*, [1983] 2 F.C. 463 (C.A.), where the Minister described with as much detail as the nature of the subject matter would allow the precise policy matters sought to be protected from disclosure.

41 Counsel for Carey argued that Dr. Stewart's affidavit is inadequate in that it does not set forth with sufficient particularity the interests sought to be protected. I suppose the point may be put in this way. Certainly the grounds advanced for protection are, as some cases have put it, somewhat amorphous and as Thorson J.A. pointed out, less helpful than they might be. Nonetheless, it seems to me that Thorson J.A. was correct in his view that in substance what was sought was the protection as a class of what he generally described as "Cabinet documents", i.e., documents prepared by government departments and agencies in formulating government policies, decisions made by Cabinet, and the like. That being so, Dr. Stewart did not see it as necessary to particularize the nature of the information sought to be protected as would be necessary if the claim for protection was based on the nature of the contents of the documents. Essentially what the certificate argues is that the process by which government policy is determined by the Executive Council must remain confidential whatever the policy may be and however much [page655] time (save when it has become of historical interest only) has elapsed since the policy was developed. I refer in confirmation to the paragraphs of Dr. Stewart's affidavit already cited.

42 So viewed, the question is not so much whether the affidavit is insufficient as whether the substance of the claim is one to which the courts should give effect. Counsel for the Government put it that the issue raised was a simple question of principle. In short, may the documents be withheld from production simply because they are Cabinet documents as above described, at least where those documents are concerned with the formulation of government policy by the Cabinet? If one replies to this broad question in the negative, it may be necessary to ask whether the documents should be withheld because of the particular policy to which they refer. In that case it would be the duty of whoever makes the affidavit to give the court all the help he reasonably can. But if the question is answered in the affirmative, that would be an end to the matter. I shall, therefore, attempt to reply to the "simple question of principle" counsel for the Government asked us to address.

Rationale for Non-disclosure of Cabinet Documents

43 Generally speaking, a claim that a document should not be disclosed on the ground that it belongs to a certain class has little chance of success. Claims to secrecy for some classes of documents have, however, traditionally been considered valid, notable among these being documents relating to national defence or security and those regarding diplomatic relations with other countries. To some extent, though, claims regarding these documents, and particularly those dealing with defence or security, may be looked upon as akin to a "contents" claim. That, however, cannot be said of Cabinet documents which the [page656] cases have frequently considered as meriting the same type of protection as documents relating to national defence and diplomatic communications. That was done even in *Conway v. Rimmer* and in *Gagnon v. Commission des valeurs mobilières du Québec*, supra, despite the fact that the general thrust of these cases strongly favoured disclosure. Indeed in *Conway's* case, the impression left is that Cabinet documents should never be revealed. But it was not necessary in those cases to decide the issue and it becomes essential to analyse the reasons underlying the claim.

44 The principal argument for withholding the documents described in the affidavit is that their disclosure would lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest. The familiar "candour argument" is combined with the need of completeness and the fear that the freedom of Cabinet members to discuss matters of sig-

nificant public concern and policy might be diminished. This may simply mean that the setting in which confidential statements are made may make them different in kind from others.

45 At all events, the Government's counsel in his factum put it on the following basis. The principles of joint responsibility of the members of Cabinet, and of Cabinet solidarity, are basic to Canadian constitutional law and must be maintained and preserved in the public interest. These principles, he added, would be prejudiced by disclosure of the documents and information sought to be produced in these proceedings. In Canada, the United Kingdom and elsewhere in the Commonwealth, he maintained, Cabinet documents have consistently been accorded a high degree of protection against disclosure and courts will order them inspected or [page657] produced only in the most exceptional and unusual circumstances.

46 I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

47 The House of Lords had occasion to deal with the candour argument in *Conway v. Rimmer*, albeit at a lower level of government. Lord Reid dismissed it so far as it concerned routine documents like the probation and other reports in question in that case. He failed to see how such an argument could apply to such communications within a government department when similar communications within public corporations would not be so protected. Lord Morris of Borth-Y-Gest found the proposition that candour would be affected by the knowledge that by some remote chance a document might be the subject of possible enforced production one of "doubtful validity" (p. 957). To Lord Hodson, it seemed strange that civil servants alone are supposed to be unable to be candid without the protection denied other people (p. 976). Lord Pearce indicated that there were many circumstances where the possibility of disclosure would make the writer more candid (p. 987). And Lord Upjohn found it difficult to justify non-disclosure of class documents simply on the basis of the candour argument when equally important matters of confidence in relation to security and personnel matters in other walks of life were not similarly protected (p. 995).

[page658]

48 The same approach was adopted in later cases of which I mention only a few. In the *Glasgow Corporation* case, *supra*, at p. 20, Lord Radcliffe made the same point more colourfully by saying he would have supposed Crown servants were "made of sterner stuff". From my experience, he would not be disappointed. And I suspect Cabinet Ministers would be incensed at the suggestion that their officials were made of sterner stuff than themselves. In 1973, Lord Salmon in *Rogers v. Home Secretary*, [1973] A.C. 388 (H.L.), at p. 413, described the candour argument as "the old fallacy". More recently in *Burmah Oil Co. v. Bank of England*, *supra*, at p. 724, Lord Keith of Kinkel characterized the argument as "grotesque".

49 In both the *Gagnon* and *Conway* cases, however, Cabinet documents were looked upon in a different light than lower level official documents, and in the latter case the Law Lords dealt with the issue at some length. Most of them looked at these, we saw, as requiring a similar degree of pro-

tection as documents relating to national security and diplomatic relations. Production of Cabinet correspondence, they asserted, would never be ordered. For them this was simply obvious. Given the general attitude at the time, this is not surprising. The best explanation is that of Lord Reid. For him it was not candour but the political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only. He put it this way at p. 952:

I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that [page659] such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition.

50 While some of these remarks may seem somewhat dated, I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable. What I would quarrel with is the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation. Subsequent cases have addressed these issues.

The Decline of Absolute Protection

51 The idea that Cabinet documents should be absolutely protected from disclosure has in recent years shown considerable signs of erosion. This development began in the United States in the famous case of *United States v. Nixon*, 418 U.S. 683 (1974), where a subpoena was directed to the former President of that country to produce tape recordings and documents relating to certain conversations and meetings between him and others. The President, claiming executive privilege, filed a motion to have the subpoena quashed, but the [page660] Supreme Court of the United States, affirming the courts below, rejected the President's claim.

52 While there are important differences between the governmental structure of the United States and that of this country, the underlying values concerned are much the same. Consistent with the law in this country, the Court observed that, while it would accord great deference to presidential views, the judiciary, not the President, was the final arbiter of a claim of privilege. In doing this, a court was bound to weigh the conflicting interests.

53 The Court recognized the need to protect communications between high government officials. It gave some weight to the candour argument, but it also noted the importance of protecting the President from being harassed by vexatious and unnecessary subpoenas.

54 On the other hand, the need for confidentiality in government, the court thought, must be weighed against the historic commitment to the rule of law. The integrity of the judicial system and public confidence in it depended on full disclosure of all facts within the framework of the rules of evidence, particularly in criminal matters.

55 In weighing the competing interests, the Court took account of the fact that the claim to confidentiality was general in nature. It could not be concluded that presidential advisors would be moved to temper their candour by the infrequent occasions of disclosure in judicial proceedings. By contrast, the production of evidence in criminal proceedings was specific and central to the fair adjudication of a particular case.

56 The Court also took into account that the claim, as in the case here, was made solely on the basis that confidentiality was required to secure the decision-making process generally, not to protect the revelation of any particular action or policy.

[page661]

57 In the United Kingdom, the erosion of the notion of absolute protection of Cabinet documents from disclosure began the following year with the case of *Attorney-General v. Jonathan Cape Ltd.*, [1975] 3 All E.R. 484. Mr. R.H.S. Crossman, who had been a Cabinet Minister from 1964 to 1970, had throughout that period kept diaries with a view to writing his memoirs for the purposes of publication. The memoirs contained details of Cabinet discussions and disclosed differences between Cabinet Ministers on particular issues. After Mr. Crossman's death, the defendants, a book publisher and a newspaper, by arrangement with his literary executors, proposed to publish the memoirs. However, objection was made to their publication by the Secretary of the Cabinet, and the Attorney General sought to obtain two permanent injunctions restraining their publication.

58 The Attorney General contended that all papers, discussions and proceedings of Cabinet were confidential and the court should restrain their disclosure. The basis of that contention was that the confidential character of those materials derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet had to be supported thereafter by all its members whether they approved of it or not, unless they felt compelled to resign. Accordingly Cabinet proceedings could not be referred to outside the Cabinet in such a way as to disclose the attitude of individuals in arguments preceding a decision because this would inhibit free and open discussion in the Cabinet in the future. The Attorney General also contended that advice tendered to Ministers by civil servants and personal observations made by Ministers regarding their capacity and suitability were also confidential and could equally be restrained by the court.

59 Lord Widgery C.J. agreed that the views expressed by Ministers in Cabinet are confidential and their disclosure may be restrained where this [page662] is clearly necessary in the public interest. He also accepted that the maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest. However, the precise degree of confidentiality pertaining to Cabinet discussion, he found, was not entirely clear. There was no question that a court would restrain a person

from disclosing information that affected national security or in other extreme cases. But the Attorney General faced serious difficulties in relying on the public interest in non-disclosure generally. While the application of the doctrine of joint responsibility might be prejudiced by premature disclosure of views, there must, Lord Widgery C.J. stated, be some time after which the confidential character of the information, and the duty of the court to restrain publication, would lapse. The precise point at which material loses its confidentiality may be extremely difficult to determine in a particular case. However, he rejected the suggestion that there should be an arbitrary period of thirty years. Rather he put the matter simply in this way at p. 496.

The question for the court is whether it is shown that publication now might damage the doctrine notwithstanding that much of the action is up to 10 years old and three general elections have been held meanwhile.

He concluded that it would not.

60 There is a difference, however, between refusing to restrain disclosure and compelling disclosure and it is interesting that Lord Widgery C.J. thought it quite clear that no court would compel the production of Cabinet papers in the course of discovery in an action. As in *Conway v. Rimmer*, however, the question was not before the Court. Indeed, up to that time so far as I am aware, the only case in which that view was ever acted upon was in *Lanyon Pty. Ltd. v. Commonwealth of Australia* (1974), 129 C.L.R. 650, where Menzies J. of the High Court of Australia held in an action of compensation for land that Cabinet documents [page663] related to the matter should not be disclosed in the public interest.

61 It was in Australia, however, that the next stage of development took place. In *Sankey v. Whitlam* (1978), 21 A.L.R. 505 (H.C.), a private prosecutor had laid an information alleging that Mr. Whitlam, the former Prime Minister, and three former Cabinet colleagues had committed an offence against s. 86 of the Crimes Act and had been involved in a conspiracy at common law. The charges arose out of activities taken while the accused had been members of the Australian Cabinet.

62 In the course of the proceedings, a number of subpoenae duces tecum were issued on behalf of the prosecutor seeking production of various documents, including Cabinet documents, and communications between Ministers and departments and others. The Commonwealth objected to the production of some of these documents on the ground that disclosure would impede the proper functioning of the executive branch of government and the public service. As here, the objection was made not on the basis that disclosure of the contents would harm the national interest, but on the basis of the class to which they belonged. The magistrate upheld the objection and refused to order production of the documents. The prosecutor then brought an action for declarations that the documents be produced. The case was ultimately heard by the High Court of Australia which concluded that the documents should be produced.

63 The principal judgment, delivered by Gibbs A.C.J., is a veritable textbook on the subject. Dealing with the arguments traditionally advanced for non-disclosure of Cabinet documents, he noted that while some judges find the candour argument unconvincing, he did not find it altogether unreal that in some matters at least communications between Ministers and public servants might be more frank and candid if those concerned believed they were protected from disclosure. However, he did not think this consideration was sufficient to justify a grant of complete immunity from disclosure. Similarly, referring to the statement of Lord Reid above cited, he thought it was inherent in the [page664] nature of things that government at a high level cannot function without some degree

of secrecy. But here again he did not think the public interest required that all high level government documents should be protected from disclosure irrespective of their subject matter. Consistently with these views, Stephen J. noted that there were no static rules for classifying one class of documents as being immune from disclosure; it was simply one of the variables to take into account in balancing the relevant public interests.

64 Nor, the Court thought, should protection from disclosure last forever. The length of time the immunity should last would depend on the subject matter. The statement in *Conway v. Rimmer* that Cabinet documents should not be disclosed at least until they become of historical interest only was out of keeping with the principle enunciated in that case, namely, that documents should be withheld from disclosure only, and to the extent, that the public interest renders it necessary. The matters with which the documents in that case dealt with had occurred over three years before and were no longer of continuing significance.

65 Gibbs A.C.J. made another significant point. He underlined that "a rule of evidence designed to serve the public interest" should not "become a shield to protect wrongdoing by ministers in the execution of their office" (p. 532). Stephen J. elaborated on this issue. In some cases, he observed, it is important that disclosure be given to support the very purpose that non-disclosure is intended to support, i.e., the proper functioning of government. In that case, the charge of misbehaviour in the conduct of government operations made it important in the public interest that the documents be revealed.

[page665]

66 The general flavour of the case may be rendered by the following remarks of Stephen J. at p. 534, with which I am in complete agreement:

On the one hand, a measure of secrecy must surround at least some aspects of what has been called the counsels of the Crown; the Executive Government of the Commonwealth should, in those cases where real need arises, be able to preserve the confidentiality both of information which it possesses and of advice which it receives. On the other hand, in civil and criminal cases alike, the course of justice must not be unnecessarily impeded by claims to secrecy and those who, with the Governor-General, exercise the executive power of the Commonwealth, Ministers of the Crown acting in exercise of their offices, should, in common with those officers of the public service of the Commonwealth who advise them, be as amenable to the general law of the land as are ordinary citizens.

67 Though the *Whitlam* case involved a criminal prosecution, the Court, as the last quotation reveals, saw no difference in principle between criminal and civil cases. The following year, the House of Lords in *Burmah Oil Co. v. Bank of England*, *supra*, also concluded that a court, in certain circumstances, might order the production of high level government documents -- high level in that they were concerned with the formulating of government policy and that they involved the inner workings of the government. It was, as well, a civil case, one moreover that did not involve "special circumstances" such as criminal activities or other improprieties described by the Divisional Court.

On the basis of this case, then, the Court of Appeal in the present case was quite right in rejecting the concept of special circumstances.

68 In the *Burmah Oil* case, *Burmah Oil* sued the Bank alleging that a sale of certain shares to the Bank should be set aside as an unconscionable transaction. Negotiations between the company and the Bank, which acted pursuant to government policy, were made at a time when *Burmah Oil* was in serious financial difficulties. Various documents disclosing the government's role in the transaction appeared on the Bank's list of documents in the litigation. At the request of the Crown, the Bank objected to discovery of a number of these documents. [page666] A certificate by the Chief Secretary to the Treasury claimed privilege on the ground that he had concluded that the production of the documents would be injurious to the public interest because it was necessary to the proper functioning of the public service that they be withheld. The documents included high level ministerial papers relating to government policy (i.e., memoranda of meetings attended by Ministers) and inter-departmental communications between senior government officials. The documents were said to belong to a class relating to the formulation of government policy on important economic and financial matters.

69 Unlike the situation in the present case, the certificate was not "amorphous" but specific and motivated. The Minister had not contented himself with a claim of a blanket character that such documents should not be revealed in the public interest. Rather, he had fully set forth why they should be withheld, namely that they concerned discussions at a very high level of specific government policies, policies identified as being of the highest national and political importance. The case, therefore, involved circumstances of far greater sensitivity than those in the present case.

70 All the Law Lords were agreed that there was no rule of law that a claim of immunity from production of Cabinet documents was conclusive. Whether the documents should be revealed or not was a question for the court.

71 *Sankey v. Whitlam*, *supra*, was cited with approval. A majority thought (Lord Wilberforce dissenting) that the action was not concerned with the policy reasons for rescuing *Burmah Oil* but with an alleged unconscionable transaction taken within the confines of that policy. The majority also concluded that a reasonably probable case had been made out that the documents contained material relevant to issues in the action. That being [page667] so, the court had a discretion to review the Crown's claim of privilege. In doing so, it had to balance the competing interests of preventing harm to the public service against the public interest in the administration of justice, and could inspect the documents privately to determine where the balance of interest lay. Having inspected them, however, the Law Lords concluded that the documents did not contain material necessary for disposing fairly of the case and therefore upheld the Crown's objection to their disclosure.

72 It is obvious that Lord Wilberforce accepted the newer approach with reluctance, but the majority was more favourably disposed towards disclosure for a variety of reasons. Lord Edmund-Davies, for example, underlined that the party objecting to disclosure was "not a wholly detached observer of events"; the government, he noted, had "a very real and lively interest" in the result of the proceedings (p. 720). Lord Keith of Kinkel emphasized that the whole context must be examined. In particular, he observed, "Details of an affair which is stale and no longer of topical significance might be capable of disclosure without risk of damage to the public interest" (p. 725); see also Lord Scarman, at p. 733. Lord Keith also noted the significance of the modern trend to more open government. While it is for Parliament to determine how far this trend should go, it is not a matter of indifference to the courts. As he put it at p. 725:

There can be discerned in modern times a trend towards more open governmental methods than were prevalent in the past. No doubt it is for Parliament and not for courts of law to say how far that trend should go. The courts are, however, concerned with the consideration that it is in the public interest that justice should be done and should be publicly recognised as having been done. This may demand, though no doubt only in a very limited number of cases, that the inner workings of government should be exposed to public gaze, and there [page668] may be some who would regard this as likely to lead, not to captious or ill-informed criticism, but to criticism calculated to improve the nature of that working as affecting the individual citizen.

73 Lord Scarman eloquently set forth the need for disclosure and distinguished between objections on the basis of class and content at p. 733:

A Cabinet minute, it is said, must be withheld from production. Documents relating to the formulation of policy at a high level are also to be withheld. But is the secrecy of the "inner workings of the government machine" so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some state secret of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?

(Emphasis added.)

74 Once again English judicial attitude was adapted to conform with more liberal developments in other parts of the Commonwealth. In this approach, it was soon joined by the New Zealand Court of Appeal in *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146.

75 In Canada, however, the former attitude prevailed until the early 1980s. Until then, dicta can be found in several appeal courts to the effect that Cabinet documents are not open to disclosure until they become of historical interest; see *R. and Vanguard Hutterian Brethren Inc.* (1979), 97 D.L.R. (3d) 86 (Sask. C.A.); *Smerchanski v. Lewis*, supra. *R. in Right of Alberta v. Mannix*, [1981] 5 W.W.R. 343 (Alta. C.A.) showed somewhat more openness, but it was not until *Gloucester Properties Ltd. v. R.* (1981), 24 C.P.C. 82 that the new trend was adopted in a Canadian court. There Nemetz C.J., speaking for the British Columbia Court of Appeal, accepted the view that Cabinet minutes and discussions are not subject to absolute privilege. The claim of privilege, he [page669] stated, will prevail only when it is necessary in the public interest. In words reminiscent of those expressed by Fauteux J. in *Gagnon v. Commission des valeurs mobilières du Québec*, supra, he noted that the court will weigh the facts in each particular case to determine whether the public interest in the administration of justice should prevail over the public interest in non-disclosure.

76 This Court had occasion to deal with the matter the following year in *Smallwood v. Sparling*, supra. Sparling was appointed under the Canada Corporations Act to conduct an investigation for the Restrictive Trade practices Commission into the management of Canadian Javelin Ltd. A sub-

poena was issued to Mr. Smallwood, the former Premier of Newfoundland, to give evidence and to bring forth certain particularized documents. Mr. Smallwood then applied for an injunction enjoining Sparling and others from acting upon the subpoena. In support of his application, it was asserted that at the relevant times he had acted solely as Premier, and that any testimony he would be called upon to give or any documents he would be called upon to produce were subject to public interest immunity.

77 This Court, however, decided against the granting of the injunction. In dealing with these issues, Wilson J., who delivered the judgment, first noted that while a former Minister may, in some circumstances, claim public interest immunity with respect to specific oral or documentary evidence, he cannot claim complete immunity. In her review of the cases, she emphasized Rand J.'s statement in *R. v. Snider*, *supra*, that the general principle was that all facts must be available to the court in the absence of an overriding public interest. *Conway v. Rimmer*, she added, later adopted the view that state documents enjoyed only relative immunity and could in appropriate circumstances be divulged. She noted, however, that some comments in that case indicated that Cabinet documents could not be disclosed until they were of [page670] historical interest. In her view, however, the more recent *Burmah Oil* case did not appear to be based on any absolute principle of public immunity. That case, Wilson J. concluded, indicated that "it is the role of the courts, not the administration to determine whether disclosure of documents would be injurious to the public interest" (p. 704). The same principle applied to oral evidence.

78 In rejecting Mr. Smallwood's claim to immunity on the basis of the doctrine of collective Cabinet responsibility, Wilson J. underlined that in *Attorney-General v. Jonathan Cape Ltd.*, *supra*, Lord Widgery C.J. had made it clear that there was a time limit on the application of the doctrine. Indeed after a careful examination of the case, she concluded at p. 707 that:

... the onus would be on Mr. Smallwood to establish that the public interest in joint cabinet responsibility would be prejudiced by any particular disclosure he was being asked to make. Any blanket claim to immunity on this basis must, in my view, also fail.

Later, at p. 708, she added:

His immunity in that regard is relative only and must wait upon the content of the proposed examination. Mr. Smallwood cannot be the arbiter of his own immunity. This is for the courts. The application in this respect was therefore premature.

Summary and Application of the Principles

79 The foregoing authorities, and particularly, the Smallwood case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection [page671] of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important

factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

80 To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the document; to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.

81 I would repeat that no claim is made here on the basis of the nature of the policy discussed in the documents. If the certificate had particularized that their divulgence should be withheld on the ground, for example, that they relate or would affect such matters as national security or diplomatic relations, that would be another matter. If the certificate was properly framed, the court might in such a case well agree to their being withheld even without inspection; see in this context *Goguen v. Gibson*, *supra*. For on such issues, it is often unwise even for members of the judiciary to be aware of their contents, and the period in which they should remain secret may be very long.

82 In the present case, however, we are dealing with a claim based solely on the fact that the [page672] documents concerned are of a class whose revelation might interfere with the proper functioning of the public service. It is difficult to see how a claim could be based on the policy or contents of the documents. We are merely dealing with a transaction concerning a tourist lodge in northern Ontario. The development of a tourist policy undoubtedly is of some importance, but it is hardly world-shaking. Apart from this, are we really dealing with the formulation of policy on a broad basis, or are we simply concerned with a transaction made in the implementation of that policy? Such a distinction was accepted by a majority of the House of Lords in *Burmah Oil* in relation to far more sensitive policy issues, i.e., major financial and economic policies of the nation. Policy and implementation may well be intertwined but a court is empowered to reveal only so much of the relevant documents as it feels it is necessary or expedient to do following an inspection.

83 I turn now to the length of time since the transaction in question occurred. Recent cases make clear that if Cabinet documents may be given protection as a class, that protection need not be continued until they are only of historical interest. Rather, these cases indicate that the period of protection solely for preserving the confidentiality of the government decision-making process will be relatively short. While it may be true as the Court of Appeal states that the government policy concerned -- the tourist and recreational industry in northwestern Ontario -- may still be ongoing, I find it difficult to accept its conclusion that the advice given and decisions taken respecting the transaction involved in this case have not so lost their immediacy that a court must concern itself about them. We are talking about a transaction that took place over twelve years ago in connection with what by any measure can scarcely be regarded as high level government policy. To advert to the remarks of Lord Widgery C.J. in the *Jonathan Cape* case, several provincial elections have taken place since that time, and governments [page673] have come and gone. In the *Burmah Oil* case, the Court inspected the documents though the transaction concerned far more sensitive policy and had taken place three or four years before; see also the *Whitlam*, *Nixon* and *Smallwood* cases. Assuming there were matters respecting the transaction that could, even feebly, affect present policy, a

court could, on weighing the competing interests, simply refrain from having these matters divulged.

84 There is a further matter that militates in favour of disclosure of the documents in the present case. The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government. This has been stated in relation to criminal accusations in *Whitlam*, and while the present case is of a civil nature, it is one where the behaviour of the government is alleged to have been tainted.

85 Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. As Lord Keith of Kinkel noted in the *Burmah Oil* case, *supra*, at p. 725, it has a bearing on the perception of the litigant and the public on whether justice has been done.

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Inspection

86 I would, therefore, order disclosure of the documents for the court's inspection. This will permit the court to make certain that no disclosure is made that unnecessarily interferes with confidential government communications. Given the deference owing to the executive branch of government, Cabinet documents ought not to be disclosed without a preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice.

87 The Court of Appeal refused to inspect the documents not so much for the reasons I have described earlier, but because it felt that even before it could inspect the documents, there must be some concrete ground for belief, something beyond speculation, that the documents are likely to provide evidence of facts or a state of affairs which, if the documents were produced, would substantially assist the party seeking their production. That consideration was all the more important, it thought, where there was reason to believe these facts or state of affairs are likely to be capable of proof by some other means.

88 There is no doubt authority for this approach in recent English cases. In *Burmah Oil Co. v. Bank of England*, *supra*, the House of Lords, we saw, inspected Cabinet documents with a view to balancing the competing interests involved, but that was on the ground that it was reasonably probable or likely (Lord Wilberforce would have required a strong positive case) that the documents contained matter that was material to the issues arising in the case.

89 It is by no means clear from the judgment that the expressions "reasonably probable" or "likely" were used as a test or reflected the state of facts in that case. Indeed in the *Smallwood* case, at p. 703, Wilson J. interpreted the *Burmah Oil* case as holding that "when a claim of privilege is made in respect of documents which are *prima facie* [page675] relevant to the issues before the

court, the court must review the documents in order to balance the competing interests" already described.

90 The law in England was considerably clarified by the subsequent case of *Air Canada v. Secretary of State for Trade* (1983), 2 W.L.R. 494 (H.L.) There the British Airport Authority fixes the charges airlines have to pay for using airports. The Authority embarked on a programme of improvements which it had intended to finance out of its reserves and from borrowing. However, the Secretary of State for Trade, who had certain statutory powers over the Authority, ordered it to finance these improvements out of revenue. In consequence, the Authority imposed a 35 per cent increase on the charges at Heathrow Airport. Air Canada and other airlines then brought suit against the Authority and the Secretary of State claiming that the Secretary had acted unlawfully and that the charges were excessive and unlawful.

91 The airlines alleged that the Secretary's power was confined to the purposes of the Act concerned, whereas the dominant purpose for which he acted was to reduce public sector borrowings. So, they concluded, his directions were unlawful. They did not allege that his motives were different from those expressed in a White Paper and in a statement made by the Secretary in the House of Commons. But the airlines were not content to rely on the latter information; they sought production of a number of high level ministerial documents relating to the formulation of government policy and to interdepartmental communications between senior civil servants. The Secretary claimed public interest immunity against disclosing these documents.

92 The trial judge held that the court's concern was to elicit the truth whether it favoured one side or the other, and that the documents were necessary for the due administration of justice if they substantially assisted the court in determining the [page676] facts upon which its decision depended. This involved the interpretation to be given to Order 24, r. 13(1) of the English Rules of Court which provided that no order for the production of any documents for inspection or to the court shall be made unless the court is of the opinion that the order is "necessary either for disposing fairly of the cause or matter or for saving costs". Being inclined to think the high level ministerial documents were relevant for the purpose, the trial judge decided to inspect them, but stayed the order pending appeal.

93 The Court of Appeal allowed the appeal and its decision was upheld by the House of Lords. Three of the Law Lords (Lord Fraser of Tullybelton, Lord Wilberforce and Lord Edmund-Davies) were of the view that to permit documents to be inspected for the purpose of considering whether they should be produced under Order 24, r. 13(1), it was necessary for the person seeking their production to establish that they would give substantial support to the contention of the party seeking disclosure. Unless this were established, the court should not even inspect the documents. In their view, the party seeking production must first establish that they would be of assistance in establishing the plaintiff's case. Only if this had been done would the court inspect the documents to weigh the competing interests. This approach was adopted by the Court of Appeal in the present case.

94 It should be mentioned, however, that in the *Air Canada* case two of the Law Lords (Lord Scarman and Lord Templeman) were of the view that it was sufficient if the documents might assist any of the parties to the proceeding. They adopted the view of the trial judge that "documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts upon which the decision in the cause will depend"; see Lord Scarman, at p. 535.

95 It should also be underlined that it was not solely for these reasons that the Law Lords refused [page677] to inspect the documents, let alone have them disclosed. They were all of the view that any relevant information that might be gleaned from them had already been publicly revealed in the White Paper and the Secretary's statement mentioned earlier. Accordingly, their production was not, in the words of Order 24, r. 13(1) "necessary either for disposing fairly of the cause or matter or for saving costs". Lord Scarman made it clear that it was "for this reason, but for no other" that he would hold that the trial judge was wrong to decide to inspect the documents (p. 535).

96 What was involved in the *Burmah Oil* and *Air Canada* cases, therefore, was the question of how, in the particular circumstances of those cases, the court should exercise its discretion under an English Rule of Court in the context of the general practice in English courts, a rule the appellant maintains has no equivalent in this country. Before delving further into this matter, however, it is important that one look at precisely what the Court of Appeal did in the present case.

97 The approach of the Court of Appeal was as follows. Carey, it stated, failed to make the case he had to make in order to succeed. The Crown's objection to having the documents disclosed was based on a ground of a public interest which the law recognizes as sufficient to make a *prima facie* case for their protection. The burden of persuasion, therefore, was on the plaintiff to make the case to the contrary in accordance with the rules that govern how that is to be done. Central to Carey's claim, it stated, is his allegation that the Crown breached several agreements, which agreements could be established if the Cabinet documents in question were produced. However, the Court went on to say that to the extent that the agreements were later reduced to writing, they should be readily capable of being proved at trial. To the extent that they were not reduced to writing, their existence could be proved by calling witnesses. Counsel did not assert or lead the Court to believe these witnesses were unavailable.

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98 In a word, the Court stated, no case was made that the existence of and terms of the agreements are unlikely to be capable of proof by other means. All the submissions on behalf of Carey came down to, it concluded, is that the documents are relevant to his case and that, accordingly, they either could or might assist him. This was no more than "a bare unsupported assertion... that something to help him may be found" in the documents; Carey's case stopped far short of showing "some concrete ground for belief" which would take the case beyond mere speculation.

99 What troubles me about this approach is that it puts on a plaintiff the burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation. But they deal with precisely the subject matter of the action and what one party was doing in relation to the relevant transactions at the time.

100 It may well be that witnesses could establish what the contract was but there are always questions of precise recall and of credibility. Besides, in an evolving arrangement like the one alleged there is no substitute for written documents in determining precisely what was going on, and what the parties had in mind. In particular, in the present case the Court failed to observe that the plaintiff was not only alleging breach of an agreement, but that the transfer of the lodge under the circum-

stances constituted an unconscionable transaction, the determination of which could surely be assisted by an examination of the document.

101 The method of approach adopted by the Court of Appeal appears to be diametrically opposed to that implicit in Wilson J.'s remark in *Smallwood*, supra, p. 703, cited earlier, regarding the *Burmah* [page679] Oil case. But even if one were to adopt the most stringent English view regarding the production of documents, which appears to have found favour with the Court of Appeal, I cannot help concluding that the documents are likely (though one cannot really tell without inspecting them) to assist Carey's case. The whole of the surrounding circumstances is, I think, sufficient to give a "concrete ground" for that view. I cannot agree that under the known circumstances the attempt to obtain disclosure can be categorized as a mere "fishing expedition".

102 It is instructive to examine more closely the observations on the point made by the Law Lords in the *Burmah Oil* case. It was the surrounding circumstances that persuaded the House to examine the documents in that case; see for example Lord Keith of Kinkel, at pp. 722-23. As Lord Scarman noted, "common sense must be allowed to creep into the picture" (p. 731). As in this case, the House at the time it heard the case was, in Lord Edmund-Davies' words at p. 720, "completely in the dark as to the cogency" of the documents. He added that "No judge can profitably embark on such [public interest] balancing exercise without himself seeing the disputed documents" (p. 721), a view shared by Lord Scarman (p. 731).

103 The *Burmah Oil* case bears a considerable resemblance to this case at least in so far as it alleged that the transaction was an unconscionable one, one forced on the plaintiff by undue pressure of the other party. That issue, as the majority in the *Burmah Oil* case noted, cannot be treated entirely objectively. On this issue, it seems to me, the remarks of Lord Scarman at p. 731 are compelling:

Burmah's case is not merely that the Bank exerted pressure: it is that the Bank acted unreasonably, abusing its power and taking an unconscionable advantage of the weakness of *Burmah*. On these questions the withheld documents may be very revealing. This is not "pure speculation". The government was creating the pressure; the Bank was exerting it on the government's instructions. [page680] Is a court to assume that such documents will not assist towards an understanding of the nature of the pressure exerted? The assumption seems to me as unreal as the proverbial folly of attempting to understand Hamlet without reference to his position as the Prince of Denmark.

104 I might also observe that there was evidence in that case, apart from the documents sought to be discovered, that went some considerable way towards establishing that the transaction was unconscionable. The fact that there may be other evidence in the present case to prove the existence and terms of the transaction and the surrounding circumstances is no reason for refusing to produce, let alone inspect, the documents. This case is entirely different from the *Air Canada* case where the sole reason for seeking the production of the documents was to establish the motive of the Secretary of State in instructing the Airport Authority, a motive already fully revealed in a White Paper and a statement of the Secretary in the House of Commons. Under these circumstances the Law Lords concluded that it was improbable that the documents whose production was sought contained anything that had not already been published and were, therefore, unlikely to be of assistance to the Court.

105 I should add that I much prefer the approach of Lord Scarman and Lord Templeman in the *Air Canada* case that the court may under R.S.C. Order 24, r. 13 inspect the document and, if not found to be outbalanced on the basis of some public interest, produced not only when this is likely to assist the plaintiff's case or damage the defendant's, but also where it may assist any of the parties to the proceedings. Disclosure may as they indicate be necessary for a fair determination of the issues and for saving costs even when it does not directly assist the plaintiff's case; see for example Lord Scarman at p. 535.

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106 Indeed, I do not think the rule, if it existed in this country, would require the rigorous approach adopted in England. Its language is not compelling and, even in England, a more relaxed practice is adopted when questions of confidentiality are not raised. It seems to me that in a claim of public interest immunity which, like the present, seems doubtful, the court should feel free to examine the documents. There has, for a long period now, been a far more open and flexible attitude towards discovery in this country than in England. I think deciding the issue on a bare *prima facie* case of a public interest in non-disclosure, such as the Court of Appeal did here, is out of place in Canadian practice. Lord Scarman referred with approval to the trend towards inspection and disclosure in the United States and in the Commonwealth generally as well as under Scottish law. Besides, counsel did not refer us to any rule in Ontario similar to R.S.C. Order 24, r. 13. The practice in the province is governed by rules having a quite independent base; for its genesis, see Williston and Rolls, *The Law of Civil Procedure* (1970) vol. 2 pp. 745-51, 780-81, 805-06. The different legislative base requires, as Le Dain J. in speaking on the regime under Canada Evidence Act pointed out in *Goguen v. Gibson*, *supra*, at p. 472, that the *Air Canada* case "be treated with caution".

107 The approach that, in my view, should be followed may be exemplified by a recent case in New Zealand, *Fletcher Timber Ltd. v. Attorney-General*, [1984] 1 N.Z.L.R. 290 (C.A.) where there is also no provision like Order 24, r. 13. There a judge refused to order the production and inspection of documents in an action for breach of a timber cutting agreement, or alternatively, for damages in tort resulting from negligent misrepresentation. The documents concerned included Cabinet documents and the Ministry of Forests raised a claim against their production on the ground of public interest immunity. On appeal, [page682] the Court, in the exercise of its discretion, ordered their inspection.

108 I shall largely confine myself to the remarks of Woodhouse P. with whom the other judges were in substantial agreement. He referred to the different procedural environment that existed in England under which, he stated, the same test had to be used when the judge was asked to examine documents privately in order to resolve whether they should be made available to the applicant. He wryly added: "To describe the conclusion in another way, the condition upon which the discretion to make an order will arise has been brought forward to qualify what might be the only profitable way of deciding how the discretion could be correctly exercised" (p. 294). Whatever might be the situation in England, he held, this was not the law in New Zealand. At p. 295, he made the following statement with which I am in total agreement:

If the balance of public interest can be seen to support the claim of immunity without prior inspection by the Judge then the consequential decision against production will be made without further ado. In that regard the certificate itself should demonstrate with sufficient particularity both in terms of any need to preserve their confidentiality on the one hand and for the actual litigation on the other. But where this is not the position, where the Judge has been left uncertain, it is difficult to understand how his own inspection could affect in any way the confidentiality which might deserve protection. And in that situation I think it would be wrong to put aside such a direct and practical means of resolving the difficulty. Indeed if it were to happen the primary responsibility of the Courts to provide informed and just answers would often depend on processes of sheer speculation, leaving the Judge himself grasping at air. That cannot be sensible nor is it necessary when by the simple act of judicial reconnaissance a reasonably confident decision could be given one way or the other.

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See also Richardson J., especially at pp. 301-302 and McMullin J., especially at pp. 307-308. These judges make it clear, in McMullin J.'s words at p. 308, that:

... once the documents are admitted to relate to the case, as they are here, they should be available for inspection unless there is some reason shown why in the interests of public policy that course should not be followed. And the onus of establishing that they should not be produced for inspection must lie on the party which seeks a departure from the general rule.

109 I am, therefore, of the view that the documents to be produced should be inspected by the trial judge to determine whether, on balancing the competing interests already described, they should be produced.

Conclusion

110 For these reasons, I would allow the appeal with costs throughout and I would also set aside the order of the Honourable Mr. Justice Catzman dated July 9, 1982 quashing the subpoena duces tecum directed to Dr. E.E. Stewart.

qp/mem

Case Name:

Babcock v. Canada (Attorney General)

**The Attorney General of Canada on behalf of Her Majesty
the Queen in Right of Canada and in his capacity as
Minister of Justice, the Treasury Board of Canada and
the Deputy Minister of Justice, appellants;**

v.

**Patricia Babcock, Linda Bell, Victoria Bryan, Lynn
Burch, Karl Burdak, George Carruthers, Gordon
Carscadden, Margaret E.T. Clare, Timothy W. Clarke,
Moyra Dhaliwal, Mary Jane Dodge, Jonas Dubas, S. David
Frankel, Greg D. Franklin, Valerie Hartney, Bruce
Hilchey, John Kennedy, Digby Kier, Daniel L. Kiselbach,
Ingeborg E. Lloyd, Josephine Loncaric, John Loo, William
Mah, Ian McKinnon, Robert Moen, Nancy Oster, Michael
Owens, Brent Paris, Darlene Patrick, Paul Pelletier,
David Prest, Brian Purdy, Christopher Randall, Brian
Sedgwick, Karen Shirley, Pamela Lindsay Smith, Tim
Stokes, Cory Stolte, Josée Tremblay, Karen A. Truscott,
Max Weder, Harry Wruck and Wendy Yoshida, respondents,
and**

**The Attorney General of British Columbia, the Attorney
General for Alberta, the Information Commissioner of
Canada and the British Columbia Civil Liberties
Association, interveners.**

And between

**The Attorney General of Canada on behalf of Her Majesty
the Queen in Right of Canada and in his capacity as
Minister of Justice, the Treasury Board of Canada and
the Deputy Minister of Justice, appellants;**

v.

**Rosemary Lutter and Emily Reid, respondents, and
The Attorney General of British Columbia, the Attorney
General for Alberta, the Information Commissioner of
Canada and the British Columbia Civil Liberties
Association, interveners.**

[2002] S.C.J. No. 58

[2002] A.C.S. no 58

2002 SCC 57

2002 CSC 57

[2002] 3 S.C.R. 3

[2002] 3 R.C.S. 3

214 D.L.R. (4th) 193

289 N.R. 341

[2002] 8 W.W.R. 585

J.E. 2002-1314

168 B.C.A.C. 50

3 B.C.L.R. (4th) 1

3 C.R. (6th) 1

114 A.C.W.S. (3d) 1057

File No.: 28091.

Supreme Court of Canada

Heard: February 20 2002;

Judgment: July 11 2002.

**Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier,
Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel
JJ.**

(65 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Evidence -- Disclosure of government information -- Objection relating to a confidence of the Queen's Privy Council -- Government claiming in litigation with staff lawyers that certain docu-

ments were Cabinet confidences and consequently exempt from disclosure under s. 39 of Canada Evidence Act -- Processes by which Cabinet confidentiality may be claimed and relinquished -- Requirements for valid certification -- Whether by releasing some documents Crown has waived its right to invoke s. 39 over other documents -- Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.

Constitutional law -- Validity of legislation -- Legislation exempting Cabinet confidences from disclosure -- Whether legislation unconstitutional by reason of unwritten principles of Canadian Constitution -- Whether Parliament's decision to limit superior courts from compelling disclosure of Cabinet confidences impermissibly invades core jurisdiction of superior courts -- Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39 -- Constitution Act, 1867, preamble, s. 96.

Summary:

The respondents, who are staff lawyers with the federal Department of Justice in Vancouver, sued the federal Crown for breach of contract and breach of fiduciary duty when they failed to be paid the same salary as staff lawyers in Toronto. Lists of documents were exchanged, in which the government listed a number of documents as producible. In support of a motion to have the action transferred to the Federal Court, which was dismissed, the government filed the affidavit of an officer of the Treasury Board Secretariat which set out the rationale for the pay raise for Toronto lawyers. The government later changed its position on disclosure and delivered a certificate of the Clerk of the Privy Council pursuant to s. 39(1) of the *Canada Evidence Act* objecting to the disclosure of 51 documents and any examination thereon, on the ground that they contain "information constituting confidences of the Queen's Privy Council for Canada". The certificate claimed protection for 12 government documents previously listed as producible (some of which had already been disclosed), for five documents in the control or possession of the respondents, and for 34 government documents and information previously listed as not producible. The chambers judge dismissed the respondents' application to compel production of the documents for which the government claimed protection. A majority of the Court of Appeal reversed this decision and ordered production on the ground that the government had waived its right to claim confidentiality by listing some of the documents as producible and by disclosing selective information in the affidavit.

Held: The appeal should be allowed in part. The documents certified but disclosed are no longer protected and may be used in the litigation.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.: Section 39 of the *Canada Evidence Act* is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings. Certification by the Clerk of the Privy Council or by a minister of the Crown is the trigger by which information becomes protected. Before certifying information, however, the Clerk or minister must answer two questions in the affirmative: first, is it a Cabinet confidence within the meaning of ss. 39(1) and 39(2); and second, is it information which the government should protect taking into account the competing interests in disclosure and retaining confidentiality? Once certified, information gains greater protection than at common law since the absolute language contained in s. 39 goes beyond the common law approach of balancing the public interest in protecting confidentiality and disclosure on judicial review. The requirements for valid certification are as follows: (1) it must be done by the Clerk or minister; (2) it must relate to information within s. 39(2); (3) it must be done in a *bona fide* exercise of delegated power; (4) it must be done to prevent disclosure of hitherto confidential information. If there has been disclosure, s. 39 no

longer applies, since its only purpose is to prevent disclosure. The only timing limits are those found in s. 39(4). The protection of s. 39 continues indefinitely unless: (1) the certificate is successfully challenged on the ground that it related to information that does not fall under s. 39; (2) the power of certification of the Clerk or minister has otherwise been improperly exercised; (3) s. 39(4) is engaged; or (4) the Clerk or minister chooses to decertify the information.

The concept of waiver in any ordinary sense of the term does not apply on the facts of this case, and this is consistent with the common law. By releasing some documents, the Crown has not waived its right to invoke s. 39 over other documents. Moreover, the language of s. 39(1) does not permit one to say that disclosure of some information removes s. 39 protection from other, non-disclosed information.

The wording of s. 39(1) leaves little scope for judicial review of a certification of Cabinet confidentiality. However, the principle that official actions must flow from statutory authority clearly granted and properly exercised still applies. The certification of the Clerk or minister under s. 39(1) may be challenged where the information for which immunity is claimed does not on its face fall within s. 39(1), or where it can be shown that the Clerk or minister has improperly exercised the discretion conferred by s. 39(1). It does not follow from the fact that s. 39 makes it difficult to attack a certification that the procedure is unlawful. All bodies expressly mentioned in s. 39, not just superior courts, are competent to inquire into the validity of s. 39 claims for protection.

The s. 39 certification does not apply to the documents already disclosed, nor does it apply to the five documents that were in the respondents' possession or control. Section 39 cannot be invoked regarding the affidavit, since the government disclosed selective information from it; therefore, the affidavit must be disclosed and the affiant may be cross-examined on its contents. As to related information, if it has been voluntarily disclosed in other documents, then s. 39 does not apply and the documents must be produced. By contrast, the government is under no obligation to disclose related information contained in documents that have been properly certified under s. 39, but runs the risk that refusal may permit the court to draw an adverse inference. The remaining documents are protected by s. 39 of the Act. These conclusions are made without prejudice to future applications in this case.

Section 39 of the Act is constitutional. The unwritten constitutional principles do not limit government actions in this case. It is well within the power of the legislature to enact laws, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. Moreover, Parliament's decision to limit superior courts from compelling disclosure of Cabinet confidences does not impermissibly invade the core jurisdiction of the superior courts. Section 39 does not entirely exclude judicial review of the determination by the Clerk that the information is a Cabinet confidence. It does not, in and of itself, impede a court's power to remedy abuses of process.

Per L'Heureux-Dubé J.: There is substantial agreement with the majority's reasons. Before certifying information as confidential under s. 39(1) of the *Canada Evidence Act*, however, the Clerk or minister need not take into account the "competing interests" in disclosure. The Clerk or minister must only answer two questions before certifying, namely, (1) whether the document is a Cabinet confidence; and (2) whether it is information that the government wishes to protect.

Cases Cited

By McLachlin C.J.

Referred to: *Singh v. Canada* (Attorney General), [2000] 3 F.C. 185; *Carey v. Ontario*, [1986] 2 S.C.R. 637; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624; *Leeds v. Alberta* (Minister of the Environment) (1990), 69 D.L.R. (4th) 681; *Sankey v. Whitlam* (1978), 142 C.L.R. 1; *Makanjuola v. Commissioner of Police of the Metropolis*, [1992] 3 All E.R. 617; *RJR-MacDonald Inc. v. Canada* (Attorney General), [1995] 3 S.C.R. 199; *Commission des droits de la personne v. Attorney General of Canada*, [1982] 1 S.C.R. 215; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 37, 38, 39.

Constitution Act, 1867, preamble, s. 96.

Ombudsman Act, R.S.B.C. 1996, c. 340.

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Great Britain. Report of the Committee of Privy Counsellors on Ministerial Memoirs. London: HMSO, January 1976.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (2000), 188 D.L.R. (4th) 678, 142 B.C.A.C. 161, 76 B.C.L.R. (3d) 35, [2000] 6 W.W.R. 577, [2000] B.C.J. No. 1127 (QL), 2000 BCCA 348, allowing the respondents' appeal from a judgment of the British Columbia Supreme Court (1999), 176 D.L.R. (4th) 417, 70 B.C.L.R. (3d) 128, [1999] B.C.J. No. 1777 (QL). Appeal allowed in part.

Counsel:

David Sgayias, Q.C., and Christopher Rupar, for the appellants.

Richard R. Sugden, Q.C., and Craig P. Dennis, for the respondents.

George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

James C. Robb, Q.C., for the intervener the Attorney General for Alberta.

Daniel Brunet, for the intervener the Information Commissioner of Canada.

Joseph J. Arvay, Q.C., and Christopher Jones, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. was delivered by

1 McLACHLIN C.J.:-- This case raises the issue of when, if ever, Cabinet confidences must be disclosed in litigation between the government and private citizens.

2 On June 6, 1990, the Treasury Board of Canada set the pay of Department of Justice lawyers working in the Toronto Regional Office at a higher rate than that of lawyers working elsewhere. Vancouver staff lawyers brought an action in the Supreme Court of British Columbia, contending that by failing to pay them the same salaries as Toronto lawyers the government breached their contracts of employment and the fiduciary duty toward them.

3 The action proceeded, and the parties exchanged lists of relevant documents in December 1996, as required by the B.C. Supreme Court Rules. A supplemental list of documents was delivered by the government in June 1997. The government listed a number of documents as producible.

4 The government then brought a motion to have the action transferred from the Supreme Court of British Columbia to the Federal Court. In support of its application, it filed an affidavit by Joan McCoy, an officer of the Treasury Board Secretariat. The affidavit stated that the rationale for the Order-in-Council authorizing the pay raise for Toronto lawyers was that lawyers in Toronto generally commanded higher salaries than lawyers in other parts of the country. The affidavit also disclosed the date of the Treasury Board's decision.

5 The government's motion to transfer the action was denied and the action continued in the Supreme Court of British Columbia. The government, nearly two years after it delivered the first list of documents, changed its position on disclosure of documents. It delivered a certificate of the Clerk of the Privy Council pursuant to s. 39(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, objecting to the disclosure of 51 documents and any examination thereon, on the ground that they contain "information constituting confidences of the Queen's Privy Council for Canada". The certificate claimed protection for 12 government documents previously listed as producible (some of which had already been disclosed), for five documents in the control or possession of the plaintiffs, and for 34 government documents and information previously listed as not producible.

6 The plaintiffs (respondents) brought an application to compel production of the documents for which the government claimed protection. The chambers judge, Edwards J., ruled against them, holding that s. 39 of the *Canada Evidence Act* was constitutional and clear. If the Clerk of the Privy Council filed a certificate, that was the end of the matter, and the courts had no power to set the certificate aside. A majority of the Court of Appeal reversed this decision and ordered production of the documents on the ground that the government had waived its right to claim confidentiality by listing some of the documents as producible and by disclosing selective information in the McCoy affidavit. The government appeals this decision to this Court.

I. Legislation

7 *Canada Evidence Act*, R.S.C. 1985, c. C-5

39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agenda of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

(3) For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

- (i) if the decisions to which the discussion paper relates have been made public, or
- (ii) where the decisions have not been made public, if four years have passed since the decisions were made.

II. Decisions

A. *British Columbia Supreme Court* (1999), 176 D.L.R. (4th) 417

8 The chambers judge dismissed the plaintiffs' application for production and upheld the government's claim to confidentiality in its entirety. He held that certification by the Clerk of the Privy Council or a minister of the Crown under s. 39 creates absolute protection, which reflects the importance of protecting the confidentiality of the Cabinet process. Since the remuneration of employees was exclusively within competence of the federal government, the Clerk's decision to certify the documents and information as confidential could not be challenged. Neither the listing of documents as producible nor the disclosure of information in the McCoy affidavit constituted waiver. Edwards J. found that barring very exceptional circumstances, prior disclosure does not waive s. 39. Finally, Edwards J. rejected the argument that confidentiality unconstitutionally trespassed on the core jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*, given the long recognition of cabinet privilege as a legitimate exercise of Parliament's power.

B. British Columbia Court of Appeal (2000), 188 D.L.R.

(4th)

678, 2000 BCCA 348

9 The majority of the Court of Appeal held that Edwards J. erred in rejecting the claim that the government had waived protection to the documents and information. The Crown, as a public representative, must be able to waive privilege; otherwise, any litigant opposing the Crown would be in the untenable position of being unable to rely on the government's production of documents, regardless of how essential the documents were to their case or how late the Crown's application for immunity. While there might be a need for "extreme curtailment" of a litigant's rights to full discovery for documents concerned with sensitive matters like state defence, internal security or diplomatic relations, the government must be permitted to waive protection in appropriate cases.

10 Applying this principle, the majority held that the government waived immunity for the 17 documents previously identified as producible. Protection was also waived for the information in the McCoy affidavit which outlined the government's rationale for the salary differential at the heart of the litigation. Any claim for privilege thereafter would be selective, requiring that claims for confidentiality on all related information be treated as waived. With respect to the remaining 34 documents, the majority held that s. 39 confers class immunity rather than selective immunity; it followed that waiver operates on a class basis. Thus, waiver of immunity for 17 of the documents covered by the s. 39 certificate waived the immunity for all of the relevant documents within the class. In view of this conclusion, it was not necessary to consider whether s. 39 was constitutional.

11 Southin J.A. dissented. In her view, it is "not appropriate for the judiciary to intermeddle in the business of the Cabinet and its committees and it is not at all clear to me ... that the judiciary must regain its control over this whole field of the law, a proposition which to me has a distasteful ring of judicial arrogance" (para. 52). This said, s. 39 is limited to papers that are actually put before the Cabinet or a Cabinet committee and the Clerk must exercise her powers properly. She must properly describe the documents, bringing them within the ambit of the section, and if it can be shown, either from internal or external evidence, that the Clerk has exceeded the power conferred upon her, the court can require disclosure of all documents not within the section.

12 Southin J.A. held that only an act of the Clerk or of a minister of the Crown can effect waiver. Otherwise, junior functionaries having no conception of the importance of Cabinet confidentiality would be able to waive it, to the detriment of the national interest.

13 Newbury J.A concurred with MacKenzie J.A. with respect to the waiver of privilege in this case. However, she went on to state that had waiver not occurred, she would have agreed with Southin J.A.'s findings concerning the requirements of particularity on the part of the Clerk in claiming the privilege.

III. Issues

14 1. What is the nature of Cabinet confidentiality and the processes by which it may be claimed and relinquished?

2. Is s. 39 of the *Canada Evidence Act* constitutional?

IV. Discussion

A. *The Principles*

15 Cabinet confidentiality is essential to good government. The right to pursue justice in the courts is also of primary importance in our society, as is the rule of law, accountability of the executive, and the principle that official actions must flow from statutory authority clearly granted and properly exercised. Yet sometimes these fundamental principles conflict. How are such conflicts to be resolved? That is the question posed by this appeal.

16 The answer to the question lies in our understanding of Cabinet confidentiality. What is its purpose? What does it apply to? What is the process for claiming it? Once claimed, can it be relinquished or lost, and if so, how? These questions find their answers in an understanding of Cabinet confidentiality and the ambit and effect of s. 39 of the *Canada Evidence Act* that protects it.

(1) The Function of Section 39 of the *Canada Evidence Act*

17 Sections 37, 38 and 39 of the *Canada Evidence Act* deal with objections to the disclosure of protected information held by the federal government. Section 37 relates to all claims for Crown privilege, except Cabinet confidences, or confidences of the Queen's Privy Council; s. 38 pertains to objections related to international relations or national defence; and s. 39 deals with Cabinet confidences. Under ss. 37 and 38, a judge balances the competing public interests in protection and disclosure of information. Under s. 39, by contrast, the Clerk or minister balances the competing interests. If the Clerk or minister validly certifies information as confidential, a judge or tribunal must refuse any application for disclosure, without examining the information.

18 The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (January 1976), at p. 13:

A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations -- members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future... . The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardise" another, -- ever compare his present contribution to the common fund of counsel with a previously expressed opinion... .

The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

19 At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see *Carey, supra*. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey, supra*.

20 In addition, many jurisdictions have enacted laws that modify the common law and provide a statutory process for determining what documents are protected and how claims to confidentiality may be challenged: see, for example, the *Ombudsman Act*, R.S.B.C. 1996, c. 340. The exercise of this statutory power is subject to the well-established rule that official actions must flow from statutory authority clearly granted and properly exercised: *Roncarelli v. Duplessis*, [1959] S.C.R. 121. The courts have the power and the responsibility, when called upon, to determine whether the certifying official has exercised his or her statutory power in accordance with the law.

21 Section 39 of the *Canada Evidence Act* is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings. It sets up a process for bringing information within the protection of the Act. Certification by the Clerk of the Privy Council or by a minister of the Crown, is the trigger by which information becomes protected. The Clerk must certify that the "information constitutes a confidence of the Queen's Privy Council for Canada". For more particularity, s. 39(2) sets out categories of information that falls within its scope.

22 Section 39(1) permits the Clerk to certify information as confidential. It does not restrain voluntary disclosure of confidential information. This is made clear from the French enactment of s. 39(1) which states that s. 39 protection arises only "*dans les cas où*" (in the cases where) the Clerk or minister opposes disclosure of information. Therefore, the Clerk must answer two questions before certifying information: first, is it a Cabinet confidence within the meaning of ss. 39(1) and

39(2); and second, is it information which the government should protect taking into account the competing interests in disclosure and retaining confidentiality? If, and only if, the Clerk or minister answers these two questions positively and certifies the information, do the protections of s. 39(1) come into play. More particularly, the provision that "disclosure of the information shall be refused without examination or hearing of the information by the court, person or body" is only triggered when there is a valid certification.

23 If the Clerk or minister chooses to certify a confidence, it gains the protection of s. 39. Once certified, information gains greater protection than at common law. If s. 39 is engaged, the "court, person or body with jurisdiction" hearing the matter must refuse disclosure; "disclosure of the information shall be refused". Moreover, this must be done "without examination or hearing of the information by the court, person or body". This absolute language goes beyond the common law approach of balancing the public interest in protecting confidentiality and disclosure on judicial review. Once information has been validly certified, the common law no longer applies to that information.

24 This raises the issue of what constitutes valid certification. Two requirements are plain on the face of the legislation. First, it must be done by the Clerk of the Privy Council or a minister of the Crown. Second, the information must fall within the categories described in s. 39(2).

25 A third requirement arises from the general principle applicable to all government acts, namely, that the power exercised must flow from the statute and must be issued for the *bona fide* purpose of protecting Cabinet confidences in the broader public interest. The function of the Clerk under the Act is to protect Cabinet confidences, and this alone. It is not to thwart public inquiry nor is it to gain tactical advantage in litigation. If it can be shown from the evidence or the circumstances that the power of certification was exercised for purposes outside those contemplated by s. 39, the certification may be set aside as an unauthorized exercise of executive power: see *Roncarelli, supra*.

26 A fourth requirement for valid certification flows from the fact that s. 39 applies to disclosure of the documents. Where a document has already been disclosed, s. 39 no longer applies. There is no longer a need to seek disclosure since disclosure has already occurred. Where s. 39 does not apply, there may be other bases upon which the government may seek protection against further disclosure at common law: *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), at p. 630; *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681 (Alta. Q.B.); *Sankey v. Whitlam* (1978), 142 C.L.R. 1 (Austl. H.C.), at p. 45. However, that issue does not arise on this appeal. Similarly, the issue of inadvertent disclosure does not arise here because the Crown deliberately disclosed certain documents during the course of litigation.

27 On the basis of these principles, I conclude that certification is generally valid if: (1) it is done by the Clerk or minister; (2) it relates to information within s. 39(2); (3) it is done in a *bona fide* exercise of delegated power; (4) it is done to prevent disclosure of hitherto confidential information.

28 It may be useful to comment on the formal aspects of certification. As noted, the Clerk must determine two things: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within the ambit of

the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) or an analogous category; the possibility of analogous categories flows from the general language of the introductory portion of s. 39(2). This follows from the principle that the Clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the Clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the Clerk has otherwise exceeded the powers conferred upon her.

29 As to the timing of certification, the only limits are those found in s. 39(4). Subject to these outer limits, it seems that information that falls within s. 39(2) may be certified long after the date the confidence existed or arose in Cabinet. At the same time, as discussed, if there has been disclosure, s. 39 no longer applies, since its only purpose is to prevent disclosure.

30 It may be that the Clerk or minister can withdraw a certification of Cabinet confidence under s. 39 of the *Canada Evidence Act*, on the theory that the power to certify must also include a power to decertify, as suggested by Southin J.A.; and that where a certification is made in error, for example, the Clerk or minister should be able to correct the matter. However, that issue does not arise here.

(2) Waiver

31 On the facts of this case, the concept of waiver in any ordinary sense of the term finds no place. As discussed, the Clerk or minister is not compelled to certify Cabinet confidences and invoke the protection of s. 39(1). However, if the Clerk or minister chooses to do so, the protection of s. 39 automatically follows. That protection continues indefinitely, unless: (i) the certificate is successfully challenged on the ground that it related to information that does not fall under s. 39; (ii) the power of certification of the Clerk or minister has otherwise been improperly exercised; (iii) s. 39(4) is engaged; or (iv) the Clerk or minister chooses to decertify the information. The clear language of s. 39(1) permits no other conclusion.

32 This is consistent with the fact that waiver does not apply at common law. A claim for confidentiality at common law cannot be contested on the ground that the government has waived its right to claim confidentiality. As Bingham L.J. observed in *Makanjuola v. Commissioner of Police of the Metropolis*, [1992] 3 All E.R. 617 (C.A.), at p. 623, "[p]ublic interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish". Consequently, "public interest immunity cannot in any ordinary sense be waived" (p. 623). Issues of production pursuant to s. 39 of the *Canada Evidence Act* fall to be resolved by the Clerk or minister responsible for balancing the public interests. If a certificate is not properly filed, and documents are released, the Crown is precluded from claiming s. 39 protection. However, by releasing some documents, the Crown has not waived its right to invoke s. 39 over other documents.

33 It is argued that unless the broad power of waiver envisioned by the majority of the Court of Appeal is recognized, litigants opposing the Crown will be placed in the untenable position of being

unable to rely on the Crown's production of documents, no matter how essential such documents are to their case or how late the Crown makes its claim to immunity. This concern is alleviated by the fact that s. 39(1) cannot be applied retroactively to documents that have already been produced in litigation; it applies only to compel disclosure.

34 The conclusion that waiver does not apply here makes it unnecessary to consider the issue of class waiver -- whether disclosure of one document removes protection from all documents in the same class. However, the related issue of class disclosure of information must be addressed.

35 Section 39 protects "information" from disclosure. It may be that some information on a particular matter has been disclosed, while other information on the matter has not been disclosed. The language of s. 39(1) does not permit one to say that disclosure of some information removes s. 39 protection from other, non-disclosed information. If the related information has been disclosed in other documents, then s. 39 does not apply and the documents containing the information must be produced. If the related information is contained in documents that have been properly certified under s. 39, the government is under no obligation to disclose the related information.

36 This raises the concern that selective disclosure of documents or information may be used unfairly as a litigation tactic. The fear is that the Crown could choose to disclose only those documents which are favourable to its position and certify those documents which are detrimental. Selective disclosure designed to prevent getting at the truth would not be a proper exercise of the Clerk's or minister's s. 39 powers: *Roncarelli, supra*. Moreover, the ordinary rules of litigation offer protection from abuse. First, government witnesses may be cross-examined on the information produced. Second, the refusal to disclose information may permit a court to draw an adverse inference. For example, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, the Attorney General's refusal to disclose information relating to an advertising ban on tobacco, led to the inference that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result (para. 166, *per* McLachlin J.).

(3) Judicial Review

37 Judicial review under s. 39 arises when "a court, person or body with jurisdiction to compel the production of information" is presented with an application to order disclosure of information which the Clerk or a minister has certified as a Cabinet confidence under s. 39(1). Section 39 is directed to whether a document is protected from disclosure.

38 Section 39(1) leaves little scope for judicial review of a certification of Cabinet confidentiality. It states flatly that "disclosure of the information shall be refused" (emphasis added). Furthermore, it must be refused "without examination or hearing of the information by the court, person or body".

39 As discussed, even language this draconian cannot oust the principle that official actions must flow from statutory authority clearly granted and properly exercised: *Roncarelli, supra*. It follows from this principle that the certification of the Clerk or minister under s. 39(1) may be challenged where the information for which immunity is claimed does not on its face fall within s. 39(1), or where it can be shown that the Clerk or minister has improperly exercised the discretion conferred by s. 39(1). "[T]he Court may entertain a proceeding for judicial review of the issuance of a certificate although it may not review the factual correctness of the certificate if it is otherwise in proper form": *Singh, supra*, at para. 43. The appropriate way to raise an argument that the Clerk has exer-

cised her decision improperly is "by way of judicial review of the Clerk's certificate" (para. 50). The party challenging the decision may present evidence of "improper motives in the issue of the certificate" (para. 50), or otherwise present evidence to support the claim of improper issuance.

40 The court, person or body reviewing the issuance of a s. 39 certificate works under the difficulty of not being able to examine the challenged information. A challenge on the basis that the information is not a Cabinet confidence within s. 39 thus will be generally confined to reviewing the sufficiency of the list and evidence of disclosure. A challenge based on wrongful exercise of power is similarly confined to information on the face of the certificate and such external evidence as the challenger may be able to provide. Doubtless these limitations may have the practical effect of making it difficult to set aside a s. 39 certification.

41 However, it does not follow from the fact that s. 39 makes it difficult to attack a certification that the procedure is unlawful. As pointed out in *Singh, supra*, at para. 50, the restrictions in s. 39(1) amount to a privative clause -- an unusual privative clause perhaps, but one nevertheless open to Parliament to prescribe. Courts are not unfamiliar with privative clauses that preclude them from making certain findings of fact. Provided they are within Parliament's constitutional power, they will apply. This does not, however, prevent the tribunal from drawing inferences as to the motives of the Clerk or minister from all the surrounding evidence in determining whether the statutory power to certify has been properly exercised: see *Roncarelli, supra*, where the majority of the Court drew the inference of illegitimate exercise of power from circumstantial evidence.

42 One issue remains: what tribunals are competent to decide whether a s. 39 certificate's claim to protection should be set aside on grounds that the information, as described, does not fall within s. 39 or that the certification power has been improperly exercised? The wording of s. 39(1) refers to "information before a court, person or body with jurisdiction to compel the production of information" and directs the relevant tribunal to refuse disclosure. It would seem to follow that the same bodies are competent to make orders for disclosure for improperly claimed s. 39 protection. This view is reinforced by the fact that s. 39(1) is essentially an evidentiary provision; questions of the admissibility of evidence normally fall to be decided by the tribunal seized of the matter in which the admissibility issue arises.

43 The Federal Court of Appeal in *Singh, supra*, at para. 44, however, suggested that only judicial bodies, like the Federal Court, could review a s. 39 certificate: the R.C.M.P. Public Complaints Commission could not do so because it "is essentially an agency of the Executive and draws such powers as it has solely from an Act of the same Parliament that enacted the *Canada Evidence Act*". It is not apparent why this should be so, however. It seems open to Parliament to confer on a court, person or body with jurisdiction the power to determine whether acts of other public officials are valid. While the issue need not be decided in this case, I see no reason why all bodies expressly mentioned in s. 39 should not have the power to inquire into the validity of s. 39 claims for protection. The same would seem to apply for reviews at common law, given that the matter is essentially one of admissibility of evidence in a proceeding. The common law does not restrict review of claims for public immunity to superior courts.

44 Against this may be put the concern that to permit a proliferation of tribunals to set aside s. 39 certificates risks undue disclosure of important Cabinet confidences. However, s. 39 review is limited by the condition that the tribunal cannot inspect the documents, undermining the concern of improvident disclosure. Moreover, the government may appeal the tribunal's decision. Ultimately, I

am not persuaded that permitting tribunals other than superior courts to determine s. 39 issues will illegitimately undermine s. 39 claims to protection.

B. Application of the Principles

(1) The Documents

45 The government issued a s. 39 certificate for 51 documents. Twelve of these had been identified in its list of documents under "Part I: Documents to which there is no objection to production". Of these 12, a number appear to have been not only listed, but actually disclosed to the plaintiffs. The certificate also claimed confidentiality for five documents which were in the plaintiffs' possession or control and which the plaintiffs had listed as producible.

46 On the record before us, s. 39 certification applies to the 34 documents listed as not producible.

47 As discussed, s. 39 of the *Canada Evidence Act* does not apply to the government documents already disclosed. Nor does s. 39 apply to the five certified documents that were in the plaintiffs' possession or control. The documents were disclosed by the government in the context of litigation. The disclosure provisions of s. 39 therefore do not apply and these documents should be produced.

(2) Information in the McCoy Affidavit

48 The government claims protection from disclosure for the information contained in the affidavit of Joan McCoy, which was filed in support of the government's unsuccessful motion to transfer the plaintiffs' case from the Supreme Court of British Columbia to the Federal Court.

49 Of particular importance is Ms. McCoy's statement in para. 21 that: "The rationale for the Treasury Board's decision to increase rates for legal officers in the Toronto Regional Office was the rise in private sector salaries to levels well above those paid in the public sector during a period of rapid economic growth in the late 1980s". According to the McCoy affidavit, "[t]he escalation of external pay rates, matched to a large degree by increases for provincial lawyers as well, had impaired the ability of the Department of Justice to attract candidates for positions in the Law group in the Toronto Regional Office. It had also led to an increase in resignations from the federal Public Service as experienced legal officers, attracted by higher salaries, left for employment in the provincial government and the private sector in the Toronto area. The viability of the regional operation was imperilled by these losses and immediate action was required to stem the flow" (para. 21 of McCoy affidavit).

50 The plaintiffs take issue with this rationale and seek to cross-examine Ms. McCoy on her statement. The government refuses to permit the statement to be used in evidence and denies the right to cross-examine on the information contained in it.

51 When it filed the McCoy affidavit, the government chose to disclose the reason for the decision to pay the Toronto Law group more than other Law groups. The government disclosed that information to support the motion that the B.C. Supreme Court was not the appropriate forum for the case. Therefore, s. 39 cannot be invoked. The affidavit must be disclosed and Ms. McCoy may be cross-examined on its contents.

52 As to related information, if it has been voluntarily disclosed in other documents, then s. 39 does not apply and the documents must be produced. By contrast, the government is under no obli-

gation to disclose related information contained in documents that have been properly certified under s. 39, but runs the risk that refusal may permit the court to draw an adverse inference.

C. *The Constitutionality of Section 39*

53 Because s. 39 applies to the undisclosed documents, it is necessary to consider the constitutional questions in this case. The respondents argue that s. 39 of the *Canada Evidence Act* is of no force or effect by reason of one or both of the preamble to the *Constitution Act, 1867* and s. 96 of the *Constitution Act, 1867*.

(1) The Preamble to the *Constitution Act, 1867*

54 The respondents in this case challenge the constitutionality of s. 39 and argue that the provision is *ultra vires* Parliament because of the unwritten principles of the Canadian Constitution: the rule of law, the independence of the judiciary, and the separation of powers. Although the unwritten constitutional principles are capable of limiting government actions, I find that they do not do so in this case.

55 The unwritten principles must be balanced against the principle of Parliamentary sovereignty. In *Commission des droits de la personne v. Attorney General of Canada*, [1982] 1 S.C.R. 215, this Court upheld as constitutional s. 41(2) of the *Federal Court Act*, the predecessor to s. 39, which permitted the government to claim absolute privilege over a broader class of confidences.

56 Recently, the Federal Court of Appeal considered the constitutional validity of s. 39 of the *Canada Evidence Act* in *Singh, supra*. On the basis of a thorough and compelling review of the principle of parliamentary sovereignty in the context of unwritten constitutional principles, Strayer J.A. held that federal Crown privilege is part of valid federal law over which Parliament had the power to legislate. Strayer J.A. concluded at para. 36:

... the rule of law cannot be taken to invalidate a statute which has the effect of allowing representatives of the Crown to identify certain documents as beyond disclosure: that is, the rule of law does not preclude a special law with a special result dealing with a special class of documents which, for long standing reasons based on constitutional principles such as responsible government, have been treated differently from private documents in a commercial law suit.

57 I share the view of the Federal Court of Appeal that s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary. It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

(2) Section 96 of the *Constitution Act, 1867*

58 A second constitutional question must be considered: whether Parliament's decision to limit superior courts from compelling disclosure of Cabinet confidences impermissibly invades the core jurisdiction of the superior courts?

59 There is no clear test for defining what is considered to be the "core jurisdiction" of a s. 96 court. In *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, Lamer C.J. stated at para. 56:

Section 96's "core" jurisdiction is a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system.

Citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, the respondents argue that s. 39 impermissibly infringes on the core jurisdiction of a superior court because it interferes with courts' ability to control their own process. First, because the section operates to prevent a superior court from remedying an abuse of process, and second, because it denies evidence centrally relevant to the core factual questions in the litigation. The respondents contend that s. 39 deprives the judiciary of its role of review, a power which a superior court possesses under the common law of public interest.

60 As previously stated, there is a long common law tradition of protecting Cabinet confidences. In Canada, superior courts operated since pre-Confederation without the power to compel Cabinet confidences. Indeed, at the time of Confederation, no court had any jurisdiction regarding actions against the Sovereign: see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. Further, s. 39 has not substantially altered the role of the judiciary from their function under the common law regime. The provision does not entirely exclude judicial review of the determination by the Clerk that the information is a Cabinet confidence. A court may review the certificate to determine whether it is a confidence within the meaning provided in s. 39(2) or analogous categories, or to determine if the certificate was issued in bad faith. Section 39 does not, in and of itself, impede a court's power to remedy abuses of process.

61 I therefore conclude that there is no basis upon which to find that s. 39 of the *Canada Evidence Act* is unconstitutional.

V. Conclusion

62 I would allow the appeal in part, with costs to the respondents.

63 On the record before us, the documents certified but disclosed, including the McCoy affidavit, are no longer protected and may be used in the litigation. The plaintiffs may cross-examine on the McCoy affidavit. The remaining documents are protected by s. 39 of the *Canada Evidence Act*. These conclusions are made without prejudice to future applications in this case.

The following are the reasons delivered by

64 L'HEUREUX-DUBÉ J.:-- While I agree substantially with the reasons of the Chief Justice and the result she reaches, I cannot agree with her view as reflected in paras. 17, 22 and 28 of her reasons that "competing interests" in disclosure must be taken into account.

65 In my view, the unequivocal language of the statute does not mandate consideration of the public interest in disclosure; I believe the Clerk or the minister must only answer two questions before certifying, namely, whether (1) the document is a Cabinet confidence; and (2) it is information that the government wishes to protect.

Solicitors:

Solicitor for the appellants: The Deputy Attorney General of Canada, Ottawa.

Solicitors for the respondents: Sugden, McFee & Roos, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitor for the intervener the Information Commissioner of Canada: The Information Commissioner of Canada, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Victoria.

cp/e/qlls

* Access: Provincial Order *

Case Name:
Order PO-2034

**Institution: Ministry of Community and Social
Services**

[2002] O.I.P.C. No. 119

Order PO-2034

Appeal PA-010291-1

Ontario Information and Privacy Commissioner

L. Cropley, Adjudicator

August 21, 2002

(120 paras.)

NATURE OF THE APPEAL:

1 The appellant submitted a request to the Ministry of Community & Social Services (the Ministry, now the Ministry of Community, Family and Children's Services) under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

Copies of any and all materials and/or instructions that may have been given or imparted to employees and/or contractees of the Family Responsibility Office [the FRO] during the past four years with respect to the application and/or interpretation of section 41 of the Family Responsibility and Support Arrears Enforcement Act [the FRSAEA], or any subsections thereof. I include in the definition of "contractees" panel lawyers who may from time to time represent the FRO in section 41 hearings.

2 The Ministry located eight records, totalling 129 pages, as being responsive to the request and initially denied access to them pursuant to the discretionary exemptions in sections 14(1)(c) (law enforcement - investigative techniques) and 19 (solicitor-client privilege) of the Act. The Ministry attached to the decision letter an index of records entitled "Summary of Records Being Denied".

3 The appellant appealed the Ministry's decision.

4 During mediation, the mediator noted that one of the records at issue had the discretionary exemption in section 13(1) written on it as well as the two exemptions referred to by the Ministry in its decision. The Ministry confirmed that it had decided not to rely on this provision. The mediator also referred the Ministry to some orders issued by this Office that had addressed similar issues to the ones raised in this appeal (Orders PO-1921 and PO-1928). After reviewing these orders, the Ministry reconsidered its position and issued a revised decision letter on November 21, 2001 together with an index of records entitled "Updated Document Control List".

5 In its revised decision letter, the Ministry granted full access to Record 1, partial access to Records 3, 4, 5, 6, and 7 and continued to deny access to Records 2 and 8. The Ministry also raised two additional discretionary exemptions in its revised decision (sections 13(1) (advice or recommendations) and 18(1)(e) (economic and other interests)) and claimed that some of the records were not responsive to the request. The "Updated Document Control List" which the Ministry attached to its revised decision cites the exemptions claimed for every page of each record.

6 In his initial letter of appeal, the appellant indicated that disclosure of the records was in the public interest, thus raising the possible application of the so-called "public interest override" in section 23 of the Act. Section 23 does not override the exemptions in sections 14 or 19 of the Act. In view of the conclusions I have reached about the application of the exemptions that can be overridden (sections 13(1) and 18(1)(e)), it will not be necessary for me to consider whether or not section 23 applies in the circumstances of this appeal and I will not refer to it further in this order.

7 After reviewing the Ministry's decision, the appellant agreed not to pursue access to the remaining portions of records 4, 7, and 8 (which the Ministry claimed were not responsive to the request). However, the appellant disputed the Ministry's claim that certain other information in the records was not relevant to the request. The appellant also took issue with the late raising of sections 13(1) and 18(1)(e). Accordingly, the responsiveness of records and the late raising of a new discretionary exemption are at issue in this appeal, and I will deal with these as preliminary issues. In addition, the appellant has objected to the Ministry's reliance on his personal information both in its decision-making at the request stage and in its representations on appeal. He has made privacy complaints regarding these objections. However, as this also relates to the adjudication of the appeal, I will comment on these objections as a preliminary issue.

8 Further mediation could not be effected and this appeal was moved into inquiry. I decided to seek representations from the Ministry initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal. The Ministry submitted representations in response, the majority of which I then sent to the appellant along with a Notice of Inquiry. The appellant submitted representations in response. After reviewing them, I sent the Ministry a Reply Notice along with the appellant's representations and asked it to comment on certain portions of them. The Ministry submitted representations in reply.

RECORDS:

9 As a result of the above decisions and discussions during mediation, the records and parts of records that remain at issue in this appeal are as follows:

- * Record 2 (pages 20-24, withheld in full) - Client Service Associate Policy and Procedures: Default Hearings (sec 41);
- * Record 3 (withheld portions of pages 27, 36, 37) - Manual for Counsel Representing the Director of the FRO, Default Hearings;
- * Record 5 (withheld portions of pages 88, 93, 101, 106, 107 and 108, and pages 64 - 71, 77, 78, 82, 83, 94, 95, 102, 103, 104 and 105 in their entirety) - Default Hearings (prepared for Client Service Associates/Client Service Clerks); and
- * Record 6 (withheld portions of pages 111, 114 and 117, pages 110, 112, 113, 115, 116 and 118 in their entirety, and pages 119-123 in their entirety).

10 Although the Ministry has withheld pages 119-123 of Record 6 as being non-responsive to the request, it continues to claim sections 14(1)(c) and section 19 for this information, in the alternative.

BACKGROUND AND PRELIMINARY MATTERS:

11 In 1987, the Support and Custody Orders Enforcement Act (SCOEA) was enacted to address spousal and child support arrears. SCOEA was repealed in 1992 and replaced by the Family Support Plan Act (FSPA). The FSPA was subsequently repealed in 1997 and replaced by the FRSAEA. Pursuant to section 5(1) of the FRSAEA, the Director of the FRO is under a duty to enforce all "support orders", as defined in that Act, which are filed with it.

12 In order to place its representations on the issues in perspective, the Ministry has provided background on the FRO and its place in the overall family law scheme:

The [FRO] occupies a unique position in the provincial government. As an enforcement agency, FRO must be equipped with effective mechanisms for ensuring that child and spousal support monies are collected and paid to whom they are owed. As a public agency, FRO is governed by the [Act], and is obligated to respond to appropriate requests for information. Fulfilling dual roles requires FRO to strike a delicate balance between seemingly competing public interests: the interest of addressing child poverty by ensuring effective enforcement of support orders on one hand, and the interest in open access to information on the other.

13 The Ministry states that the FRSAEA gave the newly established FRO "new and stronger mechanisms to use in enforcement and a positive duty to do so". In particular, the Ministry states that:

FRO is the only body empowered with the duty and mandate to actively and, where necessary, aggressively enforce orders that are civil in nature. Because of FRO's distinct status, it is, at times, difficult to apply civil litigation jurisprudence to our office.

14 The Ministry explains the role the FRO plays in the larger system of family law litigation. In short, all court ordered support orders are filed with the FRO by the court, but the parties may opt out if they choose. The FRO's initial role is to facilitate the process of collecting payment from support payors and to remit those funds to the support recipients. As I indicated above, where a support payor is in arrears, the FRSAEA gives the Director the mandate to enforce the order.

15 The FRO's role, as provided for in the FRSAEA, does not extend to issues regarding the amount of support awarded, and the FRO will only become involved in court proceedings where that is at issue if the support payor requests enforcement relief. The Ministry states:

The objective of enforcement is to get funds flowing. The most aggressive option open to FRO is a default proceeding. At a default proceeding, the Director may negotiate with the payor with respect to the repayment schedule, but never with respect to the amount owing. In other words, the support payors have relief available to them before FRO steps in to enforce. Those cases that make it to the stage of default proceedings are generally those that have been the most difficult cases to enforce.

USE AND DISCLOSURE OF APPELLANT'S PERSONAL INFORMATION/ADMISSIBILITY AND RELEVANCE AT INQUIRY

16 As noted above, the appellant objects to the Ministry's reliance on his personal information both in its decision-making at the request stage and in its representations on appeal. More particularly, the Ministry considered the appellant's identity and past relations with the FRO during its initial decision-making, and has provided detailed representations on this subject in this appeal. Referring to section 42(d) of the Act and the Information and Privacy Commissioner/Ontario (the IPC)'s Code of Procedure, the appellant states:

In its Code of Practice, the [IPC] states the following:

Anyone, including employees of an institution, is entitled to exercise his or her right to access information under the acts or make a privacy complaint, without being unnecessarily identified and without fear of negative repercussions.

...

Employees of an institution responsible for responding to requests - generally the Freedom of Information and Privacy Co-ordinator [the Co-ordinator] and assisting staff - should not identify any requester when processing requests for general records. There is no reason to identify an individual requesting general records to employees outside the Co-ordinator's office.

[I]n the letter of apology dated 20 September 2001 ... [relating to the appellant's privacy complaint about the use of his personal information at the request stage, the Co-ordinator] said the following:

Please accept my assurance that it is not ministry practice to inquire into reasons a person might have for making an access request.

I submit that the Ministry, in its representations, has

- a. Contradicted and repudiated the "assurance" given by [the Co-ordinator] in her letter of 20 September 2001;
- b. Offended [the Act] and the practices and procedures promulgated thereunder;
- c. Betrayed the transparency of its attempts to disguise its general records as records intended to be used in a specific litigation against a specific person.
[emphasis in the original]

17 In other words, The appellant asserts that the identification of him as the requester (by the Co-ordinator to the FRO) and the subsequent disclosure of information about him to the IPC offends section 42(d) of the Act and the principles set out in the IPC Code of Procedure. Moreover, he does not believe that these factors are relevant to the issues on appeal. This raises the question whether I should admit this evidence, and if I do admit it, whether I should give it any weight.

18 Referring to *Ethicon v. Cyanamid of Canada Inc.* [1977] FCJ No. 302 (F.C.T.D.) and *R. v. Wray* [1971] S.C.R. 272, the Ministry notes that a decision-maker must have all "relevant" information before him or her in order to make a proper decision and states:

The Ministry relies on the common law rules of evidence to support its submission that the appellant's history is relevant and necessary to the IPC being able to make an informed decision on the question of anticipated litigation, and therefore, litigation privilege.

19 In contrast to the strict rules of evidence at common law, administrative tribunals are generally not bound to apply the more traditional grounds for "admissibility" of evidence, but consider, rather, its relevance to the issues to be decided and the weight to be given to the information (see: Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, (Carswell: Toronto, 2001) at paragraphs 17(1)(a) through (f)).

20 Sections 42(d) and (m) of the Act provide:

An institution shall not disclose personal information in its custody or under its control except,

- (d) where disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and where disclosure is necessary and proper in the discharge of the institution's functions;
- (m) to the Information and Privacy Commissioner.

21 The crux of the appellant's argument is that he requested general records under the Act, and he should have been free to do so anonymously. In a general records request, there should normally be no need to identify the requester to the area holding the records in order for it to respond to the request, and I would expect that such information would not be routinely shared by the Ministry.

22 However, in order to properly apply the Act, the Ministry has a responsibility to ensure that the information does not fall within one of the exemptions or exceptions set out therein, and if it believes that it does, to decide whether it can be disclosed regardless. Even in a request for general records, there are limited circumstances in which the identity of the requester is relevant in assessing the applicability of an exemption.

23 For example, in a section 19 claim based on solicitor-client privilege, it may not be possible to assert privilege if the requester is a client and therefore part of the solicitor-client relationship (Order PO-2006).

24 Other sections of the Act, such as sections 20 (danger to safety or health) and 14(1)(e) (danger to life or safety) contain no requirement that the information be "personal information". In some cases, the identity of the requester is not relevant to their application (for example, as in Reconsideration Order PO-1817). In others, however, the identity of the requester is the very reason the exemption was claimed (see: for example, Order PO-2003).

25 It is apparent from these examples that the decision to identify a requester in relation to a particular request is context specific. In this case, the contentious nature of the enforcement process forms the backdrop to the Ministry's decision-making. The Ministry's interpretation of the role of the FRO as expressed in its representations and the manner in which the exemptions should be applied reflects its belief that the identity of the appellant is relevant in the circumstances. Despite my ultimate findings on the issues below, I accept that it was reasonable in the circumstances for the Ministry to take its knowledge of and relationship with the appellant into consideration in arriving at its decision on access as well as in defending that decision during mediation and at inquiry.

26 In my view, the information provided in the representations relating to the various exemption claims is relevant to the application of some of the exemptions as interpreted and argued by the Ministry, and should therefore be considered by me in disposing of those issues. Given the analysis that led to my findings below, however, it is not necessary for me to determine what weight to give to this evidence.

NON-RESPONSIVE INFORMATION

27 The Ministry has withheld the majority of a chart (on pages 119-123) as being non-responsive to the appellant's request.

28 In Order P-880, former Adjudicator Anita Fineberg canvassed the issue of responsiveness of records in detail. In applying the direction provided by the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3rd) 197, she concluded:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

29 In responding to this issue, the Ministry states:

The Ministry relies on the wording of [the Act], which gives requesters a right of access to "a record or part of a record" (s.10). This wording gives institutions flexibility when making decisions regarding responsiveness (MO-1483) ... Many previous orders indicate that records are often severed by an institution on the basis that certain portions do not fall within the scope of the request.

Additionally, s. 10 permits government organizations to disclose "part of a record" if only part contains responsive information ... This approach is practical because it recognizes that government organizations create records for a variety of reasons, and some documents may be created to serve multiple purposes (P-913).

30 Referring to the principles set out in Order P-880, the Ministry states further:

[T]here was no doubt as to the interpretation of the request. The request was not considered to be too broad, or so vague as to cause uncertainty regarding what the appellant was seeking. The appellant requested "copies of any and all materials and/or instructions that may have been given or imparted to employees and/or contractees of FRO ... with respect to the application and/or interpretation of s. 41 ... or any subsection thereof ..." It is clear that this request is quite specific, and that portions of these materials that are reasonably related to the request should be disclosed ...

The chart in question, entitled "What you should note on your court Results", contains information that is not relevant to "the application and/or interpretation of s. 41" of the FRSAEA, the section that deals with default hearings. The chart is administrative in nature, and consists of basic directions on how to fill out a Panel Lawyer Report Form. This chart contains brief notes on what should be recorded by a lawyer after attending court on any of the proceedings referred to ...

... the ministry has decided to release a portion of the chart on page 120 that may be somewhat related to the request. However, the remaining portions of the chart deal with other facets which are in no way included in the appellant's request. The withheld sections in the chart briefly deal with refraining orders, variation orders, costs orders, and substitutional service orders made against FRO, all of which require completely separate proceedings from a default hearing.

...

The ministry would like to emphasize that the appellant in no way has requested records or information concerning refraining orders, variations, costs, or sub-service matters ... Thus, these materials are not reasonably relevant to the request, as they do not contain information regarding default hearings brought pursuant to s. 41 FRSAEA.

31 In responding to the Ministry's representations on this issue, the appellant takes the position that "if a portion of a chart is deemed to be related to the request' ..., then the entire chart is related to the request". The appellant submits that:

[T]o invoke s. 10(1) of [the Act], as the Ministry does, is to go beyond the meaning and intent of the Act. I suggest that the words of that section ... do not contemplate or authorize the editing of a single item (the chart) in a record when at least part of that item is acknowledged to be "related to the request".

32 Referring to the Ministry's reliance on Order MO-1483, the appellant attempts to distinguish the conclusions of Assistant Commissioner Tom Mitchinson on the basis that there were a large number of records at issue in that order, whereas the only record at issue in the present case consists of a single chart of only a few pages.

33 In the appeal dealt with in Order MO-1483, the appellant argued that if a record contains both responsive and non-responsive information, the institution must disclose the non-responsive portions unless they qualify for exemption under the Act. Assistant Commissioner Mitchinson explained the rationale for withholding non-responsive information from disclosure:

It is clear from previous orders of this Office that records are often severed by an institution or an Adjudicator on the basis that certain portions do not fall within the scope of a request. Perhaps the most common example is a request for records relating to a motor vehicle accident, where certain notebook entries made by an investigating police officer are responsive, and other entries dealing with unrelated activities undertaken by that police officer on the same day are withheld on the basis that they fall outside the scope of the request. Another example might be an audit report dealing with the operation of a number of publicly funded bodies, where only one of these bodies is identified in a request. In my view, this approach to dealing with requests is both practical and supportable by the wording of the Act. Section 4 of the Act gives requesters a right of access to "a record or part of a record", presumably for the purpose of giving institutions flexibility when making decisions regarding responsiveness. Section 17 of the Act is also relevant in this regard. It imposes obligations on both institutions and requesters to clearly identify information responsive to a request and, where unclear, to actively work together to ensure that both parties understand what information is requested and what is not.

To require all portions of records, whether responsive or not, to undergo an exemption-based review in the context of responding to a particular request would, in my view, impose an unnecessary and unproductive burden on the statutory access scheme.

34 Commenting on the manner in which severances should be made, Senior Adjudicator David Goodis stated in Order PO-1878:

A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable

where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1997), 102 O.A.C. 71 (Div. Ct.)].

35 I agree with the Ministry that the appellant's request is specific to records pertaining to the interpretation and/or application of section 41 of the FRSAEA. Section 41 deals only with default hearings, while other sections contemplate a number of different types of proceedings and orders, as explained by the Ministry in its representations. For example, Refraining Orders, which are dealt with in sections 35 to 39 of the FRSAEA, would be granted in a motion brought by the support payor. The Ministry indicates that this is a separate proceeding from a default hearing, which is initiated by the Director of the FRO. I accept the Ministry's position that portions of records pertaining to other types of proceedings and orders that fall outside the scope of section 41 are not "reasonably related to" the appellant's request as worded.

36 I do not accept the appellant's interpretation of section 10 of the Act. In my view, regardless of the number of pages at issue, section 10 contemplates that any portion of a record may be severed from a record, either because it is not responsive or because it is exempt under the Act as long as to do so does not result in "disconnected snippets", or "worthless", "meaningless" or "misleading" information.

37 Accordingly, if the chart on pages 119-123 contains information about default hearings and other types of proceedings, the record must be reviewed in order to determine whether the information that is not responsive to the appellant's request can be reasonably severed.

38 It is apparent from a review of this record that it is designed for multi-purpose use, that is, it is intended to provide panel lawyers with a checklist of what is required to be included in their reports for the different types of proceedings in which they act for the FRO. The chart is broken down into three columns and a number of rows, each row addressing a separate type of proceeding. The information contained in each row is specific to the type of hearing specified and is not dependent on or related to the information contained in the other rows and columns. The only information on this chart that pertains to default hearings is found in the three columns that comprise the second row on page 120. I find that this information is clearly related to the appellant's request and that it is severable from the remaining information in the chart. I find that the remaining information on this record is not reasonably related to the appellant's request and is, therefore, not responsive. I will not consider the non-responsive information further in this order.

39 Because the Ministry has decided to disclose the responsive portion of this chart, pages 119-123 are no longer at issue.

LATE RAISING OF NEW DISCRETIONARY EXEMPTIONS

40 On August 22, 2001, the Commissioner's office provided the Ministry with a Confirmation of Appeal, which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until September 26, 2001) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

41 Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This in-

cludes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

42 The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

43 In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeal process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

44 Former Adjudicator Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, former Adjudicator Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

45 In this case, as I indicated above, the decision to claim additional exemptions was made during mediation, but after the 35 day deadline, when the Ministry sought to apply sections 13(1) and 18(1)(e) to some of the records at issue. Since the Notice of Inquiry had not yet been issued, it was possible to seek representations on these issues without delaying the inquiry.

46 The Ministry's representations explain why it did not raise the discretionary exemptions in sections 13(1) and 18(1)(e) earlier in the processing of the appellant's request and appeal:

The delay in identifying new discretionary exemptions (during the mediation stage), resulted in part because of the recent transfer of the [FRO] Branch from the Ministry of the Attorney General (MAG) to the [Ministry], which took place on April 9, 2001. With respect to requests for information made pursuant to [the Act], the reporting procedures of these two ministries are different.

In any event, the FRO and the ministry were confident at the beginning stages that they had exercised their obligation for the due diligence in reviewing the information, and denying the requester access to it by relying on s. 19 and s. 14(1)(c). It seemed unnecessary at that time to have to include additional discretionary exemptions which the ministry considered applicable in denying access to the information. The ministry believed, and continues to believe that they have a very strong case pursuant to s. 19 and s. 14(1)(c), as initially relied on.

It wasn't until the mediation stage that the ministry was referred to the very recent IPC decisions of the Office of the Children's Lawyer, under MAG (PO-1928) and the Office of the Fire Marshal (OFM), under the Ministry of the Solicitor General (PO-1921). To the ministry's surprise these two cases challenged

their position with respect to the scope of the protection of information afforded by s. 19 and s. 14(1)(c). It was only in response to these two decisions, that the ministry reconsidered its position and after an in-depth review of the documents, decided to release a large part of the information and also determined the necessity to claim additional discretionary exemptions that applied to the information that the ministry continued to deny to the requester. The ministry's decision to release information and add exemptions was promptly done in response to the communication with the mediator at this stage, and the appellant was immediately notified.

... any delay caused was not excessive. The amended decision was made during the mediation stage, thus giving the appellant ample time to address the application of the new exemptions (Order PO-1840) ... The purpose and objective of the mediation process is to investigate the decision on the request, and to attempt to effect a settlement and/or narrow the issues. The ministry complied with this process and effectively narrowed the issues.

47 The Ministry notes that during mediation, it decided to disclose 87 of the 129 pages in whole or part to the appellant, which, it submits, was "clearly to the benefit of the appellant". The Ministry points out that this is not a case where it is seeking to reverse its position such that new information is being denied, but rather, new exemptions are being invoked to further defend its decision to deny access to the records. The Ministry concludes:

In this case, the records at issue were narrowed by the same review process that also resulted in adding new discretionary exemptions. Despite the mediation process, the records that remain at issue are the same as those which were originally exempted. Thus there is no resulting prejudice to the appellant, nor is the integrity of the appeal process compromised.

48 It appears that the appellant's primary objection to the late raising of a new discretionary exemption arises from the delay overall in the processing of his request. Moreover, he interprets the Ministry's "explanation" for the delay in addressing this issue (that is, the transfer of the FRO from the MAG to the Ministry) as an "excuse" for inaction. Overall, he believes that he has been prejudiced by the Ministry's actions in the manner in which it has dealt with his request and appeal.

49 While I recognize that administrative changes can result in unintentional and/or unavoidable delay, it does not appear that these changes had any impact on the decision-making with respect to the appellant's request. As the appellant notes (referring to the dates provided by the Ministry), the FRO was transferred in early April, 2001 but he did not submit his request until late June, 2001 and the Ministry's decision was not issued until early August 2001. I have concluded, therefore, that this factor did not produce any substantial delay in responding to the issues. The issuance of relatively recent decisions appears to have had a greater impact on the Ministry's decision-making.

50 Once the appellant appealed the Ministry's decision, the matter proceeded in accordance with the mediation timelines established by the IPC. As a result of mediation, the Ministry disclosed a large number of records to the appellant, which allowed him access more quickly than would have occurred if disclosure took place as a result of an order. Moreover, I find the Ministry's initial approach to the application of exemptions to be reasonable, that is, since the Ministry believed that

two of the exemptions claimed were sufficient to justify its decision to withhold the records, it was not necessary at that time to include every possible exemption. However, in this case, once the Ministry had amended its decision during mediation to disclose a number of records and parts of records, it determined that it would now be prudent to claim the additional exemptions. In my view, to deny the Ministry an opportunity in these circumstances to re-assess the basis for withholding those records which it had initially determined should not be disclosed may ultimately de-motivate the Ministry from entering into mediation in a meaningful way.

51 In this case, the Ministry never intended to disclose the records at issue, it simply altered the basis for withholding them. Moreover, this decision was made during the mediation stage and the appellant was fully apprised of the changes at that time. In effect, there has been no additional delay to the process because of the Ministry's actions and, in fact, the change in the Ministry's decision conferred benefits on the appellant, since he obtained access to a substantial number of records that had previously been denied. In my view, there was no prejudice to the appellant under the circumstances.

52 Accordingly, I will consider the possible application of sections 13(1) and 18(1)(e) in this order.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

53 The Ministry claims that section 13 applies to the records. This section reads:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

54 In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

55 In previous orders, this office has found that the words "advice" and "recommendations" have similar meanings, and that in order to qualify as "advice or recommendations" in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making [see, for example, Orders P-118, P-348, P-883, P-1398 and PO-1993]. In addition, adjudicators have found that advice or recommendations may be revealed in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given [see Orders P-1037 and P-1631].

56 The Ministry states:

The records in question contain two specific sets of materials. The records contain advice and recommendations from the FRO legal department to the Director's enforcement officers (records 2 and 5), and advice and recommendations from the FRO legal department to FRO panel lawyers (records 3 and 6). Both sets of materials are written with an envisioned measure of flexibility to deal with the specific facts of a given case. The advice and recommendations act as maps and boundaries' outlining the optimal strategy that panel lawyers and enforcement officers should adopt with regard to the circumstances. It is legal advice that can be accepted or rejected by its client (CSA's [Client Service Associates] in the case of CSA manuals) and recommended instructions that may be subject to adjustment depending on information disclosed during the court proceedings, as related by its panel lawyers (in the case of panel lawyer manuals). Therefore, the manuals contain a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process and thus, follows the precedent laid out in [previous orders of this office]. [emphasis in the original]

57 Referring to section 5(1) of the FRSAEA, the Ministry states further that:

Section 5(1) makes it clear that the enforcement measures outlined in the severed material is clearly related to the actual business of the [Ministry]. For this reason, allowing the exemption to stand in these circumstances would not be extending the exemption beyond its purpose and intent [Order P-434]. [emphasis in the original]

58 The Ministry notes that section 6(1) of the FRSAEA provides discretion for the Director to enforce in the manner that is most practical:

Section 6(1) clearly envisions that the Director's enforcement officers and solicitors will take actions that correspond to the particular circumstances of a given case. It provides enforcement officers and solicitors with a measure of flexibility that is exercised as a given situation presents itself and stands as recognition of the valuable role that individual decision making plays in the Director's officers and solicitors daily actions. For this reason, the information contained within the severed pages can be viewed as a "submission of a suggested course of action, which will ultimately be rejected or accepted" and thus be categorized as recommendations.

Because the information could be used by defaulting payors to thwart default proceedings, the free flow of such advice and recommendations in the future would be significantly inhibited to avoid such an outcome. As a result, the Director's duty of enforcing support orders to collect money for recipients and their children would be negatively affected. Moreover, since new enforcement tools are always being developed, the free flow of advice and recommendations regarding the development and implementation of these new tools would be inhibited to avoid having them being rendered useless. Consequently, the risk of release of such information will result in a "catch-22" situation since it is the giving

of such advice and recommendations that result in the success of any enforcement mechanism that is utilized.

59 In responding to the Ministry's representations, the appellant notes that the Ministry describes the records at issue as "materials intended to train" panel lawyers and CSAs with respect to default hearings. He continues:

More particularly, the information at issue is described by the Director of the FRO as Panel Lawyer Presentations Materials", "Client Service Associate Policy and Procedures", "Manual for Counsel Representing the Director of the FRO, Default Hearings", "Panel Lawyers' Meeting", "Default Hearings (prepared for Client Service Associates/Client Service Clerks", "Panel Lawyer Training Sessions", and "Panel Lawyer Newsletter(s)" ... These materials were issued to hundreds of employees and panel lawyers. They may be described as "guidelines" or "instructions" but they do not begin to meet the definition of "advice" or "recommendations".

60 The Ministry correctly points out in response that it is the substance of the information that determines whether the exemption applies to it rather than the "label" that is used to describe it. In my view, however, the nature of the information at issue as described by the appellant is relevant to its substance.

61 In Order PO-1928, former Adjudicator Dora Nipp addressed the institution's argument that certain records of the Office of the Children's Lawyer (the OCL) relating to interviewing techniques, procedures followed, and if they exist, policies and procedures manuals and training manuals used by OCL lawyers to determine a child's wishes in determining questions of custody and/or access, and "anything that pertains to how the office conducts their investigations and decision-making practices" were exempt under section 13(1) of the Act:

The Ministry submits:

The documents were prepared by in-house staff for use by staff and panel lawyers and social workers when rendering services to OCL on behalf of children. The records are intended to provide suggestions and guidance to lawyers and social workers who are providing legal representation to children or preparing an investigation and report in personal rights cases when so ordered by the court. The documents at issue were used for discussion purposes at province-wide training. At no time were they intended for public distribution.

I do not accept the Ministry's position. Although these records contain guidelines for OCL staff, they do not constitute the type of advice or recommendations that may be accepted or rejected in the deliberative process of government decision-making and policy-making [see Order P-363, upheld on judicial review in Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner) (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)].

62 In my view, these findings are similarly applicable to the types of records at issue in the current appeal. The records at issue are best described as instructions and guidelines for panel lawyers and CSAs to follow in carrying out their responsibilities under the Act. Rather than establishing a rigid process, these guidelines may offer suggested approaches that are available to these representatives of the Director. Even though I accept that the guidelines pertain to the central role of the FRO, I am not persuaded that documents of this nature, which provide only general guidance and instructions and do not relate to any specific "fact" situation, can or should be interpreted as advice or recommendations in the sense contemplated by this section of the Act. On this basis, I find that the records do not qualify for exemption under section 13(1) of the Act.

LAW ENFORCEMENT - INVESTIGATIVE TECHNIQUES AND PROCEDURES

Introduction

63 The Ministry submits that the records qualify for exemption under Section 14(1)(c) of the Act. This section reads:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

64 In order to establish that the particular harm in question under section 14(1)(c) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

65 The Ministry claims that this exemption applies to all of the records at issue, and provides specific examples of "techniques and procedures" which it submits are described in the records.

66 In order to establish that section 14(1)(c) applies, the Ministry must demonstrate that:

- (i) disclosure of the record could reasonably be expected to reveal investigative techniques and procedures; and
- (ii) the techniques and procedures are currently in use or likely to be used in law enforcement.

Investigative techniques and procedures

67 In order to constitute an "investigative technique or procedure", it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and accordingly that the technique or procedure in question is not within the scope of section 14(1)(c) [see Orders P-170, P-1487].

68 The Ministry states:

In 1993, the Information and Privacy Commissioner issued Order P-589, an oft-cited order which states that the information gathering process used by the FRO in the enforcement of support deduction orders is, in fact, a law enforcement matter. In addition, the provisions of the FRSAEA make it clear that the FRO engages in law enforcement activities, as defined in subsection 2(1) of [the Act]. Subsection 5(1) of the FRSAEA states that it is the duty of the Director to enforce support orders that are filed in the Director's office, and to pay the amounts collected to the person to whom they are owed. In order to carry out this duty, the Director may employ a variety of law enforcement tools. For example, where arrears exist, the Director may file writs of seizure and sale against the payor, institute garnishment proceedings against a payor, and the Director can serve the payor with a notice of default (a default hearing, pursuant to section 41 of FRSAEA ...).

It is sometimes the case that support payors registered with the FRO deliberately attempt to delay or subvert the enforcement of their support obligations. Willful refusal to pay can lead to enforcement proceedings, including default hearings. At these hearings, unless the payor can satisfy the court that he or she is unable to pay for valid reasons, the court may make a number of orders pursuant to s. 41(9) FRSAEA to facilitate compliance with the court ordered support obligation.

The responsive records in this request are manuals drafted to assist CSA's, who initiate and pursue these aggressive enforcement techniques, as well as to assist the panel lawyers who represent the Director before the court in these proceedings.

69 The Ministry notes that the records describe the process for commencing enforcement action including timelines, describe the enforcement remedies available to the FRO, describe circumstances where investigation and inquiry are essential prior to pursuing a court action and describe negotiation strategies to be utilized by office staff or FRO counsel. The Ministry describes various ways in which, it submits, knowledge of this information could be used by support payors to manipulate and effectively thwart the FRO with respect to the enforcement proceedings.

70 The appellant takes the position that hearings under section 41 of the FRSAEA are "convened not to enforce the law but to enforce court orders. Court orders are not laws". In fact, the definition of "law enforcement" in section 2 of the Act includes "proceedings in a court or tribunal if a penalty or sanction could be imposed", and section 41 of the FRSAEA provides for sanctions such as the issuance of a warrant for the payor's arrest (section 41(6)). In my view, therefore, hearings under section 41 meet the definition of "law enforcement". This conclusion is consistent with previous orders of this office (as discussed further below).

71 The appellant further argues that any powers or duties assigned to the FRO by virtue of section 41 are "mechanical or administrative in nature". Referring to the various subsections of section 41 of the FRSAEA, the appellant states:

I submit that none of the functions of the FRO set out in s.41(1) refer to the use of "investigative techniques or procedures". I further submit that there is no "reasonable expectation of harm" if the public is made privy to the manner in which the FRO (a) prepares statements of arrears, and (b) serves notice on payors to deliver a financial statement and to appear in court.

72 In Order P-1340, former Adjudicator Fineberg commented on records in the Family Support Plan (the FSP) which, as noted above, was replaced by the FRSAEA:

The records at issue contain information gathered by the FSP under the Family Support Plan Act (the FSPA) R.S.O. 1990, c. S.28. The FSP has broad investigatory and enforcement powers in relation to the administration of the FSPA and the enforcement of support and custody orders filed with the Director of the FSP. The Director, or any person designated by the Director as an enforcement officer, has the power to commence and conduct a proceeding and to take steps for the enforcement of an order. The enforcement of a support deduction order does not end until the support order to which it relates is terminated and there are no arrears owing, and enforcement continues despite the fact that the support order has not been filed in, or has been withdrawn from, the Director's office.

The FSPA also provides that when a payor under a support order is in default, the Director may require the payor to file a financial statement and to appear before the court to explain the default. If the payor fails to appear before the court, the court may issue a warrant for the payor's arrest for the purpose of bringing him or her before the court. The court may also order the arrest of an absconding payor.

The FSPA also provides that, in addition to its powers in respect of contempt, the court may punish by fine or imprisonment, or by both, any wilful contempt of, or resistance to, its process, rules or orders under the FSPA.

In Order P-589, former Inquiry Officer Asfaw Seife concluded that, on the basis of the above description of the jurisdiction of the FSP, information gathered by the FSP under the FSPA in enforcement of a support deduction order issued by the court against the appellant was a law enforcement matter. This approach has been adopted in Orders P-1198 and P-1269 of this office.

The appellant submits that the issue involved in this FSP file was not one of "law enforcement" but rather one of the interpretation of the separation agreement between him and the affected person. The interpretation of the separation agreement was resolved by a decision of the Provincial Court dated April 26, 1996.

In this case, the separation agreement between the appellant and the affected person was filed with the Director of the FSP who then proceeded to monitor and enforce the support provisions of the agreement pursuant to the provisions of the FSPA as described above. In my view, that the issue of arrears was ultimately resolved by a court judgement, does not negate the fact that the matters contained in the records deal with the functions of the FSP as set out in the FSPA. Accord-

ingly, I find that these are "law enforcement" matters for the purposes of section 14(1) of the Act.

Records 6-7 and 16 are FSP computer printouts. Records 6-7 are entitled "Debtor Tracing Information" and "Payor Tracing Information" respectively. Record 16 is entitled "Payor Assets Information". Apart from the standard information headings and the case, file and enforcement officers' numbers which appear on Records 7 and 16, these documents are blank.

...

Section 14(1)(c) has also been claimed by the Ministry on the basis that the disclosure of these records could reasonably be expected to reveal investigative techniques and procedures currently in use.

...

[I]n my view, the records relate to what is more appropriately categorized as an enforcement technique as opposed to an investigative technique. [emphasis added]

73 I agree with this line of orders and find that, similar to the conclusions drawn by former Adjudicator Fineberg in Order P-1340 (and former Adjudicator Holly Big Canoe in Order P-1269), the records at issue in this appeal relate to "enforcement" not "investigation" and are more appropriately characterized as "enforcement techniques and procedures" rather than "investigative techniques and procedures". As a result, section 14(1)(c) is not applicable to exempt them from disclosure.

ECONOMIC AND OTHER INTERESTS

Introduction

74 The Ministry claims that section 18(1)(e) applies to pages 104-108 the records. This section reads:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

75 In order to qualify for exemption under section 18(1)(e), the Ministry must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; and
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and
3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

(Order P-219)

76 In Orders MO-1199-F and MO-1264 I stated the following with respect to the municipal equivalent of section 18(1)(e) of the Act:

Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P-229).

In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

77 Applying this reasoning, I find that there must be some evidence that a course of action or manner of proceeding is "pre-determined", that is, there is some organized structure or definition given to the course to be taken.

78 The Ministry notes that pages 104-108 of the records comprise a part of the manual, which was produced by the legal department for CSAs, and submits:

The information on pages 104 to 108 are instructional in nature and describe certain enforcement tools available to the ministry, and how to use them in negotiations to obtain the most favourable outcome. The purpose of the enforcement tool described here is to come to a satisfactory payment order in the context of a default hearing, whether it is an interim or final order. The Director, FRO under the ministry has found that the use of this tool is very effective in achieving this purpose.

Section 38(1)(d) [of the FRSAEA] grants the ministry valuable negotiating power in the type of agreements mentioned in the last paragraph of page 104, and described on pages 105 and 106. The ministry submits that if this information is released, it will decrease the negotiating power and will cause unfavourable results. All of the pages withheld under this exemption deal with how this negotiation process can be most successful.

79 With respect to the four parts of the above test, the Ministry states:

- 1) The records clearly meet the first requirement, as the withheld information constitutes procedures, criteria and instructions, as well as the position of the ministry in these matters.
- 2) The procedures, instructions and criteria contained in the records are directly applied to negotiations required with support payors in the context of a default hearing (CSAs and panel lawyers are in consultation in this regard) ...
- 3) Negotiations occur during the course of default hearings conducted by the ministry. There are currently numerous default hearing appearances con-

ducted daily across Ontario, all of which include negotiations through the CSAs and panel lawyers. These negotiations and default hearing appearances will continue to proceed in the future ...

- 4) Negotiations in the context of a default hearing are by the Director for the benefit of the recipient of support. In circumstances where a support recipient is collecting social assistance, some arrears may be owing to the [Ministry] by virtue of an assignment of the support owed. Thus the economic interests of support recipients as well as the ministry are at stake and should be protected by the s. 18(1)(e) exemption.

80 The appellant simply takes the position that section 41 of the FRSAEA "makes no reference or allusion to negotiations' or any of its variants, and has nothing to do with negotiations'."

81 Comments made at page 321 of Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) are helpful in understanding the Legislature's intention in including this section of the Act:

There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage ...

...

[T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

82 With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:

The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:

An agency may refuse to disclose:

A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.

We favour the adoption of a similar provision in our proposed legislation.

83 The records at issue are contained in procedural manuals and are designed to establish guidelines and/or instructions on proceeding through the various steps involved in enforcing support orders through the provisions of section 41 of the FRSAEA (and its numerous subsections). I agree that they contain procedures, criteria and instructions and the first part of the test is satisfied.

84 Although the legislation enacted to facilitate the enforcement of support orders would appear to be intended to benefit the support recipients (as determined by court order), its overall objective is to "address the massive default rates regarding spousal and child support, and the resulting poverty of children". The Ministry plays an integral role in accomplishing this objective, in the overall support scheme in "addressing child poverty" and through the more general "social assistance" regime. On this basis, I find that any "negotiations" conducted by the Ministry would be by or on behalf of the government of Ontario, as discussed in requirement 4, for the benefit of the government of Ontario.

85 That being said, I do not agree with the Ministry that pages 104-108 contain "negotiation strategies" or "procedures, criteria or instruction to be applied to negotiations" as discussed in requirement 2. This portion of the records refers to certain "negotiations" under a different section of the FRSAEA, but, in my view, it does not relate to a strategy or approach to the negotiations themselves. Rather, the information at issue in this discussion simply reflects mandatory steps to follow in connection with an alternate enforcement provision under the FRSAEA. It would appear that in any case in which the alternate enforcement mechanism is relevant, the steps taken as described in these pages would be followed - and would likely become common knowledge to anyone involved in this process. Accordingly, I find that pages 104-108 do not contain positions, plans, procedures, criteria or instructions "to be applied to any negotiations" within the meaning of this section as required in order to satisfy the second part of the section 18(1)(e) test, and this section, therefore, does not apply.

86 In concluding this discussion, I am mindful of the comments made by Senior Adjudicator Goodis in Order PO-1921 with respect to the records at issue in that appeal, which consisted of training and instructional materials, and guidelines, which are intended to assist OFM staff in discharging their statutory duties in investigating the cause, origin and circumstances of certain fires, explosions or conditions under section 9(2)(a) of the Fire Protection and Prevention Act (FPPA):

Although it is not necessary to my determination, I find support in sections 33(1)(b) and 35(2) of the Act for the conclusion that the records should be disclosed, with certain minor exceptions. These sections require institutions to make certain types of records available to the public:

33. (1) A head shall make available, in the manner described in section 35,

- (b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

35. (2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public in the reading room, library or office designated by each institution for this purpose.

In my view, the records can be described as instructions to, and guidelines for, officers of the OFM on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration of the provisions of the FPPA, an enactment or scheme which affects the public. Sections 33(1)(b) and 35(2) thus signal the Legislature's intent that records of this nature ought to be made available to the public, subject to any necessary severances for exempt information. If I were to accept the Ministry's submission that records of the nature at issue in this appeal are exempt on the basis that they are not now publicly available and their contents makes them useful to others, the legislative intent reflected in sections 33(1)(b) and 35(2) could be largely frustrated. I do not accept that sections 18(1)(a) and (c) in particular were intended to be so applied.

87 In my view, these comments are similarly applicable to training and instructional records designed, for general application, to assist the Director and her enforcement officers and panel lawyers in commencing and proceeding through default hearings.

SOLICITOR-CLIENT PRIVILEGE

Introduction

88 The Ministry claims that the section 19 exemption applies to all of the records at issue. Section 19 of the Act states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

89 Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-1879].

90 The Ministry relies on the application of both heads of privilege to the records.

LITIGATION PRIVILEGE

Introduction

91 In Order MO-1337-I, Assistant Commissioner Mitchinson discussed the scope of litigation privilege, particularly in light of a landmark decision of the Court of Appeal for Ontario in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege ...

.....

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

The test really consists of three elements, each of which must be met. First, it must have been produced with contemplated litigation in mind. Second, the document must have been produced for the dominant purpose of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation.

Third, the prospect of litigation must be reasonable - meaning that there is a reasonable contemplation of litigation.

Thus, there must be more than a vague or general apprehension of litigation.

Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:

1. The record must have been created with existing or contemplated litigation in mind.
2. The record must have been created for the dominant purpose of existing or contemplated litigation.
3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.

In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

92 In Order MO-1337-I, Assistant Commissioner Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief. This aspect of litigation privilege arises from a line of cases that includes *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) and *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.). As the Assistant Commissioner points out in his analysis, the test for this aspect of litigation privilege from *Nickmar* was quoted with approval by two of the three judges in *General Accident*. As a result, the Assistant Commissioner concluded that this aspect of privilege remains available after *General Accident*, and he adopted the test in *Nickmar*:

... 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 the solicitor, then I consider privilege should apply.

93 The Assistant Commissioner then elaborated on the potential application of the *Nickmar* test:

The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere," and [Hodgkinson] calls them "documents collected by the ... solicitor from third parties and now included in his brief." Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose."

94 I agree with the Assistant Commissioner's approach to litigation privilege as set out above, and I will apply it for the purpose of this appeal. In its representations, the Ministry states:

The ministry acknowledges that the documents at no time constituted part of the lawyer's brief; therefore, this line of submissions will rely on the "dominant purpose" test.

Dominant purpose

95 In Order PO-1928, former Adjudicator Nipp dealt with the application of section 19 to information contained in "handbooks" and/or "training manuals" developed and used by the Office of the Children's Lawyer. With respect to litigation privilege, she found:

In order to qualify for litigation privilege, a record must meet the three-part test articulated above. Each element of the test requires a specific nexus between the creation of the record and "existing" or "contemplated" litigation. The Ministry's position is essentially that litigation privilege can apply to a record created not for the dominant purpose of a particular piece of litigation, but rather for litigation in general. In my view, it is apparent from the authorities that litigation privilege is an ad hoc type of privilege, designed to protect documents that pertain to a particular piece of litigation while that litigation is continuing or reasonably in contemplation, but no longer. This type of privilege was subjected to extensive analysis by the court in *General Accident*, above. Justice Carthy, the author of the majority reasons, quoted several authorities which support this view:

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 ...

[emphasis added]

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 p. 163. He stated at pp. 164-65:

It is crucially important to distinguish litigation privilege from solicitor-client privilege ... Litigation privilege ... 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 ...

[emphasis added]

In my view, these extracts, quoted with approval by the Court of Appeal for Ontario, indicate that documents which may qualify for litigation privilege under the dominant purpose test must have been produced with particular litigation in mind, and not litigation generally. This view is reinforced by the following extract from *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27 at 33-34:

... [U]nder our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

[emphasis added]

In my view, based on the records themselves and the surrounding circumstances, the dominant purpose for preparing the records was to train OCL staff in discharging their duties. While one of the lesser purposes for creating the records may have been to foster the conduct of litigation generally, this would not attract litigation privilege, even if it were the dominant purpose, since they were not prepared with any particular litigation in mind.

For these reasons, I find that the guide portion of record 4, and records 1, 2 and 3, do not meet the dominant purpose test.

96 The Ministry submits that Order PO-1928 is distinguishable from the current appeal:

In Order PO-1928, the case of *Susan Hosiery Ltd. v. M.N.R.* is quoted as standing for the proposition that "the dominant purpose test must have been produced with a particular litigation in mind, and not litigation generally." [sic] However, the case itself states that the purpose of the privilege is to protect the possibility

of the "distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation". The ministry respectfully submits that the protection from the possibility of the distortion of truth of support payors' financial or other circumstances (the purpose of the privilege) must be kept in mind when analyzing whether litigation privilege applies to the records at issue in the case at hand. Moreover, PO-1928 - which did not find that the Office of the Children's Lawyer (OCL) manuals were covered by litigation privilege - can be distinguished from the case at hand. The manuals in this case were produced to prepare the client's (Director's) case with respect to a "particular litigation in mind," that being s. 41 default hearings, whereas the OCL's manuals were created to train OCL staff in discharging their duties.

The pages at issue contain FRO's strategies in court and mechanisms by which FRO collects payments from those payors who do not live up to their court ordered support obligations. When dealing with such payors, FRO needs to avail itself of more aggressive enforcement techniques. The responsive records in this request are manuals to assist CSA's, who initiate and pursue these aggressive enforcement techniques, as well as to assist the panel lawyers who represent the Director before the court in these proceedings.

97 The Ministry believes that access to the information in the records at issue would assist a support payor to manipulate the enforcement proceedings and concludes:

It is crucial then, that the information contained in the severed pages be protected under litigation privilege. This litigation is "particularly related to the needs of the adversarial trial process." Further, it "is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate." [R.J.Sharpe. "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, L.S.U.C. Special lectures (Toronto: De Boo, 1984) at pg. 163.]

98 The Ministry also seeks to distinguish the findings in Order PO-1928 on the basis that the authorities referred to in it do not explicitly state that litigation privilege must attach itself strictly to a single case, that one of them relates to documents in a lawyer's brief, for which the Ministry is not asserting privilege, and because they concerned litigation privilege and its relation to examination for discovery.

99 I do not agree that Order PO-1928 is distinguishable from the present appeal. I am not persuaded that the Legislature intended this privilege to extend to procedures to be applied generally. This view is amply supported by the authorities cited by former Adjudicator Nipp, above. It finds further support in dictionary definitions.

100 The Concise Oxford Dictionary of Current English, 8th ed., R.E. Allen, ed. (Oxford: Oxford University Press, 1990) defines the term "litigate" as:

- * Be a party to a lawsuit;
- * Contest (a point) in a lawsuit

101 Black's Law Dictionary, 6th ed., J.R. Nolan et al., (St. Paul, MN: West Publishing Co., 1990) (Black's) defines the term "litigate", in part as:

- * To dispute or contend in form of law; to settle a dispute or seek relief in a court of law; to carry on a lawsuit.
- * To bring into or engage in litigation; the act of carrying on a suit in a law court.

102 "Litigation" is defined in Black's as:

- * A lawsuit.
- * Legal action, including all proceedings therein.
- * Contest in a court of law for the purpose of enforcing a right or seeking a remedy.

103 Finally, Black's defines "lawsuit" as:

- * A vernacular term for a suit, action, or cause instituted or depending between two private persons in the courts of law.
- * A suit at law or in equity.
- * An action or proceeding in a civil court.
- * A process in law instituted by one party to compel another to do him justice.

104 Whether in common usage or as a term of art in the legal context, reference to the term "litigation" is primarily recognized as pertaining to a specific proceeding relating to arguably identified parties. In my view, it is entirely reasonable to incorporate these definitions into the interpretation of the term as used in section 19 of the Act.

105 Consequently, I have concluded that the findings of former Adjudicator Nipp in Order PO-1928 are similarly applicable in the circumstances of this appeal. Moreover, I find that her comments and the authorities on which they are based pertain to all aspects of the litigation of a particular matter. This does not, in my view, encompass general guidelines or manuals such as the records at issue here.

106 In a further argument, the Ministry refers to a recent decision of the Ontario Divisional Court overturning the decision of Adjudicator Big Canoe in Order P-1561 (Ontario (Attorney General) v. Big Canoe [2001] O.J. No. 4876):

[I]n the judicial review of Order P-1561, the Ontario Divisional Court rules that s. 19 contains two branches of privilege. The first is solicitor-client privilege, which includes within its ambit litigation privilege, but that the words "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation" create a discretionary privilege, to which the common law rules of privilege do not apply.

The court said:

When it comes to Branch 2, there is no issue to "clarify". There is no reference in Branch 2 to the common law principle of solicitor-client privilege (which includes litigation privilege). A head may refuse to disclose a record that was prepared by Crown counsel for use in giving legal advice or in contemplation of, or for use in, litigation. The language is clear and unambiguous. Unlike Branch 1, no external considerations such as a change in the common law, can serve to import a different way of construing Branch 2 ... [t]hus, if it was not the intention of Branch 2 of s. 19 to enable government lawyers to assert a privilege more expansive or durable than that available at common law ... it was open to parliament to say so.

What the court is saying is that s. 19 affords solicitor-client privilege (which includes litigation privilege) and a second branch of privilege that is wider than common law litigation privilege. The court is clear that all materials prepared for or in contemplation of litigation are protected under this discretionary privilege, and the common law doctrine surrounding "a particular piece of litigation" are not to be applied under that branch.

107 As the Ministry notes, the Ontario Divisional Court found that "if it was not the intention of Branch 2 of s. 19 to enable government lawyers to assert a privilege more expansive or durable than that available at common law ... it was open to parliament to say so."

108 I do not accept the Ministry's argument that any document relating to the litigation process, provided it was drafted by a Crown counsel, was intended to be exempt under section 19. In my view, if the record does not relate to a particular piece of litigation, it was not prepared "in contemplation of or for use in litigation" within the meaning of section 19, and is not exempt. This view is reinforced by the purposes of the Act recited in section 1, which require exemptions from access to be "limited and specific", and by sections 33(1)(b) and 35(2) of the Act, referred to above, which specifically identify the type of records at issue in this appeal as "public records".

109 The Ministry also submits that application of the strict rules designed for two-party litigation is not appropriate to proceedings under section 41 of the FRSAEA. Referring to the "tremendous social need for FRO's work" (as discussed in the background section above) and the nature of its work, the Ministry states:

FRO's default proceedings are unique and, as a result, the ministry submits that it should be allowed some flexibility in using s. 19 of [the Act] to protect information that was prepared for use in litigation.

...

The strict common law rules were developed in the context of private litigation. In that context it makes sense that when one court case ends, litigation privilege is likely no longer necessary. In FRO's case, however, hundreds of default proceedings are conducted every month. It would be impossible for FRO counsel to write out instructions for every panel lawyer every time she or he was going to represent the Direct at a default proceeding. The same holds true for FRO coun-

sel to write out instructions to CSAs regarding the commencement of default proceedings.

110 In my view, the social context of the FRO's work is not the governing factor in deciding whether section 19 applies. Section 19 is not a harms-based exemption, and its application depends on the factors I have already considered. In my view, this argument does not advance the Ministry's position.

111 The Ministry also submits that access to the information in the records at issue would assist a support payor to manipulate the enforcement proceedings and concludes:

It is crucial then, that the information contained in the severed pages be protected under litigation privilege. This litigation is "particularly related to the needs of the adversarial trial process." Further, it "is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate." [R.J.Sharpe. "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, L.S.U.C. Special lectures (Toronto: De Boo, 1984) at pg. 163.]

112 Again, section 19 does not have a "harms" component. That is, it is not the consequences of disclosure but the nature of the record itself that will determine whether it meets the requirements of the exemption. The record either meets the test as set out in this order or it does not. Therefore, many of the concerns and arguments raised by the Ministry with respect to the unique nature of the FRO, the need for its work and the perceived consequences of disclosure do not assist me in determining whether section 19 applies in the circumstances.

113 Applying the above discussion to the records at issue in this appeal, I find that they do not pertain to a particular litigation and on this basis, do not qualify for exemption pursuant to the litigation aspect of the solicitor-client privilege in section 19 of the Act.

SOLICITOR-CLIENT COMMUNICATION PRIVILEGE

Introduction

114 Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

115 This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

116 The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

117 The Ministry states:

The pages at issue as outlined above are taken from the [FRO] Policy & Procedures Manual. This material is prepared exclusively for FRO's enforcement officers as defined in the paragraph above and therefore satisfies the test ... The material is written by the Director's legal counsel; contains information of a confidential nature that is not distributed to anyone other than those expected to initiate Default Proceedings on the Director's behalf; has been written by the Director's legal advisors for the use of the Director and her enforcement officers; and is designed to give legal advice as to how and when a default proceeding should be commenced, and how it is to proceed.

...

... It provides comprehensive and direct legal advice as to what should prudently and sensibly be done in a particular legal context.

...

[Other pages] contain information found in the panel lawyer training material. FRO has just over 100 panel lawyers across Ontario who regularly appear in their local courts on behalf of FRO, a centralized agency. Each panel lawyer is retained to appear on a specific matter in each case.

...

The solicitor/client relationship here is akin to a common scenario in private practice where a client seeks legal advice from a senior lawyer, decides on a

course of action, and instructs the senior lawyer to proceed. The senior lawyer, with the client's consent, may instruct a junior lawyer to draft materials or appear in court to move the proceedings forward.

...

In the case at hand, the Director originally sought the advice of FRO in-house counsel with regard to the commencement and litigation of default hearings. This advice was provided to the Director, and the Director gave instructions regarding the procedures to be followed in default hearings. In-house counsel then prepared these materials, reflecting the Director's instructions, to the panel lawyers in the form of a manual or training material.

118 Commenting on the application of the solicitor-client communication privilege to similar types of records, former Adjudicator Nipp found in Order PO-1928:

[I]n a similar vein to my finding above under litigation privilege, to be subject to solicitor-client communication privilege, the communication in question must relate to a particular matter on which legal advice is being sought or provided. This privilege is not intended to apply to general guidelines to staff or agents, or policies about how to carry out their duties, in the absence of a specific legal issue on which advice is being sought. By contrast, had legal advice been sought and given on the specific legal issue of what the guidelines should contain, then confidential communications between legal counsel and an OCL client made for this purpose may well have attracted privilege.

119 I agree with these conclusions and find that they are similarly applicable in the circumstances of the current appeal. I accept that the records were prepared by legal counsel for the Director, and that during their preparation, any communications between the Director and/or her staff and/or agents with respect to the interpretation of the relevant sections of the FRSAEA, and the content of the procedures and guidelines may well have attracted privilege. However, once the document was completed, its purpose was not to communicate advice from legal counsel to the Director and her staff and agents, but rather, to be then used by her in overseeing the procedures to be followed by staff in applying and enforcing the legislation. I am not persuaded that simply because these records pertain to one specific section of the FRSAEA that they pertain to a "particular legal context" in the requisite sense. These are guidelines, procedures and instructions for "general application" in the default hearing process under section 41 of the FRSAEA as opposed to being in relation to a particular proceeding on which legal advice is sought or given. Accordingly, I find that the records are not exempt under the solicitor-client communication privilege aspect of the section 19 exemption.

ORDER:

120

1. I uphold the Ministry's decision to withhold the portions of pages 119-123 that are not responsive to the appellant's request.

2. I order the Ministry to disclose the remaining records and parts of records at issue by providing him with copies of these pages on or before September 10, 2002.
3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the disclosed records, only upon request.

qp/e/qlcct

Ministry of Community and Social Services v. Cropley et al.

[Indexed as: Ontario (Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner)]

70 O.R. (3d) 680

[2004] O.J. No. 1854

Court File No. 527/02

Ontario Superior Court of Justice
Divisional Court

Ferrier, Swinton and Linhares de Sousa JJ.

May 3, 2004

Administrative law -- Freedom of information -- Exemptions to disclosure -- Solicitor-client privilege -- Commissioner erring in finding that solicitor-client privilege did not apply to guidelines and training material prepared by in-house counsel of Family Responsibility Office at request of Director as those documents did not relate to particular proceedings or to "particular legal context" -- Documents exempt from disclosure on grounds of common law solicitor-client privilege under s. 19 of Freedom of Information and Protection of Privacy Act -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 19.

A request was made under the Freedom of Information and Protection of Privacy Act ("FIPPA") for a number of documents dealing with s. 41 default hearings under the Family Responsibility and Support Arrears Enforcement Act, 1996, S.O. 1996, c. 31 ("FRSAEA"). A group of those documents were created by in-house counsel of the Family Responsibility Office at the request of the Director, for the Director and the Director's enforcement officers, and dealt with how and when default proceedings should be commenced and how to proceed with default hearings. The other group of documents was also created by in-house counsel of the Family Responsibility Office at the Director's request, for the Director and the Directors to communicate, at training sessions and otherwise, the Director's instructions to panel lawyers who were retained to act for the Director concerning the handling of s. 41 default hearings. The Ministry of Community and Social Services sought exemptions from disclosure under ss. 13(1), 14(1)(c), 18(1)(e) and 19 of the FIPPA. The

Information and Privacy Commissioner found that the exemptions did not apply and ordered full disclosure of the requested documents. The Ministry brought an application for judicial review of that decision.

Held, the application should be granted in part.

The standard of review of the Commissioner's determinations under ss. 13, 14 and 18 of the FIPPA was that of reasonableness. The Commissioner's determinations with respect to s. 19 of the FIPPA, the exemption for solicitor-client privilege, was not entitled to deference, given that the relative expertise of the court in the area of common law and statutory solicitor-client and litigation privilege was overwhelming. The standard of review was that of correctness.

The Commissioner's decision with respect to the exemptions claimed pursuant to ss. 12, 14 and 18 of the FIPPA was reasonable. [page681]

In the Commissioner's view, any communications between the Director and her staff and legal counsel during the preparation of the records by legal counsel for the Director may be subject to privilege. However, once the records or documents were completed and became used by the Director to direct the procedures to be followed both by her enforcement staff and panel lawyers and to instruct those individuals in their enforcement work under s. 41 of the FRSAEA, no privilege remained. The documents then, in the view of the Commissioner, became guidelines, procedures and instructions for "general application" in the default hearing process under s. 41 of the FRSAEA. As such, the documents lacked a "particular legal context" or the quality of relation to a "particular proceeding" necessary to qualify for solicitor-client privilege.

The Minister erred in her interpretation of the common law principle of solicitor-client privilege. Specifically, she erred in finding that the documents, in order to be exempt under the common law solicitor-client privilege, must relate to particular proceedings or to a "particular legal context". There is no requirement that solicitor-client communications relate to a discrete transaction or particular litigation. The legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected must be construed as broad in nature, including advice on what should be done, legally and practically.

The records in dispute were created by legal counsel at the instruction of the Director, and included instructions and advice as to how and when s. 41 default proceedings should be commenced and how they are to proceed. Among other things, they included the following: discussions of the statutory requirements of those proceedings and the evidentiary requirements of such cases; a discussion of criteria to be considered when deciding to proceed with those types of cases; an examination of options to be considered, depending on how the default hearings unfolded before the court; and a discussion of how the enforcement officers should interact with the panel lawyers on those occasions. The documents were clearly the product of confidential communications between the Director and her legal counsel. The fact that the Director then instructed the in-house counsel to share the documents for the purpose of instructing its enforcement officers and the panel lawyers,

all of whom were agents of the Director, did not change the source of those documents as arising from confidential communications from legal counsel.

The Commissioner's interpretation and application of the term "particular legal context" was too narrow. It need not be limited to a single discrete transaction or particular litigation. The Commissioner appeared to have confused litigation privilege with solicitor-client communication privilege. The documents in question were exempt from disclosure on the grounds of common law solicitor-client privilege as provided for in s. 19 of the FIPPA.

Cases referred to

Balabel and another v. Air India, [1988] 2 W.L.R. 1036, [1988] 2 All E.R. 246 (C.A.); Canada (Director of Investigation and Research) v. Southam Inc. (1996), [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, 209 N.R. 20, 71 C.P.R. (3d) 417, affg (1995), 127 D.L.R. (4th) 329, 185 N.R. 291, 21 B.L.R. (2d) 68, 63 C.P.R. (3d) 67 (F.C.A.); Douglas Aircraft Co. of Canada v. McConnell, [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385, 29 N.R. 109, 79 C.L.L.C. Â14,221, varg (1976), 14 O.R. (2d) 1, 72 D.L.R. (3d) 453 (Div. Ct.); John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, [1993] O.J. No. 1527, 106 D.L.R. (4th) 140 (Div. Ct.); Legal Services Society v. British Columbia (Information and Privacy Commissioner), [2003] B.C.J. No. 1093, 226 D.L.R. (4th) 20, 2003 BCCA 278, [2003] B.C.J. No. 1093 (C.A.); [page682] Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer) (2002), 62 O.R. (3d) 167, [2002] O.J. No. 4596, 220 D.L.R. (4th) 467, 22 C.P.R. (4th) 169 (C.A.) [Leave to appeal dismissed, [2003] S.C.C.A. No. 31], affg (2001), 16 C.P.R. (4th) 1 (Ont. Div. Ct.) (sub nom. Ontario (Attorney General) v. Big Canoe); Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner) (2003), 66 O.R. (3d) 692, [2003] O.J. No. 3522, 231 D.L.R. (4th) 727, 45 R.F.L. (5th) 285 (Div. Ct.); Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor) (1999), 46 O.R. (3d) 395, [1999] O.J. No. 4560, 181 D.L.R. (4th) 603, 3 C.P.R. (4th) 506 (C.A.) (sub nom. Big Canoe v. Ontario (Minister of Labour)); Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner), [2004] O.J. No. 163, 181 O.A.C. 251 (Div. Ct.); Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner), [2004] O.J. No. 224, 181 O.A.C. 171 (Div. Ct.); Right to Life Assn. of Toronto and Area v. Metropolitan Toronto District Health Commission, [1991] O.J. No. 2129, 86 D.L.R. (4th) 441 (Div. Ct.)

Statutes referred to

Family Responsibility and Support Arrears Enforcement Act, 1996, S.O. 1996, c. 31, ss. 5, 41

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 12, 13, 14, 18, 19, 33, 35

Authorities referred to

Ontario, Ministry of Community and Social Services, Family Responsibility Office Panel Lawyers Training Sessions, Fall 2000

Ontario, Manual for Counsel Representing the Director of the Family Responsibility Office (Toronto: Ministry of Community and Social Services)

APPLICATION for a judicial review of a decision of the Information and Privacy Commissioner.

Anita Lyon, for applicant.

John Higgins and William S. Challis, for respondent.

The judgment of the court was delivered by

LINHARES DE SOUSA J.: --

Introduction

[1] This is an application brought by the Ministry of Community and Social Services ("Ministry") for judicial review of Order PO-2034 issued by the Information and Privacy Commissioner, and, more particularly, Adjudicator Laurel Cropley (Commissioner), dated August 21, 2002, made under the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, as amended, ("FIPPA"). Under that order, the Commissioner required full disclosure of documents requested by John Doe ("Requester") after finding that the exemptions claimed by the [page683] Ministry under FIPPA did not apply. The Ministry had sought exemptions from disclosure under ss. 13(1), 14(1)(c), 18(1)(e) and 19 of FIPPA. These sections read as follows:

13(1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

.

14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

.

(c) reveal investigative techniques and procedures currently in use or likely to

be used in law enforcement;

.....

18(1) A head may refuse to disclose a record that contains,

.....

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

.....

19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[2] The Ministry seeks an order quashing the order of the Commissioner and upholding the decision of the Ministry to withhold the disclosure of the records in question.

[3] The documents that are the subject of dispute came before this court under seal by order of Carnwath J., dated November 12, 2002, and have been examined by this court during its deliberations. The source and general subject matter of the documents were not disputed by the parties. All of them deal with s. 41 default hearings under the Family Responsibility and Support Arrears Enforcement Act, 1996, S.O. 1996, c. 31 ("FRSAEA"), one of the legal proceedings available to the Director of the Family Responsibility Office ("Director") in fulfilling its mandate under FRSAEA as stated in s. 5(1) of FRSAEA:

5(1) It is the duty of the Director to enforce support orders where the support order and the related support deduction order, if any, are filed in the Director's office and to pay the amounts collected to the person to whom they are owed.

[4] The documents are described and categorized, in para. 13 of the Ministry's Factum. A group of these documents were created [page684] by in-house counsel of the Family Responsibility Office at the request of the Director, for the Director and the Director's enforcement officers. Generally, they deal with how and when default proceedings should be commenced and how to proceed with the default proceedings. Some of these documents come from a Policy and Procedures Manual. Others are entitled "Default Hearings, Prepared for CSA/CSC", with the CSA, the Client Services Associates, and the CSC, the Client Services Clerks.

[5] The other group of documents was also created by in-house counsel of the Family Responsibility Office at the request of the Director to communicate, at training sessions and otherwise, the Director's instructions to panel lawyers who are retained to act for the Director

concerning the handling of s. 41 default hearings. The evidence indicated that there are approximately 100 of these panel lawyers across the province of Ontario that appear in local courts on s. 41 default hearings in specific cases as agents of the Director. Some of these documents come from a record entitled Manual for Counsel Representing the Director of the Family Responsibility Office. The rest of the documents come from a record with a cover sheet entitled, Family Responsibility Office Panel Lawyers Training Sessions, Fall 2000.

[6] After hearing the submissions of the Ministry with respect to its claimed exemptions, the court requested argument from the Commissioner with respect to only two of them, namely, the exemptions claimed by the Ministry pursuant to ss. 18(1)(e) and 19 of FIPPA.

Standard Of Review

[7] The appropriate standard of review of the Commissioner's decisions to be used by this court is dependent on the nature of the question. For those issues that come within the unique range of the expertise of the Commissioner, namely, balancing the need for access to information against the right to protection of privacy, the courts will bestow a "high degree of curial deference", although there is no privative clause found in FIPPA. In these instances, the appropriate standard of review is that of reasonableness. (See *Right to Life Assn. of Toronto and Area v. Metropolitan Toronto District Health Commission*, [1991] O.J. No. 2129, 86 D.L.R. (4th) 441 (Div. Ct.), and *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, [1993] O.J. No. 1527 (Div. Ct.).)

[8] An unreasonable decision is one that is "irrational", "not in accordance with reason" or "not supported by any reasons that can stand up to a somewhat probing examination". (See [page 685] *Canada (Director of Investigation and Research) v. Southam Inc.* (1996), [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1.)

[9] The Divisional Court has applied the reasonableness standard of review to the Commissioner's determinations under ss. 13, 14 and 18 of the FIPPA, based on the expertise of the Commissioner. (See *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 66 O.R. (3d) 692, [2003] O.J. No. 3522 (Div. Ct.), leave to appeal granted (January 30, 2004) Doc. M30291 (C.A.); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224, 181 O.A.C. 171 (Div. Ct.), leave to appeal applied for, Doc. M30912 (C.A.); *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395, [1999] O.J. No. 4560 (C.A.); *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163, 181 O.A.C. 251 (Div. Ct.), leave to appeal applied for, Docs. M30913 and M30914 (C.A.)).

[10] Where the Commissioner deals with questions that go to its jurisdiction or questions of law, then the standard of review is that of correctness. In these instances, there is reduced deference as the Commissioner is in no better a position to deal with the matter than a court of law. The

interpretation and application of s. 19 of FIPPA is one such area because it relates to questions of common law and statutory solicitor-client privilege and litigation privilege. On these kinds of questions, the relative expertise of the court is overwhelming. (See *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167, 220 D.L.R. (4th) 467 (C.A.), leave to appeal dismissed, [2003] S.C.C.A. No. 31 (May 15, 2003), S.C.C. 29572, [affg (2001), 16 C.P.R. (4th) 1 (Ont. Div. Ct.) (sub nom. *Ontario (Attorney General) v. Big Canoe*)]]; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [2003] B.C.J. No. 1093, 226 D.L.R. (4th) 20 (C.A.)).

[11] On questions of fact, the Commissioner continues to be entitled to curial deference. (See *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385). However, in this case, all of the Commissioner's conclusions of fact were based on the parties' written and oral submissions and on the Commissioner's own examination of the documents in question. The Commissioner has no greater expertise than this court in determining whether the documents in issue are privileged. [page686]

Disposition with Respect to Exemptions Claimed Pursuant to Sections 13, 14 and 18

[12] With respect to the exemptions claimed pursuant to ss. 13, 14 and 18 of FIPPA, after examining the reasons of the Commissioner and the documents in question; after hearing the arguments of counsel; and, after applying the appropriate standard of review, this court is of the view that the Commissioner's decision is reasonable and there is no basis for quashing the decision.

The Decision of the Commissioner on the Section 19 Exemption Claim

Solicitor-client privilege

[13] In the Commissioner's reasons, she accepts the description and source of the documents in question as described in paras. 4 and 5 of those reasons. She goes on to state as follows:

... I accept that the records were prepared by legal counsel for the Director, and that during their preparation, any communications between the Director and/or her staff and/ or agents with respect to the interpretation of the relevant sections of the FRSAEA, and the content of the procedures and guidelines may well have attracted privilege. However, once the document was completed, its purpose was not to communicate advice from legal counsel to the Director and her staff and agents, but rather, to be then used by her in overseeing the procedures to be followed by staff in applying and enforcing the legislation. I am not persuaded that simply because these records pertain to one specific section of the FRSAEA that they pertain to a "particular legal context" in the requisite sense. These are guidelines, procedures and instructions for "general application" in the default hearing process under section 41 of the FRSAEA as opposed to being in relation to a particular proceeding on which legal advice is sought or given. Accordingly, I find that the records are not exempt under the

solicitor-client communication privilege aspect of the section 19 exemption.

[14] Hence, for the Commissioner, any communications between the Director and her staff and legal counsel during the preparation of the records by legal counsel for the Director may be subject to privilege. However, once the records or documents were completed and became used by the Director to direct the procedures to be followed both by her enforcement staff and panel lawyers and to instruct those individuals in their enforcement work under s. 41 of the FRSAEA, no such privilege remained. The documents then, in the view of the Commissioner, became guidelines, procedures and instructions for "general application" in the default hearing process under s. 41 of the FRSAEA. As such, in the opinion of the Commissioner, the documents lacked a "particular legal context" or the quality of relation to a "particular proceeding" necessary to qualify for solicitor-client privilege. As the [page687] Commissioner said earlier in her reasons (see p. 24), to exempt training and instructional records designed for general application would frustrate the legislative intent reflected in ss. 33(1)(b) and 35(2) of FIPPA which read as follows:

33(1) A head shall make available, in the manner described in section 35,

.

- (b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

.

35(2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public in the reading room, library or office designated by each institution for this purpose.

[15] The Commissioner concluded that the documents in question were similar types of records as those found in the decision of former Adjudicator Nipp in Order PO-1928.

Analysis

[16] In our view, the Commissioner appears to have put too much emphasis on the fact that these documents were entitled manuals and were to be directives and guidelines for the Director's agents. Even though s. 33(1) of FIPPA does not exempt from disclosure "manuals, directives or guidelines" of general application prepared by an institution for its officers, s. 33(2) of FIPPA recognizes that even in the case of these "manuals, directives or guidelines" of general application, exemptions from disclosure can still be claimed if it can be otherwise justified under the statute or in law:

33(2) A head may delete from a document made available under subsection (1) any

record or part of a record which the head would be entitled to refuse to disclose where the head includes in the document,

- (a) a statement of the fact that a deletion has been made;
- (b) a brief statement of the nature of the record which has been deleted; and
- (c) a reference to the provision of this Act on which the head relies.

[17] After examining the decision of the Commissioner and the jurisprudence dealing with the legal principle of solicitor-client privilege, this court is of the view that the Commissioner erred in her interpretation of the common law principle of solicitor-client privilege. Specifically, she erred in finding that the documents, in order to be exempt under the common law solicitor-client privilege, [page688] must relate to particular proceedings, or a "particular legal context" and that the records in question, records pertaining to s. 41 of the FRSAEA did not have a "particular legal context" in the requisite sense so as to enjoy the exemption. In coming to that conclusion, she applied an incorrect legal test in considering the documents in question. For this reason the Commissioner's decision with respect to the s. 19 exemption cannot stand.

[18] At p. 24 of her reasons, the Commissioner discusses the various parts of s. 19 of FIPPA. She correctly states:

Section 19 encompasses two heads of privilege, as derived from the common law:

- (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-1879].

[19] In its comparative examination of solicitor-client privilege and litigation privilege, the Divisional Court in Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer), supra, confirmed the essential elements of common law solicitor-client privilege:

- 1. Confidential communication between the client and his solicitor.
- 2. The seeking of legal advice from the solicitor by the client, whether or not litigation is involved.

[20] On appeal, the Ontario Court of Appeal went on to state at p. 172 O.R., p. 473 D.L.R., that

Solicitor-and-client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation. . . . Solicitor-client privilege for confidential matters does not come to an end.

[21] It is well accepted that solicitor-client privilege protects both written and oral communications. Furthermore, there is no requirement that solicitor-client communications relate to a discrete transaction or particular litigation. (See *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, *supra*.)

[22] The legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law. The type of communication that is protected must be construed as broad in nature, including advice on what should be done, legally and practically. In *Balabel and another v. Air India*, [1988] 2 W.L.R. 1036, [1988] 2 All E.R. 246 (C.A.), the English Court of Appeal stated:

In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters [page689] great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

[23] An examination of the records in dispute reveals that the documents were created by legal counsel at the instruction of the Director. Without getting into any specific discussion that would necessarily divulge the contents of the documents, all of the documents include instructions and advice as to how and when s. 41 default proceedings should be commenced and how they are to proceed. Among other things, they include discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases; they include a discussion of criteria to be considered when deciding to proceed with these types of cases; they include an examination of options to be considered, depending on how the default hearings unfold before the court; and, they include a discussion of how the enforcement officers should interact with the panel lawyers on these matters.

[24] The Commissioner appears to recognize that the communications between the Director and her legal counsel and/ or her staff (all being agents of the Director) may be privileged in the preparation of the documents. We fail to see how that privilege can be lost once the documents are completed. Based on the court's examination of the records, the documents are clearly the product of those confidential communications. In the unique circumstances of this case, the fact that the Director then instructs the in-house counsel to share the documents for the purpose of instructing its enforcement officers and the panel lawyers, all of whom are clearly agents of the Director, in our

view, does not change the source of those documents as arising from confidential communications from legal counsel. In essence, through the medium of those documents, the agents of the Director are receiving the instructions of the Director with respect to how s. 41 default proceedings are to be conducted in the name of the Director, as the Director has been so instructed by its legal counsel. There is no basis in law for terminating the solicitor-client privilege on these facts.

[25] We are also of the view that the Commissioner's interpretation and application of the term "particular legal context" [page690] cited in the cases on which the Commissioner relied was too narrow. It need not be limited to a single discrete transaction or particular litigation. In this, the Commissioner appears to have been confusing litigation privilege with solicitor-client communication privilege (see p. 28 of the Commissioner's reasons). While the advice and instructions found in the documents in question can apply to many individual cases brought before the courts by the many agents of the Director throughout the province, all of the cases will be s. 41 default proceedings under FRSAEA on which the Director had sought legal advice from her in-house counsel. The s. 41 default proceedings are one of the litigation tools accorded to the Director under the FRSAEA in order to fulfill its legislative mandates on which it has sought legal advice. It can, therefore, be considered a "particular legal context" as described in the case of *Balabel and another v. Air India*, supra.

[26] We have examined the facts of Order PO-1928, decided by Adjudicator Nipp, on which the Commissioner relied. The Commissioner found that Adjudicator Nipp was dealing with similar types of records. We cannot agree. The subject matter of the documents in question in that case was very different. They did not deal with a particular type of litigation. They could not be considered to relate to a particular matter on which legal advice was sought. Rather, they concerned training material prepared by the staff of the Office of the Children's Lawyer to be given to both lawyers and social workers with the help of clinicians, such as a psychologist or psychiatrist. The records in question suggested a course of action for the trainees to follow when interviewing children. They were indeed generic training materials on a non-legal subject. As described earlier, the documents in this case are very different. Contrary to the Commissioner's findings, the conclusions reached in PO-1928 are not similarly applicable in the circumstances of this case.

[27] For these reasons, we conclude that the Commissioner erred in the legal test applied by her to determine whether the documents in question were exempt for reason of solicitor-client privilege. Based on this court's examination of the documents in light of the proper test as discussed earlier, we conclude that the documents are exempt from disclosure on the grounds of common law solicitor-client privilege as provided for in s. 19 of FIPPA.

[28] Having come to this conclusion, it is not necessary to consider the other branch of s. 19 of FIPPA that is discussed in the reasons of the Commissioner, namely, litigation privilege.

[29] With respect to the part of the decision of the Commissioner as it relates to the s. 19 exemption and requiring the disclosure of [page691] all of the remaining records in contention, (see

paras. 2 and 3 of the order of Adjudicator Laurel Cropley, dated August 21, 2002) the decision is quashed. It is substituted by an order of this court upholding the Minister's decision to withhold disclosure of the remaining records and part of the records that are in issue. The documents are to remain sealed as ordered by Carnwath J. dated November 12, 2002.

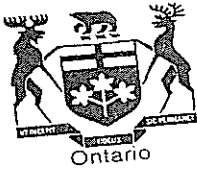
[30] Neither party has requested costs in this matter. There will be no order as to costs.

Application granted in part.

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Ontario

**The Report of the Commission
on Freedom of Information
and Individual Privacy/1980**

**VOLUME 2
Freedom of Information**

Printed by J.C. Thatcher, Queen's Printer of Ontario

ISBN: The Report (3 volumes):0-7743-5432-1

ISBN: Volume 2:0-7743-5434-8

Available from the
Publications Centre
Ministry of Government Services
Queen's Park
Toronto, Ontario

or

Ontario Government Book Store
800 Bay Street
Toronto, Ontario

CHAPTER 5

Constitutional Dimensions of the Issue

Our terms of reference directed us to consider possible changes in public information practices which would be "compatible with the parliamentary traditions of the Government of Ontario." Most freedom of information legislation has been enacted in jurisdictions whose governmental processes and structures differ in certain respects from our own. (Nova Scotia and New Brunswick, the two Canadian provinces with freedom of information laws, are the exceptions.) Although the influence of American experience on public discussion of the freedom of information question in Canada is understandable, the significant structural differences between the congressional and parliamentary systems of government suggest that care must be taken to ensure that the enactment of a freedom of information scheme drawing on the American experience would not undermine the effectiveness of valuable parliamentary traditions and conventions. In this chapter we consider the constitutional dimensions of the freedom of information issue. In particular, we consider the extent to which the doctrines of individual and collective ministerial responsibility may appear to be inconsistent with a more open style of government. We will also refer briefly to the general nature and significance of federal-provincial relations in the Canadian political context in order to anticipate the significance of federal-provincial bargaining processes for a Canadian freedom of information scheme.

It is generally agreed that the following are the major characteristics of a parliamentary system of government:

1. the members of the Cabinet or Executive Council are members of the legislature and participate directly in its decision-making processes;
2. ministers are responsible to Parliament collectively and individually for the administration of their departments;
3. members of the public service are non-partisan, are appointed on the basis of merit, and retain relative anonymity. It is the role of the public service to implement policy decisions made by elected ministers.

The first of these would not be affected in any way by the adoption of freedom of information legislation. The potential

impact of such legislation is on the remaining two features, which find their constitutional expression in the convention of ministerial responsibility. This convention may be said to contain two elements: the collective responsibility of Cabinet ministers to the legislature (and, through it, to the public for the administration of the government as a whole) and the individual responsibility of each minister for the administration of the department he heads. This convention provides a mechanism whereby an identifiable group of politicians can be held accountable to the public for the exercise of the power of the state[1].

A. COLLECTIVE MINISTERIAL RESPONSIBILITY

The requirements of the convention of collective ministerial responsibility have been described as follows:

...all members of a Government are expected publicly to support its actions and policies, or if they are not prepared to do so, to resign their offices: all ministers must accept responsibility for all of the activities carried out in the name of the Government. If Parliament should refuse to support the Government's policy then the whole Government must resign or submit itself to a general election. And, if at any election the people refuse to give the Government the requisite support to keep it in power, it must resign[2].

The convention serves to ensure that the legislature and the people can hold the entire government accountable for its actions: the administration must stand or fall together. Under modern political conditions, the effectiveness of the role of the legislature in the operation of this doctrine has been reduced to some extent. If the governing party holds a majority of seats in the house, it is unlikely that the legislature will vote to bring down the government.

The traditional corollary of the doctrine of collective responsibility is that if an individual minister disagrees with government policy and finds himself unable to support it, he is expected to resign from the Cabinet. Since all Cabinet ministers are required to support and defend publicly the policies of the government once they are made, their discussions and deliberations prior to a final decision have traditionally been surrounded by secrecy. In the words of one observer, ministers must be able

...to meet together, to have a full and frank discussion of all aspects of a problem, to make concessions to one another, to seek the best and appropriate solution and then to

enunciate it with one voice...so that the public is not... confused[3].

The confidentiality of Cabinet discussions creates an environment in which alternatives can be more vigorously debated at the Cabinet level. Public unanimity prevents individual ministers from denying responsibility for government policy.

Some of the concern expressed about the implications of freedom of information legislation for collective ministerial responsibility relates to the legislation's possible encroachment upon the confidentiality of Cabinet deliberations. If Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold all ministers responsible for government policy would be diminished.

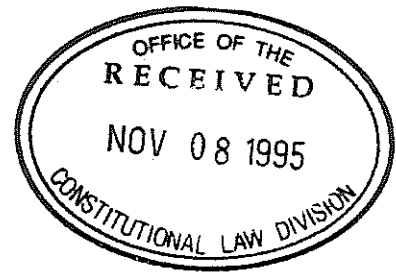
Clearly, the adoption of legislation granting members of the public a right of access to documents revealing the nature of Cabinet deliberations would be a substantial departure from current practice. In Ontario, upon taking office, Cabinet ministers swear an oath of secrecy not to reveal the nature of Cabinet deliberations[4]. The preservation of the confidentiality of Cabinet discussions would appear to be a necessary feature of a freedom of information scheme "compatible with the parliamentary traditions of the Government of Ontario."

B. INDIVIDUAL MINISTERIAL RESPONSIBILITY

The convention of individual ministerial responsibility has traditionally meant that

each individual minister is accountable for his own decisions and for all the actions of the governmental department under his control. He must present his department's programmes to the House, defend its policies and answer questions concerning it[5].

In order to focus responsibility exclusively on the minister, this convention structures the relationship between the minister and the public servant in a particular way. Since only the minister can be held accountable for the actions of the department he heads, then by convention the act of every civil servant must be regarded as the act of the minister[6]. In consequence, if



COURT FILE NO. 590/95

MASSE ET A, V. A.A. ONTARIO

O'DRISCOLL, O'BRIEN, CORBETT J.J.

ENDORSEMENT-HEARD NOVEMBER 5/95- RELEASED NOVEMBER 6/95.

This motion raised the question of public interest immunity or cabinet privilege and sought to compel production of a document prepared by the Ministry of Social Services and submitted to Cabinet for Cabinet consideration prior to reductions in social assistance in Ontario which were announced July 21/95.

Those changes were made by amendments to Regulations to the General Welfare Assistance Act and the Family Benefits Act. Both those acts contain provisions permitting the Lieutenant Governor in Council to make regulations for purposes of the respective acts.

The document in question was described as " Social Assistance Rate Reductions" with some supplementary material annexed thereto. It is apparently the type of document normally used for cabinet briefings.

The applicants argue the document is relevant to arguments they intend to make relating to certain Regulations being ultra vires their enabling legislation and also to Charter arguments. They argue the document is fundamental to their case and will assist this Court to understand what the government thought were the purposes of the statutes and regulations.

The Attorney General refuses production based on the basis of general public interest immunity and the approach taken in *Re Carey v. The Queen* [1986] 2 SCR 637.

The Attorney General also argues the document was merely an " an advice giving " document. The Attorney General filed an affidavit sworn by Rita Burak Secretary of Cabinet and Clerk of the Executive Council. That affidavit outlined the basis on which privilege was asserted and included assertions the document was used in connection with Government and Cabinet consideration to reform of the social assistance system which formed part of a larger policy agenda of the Government. The affidavit outlined a number of issues which were being considered, rate reductions being merely one of those issues.

Re Carey indicates that Cabinet documents like other evidence, must be disclosed unless that disclosure would interfere with public interest notwithstanding there is a general regime of secrecy that surrounds high level government decisions.

In determining whether Cabinet documents should be produced that decision indicates a balancing of competing interests must be considered.

Included in that process is consideration of the level of the decision-making process, the nature of the policy concerned, the contents of the document and the timing of when the information is to be revealed. The nature of the litigation involved and the extent to which facts may be proved without the document sought are also to be considered.

Re Carey noted revelations of Cabinet decisions and planning at a developmental stage when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet Government.

In this case the affidavit of Rita Burak indicates the document in question was part of an ongoing social policy reform at the developmental stage.

In considering the factors outlined in Re Carey we are satisfied that the document should not be produced at this time. If, during further argument there are grounds for renewing the application it may be re-considered

Cited as:

Ontario (Management Board of Cabinet)

**Ontario Public Service Employees Union (OPSEU),
Applicant v. The Crown in Right of Ontario as represented by
Management Board of Cabinet, Responding Party v. Manpower
Services (Ontario) Ltd., The Employment and Staffing Services
Association of Canada (Essac), AIDA Canada Ltd., Armor
Personnel Inc., Bradson Staffing Services, Drake
International Inc., Ecco Staffing Services, Ian Martin
Limited, Keith Bagg Staffing Resources Inc., Kelly Services
(Canada), Ltd., Nursing & Homemakers Inc., Olsten Services
Limited, Herzing Services Inc., Quantum Management Services
Limited, T.E.S. Contract Services Inc., Tosi Placement
Services Ltd., Y&R Personnel Services Inc., Interim
Healthcare, Intervenors**

[1998] O.L.R.D. No. 1598

41 C.L.R.B.R. (2d) 206

[1998] OLRB Rep. March/April 167

File No. 2076-96-U

Ontario Labour Relations Board

BEFORE: G.T. Surdykowski, Vice-Chair

March 11, 1998

APPEARANCES: Gavin Leeb for the applicant; Dennis W. Brown,
Q.C. and Liane Brossard for the responding party; no one
appearing for the intervenors on the motion.

DECISION OF THE BOARD

1 The responding employer, the Crown, objects to producing the documents identified in a Board summons served by the applicant trade union, OPSEU, in this proceeding.

2 This is a complaint under section 96 of the LABOUR RELATIONS ACT, 1995 in which OPSEU alleges that the Crown has violated section 17 of the Act.

3 Once an appropriate notice to bargain is given, section 17 obliges the collective bargaining partners to bargain in good faith and make every reasonable effort to make a collective agreement. OPSEU alleges that the Crown has violated section 17 in the negotiations which led to the collective agreement currently in effect between them. The following facts, taken (but not quoted exactly) from OPSEU's pleadings, are not in dispute:

1. The applicant and respondent are parties to a collective agreement that was reached March 29, 1996, following a 5 week strike.
2. Collective bargaining commenced in April, 1995.
3. The recognition clause of the collective agreement specifically provides for the inclusion of "GO Temps" in the bargaining unit.
4. GO Temp employees work on temporary assignment in the Province's ministries, agencies, boards and commissions. 'GO Temp' is the Government of Ontario temporary help service administered through the Management Board Secretariat.
5. Articles 3.38, 3.X and Appendix 16 of the collective agreement specifically apply to GO Temp employees.
6. This is the first collective agreement between the applicant and respondent to include GO Temps in the bargaining unit.
7. On 31 January, 1996, Ms. Michele Noble, Deputy Minister, Management Board Secretariat, informed Ministry employees regarding the existence of a Business Plan for the Ministry.
8. On April 11, 1996, Mr. David Johnson, Chairman, Management Board of Cabinet, released an Interim Report on Business Planning and Cost Savings Measures indicating that GO Temp services will be restructured.
9. On August 23, 1996, the Management Board secretariat issued a Request for Proposals to privatize the provision of temporary help services for the Province's ministries, agencies, boards and commissions.
10. Approximately 2,100 people were regularly employed as GO Temp employees on an ongoing basis.
11. Approximately 1,300 GO Temp employees were employed throughout the Government of Ontario each week.
12. At least eight (8) full-time OPSEU members worked for GO Temp Services on a permanent basis, providing GO Temp employees to

ministries across the government.

4 In addition, OPSEU alleges that:

- (a) The union devoted considerable effort, resources and time towards representing GO Temp employees' interest in bargaining with the respondent. The parties exchanged proposals regarding GO Temps during bargaining.
- (b) On April 12, 1996, employees of GO Temp services were advised by the Director of General Business Services, Ms Janis Clarke, that they would be losing their jobs as a result of Mr. Johnson's announcement regarding restructuring the day before.
- (c) In accordance with Appendix 16 of the collective agreement, OPSEU appointed members to a sub-committee to fulfil its obligation pursuant to Appendix 16.
- (d) The Respondent failed to advise the Applicant during bargaining that it was about to restructure and eliminate GO Temp Services.

5 In short, OPSEU alleges that the Crown violated section 17 by failing to disclose its decision to privatize the "GO Temp" service during bargaining.

6 The Crown denies OPSEU's allegations, and that it has breached the Act in any way.

7 Although the proceeding has been delayed several times (as a result of circumstances which it is unnecessary to recount), the hearing is well underway. Indeed, OPSEU has closed its case-in-chief, and is set to begin its cross-examination of the Crown's first witness, Peter Wallace (Director of Expenditure Management and Reporting for the Management Board Secretariat).

8 An issue has arisen concerning the production of documents which OPSEU requests the Crown be required to produce for the purpose of cross-examination. Although the specific device employed by OPSEU to obtain production which has given rise to this issue is a Board summons, what OPSEU seeks is a Board order (which of course the Board summons is) requiring the Crown to produce documents identified by OPSEU as follows:

- 1. All submissions prepared for and/or provided to the Management Board of Cabinet, including drafts and all supporting documents, in relation to the privatization and/or consideration of 'alternate service delivery' for GO-Temp Services, including but not limited to the Ministry's Business Plan as it relates to GO-Temp Services.
- 2. The document(s) referred to as the "Business Plan, Estimates and the Budget" in J. Clarke's e-mail to Linda Barber dated July 17, 1996. See attached. [copy of e-mail attached to this decision as Appendix "A")

3. All documents, reports, memoranda or any other material that was either prepared for or reviewed in the preparation of the Interim Report on Business Planning and Cost Saving measures delivered April 11, 1996 by the Chair, Management Board of Cabinet, in relation to GO-Temp Services.

(taken verbatim from Schedule "A" to the summons served by OPSEU)

9 The Crown objects to the production order requested on the basis that the request is untimely, and also claims Crown privilege or immunity with respect to the documents themselves.

10 The Board heard the representations of the parties with respect to the issue at a hearing held on February 5, 1998.

11 Subsequently, by letter dated February 11, 1998, OPSEU seeks to make further representations regarding the Crown's assertion that OPSEU's production request is untimely. By letter dated February 17, 1998, the Crown objects to OPSEU's written representations, on the basis that is an improper attempt to re-open or re-argue one of the issues which were before the Board on February 5, 1998. There was a further subsequent exchange of correspondence as well.

12 I am satisfied that the Crown's objection to OPSEU's post-hearing written representations must be sustained.

13 As counsel for the Crown points out, when the hearing on February 5, 1998 commenced he indicated that he had not advised OPSEU that the Crown was taking the position that the union's production request was untimely until that morning, and that if OPSEU's representative felt he needed time to prepare to deal with that part of the Crown's position he had no objection to that opportunity being afforded him. Although Mr. Leeb grumbled about the timeliness of the Crown's timeliness objection, he gave no indication that he required or wished to have an opportunity to prepare submissions in that respect. Instead, he dealt with that issue in his submissions. I note that while his post-hearing written submissions are somewhat more detailed, there is little of substance in them which was not addressed in its oral submissions at the hearing on February 5, 1998.

14 In the result, in dealing with the production issue the Board will not consider any representations made or materials filed subsequent to the February 5, 1998 hearing.

15 The Board is the master of its own procedure, both generally and specifically when it comes to the production of documents and other evidentiary matters. In that respect, subsections 111(1) and (2) of the Act provide, INTER ALIA, that:

111. (1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

...

(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before OR DURING a hearing;

(c) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things that the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

...

(e) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not.

[emphasis added]

16 However, notwithstanding that the Board is not bound to follow any particular procedure in a hearing, and that it is not bound by the rules of evidence which apply in a Court proceeding, Board proceedings are not litigation free-for-alls. Parties to a Board proceeding are absolutely entitled to fairness and natural justice, and the Board applies these principles in its proceedings. To that end, the Board also applies the logic if not the letter of various exclusionary rules of evidence.

17 It is fundamental to the system of justice in this province, both generally and specifically before the Board, that all parties to a proceeding have a full and fair opportunity to make their case, or to answer the case asserted against them. In our adversarial system, this includes a broad right to test the evidence presented by another party by cross-examining its witnesses.

18 Although the right to cross-examine is a broad one, it is not unlimited. A party can only cross-examine on issues which are relevant to the matters in issue.

19 The Crown has chosen to make itself QUA employer subject to substantially the same labour relations structure which other employers in this Province must operate within. Having said that, the Crown is not in exactly the same position as every other employer, and as a party, it is not in exactly the same position as every other party involved in a labour relations proceeding, whether before this Board or elsewhere. One difference is highlighted in this case; namely, the Crown can claim an immunity with respect to the production of otherwise arguably relevant documents or information which other litigants cannot claim (except perhaps at the instance of the Crown).

20 In this case, there are two aspects of the Crown's timeliness objection to OPSEU's attempt to obtain production:

- (a) that OPSEU had and failed to pursue an earlier opportunity to acquire the information, and that it has sufficient information for its purposes in any event; and
- (b) in seeking production after it has closed its case, OPSEU is improperly attempting to split its case.

21 The first question is whether the documents in question are relevant. If they are not, they would need not be produced even if the Crown's objection regarding the timeliness of OPSEU's request, or its claim to immunity, were denied.

22 It is well-established that one of the purposes of the duty to bargain in good faith established by section 17 of the Act is to encourage the settlement of collective agreements through a rational and informed bargaining process which minimizes the need to resort to or continue with the economic sanctions of a strike or lock-out. Section 17 requires the parties to bargain in a frank and honest manner (see, *INGLIS LTD.*, [1977] OLRB Rep. Mar. 128, among others). Accordingly, misrepresentations designed to deceive or which result in the other collective bargaining partner adopting or accepting a position which is materially different from the position it could and would have taken if it had known the real facts, are prohibited by section 17 (see, for example, *INDALLOY, DIVISION OF INDALL LTD.*, [1979] OLRB Rep. Jan. 35; *OLD OAK PROPERTIES INC.*, [1996] OLRB Rep. July/Aug. 648).

23 Section 17 therefore requires an employer to respond honestly if a union asks in bargaining about an employer's settled intentions regarding a matter which is likely to have a significant impact on the union or bargaining unit. An employer is only required to reveal decisions, including DE FACTO decisions, which have actually been made, and not plans, ideas or proposals which are merely under consideration (*WESTINGHOUSE CANADA LTD.*, [1980] OLRB Rep. Apr. 577, application for judicial review dismissed, 80 CLLC 714,062 (Divisional Court); *SUNNYCREST NURSING HOME*, [1980] OLRB Rep. Oct. 1454; *CONSOLIDATED BATHURST PACKAGING LTD.*, [1983] OLRB Rep. Sept. 1411; *PLAZA FIBERGLASS MANUFACTURING LTD.*, [1990] OLRB Rep. Feb. 192; application for judicial review dismissed, [1993] OLRB Rep. Jan. 83 (Divisional Court)). Sometimes this raises the question of whether the employer's decision-making

process is sufficiently far along that it should have been disclosed. In *CONSOLIDATED BATHURST PACKAGING LTD.*, *SUPRA*, the Board put it this way:

50. On the other hand, plans and decisions to close a plant can effectively extinguish a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, where a decision to close is announced "on the heels" of the signing of a collective agreement, the time of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persuasively argued that the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between "proposals" and "decisions" at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation. Indeed, a strong argument can be made that the *DE FACTO* decision doctrine should be expanded to include "highly probable decisions" or "effective recommendations" when so fundamental an issue as a plant closing is at stake. Having regard to the facts in each case, the failure to disclose such matters may also be tantamount to a misrepresentation. We might also point out that there are decisions taken because of costs which really ought not to be made until the underlying problem is discussed with the union to see if adjustments can be made and the decision avoided. However, for the reasons discussed above, we are not willing to adopt the *OZARK TRAILERS* test of "thinking seriously" for unsolicited disclosures as urged upon us by the complainant. The failure to reveal such, "possibilities" as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in *WESTINGHOUSE* justifying unsolicited disclosure. The purpose of such information would be investigative and to facilitate the rational discussion purposes of the bargaining duty. Accordingly, the purpose of the information and the difficulties detailed above with unsolicited disclosure militate against any substantial expansion of the unsolicited disclosure obligation as elaborated to date. The interests of employees are real but the Board is not ignoring these interests by requiring a questioning approach to disclosure as a general matter. The position urged upon us by the complainant has too much potential or "greater heat than light" at the bargaining table. There is already enough uncertainty over precisely how significant and what nature a decision must be to trigger the unsolicited disclosure duty. Unsolicited disclosure must be understood to be exceptional and centred essentially on a bad faith rationale.

24 Further, as the Board pointed out in *UNION CARBIDE CANADA LTD.*, [1992] OLRB Rep. May 645, the fact that an employer's negotiators were themselves unaware of a *DE FACTO*

decision is no defence, because the employer is obliged to send properly informed and instructed negotiators to the bargaining table.

25 In this case, in order for the Board to determine whether the Crown breached section 17 of the Act as alleged by OPSEU, the Board must be able to determine when the DE FACTO or actual decision to eliminate its Go Temp service was made. When that decision was effectively (if not officially) made is fundamental to the Board's considerations. Indeed, although OPSEU's request and submissions were somewhat more expansive, that is really what the union is after.

26 Accordingly, it is apparent that at least some of the documents which OPSEU seeks to have the Crown produce are at least arguably relevant (the test employed by the Board) to the matters in issue. That is sufficient to require the Board to consider the Crown's objections. I turn first to the Crown's timeliness objection.

27 Could OPSEU have obtained or have sought to obtain the production it seeks earlier? Of course it could have. But the fact that a party has not pursued an earlier opportunity to obtain production, either within or outside of a particular proceeding, does not necessarily preclude it from seeking such production after a hearing has begun, or even after it has closed its case in chief. There must be good reason to circumscribe a party's right to the production of otherwise relevant documentary or other evidence.

28 When it comes to arguably relevant evidence, the general principle to be applied is production rather than non-production; that is, every relevant fact should be made available to the parties and the tribunal unless there is a good reason not to (see, *R. v. SNIDER*, [1954] S.C.R. 479 (Supreme Court of Canada)).

29 Further, production is not the same as proof. The mere fact that a party is able to obtain production of apparently or arguably relevant documents before or during a hearing does not mean that it will also necessarily be able to prove them so that they actually become evidence before the Board. The mere fact that a document is produced, whether voluntarily or in response to a summons or other Board order, does not make it evidence. Unless it is entered into evidence on consent, every document must be properly proved before it can become evidence. Accordingly, a party which waits to try to prove part or all of its case in cross-examination of another party's witness(es) risks disappointment.

30 The Act specifically contemplates the production of documents in the course of hearings before the Board, it is not unknown for a party to seek production during cross-examination, and it is not obvious why the mere fact that OPSEU did not seek the production it now seeks earlier should operate to disentitle it from that production.

31 In that respect, I note that the earlier opportunity to which the Crown adverted was a consultation process in which the Crown engaged with a number of trade unions on the basis that the bargaining unit information revealed through the process would remain confidential and could

not be disclosed or used elsewhere. Because of that condition, OPSEU declined to participate in the process. It is far from clear that OPSEU could have used any information it might have obtained through that process in this proceeding (although it is not clear that it couldn't have done so either, since it may be that events have overtaken the need for that particular confidentiality). In any event, that process is part of the background, but is not directly related to this proceeding. In addition, the Crown asserts no actual prejudice which cannot be remedied within this proceeding, other than the prejudice underlying its claim to immunity.

32 Further, while OPSEU may encounter difficulty if it seeks to prove or bolster its case in reply, any objection in that respect is premature. At the moment, OPSEU is not seeking to call reply evidence, or to enter into evidence a document which has not been proved. It is seeking to test the evidence of the Crown's first witness by cross-examining him with what it hopes will be the aid of the documents which it seeks to have the Crown be required to produce. Subject to the substantive part of the Crown's objection, OPSEU is entitled to try to do so with the aid of the Crown's own documents.

33 The Crown's timeliness objection to OPSEU's request is therefore dismissed.

34 Turning to the more substantive part of the Crown's objection, counsel filed the affidavit of Robber Christ, who identifies himself in the affidavit as an Assistant Deputy Minister of Policy Co-ordination of the Cabinet Office of the Government of Ontario, in support of its assertion of Crown immunity. OPSEU did not object to the affidavit. Nor did OPSEU seek to cross-examine the deponent. In his affidavit, Mr. Christ deposes as follows:

ONTARIO LABOUR RELATIONS BOARD

Ontario Public Service Employees Union (OPSEU) v. The Crown in Right of Ontario as represented by Management Board of Cabinet, et al.

[OLRB file 2076-96-U]

Affidavit of Robber Christ

I, Robber Christ, of the City of Torrent, make oath and say as follows:

1. I am Assistant Deputy Minister of Policy Co-ordination of the Cabinet Office of the Government of Ontario, and as such have knowledge of the matters herein deposed to.
2. I have read and considered carefully the documents referred to below, and have formed the opinion that their production would not be in the public interest for the reasons outlined below.

3. In my considered opinion, disclosure of the contents of these documents would prejudice and inhibit the functioning of Cabinet government with respect to the ability of Cabinet to act and of both Ministers of the Crown and the public service to advise. It is essential for the proper working of government that Ministers and the public service not be hampered in their ability to give complete and honest advice on matters before Cabinet without concern that that advice, or parts of it, may be disclosed.
4. Generally speaking, Cabinet submissions set out the background and context of the issue under consideration, various options for addressing it, with the advantages and disadvantages of each, including legal advice, and a recommended course of action. Often the policy process requires consideration of a wide range of options viewed from different aspects and in a variety of configurations.
5. The present collection of documents shows the efforts of one ministry, Management Board Secretariat, to reduce its costs. It ranges from a speech to Cabinet by the Minister (Chair of Management Board) through submissions to Management Board of Cabinet (a committee of Cabinet) on the ministry's estimates and business plan, to briefing notes for members of Cabinet on these submissions. Many of them are of general application; a few deal exclusively or almost exclusively with the closing of Go-Temp.
6. The relevant parts of these documents touch on the government's policies on human resource management, a very sensitive issue that may involve questions of the proper size of government itself, the manner in which public services are delivered to the public, the role of the private sector in supplementing or supplanting public sector services, and the like.
7. In addition, the documents set out options for reducing public expenditures as a series of options, comparing the feasibility and desirability of some with others. Some of the options not chosen may come under consideration for future decision. Revealing other options, especially those not chosen, may create misleading and unnecessary unease among those who might appear to be affected by them.
8. The context of Cabinet's deliberations must also be kept in mind. The documents may reveal government strategies to deal with personnel matters that are still in force or still a matter of negotiation. The collective agreement, made in 1996 after a lengthy strike and difficult negotiations, remains, in effect. Sensitive legal and political aspects of the government's compliance with its obligations may emerge from the document, to the detriment of the government's position in ongoing and future discussions with the Union.
9. Labour relations matters involve continuing negotiation and shifting advantages over the life of a collective agreement and on its renewal. They therefore require a high degree of secrecy, to avoid prejudicing negotiating positions and strategies

that are of nearly constant relevance to the operations of government.

10. In short, the issues discussed in the documents relate to the formulation of significant, complex and sensitive public policy which has been the subject of intense and ongoing discussion in Cabinet and the Legislature and among the public.
11. Further, many of the documents have only the most marginal relevance to the dispute before the Board. References to the potential closure of Go Temp are few and far between. The other material in these documents may or may not have been the subject of Cabinet decisions or government announcements. It would be highly prejudicial to government operations to fuel speculation about other policies through the release of these documents.
12. I have reviewed the documents in detail to consider whether divulging some parts of the submission would not harm the public interest.
13. The first class of document - those with passing references to Go Temp - should not be disclosed, even only as to those references, because the references are out of context. It is very difficult to tell from them the reasons for the policy, or the scope of the policy, or the stage of the policy in the decision process. Disclosure would be misleading.
14. Another group of documents deal more specifically with the closure of GO-Temp. They are Cabinet documents: submissions and "pink notes" or briefing notes intended for the members of Management Board. In my view all of them raise the concerns expressed in paragraphs 8 through 10 of this affidavit. These concerns are current, not merely historical, though Go Temp's closure has been announced and carried out. The government's approach to such matters, and its current relations with its employees' bargaining agents, stand to be affected by the contents of the documents in ways that may reduce the flexibility of policy development in this area in the future.
15. In my view, releasing substantial portions of these records would adversely affect the proper functioning of Cabinet and the public service. Releasing the narrower portion would present a distorted view of material that was actually before Cabinet, as well as risk hampering policy development.
16. Disclosing all or part of the Submission would present a misleading, incomplete or erroneous impression of government's present or future policy in this area.

35 Long ago, the Crown was above the litigation fray. Rules which applied to other litigants did not apply to the Crown in the same way or at all. This included rules regarding the production of documents or other information. In essence, documents or information provided to or emanating from the Crown were subject to an absolute privilege and production could not be compelled over the objection of the Crown.

36 Except where the federal government is involved, that is no longer the case. Section 39 of the CANADA EVIDENCE ACT provides an absolute immunity for certain Cabinet documents upon

the objection by a Minister or the Clerk of the Privy Council. To the extent that section 39 does not cover a document, and matters of national security or international diplomacy are involved (see section 38 of the CANADA EVIDENCE ACT), any balancing of interests which is left to be done is heavily weighted in favour of a federal Crown claim to immunity.

37 There is no legislation analogous to section 39 of the CANADA EVIDENCE ACT which applies to the provincial Government of Ontario. Accordingly, the Crown in Right of Ontario, the responding party herein, is in much (although not entirely) the same position as any other litigant. No longer is there an absolute privilege which can be invoked by or at the request of the Crown which can operate to avoid production. A more limited public interest immunity may be invoked by or at the request of the Crown, but the Crown holds no veto in that respect. It is for the court or tribunal before which the claim to immunity is made to determine the merits of such a claim, after inspecting the documents for itself if necessary (*CAREY v. ONTARIO* [1986] 2 S.C.R. 637 at page 654; 35 D.L.R. (4th) 161 at page 174 (Supreme Court of Canada)).

38 In considering whether Crown immunity is properly applied to exclude otherwise admissible evidence, the tribunal must balance two conflicting public interests. On one hand, there is a public interest in protecting the integrity and proper functioning of the government decision-making process. The revelation of Cabinet discussions or planning at a developmental stage when there is a significant public interest in the matter may seriously interfere with the proper functioning of the executive. On the other hand, the public interest in the proper administration of justice is a very important one. The former public interest tends to favour non-disclosure, while the latter is promoted by permitting litigants full access to relevant evidence and therefore favours disclosure.

39 It is clear that the public interest in government secrecy does not have absolute priority over the public interest in the administration of justice. This is as it should be in a common-law democracy where there is a separation between the government and an independent judiciary (which for these purposes includes quasi-judicial entities). On the other hand, it is equally clear that secrecy is essential to the proper functioning of a democratic government. The question is how much secrecy is required. In a particular case is whether the public interest in government secrecy outweighs the public interest in the administration of justice.

40 The public interest immunity which the Crown can assert has evolved into an exclusionary rule of evidence. As the Australian High Court pointed out in *SNAKY v. WHILOM* [1978] 21 D.L.R. 505, it is a "rule of evidence designed to serve the public interest" and it should therefore not "become a shield to protect" government wrong-doing, an observation cited with approval by the Supreme Court of Canada in *CAREY*, SUPRA. After all, the purpose of secrecy in government is to promote the proper functioning and legitimate concerns of government, not to facilitate improper conduct. As Lord Salmon asked rhetorically in *BURMA OIL v. Bank of ENGLAND*, [1979] 3 All E.R. 700 (House of Lords) at page 733 (also cited with approval by the Supreme Court of Canada in *CAREY*, SUPRA):

What is so important about secret government that it must be protected even at the price of injustice in our courts?

Accordingly, the public interest in the proper functioning of government does not always favour secrecy.

41 In the result, the mere fact that something is a "Cabinet document" does not necessarily mean that it is immune from disclosure. Instead, the two public interests involved (together with any other relevant interest identified in the particular case), must be balanced. Where, on balance, the public interest favours non-disclosure, the immunity invoked by the Crown must be sustained, and any documents or information in the Crown's possession, power or control to which the immunity is found to properly apply need not be produced or otherwise disclosed, however relevant these may be to the matters in issue. Even secondary evidence of a document covered by this immunity is not comparable (*AIR CANADA v. SECRETARY OF STATE FOR TRADE (NO. 2)* [1983] 1 All E.R. 910 (House of Lords)).

42 The Supreme Court of Canada's decision in *CAREY, SUPRA*, is the leading case in Canada on Crown public interest immunity. While that decision makes it quite clear that Cabinet documents must be disclosed like any other evidence unless it would be contrary to the public interest to require disclosure, the Supreme Court of Canada has made it equally clear that a tribunal must proceed with caution in that respect, particularly where the documents in question concern decision-making at a high government level. It appears that in balancing the two interests, it is appropriate to consider at least the following factors:

- (a) the level and stage of the decision-making process concerned;
- (b) the nature of the policy or subject involved;
- (c) the contents of the documents themselves;
- (d) the temporal proximity of the decision-making process and policy to the proceeding in which production is sought;
- (e) the importance of the proceeding, and whether production is necessary or desirable to ensure that the case is fairly presented and considered;
- (f) the nature of the allegations.

43 Keeping all of this in mind, it is immediately apparent that some of the documents OPSEU seeks are described very generally. This is understandable since except for the documents which have been specifically identified OPSEU cannot know what documents may exist.

44 However, the affidavit filed by the Crown in support of its claim to immunity is also very general. This is to be contrasted with the situation in *CAREY, SUPRA*, where the documents in issue were listed in schedules appended to the affidavit. This is less understandable since the Crown presumably knows what documents it has. However, this lack of specificity does not impede the Board's ability to make a decision in this case.

45 As I outlined above, what is in issue is "what decision was made when" regarding the Crown's elimination of its Go Temp Services operation, and to have that service provided by the private sector. The Crown does not deny that such a decision was made and implemented. The issue between the parties is when that decision was effectively made, and whether it was made at a time and in circumstances which created an obligation on the Crown to reveal that decision to OPSEU during collective bargaining. To put it another way, was the Crown QUA employer obligated to advise the union during bargaining, of the decision (if any) it had made to eliminate a part of the bargaining unit which had only recently been added to it?

46 I am not satisfied that "all submissions prepared for and/or provided to the Management Board Cabinet, including drafts and all supporting documents, in relation to the privatization and/or consideration of "alternate service delivery" for Go Temp Services (see point #1 in paragraph 8, above) are sufficiently arguably relevant that they should be produced. These are documents which would probably reveal the basis upon which the decision in issue was made, but not what the decision was or when it was made. In the alternative, and notwithstanding that the candor argument has been given little weight in the modern approach to public interest immunity, I am satisfied that the importance of keeping "advice and recommendation" Cabinet documents confidential is greater than the likely probative value of such documents in this case (see, *MASSE v. ONTARIO (COM. & SOC. SERVICES)* (1996) 134 D.L.R. (4th) 20 (Div. CT)). I am therefore satisfied that the public interest immunity applies to these documents, and that they should not be disclosed for that reason as well.

47 The description "Ministry's Business Plan as it relates to GO-Temp Services" tends to suggest a different type of document, in the sense that a "Business Plan" suggests that decisions have been made. However, as I understand it, "Management Board Secretariat" and "Management Board of Cabinet" are not the same thing. The former is a Ministry of the government. The latter is not. Indeed, the latter is "Cabinet". The manner in which OPSEU had described this document suggests that it is in the same class as the other document referred to in point #1 of paragraph 8 above; that is, that it is a document submitted by the Ministry to Cabinet as a proposal. As such, it would be a suggestion or advice to Cabinet and not a decision of Cabinet. Even if it is in an area in which the Ministry can and does effectively make decisions, it does not present as such in this case, even if at some subsequent point Cabinet adopted it in its entirety. Accordingly, the reasoning in the previous paragraph applies equally to this document, and it need not be produced both because it lacks probative value, and because the public interest immunity claimed by the Crown applies to it.

48 The "Business Plan, Estimates and the Budget" document or documents referred to in point #2 of paragraph 8, above, present differently. It is not clear whether this refers to one or more than one document. In either event, reference to this is found in a document which is Exhibit #18 in this proceeding.

49 Exhibit #18 consists of three e-mails. The subject of the e-mails is identified as being "Status of GO-Temp Program - Reply - Reply". The first specifically asks whether a decision has been

made about the "fate" of the GO-Temp Program. The second responds that the decision has been made, "as stated in the Business Plan, Estimates and the Budget" but not implemented. The third e-mail asks how imminent implementation is.

50 Accordingly, the "Business Plan, Estimates and the Budget" referred to in Exhibit #18 appears to reflect a decision which had been made, and which has since been publicly implemented. Insofar as the document(s) reflect a decision which has been made, and implemented during the life of the collective agreement which was the subject of the bargaining which is under scrutiny in this proceeding, it is relevant to the matters in issue. To the extent that the document(s) reveals an effective decision, the Crown cannot assert a labour relations secrecy, since this is the very matter in issue.

51 Further, to the extent that any such document reflects an effective decision, it is not part of the decision-making process which PRIMA FACIE requires public interest immunity protection in the context of this case. It is both necessary and desirable that such a document be produced in this proceeding, where the issue is whether the Crown has violated its own legislation. Finally, notwithstanding the on-going nature of a collective bargaining relationship, and notwithstanding that collective bargaining parties are entitled to some secrecy in developing on-going collective bargaining positions strategies, complaints such as this one require a forensic analysis of the PAST collective bargaining conduct of the parties. I am not satisfied that the fact that other probative documents are already in evidence or may be available is a reason to refuse production. On the basis of the materials before me, I am satisfied that the balancing of interests favours disclosure and public interest immunity does not apply to this document.

52 For the reasons given in paragraph 46, above, "all documents, reports, memoranda or any other material that was either prepared for or reviewed in the preparation of the Interim Report" referred to in point #3 of paragraph 8, above, (which interim report is part of Exhibit #20 in the proceedings) are both not relevant and subject to the public interest immunity. They need not be produced.

53 Having regard to the caution which the Supreme Court of Canada has held should be exercised in these matters, I am not prepared to order production of the Business Plan, Estimates, and the Budget referred to in Exhibit #18 directly to OPSEU. Instead, I order the Crown to forthwith deposit those documents with the Board for my personal and confidential inspection. If upon inspecting the documents I am satisfied they should be produced to OPSEU, the Board will make them available to the union.

* * * * *

Appendix "A"

From: Linda Barber

To: MBSDOMO6.FERGO4(THOMASI). MBSDOMO3FERG02(CLARKEJ)

Date: 7/17/96 12:10pm

Subject: STATUS OF GO-TEMP PROGRAM -Reply -Reply

Hi Ivy and Janis

I have been talking to Angela Forest about the work of the Sub-Committee on Student and GoTemp Wage Rates. At this point, I am concerned about proceeding with the meeting we have scheduled for July 23rd because of certain labour relations issues that may arise if we do.

I need to know from the two of you whether in fact a final decision has been made about the fate of the program. For example, were the instructions you would have obtained through the estimates process clear enough to say that a decision was made at that point in time. OR is the decision still under discussion (we understand that the Deputy has asked that the matter go back to Management Board in the very near future)?

To summarize the above, is it now only a question of HOW this will be done, has the question of IF already been decided or is it still up in the air???

Could you respond on this tomorrow (Wednesday) by e-mail or by phone (326-1616) because I may need to bring the labour relations concern to the Deputy's attention at an early morning meeting on Thursday.

Thanks for your help.

Linda

The decision on WHAT has been made, as stated in the Business Plan, Estimates and the Budget. The only reason for going to the Board would be to advise on HR component and confirm the HOW and WHEN.

Janis

Hi Janis

Thanks for the speedy reply. Could you let me know what date is set for your briefing of Management Board? I need to know how imminent your implementation process is in order to assess the Implications of continuing the bargaining process.

Thanks again! Linda (3261618)

CC:

MBSDOMO6.FERGO4(moont).

cp/s/das/qlm xp

Case Name:

Bedford v. Canada (Attorney General)

Between

**Terri Jean Bedford, Amy Lebovitch and Valerie Scott,
Applicants (Respondents in Appeal), and
Attorney General of Canada, Respondent
(Appellant in Appeal), and
Attorney General of Ontario, Intervener (Appellant in Appeal)**

[2011] O.J. No. 1111

2011 ONCA 209

Dockets: M39752-C52799 and C52814

Ontario Court of Appeal
Toronto, Ontario

**D.R. O'Connor A.C.J.O.
(In Chambers)**

Heard: March 11, 2011.
Judgment: March 16, 2011.

(23 paras.)

Civil litigation -- Civil procedure -- Parties -- Intervenor -- Charter litigation -- Motion by Sex Workers' Action Project for leave to intervene in appeal from decision striking down prostitution-related Criminal Code provisions dismissed -- Project was not entitled to raise issue of discrimination as intervenor, as parties to action had not raised issue previously -- Disservice to parties and public would result from permitting this issue to be litigated on existing record -- Project advised to join another intervenor group to participate in appeal based on constitutional invalidity of legislation because of its moralistic motivation.

Constitutional law -- Constitutional validity of legislation -- Level of government -- Federal legislation -- Motion by Sex Workers' Action Project for leave to intervene in appeal from decision striking down prostitution-related Criminal Code provisions dismissed -- Project was not entitled to raise issue of discrimination as intervenor, as parties to action had not raised issue previously --

Disservice to parties and public would result from permitting this issue to be litigated on existing record -- Project advised to join another intervenor group to participate in appeal based on constitutional invalidity of legislation because of its moralistic motivation.

Motion by the Toronto Sex Workers' Action Project for leave to intervene in an appeal by the Crown from a decision striking down as unconstitutional certain sections of the Criminal Code relating to prostitution. The Project was an independent not-for-profit agency dedicated to providing support to and advocating on behalf of sex workers in Toronto. It had been a valuable resource to the community and had developed considerable expertise in respect of issues affecting sex workers. It sought to participate in the appeal by challenging the impugned legislative provisions on the basis that they were discriminatory and driven by moral views on the sale of sex, a constitutionally-impermissible justification for the legislation. The first issue was new to the litigation.

HELD: Motion dismissed. The Project was denied leave to intervene on the discrimination issue as it was not raised by the parties previously. It would do a disservice to the parties and the public interest to litigate a challenge to the legislation based on its discriminatory nature on the basis of the record before the court. The second issue had been raised previously and the argument that the Project wished to make would be made by the respondents to the appeal as well as other intervenor groups already involved. It was appropriate for the Project to join one of the existing intervenor groups.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2(b), s. 7, s. 15

Criminal Code, R.S.C. 1985, c. C-46

Counsel:

Rahool P. Agarwal and Michael Kotrly, for the proposed intervener, Maggie's: The Toronto Sex Workers' Action Project.

Alan Young and Daniel Sheppard, for the respondents.

Megan Stephens and Christine Bartlett-Hughes, for the intervener, Attorney General of Ontario.

Sandra Nishikawa and Michael H. Morris, for the Attorney General of Canada.

ENDORSEMENT

1 D.R. O'CONNOR A.C.J.O.:-- This is a motion brought by Maggie's: The Toronto Sex Workers' Action Project ("the moving party") seeking to intervene in this appeal. Counsel for the respondents do not oppose the motion provided that the intervention does not delay the hearing of the appeal. Counsel for both appellants opposed the intervention.

2 The respondents on this appeal brought a challenge to certain provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 that creates prostitution related offences, arguing that they violated ss. 7 and 2(b) of the *Canadian Charter of Rights and Freedoms* and could not be saved under s. 1 of the *Charter*. The matter was fully argued on an application before the Superior Court of Justice. The parties to the application filed a substantial record, extending to some 25,000 pages, to deal with the constitutional validity of the impugned legislative provisions as measured against the requirements of ss. 7 and 2(b) of the *Charter*.

3 In a lengthy and comprehensive decision, the applications judge ruled in favour of the respondents and struck down the impugned provisions. The matter is now before this court and is to be heard in June, 2011. To ensure that a range of voices and perspectives are available to assist the court in dealing with this difficult issue, the parties have agreed, and the court has authorized, the intervention of seven interveners, most of whom are coalitions or organizations with expertise in relation to the issues that are to be determined on the appeal.

4 The moving party, which was founded in 1986, is an independent, not-for-profit agency dedicated to providing support to, and advocating on behalf of, Toronto's sex-worker community. It is the first sex-worker agency in the world to be government-funded. It has been a valuable resource to the community and has developed considerable expertise in respect of issues affecting sex workers.

5 The moving party wishes to participate in two areas. First, it seeks to challenge the impugned legislative provisions on the basis that they do not comply with s. 15 of the *Charter*. Second, it wishes to argue that the objectives of the impugned provisions are driven by moral views on the sale of sex, which it will argue is a constitutionally impermissible justification for the legislation.

6 The first issue is new to this litigation. The original application challenging the validity of the impugned provisions was premised only on their alleged violation of ss. 7 and 2(b) of the *Charter*. Further, it was successfully argued that those violations could not be justified under s. 1 of the *Charter*. The proposed intervention does not merely raise an alternative legal argument in relation to the ss. 7 and 2(b) issues but rather raises an entirely new ground on which to challenge the legislation. The second issue was raised by the parties in the lower court and forms part of the reasons of the application judge.

7 The moving party suggests that it would be beneficial to have all of the dimensions of the constitutional argument as to the validity of this legislation considered before this court. While that

may be so in a perfect world, the fact remains that the parties chose not to raise this issue and the application judge did not address s. 15 in her reasons.

8 The test for intervention as a friend of the court has been succinctly expressed by Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 at p. 167. In considering such an application, the court must consider the nature of the case, the issues that arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties. In addition, the intervention must not prejudice the existing parties.

9 With regard to new arguments being presented on appeal, in *767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350, at para. 3, this court commented as follows, borrowing from the Nova Scotia Court of Appeal's decision in *Ross v. Ross* (1999), 131 N.S.R. (2d) 22:

[S]uch an argument could only be entertained if the court of appeal is persuaded that all of the facts necessary to address the point are before the court as fully as if the issue had been raised at trial. The rationale for the principle is that it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised.

10 I am not prepared to allow the moving party to intervene to raise the s. 15 challenge for two reasons: (1) the existing record was not developed with a view to establishing or responding to a s. 15 challenge; and (2) allowing the moving party to intervene to raise the s. 15 ground at this stage of the litigation process would be unfair to the parties.

11 I start with the record. On the application, the parties were represented by experienced counsel. They developed a record focused on the issues as they had framed them. The record is over 25,000 pages and includes numerous reports, studies, affidavits and cross-examinations.

12 The moving party accepts that it should not be entitled to introduce new evidence at this stage. It is prepared to take the record as it is. The moving party has reviewed the record. It points to a number of extracts from the record from which it could draw support for its s. 15 argument. Indeed, it urges that the record is complete and sufficient to permit this court to deal fairly with the s. 15 issue.

13 Counsel for the appellants - the two governments - strongly disagree that the record is satisfactory from their standpoint to address a s. 15 challenge. They say that had they been confronted with a s. 15 challenge, in addition to the ss. 7 and 2(b) challenges, before the application was heard, they would have introduced additional evidence and developed a different more fulsome record directed specifically at ss. 15 and 1. They accept that some of the record is relevant to a s. 15 challenge. However, they did not put their minds to s. 15 when they were developing the record. On the motion before me, counsel for the appellants were able to articulate a number of specific issues and types of evidence that they may well have canvassed and included in the record had s. 15 been a

live issue on the application. The matters that they pointed to seem perfectly sensible to me.

14 I accept the appellants' positions as to the state of the record for s. 15 purposes. There is some material in the record, and indeed some of the findings of the application judge, that could be used in making or responding to a s. 15 challenge. There is obviously overlap among some of the factual and legal issues arising from an application of the two sections. But there are also differences.

15 The fact that the moving party is able to find portions of the record that would address s. 15 issues does not mean the record is complete and sufficient for a s. 15 challenge. Nor does the moving party's acceptance of the record as is cast an onus on the appellants to establish that the record is incomplete.

16 To state the obvious, the moving party is not a party to the litigation. The parties have framed the issues and developed the record as they thought best. The respondents did not include a challenge to the legislation on the basis of s. 15. I am satisfied that it would do a disservice to the parties, to the court and, indeed, the public interest to litigate a s. 15 challenge on the basis of this record.

17 I would also dismiss the motion to intervene with respect to s. 15 on the basis of fairness to the parties to the appeal. This is a complicated appeal. All of the parties are anxious that it be heard as soon as possible. It is scheduled to be argued in mid-June. The court has imposed tight timelines for the filing of material. Seven interveners are going to participate. The respondents do not oppose the moving party's motion to intervene provided there is no delay in the hearing of the appeal.

18 I am satisfied that if the moving party were allowed to intervene on s. 15, it would result in the argument of the appeal having to be delayed. Introducing such a significant new ground on which to challenge the legislation, even on the existing record, would necessitate a thorough analysis of the record and the preparation of new material to address the issues.

19 Finally, counsel for the moving party suggests that if I am not inclined to grant the intervention on the s. 15 issue, I should defer the issue to the panel hearing the appeal. I am not prepared to do that. It would be of little comfort to the parties who take the position that the record is incomplete and insufficient for the purposes of fully examining a s. 15 argument to adopt this approach. Such a process would place the parties, particularly the appellants, in the position of having to fully prepare the s. 15 argument.

20 For the reasons I have set out above, I am of the view that this court ought not to allow an intervention on the basis of s. 15. I would not defer the issue to the panel.

21 The moving party also seeks to intervene to make the argument that the objectives of the impugned legislative provisions are driven by moral views on the sale of sex. This, it argues, is a constitutionally impermissible justification for the legislation. This issue was raised below and forms part of the reasons of the application judge. Clearly, this argument will be made by the

respondents and/or other groups that have already been granted intervener status.

22 I see no reason to make a separate grant of intervener standing to the moving party on this basis. That said, I accept that the moving party has a longstanding interest and expertise in the issues raised on the appeal. As such, I think it would be appropriate for the moving party to join one of the existing intervener groups. If there is any problem in this respect, I may be spoken to.

23 In the result, the motion for leave to intervene in order to raise the s. 15 issue is dismissed. The balance of the motion shall be addressed as I indicate in the preceding paragraph. There is no order as to costs of this motion.

D.R. O'CONNOR A.C.J.O.

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

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

*Court of Appeal for Ontario, Carthy, Doherty and Rosenberg JJ.A.
September 14, 1999*

- b** Civil procedure — Discovery — Privilege — Solicitor-client privilege — Litigation privilege — Common interest privilege — Hotel destroyed by fire — Insurance adjuster investigating fire — Suspicion of arson — Adjuster directed to provide reports directly to lawyer retained by insurer — Insurer later making partial payments of insurance — Subsequently, dismissed employee alleging that insured's claim fraudulent — Insured's lawyer providing dismissed employee with copy of transcript
- c** of his statement — Insurer suing insured — Insured making counterclaim and joining employee — Adjuster's reports before allegation of fraud not privileged — Adjuster's reports after allegation of fraud privileged — Insurer but not employee having right to assert privilege with respect to employee's statement.

- d** On November 15, 1994, a fire damaged a hotel owned by C and others. The lead fire insurer, G Co., hired B, a claims adjuster, to investigate and, on November 16, he reported that he suspected arson. G Co. retained a lawyer, E, and on December 1, G Co. directed B to report directly to E. In January 1995, C delivered a proof of loss. Subsequently, G Co. made partial payments of the claim, but on May 23, 1995, P, a dismissed former employee at the hotel who stated that his conscience was bothering him, gave E a videotape and the "float sheet and additional time sheets" from the hotel, and he made a statement under oath
- e** alleging that C had fraudulently increased the insurance claim. E made a copy of the videotape, which was later returned to P, and E had a transcript prepared of C's statement.

- f** On June 2, 1995, P was provided with a copy of the transcript on condition that he keep it confidential and that day, G Co. commenced an action for fraud against C and others. A statement of defence was filed, and it included a counterclaim against G Co., B, P and P's spouse. In those proceedings, the defendants sought production of various documents for which privilege had been claimed in the plaintiffs' affidavit of documents.

- g** On a motion for production of the documents, Kurisko J. ruled that: (1) all communications between G Co. and E were privileged; (2) communications between B and G Co. or E before May 23, 1995 were not privileged; (3) communications between B or G Co. and third parties before May 23, 1995 were not privileged; (4) communications between B and G Co. or E after May 23, 1995 were privileged; (5) privilege in P's statement had been waived; and (6) the video tape was not privileged.

- h** The Divisional Court set aside the order of Kurisko J. and ordered that privilege applied to everything except the videotape. C appealed.

Held, the appeal should be allowed.

Per Carthy J.A.: Doherty J.A.'s judgment analyzes the principles underlying solicitor-client privilege. However, the solicitor-client privilege, which derives from the interest of all citizens to access to confidential legal advice, is distinct

from the litigation privilege, which derives from the needs of the adversary process. There is a tension between the litigation privilege, which is needed to facilitate adversarial preparation, and the disclosure of all of the relevant facts, which is needed to assure the fair resolution of a dispute. The trend of the modern rules is to truncate what would previously have been protected from disclosure. Historically, however, different jurisdictions have applied different tests. Some Canadian courts extend litigation privilege only if the dominant purpose of the document was connected to anticipated or pending litigation. In Ontario, relying on the authority of the Court of Appeal's decision in *Blackstone v. Mutual Life Insurance Co. of New York*, generally, a substantial purpose test has been applied. This test, however, runs against the grain of contemporary trends in discovery and the judgments in *Blackstone* do not stand in the way of now adopting the dominant purpose test. In employing the dominant purpose test, some authorities have included as privileged those documents collected or copied through a lawyer's investigative efforts, for example, copies of public documents, even though the original documents enjoy no privilege. Those authorities should be turned aside as inconsistent with modern perceptions of discoverability and, therefore, such documents should be produced.

In the immediate case, all communications between G Co. and E were protected by solicitor-client privilege, there being no indication of waiver. As for litigation privilege, it initially attached to communications between B and E or from B through G Co. to E because of the suspicion of arson. These communications, however, were not privileged as solicitor-client communications and the litigation privilege lasted so long as litigation was contemplated. When G Co. made payments to C, this indicated that litigation was no longer contemplated and the litigation privilege came to an end. On May 23, 1995, the situation changed with P's revelations and this brought litigation into contemplation. After May 23, 1995, any communications from B, whose dominant purpose was directed to the litigation, were privileged. However, the videotape, float book and additional time sheets were not prepared for the purposes of litigation and were not privileged. The P statement was privileged in the hands of E and, as for the copy delivered to P, he was closely enough aligned with G Co. that the delivery of a copy to him was not a waiver of the privilege by the insurer. The result here, however, was not an example of common interest privilege, which, in some instances, preserves the litigation privilege even though information is shared with a third party. This may occur where the disclosure is made to a person or party with a common interest in sharing the trial preparation effort. At the time when P made his statement, litigation against him was not contemplated and he was merely a potential witness. Therefore, the statement was not privileged in the hands of P. In the result, the judgment of the Divisional Court should be set aside and production should take place in accordance with these reasons.

Per Doherty J.A. (dissenting in part): Client-solicitor privilege serves the utilitarian purpose of allowing clients and lawyers to engage in the frank and full disclosure essential to giving and receiving effective legal advice and is also an expression of our society's commitment to both personal autonomy and access to justice. It also serves to promote the adversarial process as an effective means for resolving disputes. These purposes inform the perimeters of the privilege. The adjudication of a claim to client-solicitor privilege must be fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made. The confidentiality of the communications is of central importance and an insurer is not, by the mere possibility of a claim from its insured, in a position where it can automatically claim confidentiality about its communications. If an insurer asserts a privilege over

a the product of its investigations, it must demonstrate that it intended to keep that information confidential from its client. In this case, the initial suspicion of arson provided a basis for concluding that the initial communications were intended to be kept confidential from C. Then it was up to G Co. to establish on a proper evidentiary basis that the intention to keep information confidential continued. They did not do so for the period before May 23, 1995. However, after that time, the fraud allegations provided a firm basis to infer an intention to keep communications between G Co. and E confidential.

b Assuming that the communications between G Co. and E were protected by client-solicitor privilege, the next question was whether this privilege extended to communications between B and E. The authorities established that: (1) not every communication by a third party to a lawyer that facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and (2) where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege. The second principle extends client-solicitor privileges to communications by or to a third party acting as a messenger, translator and amanuensis, and includes a third party employing an expert to assemble information provided by the client and to explain it to the lawyer. These two principles, however, were not determinative here because B was not merely a channel of communication and he could not be characterized as translating or interpreting information provided by G Co.; rather, he was gathering information from extraneous sources. Whether he was an agent under the general law of agency was also not determinative.

e The determination of the solicitor client privilege and the role of third parties should depend on the third party's function. If the third party's retainer extends to a function essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications that are in furtherance of that function and that meet the criteria for client-solicitor privilege. For privilege to attach, the third party must be empowered to obtain legal services or to act on legal advice on behalf of the client. 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, then the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected; therefore, it is not the case that client-solicitor privilege extends to all material deemed useful by the lawyer to properly advise the client. Further, such an extension of solicitor and client privilege would make litigation privilege redundant. In the circumstances of this case, B's function did not reach inside the client-solicitor relationship between G Co. and E; communications between B and E were not protected by client-solicitor privilege.

g As for litigation privilege, for the conclusions stated by Carthy J.A., the communications between B and E before May 23, 1995 were not privileged but the situation changed after that date and privilege was engaged. However, his comments about copying non-privileged documents go too far, and the issue did not arise directly on this appeal.

h Contrary to the conclusions of Carthy and Rosenberg JJ.A., the insurer did not have a claim for privilege with respect to the P statement. The operation of the litigation privilege should be recognized as a qualified one that can be overridden where the harm to other societal interests outweighs any benefit from the privi-

lege. A competing interests approach should be applied. The harm done by non-disclosure must be considered and factored into the decision whether to give effect to the privilege claim. This permits the law of privilege to adapt to the evolving interests and priorities of the community. In the immediate case, the goals of adjudicative fairness and reliability could suffer significant harm if P's statement were not produced. Further, the policies underlying G Co.'s privacy interests in non-disclosure would not be adversely affected by disclosure of the statement. Further, there was no basis upon which P could claim privilege with respect to the copy of the statement.

Per Rosenberg J.A.: The analysis of Doherty J.A. of the client-solicitor privilege should be adopted. The analysis of Carthy J.A. of the litigation privilege, but with a reservation for his comments about copies of non-privileged documents, should be adopted. The balancing test proposed by Doherty J.A. would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation and should not be adopted.

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APPEAL from an order of the Divisional Court ((1998), 37 O.R. (3d) 790) which allowed in part an appeal from an order of Kurisko J. ((1997), 34 O.R. (3d) 354, 12 C.P.C. (4th) 150 (Gen. Div.)) for the production of documents.

Paul J. Pape and James D. Young, Q.C., for appellant.

Stephen J. Wojciechowski, for respondent.

Norma M. Priday, for respondent, Denis Pilotte.

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

Daniel Chrusz and others were the owners of the University Park Inn, a motel and bar complex, which was severely damaged

a 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.

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

c 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, 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.

d 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 e 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.

f 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 g 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.

h 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.

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.

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."

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.

In extensive reasons now reported at (1997), 48 C.C.L.I. (2d) 207, 17 C.P.C. (4th) 284, Kurisko J. divided the communications into six categories.

1. *Communications between Eryou and General Accident*

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.*

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*

a

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*

b

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*

c

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.

d

6. *The Pilotte videotape*

e

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.)

f

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.

g

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.

h

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

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

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)

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 p. 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

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.

b
c 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).

d Rationale for Litigation Privilege

e 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.

f 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).

g 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.
h 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.

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, 45 C.P.C. (2d) 116 (H.C.J.) 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.

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.

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.

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, [1979] 3 W.L.R. 150 (H.L.). 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.

After considering authorities that had protected documents from production where one purpose of preparation was anticipated litigation, Lord Wilberforce concluded at pp. 1173-74:

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.

tion? 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 . . .

a

b

. . . 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 . . .

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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, 39 N.S.R. (2d) 258 (C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724, 47 N.B.R. (2d) 71 (C.A.); *Voth Bros. Construction (1974) Ltd. v. North Vancouver Board of School Trustees* (1981), 23 C.P.C. 276, 29 B.C.L.R. 114 (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.).

e

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. 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:

f

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.

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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.

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, 33 B.C.L.R. (2d) 129 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.

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.

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.

a 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:

b 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.

c 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.

d Returning to the specific topic, if original documents enjoy no privilege, then copying is only in a technical sense a creation. Moreover, if the copies were in the possession of the client prior to the prospect of litigation they would not be protected from production. Why should copies of relevant documents obtained after contemplation of litigation be treated differently? Suppose e counsel for one litigant finds an incriminating filing by the opposite party in the Security Commission's files. Could there be any justification for its retention until cross-examination at trial? Further, such copies, if relevant in their content, must be f revealed in oral discovery under rule 31.06(1) which provides that questions must be answered even though the information sought is evidence.

g The production of such documents in the discovery process does little to impinge upon the lawyer's freedom to prepare in privacy and weighs heavily in the scales supporting fairness in the pursuit of truth.

h In disagreeing with the majority reasons in *Hodgkinson*, I am at the same time differing from the reasons and result in *Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co.* (1990), 74 O.R. (2d) 637, 74 D.L.R. (4th) 742 where the Ontario Divisional Court held copies of public documents to be privileged. Montgomery J., the motions judge in that case, indicated a preference for the reasoning of Craig J.A. in *Hodgkinson*. The Divisional Court preferred to follow the majority. In the present case

the Divisional Court appears to agree with my view, although without analysis of authorities.

This court does not easily turn aside authorities such as *Lyell v. Kennedy* that have stood as the law for many years. However, consistent with the theme of these reasons, deference must be given to modern perceptions of discoverability in preference to historic landmarks that no longer fit the dynamics of the conduct of litigation. The zone of privacy is thus restricted in aid of the pursuit of early exchange of relevant facts and the fair resolution of disputes.

Common Interest Privilege

In some circumstances litigation privilege may be preserved even though the information is shared with a third party. The circumstance giving rise to this issue on the present appeal is the provision to Pilotte by the solicitor for the insurer of a copy of Pilotte's signed statement.

While solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation. It may not be inconsistent with litigation privilege *vis-à-vis* the adversary to communicate with an outsider, without creating a waiver, but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect.

The general principle was first enunciated by Denning L.J. in *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 at pp. 483-84, [1981] Q.B. 223 (C.A.):

In case this be wrong, however, I must go on to consider the claim for legal professional privilege. The arguments became complicated beyond belief. Largely because a distinction was drawn between Buttes (who are the party to the litigation) and the ruler of Sharjah (who is no party to it). Such as questions as to who held the originals and who held the copies and so forth. Countless cases were cited. Few were of any help.

I would sweep away all those distinctions. Although this litigation is between Buttes and Occidental, we must remember that standing alongside them in the selfsame interest are the rulers of Sharjah and UAQ respectively. McNeill J thought that this gave rise to special considerations, and I agree with him. There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of

a adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.

b In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

c In language more specifically directed to the issue on this appeal the U.S. Court of Appeal put it this way in *United States of America v. American Telephone and Telegraph Company*, 642 F.2d 1285 (1980 S.C.C.A.) at pp. 1299-1300:

d *The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.*

e By contrast, the *work product privilege* does not exist to protect a confidential relationship, but rather *to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.* The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. In the leading case on the work product privilege, the Supreme Court stated:
f "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege. We conclude, then, that *while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.*"
g

h We do not endorse a reading of the *GAF Corp.* standard so broad as to allow confidential disclosure to *any* person without waiver of the work product privilege. The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a

party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.

(Emphasis in original)

Although the subject of common interest has arisen in other contexts in Canadian cases, I am satisfied that the above two excerpts should be adopted as expressing both the applicable principle and the specific application of that principle to the issues on this appeal. Canadian authorities which have dealt with common interest privilege in different contexts include: *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.); *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* (1998), 61 Alta. L.R. (3d) 38, [1998] 10 W.W.R. 633 (Q.B.); *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.); *Lehman v. Insurance Corp. of Ireland* (1983), 40 C.P.C. 285, 25 Man. R. (2d) 198 (Q.B.); *Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd.* (1994), 24 C.P.C. (3d) 120, 114 D.L.R. (4th) 526 (N.S.S.C.); *Almecon Industries Ltd. v. Anchortek Ltd.*, [1998] F.C.J. No. 1664 (T.D.), released November 17, 1998 [reported [1999] 1 F.C. 507, 85 C.P.R. (3d) 30]; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13, 138 D.L.R. (3d) 221 (Ont. C.A.).

Application of Principles to the Disputed Categories

I will depart somewhat from Kurisko J.'s categories of communication in order to relate them more directly to my legal analysis.

There is no question that all communications between Eryou and General Accident are protected by solicitor-client privilege, there being no indication of waiver.

The more contentious issue is whether communications between Bourret and Eryou or Bourret and General Accident are privileged.

In my view, an insurance company investigating a policy holder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be that negotiations and even litigation will follow as to the extent of the loss but until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured. The reality of anticipation of litigation arose in this case when arson was suspected and Eryou was retained. Chrusz was presumably a suspect if this was a case of arson and litigation privilege attached to communications between Bourret and Eryou or from Bourret through General Accident to Eryou so long as such litigation was contemplated. The dominant purpose test is satisfied.

a However, I would not accord communications between Bourret and Eryou with the protection of solicitor-client privilege. Bourret was retained to perform the functions of investigating and reporting. He was expected to be honest in doing his job, and no special legal protection was necessary to ensure a candid report. I agree with the reasoning of Doherty J.A. on this subject.

b Viewed from another perspective, when the end comes to contemplated litigation what purpose is served by protecting such information if relevant in other proceedings? The sanctity of the client's secrets which are shared with a lawyer is untouched. If the circumstances surrounding the fire are relevant in other litigation there may be no better evidence than Bourret's reports. Thus, the interest of the determination of truth is served by production without effect upon the fundamental protection afforded to solicitor-client communications.

c The payments by General Accident to Chrusz between January and April 1995 are clear evidence that his involvement in arson was no longer a consideration. The parties had essentially returned to the original positions of insurer and insured negotiating over the value of the claim. Litigation was, as always, a possibility, but, so far as the evidence reveals it was not in contemplation.

d At that point, in my view, the previous existing litigation privilege came to an end and documents that had once been protected on that account became compellable in any proceedings where they were relevant.

e On May 23, 1995, a metamorphosis occurred. The revelations of Pilotte immediately brought new litigation into contemplation — the eventual claim by General Accident of fraud and misrepresentation by Chrusz following the fire. However, it was Pilotte's evidence that he was acting because his conscience bothered him. The lack of any assertion that he contemplated litigation prior to receiving the counterclaim, requires a separate analysis of whether documents in his hands must be produced, notwithstanding protection in the hands of Eryou by reason of the fresh litigation privilege.

f Dealing first with Eryou, any communications or reports from Bourret after May 23, 1995, whose dominant purpose was directed to the litigation now before us are protected by litigation privilege, subject to the rules as to discovery of evidence and witnesses. Similarly, any contacts with third parties reported on by Bourret would be protected.

g The Divisional Court refers to the "float book and additional time sheets" together with the video. It is unclear on the record before us what was delivered by Pilotte to Eryou but I will

assume it was these three items, two of which were copies or originals of documents taken from the motel. None of these were created or prepared for the purpose of litigation and so, on the principles enunciated earlier in these reasons, they cannot qualify for any form of privilege in the hands of any of Eryou, General Accident, or Pilotte.

The statement taken by Eryou from Pilotte is protected by litigation privilege in the hands of Eryou, again subject to the discovery rules, but the copy delivered to Pilotte must be considered separately. It is clear that Pilotte did not at that time contemplate litigation. In my view, however, he was closely enough aligned with General Accident in seeing his evidence pressed forward against Chrusz to protect Eryou against a waiver of his client's litigation privilege: see, in this respect, *United States v. American Telephone*, *supra*. There was nothing inconsistent in giving a copy of a statement to this witness and maintaining privilege against the adversary. This was especially so when a promise of confidentiality was requested.

As closely as he was aligned in interest to General Accident, I do not consider that Pilotte acquired a common interest privilege. In all of the examples cited by Lord Denning in *Buttes*, there is an actual contemplation of litigation shared by individuals against a common adversary. Pilotte was merely a witness who was under no apparent threat of litigation. If events had proceeded in the normal course without a counterclaim and he was called as a witness at trial he would have no more reason to refuse production of the statement than any witness to a motor vehicle accident who has been provided with a written statement to refresh his or her memory before giving evidence. The cross-examiner would be entitled to its production and claims of litigation privilege would be hollow.

The fact that Pilotte became a party to the counterclaim did not change the status of this statement in his hands. It was not created for this litigation and is simply a relevant piece of factual information that came to counsel with the original brief.

CONCLUSION

I would set aside the orders below and in their place direct production as indicated in these reasons. The parties are better able than I to be specific as to particular communications and if there are disagreements these can be resolved on settlement of the order.

Costs throughout should be to the appellants on the basis of a single counsel fee against the respondent General Accident.

DOHERTY J.A. (dissenting in part): —

a The Issues

This already prolonged litigation is stalled at the discovery stage while the parties argue over the appellants' right to production of documents in the possession of the respondents. Most of these documents were generated in the course of an investigation conducted on behalf of the respondent insurers into the origins of a fire at the appellants' hotel. The respondents resist production claiming both client-solicitor privilege and litigation privilege.

The appellants raise three issues:

- c* — Are communications between an appraiser and the insurers' solicitor protected from disclosure to the appellants by either client-solicitor privilege or litigation privilege?
- d* — Is a transcript of a statement made under oath by Deny Pilotte on May 23, 1995 to the lawyer for the insurers (the "May 23 statement") protected against production by the insurers' litigation privilege?
- e* — Is a copy of the May 23 statement that was given to Mr. Pilotte's lawyer by the lawyer for the insurers protected against production by Mr. Pilotte by either the insurers' litigation privilege or Mr. Pilotte's litigation privilege?

I have had the opportunity of reading the reasons of my colleagues, Carthy and Rosenberg JJ.A. I agree with their conclusions on the first and third issues. I respectfully dissent from their conclusion on the second. I would hold that the insurers are obliged to produce the statement.

These issues bring to the forefront two antithetical principles, both of which are accepted as fundamental to the civil litigation process. One principle, the right to full and timely discovery of the opposing party's case, rests on the premise that full access to all the facts on both sides of a lawsuit facilitates the early and just resolution of that suit. The other principle, the right of a party to maintain the confidentiality of client-solicitor communications, and sometimes communications involving third parties, rests on the equally fundamental tenet that the confidentiality of those communications is essential to the maintenance of a just and effective justice system. The tension between the two principles is described by Lamer C.J.C. in *R. v. Gruenke*, [1991] 3 S.C.R. 263 at p. 289, 67 C.C.C. (3d) 289 at p. 305:

The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication

In attempting to reconcile these principles, I do not start from the premise that one principle, access to all the facts, is a good thing in that it promotes the search for truth and that the other principle, confidentiality, is a necessary evil to be tolerated only in the clearest of situations. Both principles have a positive value to the community and individuals, and when viewed from a broad perspective, both serve the goal of ascertaining truth by means which are consistent with the important societal values of fairness, personal autonomy and access to justice.

The Facts

The appellants ("Chrusz") are the owners of a hotel property in Thunder Bay. The respondent insurers insured that property against fire loss. The respondent, General Accident Assurance Company ("General Accident"), is the lead insurer and has carriage of this litigation. For ease of reference, I will refer only to General Accident when speaking of the respondent insurers. The respondent, Deny Pilotte, was employed by Chrusz between July 1994 and January 1995 as the manager of the hotel property. The respondent, John Bourret, is a claims adjuster in the employ of the respondent, C.K. Alexander Insurance Adjusters Ltd.

On November 15, 1994, a fire caused extensive damage to the Chrusz hotel. Mr. M. Cook, the senior claims examiner for General Accident, immediately retained Mr. Bourret to investigate the circumstances surrounding the fire. On November 16, 1994, Mr. Bourret reported to Mr. Cook that "the fire may have been deliberately set and that arson was suspected."¹ His suspicion was based on the finding of traces of an accelerant in the bar area of the hotel. That part of the hotel had been leased by Chrusz to a tenant.

On November 16, 1994, upon being informed of the possibility of arson, Mr. Cook retained Mr. David Eryou, a barrister and solicitor, "for the purpose of determining any and all issues relating to the loss occasioned to the insured premises." The retainer extended to "what type of strategy could be taken with respect to

¹ In his affidavit in support of the privilege claim, Mr. Cook states that Mr. Bourret said that, "the fire had been deliberately set." Given subsequent events, it would appear that Mr. Bourret's recollection is more accurate.

a the proof of loss when it was submitted by the insured party, and general legal advice on processing of the claim as long as the file was open." On the same day, Mr. Cook told Mr. Bourret that Mr. Eryou had been retained and that Mr. Bourret "was to investigate the fire loss and report directly to Mr. Eryou." Mr. Bourret confirmed these instructions with Mr. Eryou and further confirmed that he was to take instructions from Mr. Eryou in respect of his investigation.

b Mr. Bourret prepared some 19 reports between November 1994 and October 1996. The first two reports, dated November 24 and December 16, 1994, were sent to General Accident with copies to Mr. Eryou. Beginning with the third report, dated January 12, 1995, the remaining reports were sent to Mr. Eryou. General Accident did not receive copies of these reports.²

c On January 9, 1995, Chrusz delivered a proof of loss claiming over \$1.5 million. Shortly afterwards (no date is specified in the material), General Accident advanced \$100,000 in partial payment of the claim. In April 1995, General Accident agreed to advance a further \$505,000 to Chrusz and paid some part of that amount before May 23, 1995. There is no suggestion in the record that arson, or at least the possible involvement of Chrusz in any arson, remained a concern when these payments were made.

d On May 23, 1995, matters took a dramatic turn. Mr. Pilotte made a lengthy statement under oath to Mr. Bourret and Mr. Eryou. Although privilege is claimed with respect to the statement, subsequent events make it clear that Mr. Pilotte made allegations that Chrusz was attempting to dishonestly inflate his insurance claim.³ Mr. Pilotte also turned over a videotape and certain business records to Mr. Eryou. According to Mr. Pilotte, he made these disclosures on his own initiative to clear his conscience and for no other reason. Mr. Pilotte had been fired by Chrusz about four months earlier.

e The statement was transcribed. Although Mr. Pilotte did not request a copy, Mr. Eryou promised to give him one and asked that he keep it confidential. On June 2, 1995, Mr. Eryou turned

h ² In their affidavits, both Mr. Cook and Mr. Bourret suggest that reports after December 1, 1994 were sent directly to Mr. Eryou. The documents referred to in their affidavits, however, indicate that the third report dated January 12, 1995 was the first report sent directly to Mr. Eryou.

³ The transcript of Mr. Pilotte's statement was ordered sealed by Kurisko J. A sealed copy of the transcript was filed with this court. It fills some 198 pages and is in a question and answer format. The questioning extended over two days.

a
a copy of the transcript of the statement and a copy of the videotape that he had received from Mr. Pilotte over to Mr. Pilotte's lawyer.

b
On June 3, 1995, General Accident commenced an action against Chrusz alleging fraud, concealment and misrepresentation. According to the statement of claim, General Accident became aware of Chrusz's fraud on May 23, 1995, the date on which Mr. Pilotte made his statement to Mr. Eryou. General Accident sought a declaration that Chrusz's insurance policy was void and a declaration that it was entitled to the return of the money paid under that policy. It also claimed damages in excess of \$1 million.

c
On November 14, 1995, Chrusz filed a statement of defence and denied the allegations Chrusz also counterclaimed against General Accident, Mr. Bourret and his company. In addition to claiming that General Accident had breached its obligations under the insurance contract, Chrusz alleged that General Accident had improperly relied on the "reckless, uncorroborated and malicious" statements of Mr. Pilotte. The counterclaim also made d
a claim against Mr. Pilotte for defamation. Although not particularized, the claim would appear to be based in part on the statement made by Mr. Pilotte on May 23, 1995.

The Privilege Claims Advanced by the Respondents

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The documents over which the insurers claimed privileged are described in Schedule "B" to the affidavits of documents of Mr. Bourret and Mr. Cook. Many of the documents referred to in Schedule "B" of Mr. Bourret's affidavit are obviously the product of his investigation of the fire (e.g., blueprints, photographs, drawings, videotapes, reports). Other documents referred to in that schedule are not adequately described to permit any inference as to their subject matter or purpose (e.g., faxes, handwritten notes, invoices). Mr. Cook's affidavit of documents refers to many of the same documents as are set out in Mr. Bourret's affidavit, including those which are the product of Mr. Bourret's investigation of the fire. Many of the documents set out in Schedule "B" to Mr. Cook's affidavit are also described so generically as to not allow any inference as to their content or purpose.

g
General Accident contended that communications directly between Mr. Cook and Mr. Eryou were protected by client-solicitor privilege. It further contended that client-solicitor privilege extended to communications between Mr. Bourret and Mr. Eryou because Mr. Bourret had been designated by General Accident as its agent for the purposes of those communications with Mr. h

a Eryou. Alternatively, General Accident claimed that communications between Mr. Bourret and Mr. Eryou were protected by litigation privilege in that arson was suspected and litigation contemplated prior to any of those communications taking place.

b A transcript of Mr. Pilotte's May 23 statement was listed in Schedule "B" of the affidavits of Mr. Bourret and Mr. Eryou. In the affidavits they resisted production of the transcript alleging
c both client-solicitor privilege and litigation privilege. On a motion before Kurisko J. the claim was limited to one of litigation privilege. The affidavits asserted that the transcript had been prepared "for the dominant purpose of aiding in the conduct of this litigation at a time when litigation was threatened, anticipated or outstanding."

The Rulings Below

d The reasons of Kurisko J. are reported at (1997), 34 O.R. (3d) 354, 17 C.P.C. (4th) 284, 48 C.C.L.I. (2d) 207. The reasons of the Divisional Court are reported at (1998), 37 O.R. (3d) 790.

e Mr. Justice Kurisko held that the direct communications between Mr. Eryou and Mr. Cook are protected by client-solicitor privilege.

f The Divisional Court did not address this aspect of Kurisko J.'s order. It is common ground on this appeal that those communications are privileged.

g Kurisko J. held that the communications between Mr. Eryou and Mr. Bourret are not protected by client-solicitor privilege. He further held that any claim to litigation privilege over those communications based on the possibility of arson expired when arson ceased to be a concern. He concluded that arson was no longer an issue by the time the insurers advanced some \$100,000 to the appellants shortly after January 9, 1995. Finally, Kurisko J. concluded that litigation became imminent upon receipt of Mr. Pilotte's statement on May 23, 1995. He held that communications between Mr. Bourret and Mr. Eryou after that date are protected by litigation privilege.

h The Divisional Court held that, from the time Mr. Eryou was retained on November 16, 1994, communications between Mr. Bourret and Mr. Eryou were made for the purpose of giving and obtaining legal advice. Overturning Kurisko J. on this issue, the court ruled that these communications are protected by client-solicitor privilege just as if the communications had been directly between Mr. Eryou and General Accident. As the court was satisfied that all of the communications are protected by client-solicitor privilege, it did not address the litigation privilege claim.

Kurisko J. next held that the transcript of Mr. Pilotte's statement is not privileged. He held that while the transcript was *prima facie* subject to litigation privilege in the hands of General Accident, the privilege was waived when Mr. Eryou made the unsolicited promise to Mr. Pilotte to provide him with a copy of the statement. Kurisko J. rejected the contention that Mr. Pilotte and General Accident had a "common interest" such that providing Mr. Pilotte with a copy of the transcript of the statement did not waive General Accident's claim to litigation privilege. He further ruled that as Mr. Pilotte did not anticipate litigation involving him when he made the statement, he could not rely on litigation privilege.

The Divisional Court disagreed with Kurisko J. on this issue and held that General Accident's litigation privilege was not waived by providing a potential witness with a copy of his own statement. The court declared that neither the insurers nor Mr. Pilotte were obliged to produce the transcript of Mr. Pilotte's statement.

Kurisko J. also ruled that the materials turned over to Mr. Eryou by Mr. Pilotte on May 23, 1995 (the videotape and business records) are not privileged. The Divisional Court agreed. This conclusion is not challenged on appeal.

The Client-Solicitor Privilege Claim

(a) *Generally*

Client-solicitor privilege is the oldest and best established privilege in our law. It can be traced back some 400 years in English law: *Baker v. Campbell* (1983), 153 C.L.R. 52 at p. 84, *per* Murphy J. (H.C.); N. Williams "Civil Litigation Trial Preparation in Canada" (1980), 58 *Can. Bar Rev.* 1 at pp. 37-38. In *Gruenke*, *supra*, at pp. 287-89 S.C.R., pp. 304-06 C.C.C., Lamer C.J.C. referred to client-solicitor privilege as one of the few blanket or class privileges known to our law. The Chief Justice distinguished class or blanket privilege from other privileges which are determined on a case-by-case basis. The former operate (subject to certain exceptions) whenever the criteria for their existence are established. The operation of the latter depend on the totality of the circumstances of each case. Obviously, the operation of class or blanket privileges can result in the exclusion of valuable evidence. No doubt this explains why there are so few class privileges recognized in our law.

The criteria for the existence of client-solicitor privilege are well-established. In *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860 at pp. 872-73, 70 C.C.C. (2d) 385 at p. 398, and again very

recently in *R. v. Shirose*, [1999] 1 S.C.R. 565 at p. 601, 133 C.C.C. (3d) 257 at p. 288, the Supreme Court of Canada adopted the following description of client-solicitor privilege by Wigmore (8 Wigmore, *Evidence*, § 2292, McNaughton Rev. 1961):

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The privilege extends to communications in whatever form, but does not extend to facts which may be referred to in those communications if they are otherwise discoverable and relevant: *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27 at p. 34, 69 D.T.C. ¶5278; *Grant v. Downs* (1976), 135 C.L.R. 674 at p. 686 (Ont. H.C.J.); R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993), at pp. 127-33. For example, even if Mr. Bourret's reports are privileged as a defendant by counter-claim, he may be examined for discovery on steps he, or others on his behalf, took to investigate the fire as well as on observations made and information gathered in the course of that investigation.

The rationale underlying the privilege informs the perimeters of that privilege. It is often justified on the basis that without client-solicitor privilege, clients and lawyers could not engage in the frank and full disclosure that is essential to giving and receiving effective legal advice. Even with the privilege in place, there is a natural reluctance to share the "bad parts" of one's story with another person. Without the privilege, that reluctance would become a compulsion in many cases: *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 at p. 649, [1874-80] All E.R. Rep. 396; *Smith v. Jones*, [1999] 1 S.C.R. 455 at p. 474, 22 C.R. (5th) 203 at p. 217, *per* Cory J.; J.W. Strong, ed., *McCormick on Evidence*, 4th ed. (St. Paul, Minn.: West Publishing Co., 1992), vol. 1, at p. 353.

While this utilitarian purpose is central to the existence of the privilege, its rationale goes beyond the promotion of absolute candor in discussions between a client and her lawyer. The privilege is an expression of our commitment to both personal autonomy and access to justice. Personal autonomy depends in part on an individual's ability to control the dissemination of personal information and to maintain confidences. Access to justice depends in part on the ability to obtain effective legal advice. The surrender of the former should not be the cost of obtaining the latter. By maintaining client-solicitor privilege, we promote both personal autonomy and access to justice: *Goodman Estate v. Gef-*

fen, [1991] 2 S.C.R. 353 at pp. 382-83, 81 D.L.R. (4th) 211 at pp. 231-32, *per* Wilson J.; *Solosky v. R.*, [1980] 1 S.C.R. 821 at p. 839, 50 C.C.C. (2d) 495 at p. 510; *Descôteaux v. Mierzewski*, *supra*, at pp. 892-93 S.C.R., pp. 413-14 C.C.C.; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at pp. 559-60, 103 C.C.C. (3d) 92 at pp. 107-08, *per* L'Heureux-Dubé J. (concurring); *R. v. Shirose*, *supra*, at p. 601 S.C.R., p. 288 C.C.C.; *Baker v. Campbell*, *supra*, at pp. 118-20, *per* Deane J.

The privilege also serves to promote the adversarial process as an effective and just means for resolving disputes within our society. In that process, the client looks to the skilled lawyer to champion her cause against that of her adversaries. The client justifiably demands the undivided loyalty of her lawyer. Without client-solicitor privilege, the lawyer could not serve that role and provide that undivided loyalty. As the authors of *McCormick*, *supra*, write at pp. 316-17:

At the present time it seems most realistic to portray the attorney-client privilege as supported in part by its traditional utilitarian justification, and in part by the integral role it is perceived to play in the adversary system itself. Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. *To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary.*

(Emphasis added)

In summary, I see the privilege as serving 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. Each of these purposes should guide the application of the established criteria when determining the existence of client-solicitor privilege in specific fact situations.

The adjudication of claims to client-solicitor privilege must be fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made. A claim to client-solicitor privilege in the context of litigation is in fact a claim that an exception should be made to the most basic rule of evidence which dictates that all relevant evidence is admissible. It is incumbent on the party asserting the privilege to establish an evidentiary basis for it. Broad privilege claims which blanket many documents, some of

a which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden: see *Shaughnessy Golf & Country Club v. Drake International Inc.* (1986), 26 D.L.R. (4th) 298 at pp. 302-04 and 307-08, 1 B.C.L.R. (2d) 309 (C.A.), *per* Esson J.A..

b It is also necessary to consider the context of the claim, by which I mean the circumstances in which the privilege is claimed. For example, in this case, the insurer claims client-solicitor privilege against its insured in part in respect of the product of its investigation of a possible claim by the insured under its policy. The pre-existing relationship of the insured and insurer and the mutual obligations of good faith owed by each to c the other 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* its insured. The confidentiality claim cannot be approached as if the parties were strangers to each other.

d The confidentiality of the communications is an underlying component of each of the purposes which justify client-solicitor privilege. In *McCormick*, *supra*, at p. 333, it is said:

e It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.

f The centrality of confidentiality to the existence of the privilege helps make my point that the assessment of a claim to client-solicitor privilege must be contextual. Sometimes the relationship between the party claiming the privilege and the party seeking disclosure will be relevant to determining whether the communication was confidential. For example, the reciprocal obligations of an insured and an insurer to act in good faith towards each other are well-established: *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*, [1990] 2 S.C.R. 549 at pp. 620-21, 72 D.L.R. (4th) 478; *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622 at p. 636, 85 D.L.R. (4th) 609. I have difficulty reconciling these mutual obligations with the contention that an insurer automatically intends to maintain confidentiality as against the insured over g the fruits of its investigation of an incident giving rise to a possible claim under a policy of insurance. I stress that I refer only to the fruits of the insurer's investigation and not to other topics h which may be the subject matter of communications between the insurer and its counsel.

Unlike some courts, (e.g., *Somerville Belkin Industries Ltd. v. Brocklesby Transport*, [1985] 6 W.W.R. 85 at pp. 88, 5 C.P.C. (2d) 239 (B.C.S.C.)), I do not accept that the mere possibility of a claim under an insurance policy entitles an insurer to treat its client as a potential adversary from whom it intends to keep confidential information concerning its investigation of the claim. I prefer the view which assumes that the insurer "fairly and open mindedly" investigates potential claims: see *Blackstone v. Mutual Life Insurance Co. of New York*, [1944] O.R. 328 at p. 334, [1944] 3 D.L.R. 147 (C.A.), per Robertson C.J.O.; *Walters v. Toronto Transit Commission* (1985), 50 O.R. (2d) 635 at pp. 637-38, 4 C.P.C. (2d) 66 (H.C.J.). If an insurer asserts a privilege over the product of its investigation, it must demonstrate that it intended to keep that information confidential from its client. The mere possibility of a claim will not establish that intention.

Chrusz accepts that all communications directly between Mr. Eryou and General Accident are protected by client-solicitor privilege. While I accept that concession for the purposes of this appeal, I would not want to be taken as endorsing it.

General Accident relies on Mr. Bourret's suspicion of arson as providing the necessary basis for the inference that the communications between Mr. Eryou and General Accident prior to May 23, 1995 were intended to be kept confidential from Chrusz. I can accept that the suspicion described in the affidavits provided a basis, as of November 16, 1994, for concluding that the initial communications were intended to be kept confidential from Chrusz. General Accident takes the position that once such suspicion was established, it continued as long as the investigation continued. I cannot agree. It is up to General Accident to establish a proper evidentiary basis for a finding that all of the communications referred to in the affidavits were intended to be confidential as against Chrusz. The record tells me only that General Accident had reason to suspect arson as of November 16, 1994. It would certainly seem that any suspicion had disappeared by the time the insurers advanced \$100,000 on the policy shortly after January 9, 1995. To the extent that the inference of intended confidentiality turned on the existence of the suspicion of arson, the onus was on General Accident to establish that the suspicion continued over the period for which it claims privilege. I am not prepared to assume that the suspicion continued from the day after the fire until some indeterminate point in the future.

Communications between Mr. Eryou and General Accident after the May 23, 1995 statement do not raise the same concerns. The fraud allegations against Mr. Chrusz made in that

a statement provide a firm basis from which to infer an intention to keep communications between Mr. Eryou and General Accident confidential.

(b) *Communications between Mr. Bourret and Mr. Eryou*

b Assuming that the communications between General Accident and Mr. Eryou are protected by client-solicitor privilege, I turn to the question of whether Mr. Bourret's communications with Mr. Eryou are also privileged. General Accident contends that the communications are protected by client-solicitor privilege and/or litigation privilege. At this stage of my reasons, I am concerned only with the client-solicitor privilege claim and not the litigation privilege claim. There is also no distinction to be drawn between communications made before May 23, 1995 and those made after that date when assessing the client-solicitor privilege claim. That date becomes important when the litigation privilege claim is considered.

d Claims for client-solicitor privilege, unlike claims for litigation privilege, are usually framed in terms of communications directly between a client and a solicitor. It is, however, well-settled that client-solicitor privilege can extend to communications between a solicitor or a client and a third party:⁴ *Bunbury v. Bunbury* (1839), 48 E.R. 1146, 9 L.J. Ch. 1; *Russell v. Jackson* (1851), 68 E.R. 558, 21 L.J. Ch. 146; *Hooper v. Gumm* (1862), 70 E.R. 1199, 6 L.T. 891; *Wheeler v. Le Marchant* (1881), 17 Ch.D. 675 at p. 682, 50 L.J. Ch. 793, *per* Jessel M.R.; *Jones v. Great Central Railway Co.*, [1910] A.C. 4, 79 L.J.K.B. 191 (H.L.); *Susan Hosiery Ltd. v. M.N.R.*, *supra*, at p. 36; *Goodman and Carr v. M.N.R.*, [1968] 2 O.R. 814 at p. 818, 70 D.L.R. (2d) 670 (H.C.J.); *Alcan-Colony Contracting Ltd. v. Minister of National Revenue*, [1971] 2 O.R. 365 at p. 368, 18 D.L.R. (3d) 32 (H.C.J.); *International Minerals & Chemical Corp. v. Commonwealth Insurance Co.* (1991), 89 Sask. R. 1 at pp. 7-8 (Q.B.); *Smith v. Jones*, *supra*, at pp. 462-64 S.C.R., pp. 208-10 C.R., *per* Major J. (dissenting); *Attorney-Client Privilege*, 139 A.L.R. 1250.

g The case law involving claims to client-solicitor privilege over third party communications is not extensive. It is also relatively undeveloped beyond a recognition that communications made to or by third parties who are classified as "agents" of the lawyer or the client will be protected by client-solicitor privilege: see Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*, at

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⁴ These reasons do not address communications involving employees of the client and/or the lawyer.

pp. 73-79; G. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 *Can. Bar Rev.* 315 at pp. 346-49. a

The authorities do, however, establish two principles:

- not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and b
- where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege. c

These two principles assist in resolving the applicability of client-solicitor privilege to the communications between Mr. Bourret and Mr. Eryou, but neither provide a complete answer. In my view, this case requires the court to determine when a third party's communication will be protected by client-solicitor privilege even though the third party cannot be described merely as a channel of communication or conduit of information between the solicitor and client. I will consider the two established principles and then will turn to the approach that I would take to determine whether the third party's communications to the solicitor in this case are protected by client-solicitor privilege even though the third party is not merely a channel of communication. d

Wheeler v. Le Marchant, *supra*, illustrates the first principle that communications to or by a third party are not protected by client-solicitor privilege merely because they assist the solicitor in formulating legal advice for a client. In that case, the client retained a solicitor for advice concerning a certain piece of property. The solicitor in turn retained a surveyor to give him information concerning that property. In subsequent litigation involving a claim for specific performance, the client contended that the information passed from the surveyor to the lawyer was protected by client-solicitor privilege. No litigation was contemplated at the time the surveyor provided the information to the solicitor. The client's claim succeeded initially, but on appeal it was unanimously held that the communications between the surveyor and the solicitor were not protected by client-solicitor privilege. Cotton L.J. concluded at p. 684: e

... It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must also be privileged. That is a fallacious use of the word "representa- f

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a tives." If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice.

b (Emphasis added)

c Wheeler has not escaped academic criticism: see J.D. Wilson, "Privilege in Experts' Working Papers" (1997), 76 *Can. Bar Rev.* 346 at pp. 361-65. But it has received repeated judicial approval here and in other common law jurisdictions: see *Learoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. D. 686 at pp. 690-91, 62 L.J. Ch. 509; *Calcraft v. Guest*, [1898] 1 Q.B. 759 at pp. 762-63, [1895-9] All E.R. Rep. 346 (C.A.); *Susan Hosiery Ltd. v. M.N.R.*, *supra*, at pp. 31-32; *R. v. Littlechild* (1979), 51 C.C.C. (2d) 406 at pp. 411-12, [1980] 1 W.W.R. 742 (Alta. C.A.); *C-C Bottlers Ltd. v. Lion Nathan Ltd.*, [1993] 2 N.Z.L.R. 445 at pp. 447-48 (H.C.).

d The second principle described above extends client-solicitor privilege to communications by or to a third party who serves as a line of communication between the client and solicitor. Thus, where a third party serves as a messenger, translator or amanuensis, communications to or from the party by the client or solicitor will be protected. In these cases the third party simply carries information from the client to the lawyer or the lawyer to the client.

e The privilege also extends to communications and circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor. In doing so, the third party makes the information relevant to the legal issues on which the solicitor's advice is sought. For example, in *Susan Hosiery Ltd. v. M.N.R.*, *supra*, the client's financial advisers who communicated with the lawyer were intimately familiar with the client's business. At the client's instruction, they met with the solicitor to convey information concerning the business affairs of the client. They were also instructed to discuss possible arrangements of those affairs presumably to minimize tax consequences. In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer.

h A second example of the extension of the privilege to cases involving expert third party intermediaries is found in *Smith v.*

Jones, supra. Jones was charged with aggravated sexual assault. His lawyer decided that a forensic psychiatric report could assist in Jones' defence or on sentence. Counsel retained Dr. Smith, a psychiatrist, to speak with Jones and prepare a report. The question of whether the communications from Jones to Smith were protected by client-solicitor privilege arose in a proceeding subsequently initiated by Dr. Smith.

The majority of the Supreme Court of Canada (*per* Cory J., at p. 474 S.C.R., p. 217 C.R.) assumed that the communications were protected by client-solicitor privilege and proceeded to consider whether the "public safety" exception to that privilege warranted disclosure of the communications.

Major J., in dissent (Lamer C.J.C. and Binnie J. concurring), did address the applicability of client-solicitor privilege to the communications between Jones and Smith. He said, at p. 463 S.C.R., p. 210 C.R.:

Courts in Canada, Australia, the United Kingdom and the United States have all concluded that client communications with third party experts retained by counsel for the purpose of preparing their defence are protected by solicitor-client privilege . . .

In so holding, Major J. referred with approval to the following passage from the judgment of Traynor J. in *San Francisco (City) v. Superior Court*, 281 P.2d 26 at p. 31 (1951 Cal. S.C.):

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)

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,

a 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.

b 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, 75 C.R. (3d) 382 (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. 209-10 C.R.). 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 pp. 333-35, there is considerable confusion with respect to terminology in this area of the law.

g 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.

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.

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.

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.

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.

a 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.

c 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.

d 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

e 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.

f 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 per-

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⁵ See *McCormick*, *supra*, at pp. 317-18, fn. 18. This definition has been adopted in several states: *e.g.*, Arkansas, North Dakota, South Dakota and Hawaii.

form services which are incidental to the seeking and obtaining of legal advice.

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 p. 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.

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 whom the client chose to anoint as his agent for the purpose of communicating with the client's lawyer.

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 (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254 at p. 259, 3 C.P.C. (3d) 297 (C.A.). 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 con-

- a duct 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.

- c 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

- e 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 23 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 23 statement.

f The May 23 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.

- g 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.

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⁶ The insignificance to Mr. Bourret's function resulting from the insertion of Mr. Eryou into the relationship is evident by the fact that Mr. Bourret's reports did not start to go to Mr. Eryou directly until some two months later.

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 [pp. 330-31 *ante*]); a
- 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 [p. 331 *ante*]); b
- 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 [pp. 331-32 *ante*]); c
- his adoption of the dominant purpose test as being consistent with contemporary notions of full pre-trial discovery (paras. 29-32 [pp. 332-33 *ante*]); d
- his conclusion that any litigation privilege General Accident may have had with respect to communications prior to May 23 disappeared when General Accident no longer suspected Chrusz of any involvement in arson (paras. 50-54 [pp. 338-39 *ante*]); and e
- his conclusion that communications from or to Mr. Bourret by General Accident and or Mr. Eryou after May 23 are subject to litigation privilege assuming they are not subject to disclosure under the applicable Rules of Civil Procedure (para. 56 [p. 339 *ante*]). f

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 [pp. 334-36 *ante*]). 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: g

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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 . . .

a 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 p. 594, 33 B.C.L.R. (2d) 129, where Craig J.A. observed:

b 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."

c 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 at pp. 61-62 (S.C.), Wood J. opined:

d 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].
e 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.

f The review of the case law provided in Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*, at pp. 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.

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

h 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 lit-

igation privilege: *Yri-York Ltd. v. Commercial Union Assurance Co. of Canada* (1987), 17 C.P.C. (2d) 181 (Ont. H.C.J.) at p. 186; *Catherwood (Guardian ad litem of) v. Heinrichs* (1995), 17 B.C.L.R. (3d) 326 (S.C.).

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 pp. 14-19; see also Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*, at pp. 100-03; S. Lederman, "Commentary: Discovery — Production of Documents — Claim of Privilege to Prevent Disclosure" (1976), 54 *Can. Bar Rev.* 422; *Strauss v. Goldsack* (1976), 58 D.L.R. (3d) 397 at pp. 402-03, *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.

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.

It is well established in Canada that no privilege is absolute. As Cory J. said in *Smith v. Jones*, *supra*, at p. 477 S.C.R., p. 219 C.R.:

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.

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.

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

a 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, b 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*, c [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224; *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1; *R. v. Gruenke*, *supra*; *Metropolitan Life Insurance Co. v. Frenette*, [1992] 1 S.C.R. 647, 89 D.L.R. (4th) 653; *R. v. O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1; *A. (L.L.) v. B. (A.)*, *supra*; *Smith v. Jones*, *supra*; see also *Cook v. Ip* (1985), 52 O.R. (2d) 289, 22 D.L.R. (4th) 1 (C.A.); d *R. v. S. (R.)* (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 e and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*, at pp. 20-23.

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 f 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 g 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 pp. 341 and 350, 74 W.W.R. 275, *per* Robertson J.A., and at pp. 357-58, *per* Nemetz J.A.; *Strauss v. Goldsack*, *supra*, at pp. 415-16, *per* Clement J.A., and at pp. 420-21, *per* Moir J.A.

h 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, [1994] N.W.T.R. 228 (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 then.

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.

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 pp. 21-22; Watson and Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation", *supra*, at pp. 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 pp. 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 p. 511. The statutory manifestation of that qualification is found in Rule 26(b)(iii) of the U.S. Rules of Federal 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

⁷ The Law Reform Commission of Canada recommended a similar qualification of the litigation privilege in its *Report on Evidence*, 1977 at p. 31. The authors described the proposed privilege in these terms:

A person has a privilege against disclosure of information obtained or work produced in contemplation of litigation by him or his lawyer or a person employed to assist the lawyer, unless, in the case of information, it is not reasonably available from another source, and its probative value substantially outweighs the disadvantages that would be caused by its disclosure.

a 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.

b 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 non-disclosure 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] 2 S.C.R. 1421 at pp. 1460-61, 60 C.C.C. (3d) 161 at p. 194.

e 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.

f 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 pp. 265-66, referred to by McGillivray C.J.A. in *Strauss v. Goldsack*, *supra*, at p. 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

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.

I turn now to apply the approach I favour to the May 23 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.

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, 79 C.C.C. (3d) 257. 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

⁸ Kurisko J. provided such control in this case in reasons released on November 14, 1997. His order was affirmed by the Divisional Court on July 20, 1998.

⁹ Although the statement was ordered sealed by Kurisko J., his order provided for examination of the statement by the Divisional Court or this court.

have on discovery or at trial some four or five years after the relevant events.

- a* 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.

- b* 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.

- c* 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.

- d* 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.

- e* 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. a

If the May 23 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. b

In summary, production of Mr. Pilotte's May 23 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. c

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. d

Conclusion

I would answer the three questions posed at the outset of these reasons as follows: e

- 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; f
 - The transcript of Mr. Pilotte's May 23 statement in the possession of the insurers is not protected against production by litigation privilege; and g
- h

a — The copy of the transcript of Mr. Pilotte's May 23 statement in the possession of his lawyer is not protected against production by Mr. Pilotte by virtue of litigation privilege.

I would allow the appeal and set aside the order of the Divisional Court and restore the order of Kurisko J. The appellants are entitled to their costs throughout.

b ROSENBERG J.A. (concurring): — I agree with Carthy J.A., subject to the following comments. Like him, I accept Doherty J.A.'s analysis of solicitor-client privilege. I agree with Carthy J.A.'s application of those principles to the facts of this case, subject to Doherty J.A.'s reservation, which I share, concerning
c pre-May 23, 1995 communications between Mr. Eryou and General Accident.

I agree with Carthy J.A.'s analysis of litigation privilege. The litigation privilege is well established, even if some of the nuances are not. In my view, the competing interests or balancing approach proposed by Doherty J.A. is more appropriate for
d dealing with emerging claims of privilege such as those claims dealt with in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 and *R. v. Gruenke*, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289. I am concerned that a balancing test would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation.

e That is not to say that litigation privilege is absolute. The Supreme Court of Canada has made it clear that all of the established privileges are subject to some exceptions. As Cory J. said in *Smith v. Jones*, [1999] 1 S.C.R. 455 at p. 474, 132 C.C.C. (3d) 225 at p. 239:

f Both parties made their submissions on the basis that the psychiatrist's report was protected by solicitor-client privilege, and it should be considered on that basis. It is the highest privilege recognized by the courts. *By necessary implication, if a public safety exception applies to solicitor-client privilege, it applies to all classifications of privileges* and duties of confidentiality. It follows that, in these reasons, it is not necessary to consider any
g distinctions that may exist between a solicitor-client privilege and a litigation privilege.

(Emphasis added)

h In my view, with established privileges like solicitor-client privilege and litigation privilege it is preferable that the general rule be stated with as much clarity as possible. Deviations from the rule should be dealt with as clearly defined exceptions rather than as a new balancing exercise each time a privilege claim is made: see *Smith v. Jones*, at p. 477 S.C.R., p. 242 C.C.C. Where, as in *Smith v. Jones*, a party seeks to set aside the privilege, the

onus properly rests upon the party seeking to set aside the privilege: see *Smith v. Jones*, at pp. 474-75 S.C.R., p. 240 C.C.C.

It follows that I agree with Carthy J.A.'s statement of the litigation privilege and its application to the facts of this case subject only to one reservation. As to copies of non-privileged documents, like Doherty J.A., I find the reasons of Wood J. in *Nickmar Pty Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) persuasive. However, since that issue does not arise in this case, I would prefer to leave the question open.

In all other respects, I agree with the reasons of Carthy J.A. and with his disposition of the appeal.

Appeal allowed.

**Re Airline Industry Revitalization Co. Inc.
and Air Canada**

[Indexed as: Airline Industry Revitalization Co. v. Air Canada]

Superior Court of Justice, R.A. Blair J. September 28, 1999

Corporations — Meetings — Shareholder entitled to call meeting for amendment of articles of incorporation by way of requisition — Directors cannot thwart statutory right of shareholders to do so by having fixed "record date" for meeting on other matters — "Record date" in s. 143(3)(a) of Canada Business Corporations Act referring to record date for meeting having been fixed prior to date of requisition but at which requisitioners' business may nonetheless be considered — Where directors fail to call meeting within 21 days of receipt of requisition shareholder may call requisitioned meeting itself under s. 143(4) of CBCA — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 143(3), (4).

In order to facilitate discussions between Air Canada and Canadian Airlines ("Canadian") about the restructuring of the Canadian airline industry, the Canadian Government made an order under s. 47 of the *Canada Transportation Act*, S.C. 1996, c. 10. The effect of the order was to provide a 90-day period during which Air Canada, Canadian and other parties could negotiate and enter into conditional agreements without the restraints that would otherwise be imposed on such negotiations by the *Competition Act*, R.S.C. 1985, c. C-34. The order was to expire on November 10, 1999. Onex proposed to acquire Canadian and merge it with Air Canada to form one national airline. The mechanism for accomplishing the latter part of this proposal was a take-over bid directed at Air Canada. AirCo was the corporate vehicle through which Onex launched its proposal and bid. AirCo acquired about 3.1 per cent of the Air Canada common shares and 6.6 per cent of Air Canada's Class A non-voting shares. On August 30, 1999, the Air Canada Board of Directors adopted a shareholders rights plan and agreed to hold a special meeting of shareholders on January 7, 2000. The special meeting was

Indexed as:

**Canada (Privacy Commissioner) v. Blood Tribe Department
of Health**

Privacy Commissioner of Canada, Appellant;

v.

**Blood Tribe Department of Health, Respondent, and
Attorney General of Canada, Federation of Law Societies
of Canada, Information Commissioner of Canada, New
Brunswick Office of the Ombudsman, Information and
Privacy Commissioner of British Columbia, Information
and Privacy Commissioner of Ontario, Advocates' Society,
Canadian Bar Association and Information and Privacy
Commissioner of Alberta, Interveners.**

[2008] 2 S.C.R. 574

[2008] S.C.J. No. 45

2008 SCC 44

File No.: 31755.

Supreme Court of Canada

Heard: February 21, 2008;

Judgment: July 17, 2008.

**Present: McLachlin C.J. and Binnie, Deschamps, Fish,
Abella, Charron and Rothstein JJ.**

(35 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Privacy -- Investigations of complaints -- Powers of Privacy Commissioner -- Production of documents -- Solicitor-client privilege -- Dismissed employee filing complaint with Commissioner and seeking access to her personal employment information -- Employer claiming solicitor-client privilege over some documents -- Whether Commissioner can compel production of privileged documents -- Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 12.

[page575]

Summary:

Following her dismissal, an employee asked to have access to her personal employment information because she suspected that the employer had improperly collected inaccurate information and used it to discredit her before its board. The employer denied the request, and the employee filed a complaint with the Privacy Commissioner seeking access to her personal file. The Commissioner requested the records from the employer in broad terms. All records were provided except for those over which the employer claimed solicitor-client privilege. The Commissioner then ordered production of the privileged documents pursuant to s. 12 of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), which confers the powers to compel the production of any records "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information ... whether or not it is or would be admissible in a court of law". The employer applied for judicial review of the Commissioner's decision. The reviewing judge determined the Commissioner was empowered to compel production of documents over which solicitor-client privilege was claimed in order to effectively complete her statutory investigative role. The Federal Court of Appeal set aside the decision of the reviewing judge and vacated the Commissioner's order for production of records.

Held: The appeal should be dismissed.

Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. However, experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible". Without that assurance, access to justice and the quality of justice in this country would be severely compromised. It is in the public interest that the free flow of legal advice be encouraged. [para. 9]

When the appropriate principles of statutory interpretation are applied to the general language of *PIPEDA*, the right of the individual or organization that is the target of the complaint to keep solicitor-client confidences confidential must prevail. The Commissioner [page576] is an officer of Parliament vested with administrative functions of great importance, but she does not, for the

purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder, including words as broad as those contained in s. 12 *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a statutory official to "pierce" the privilege. Such clear and explicit language does not appear in *PIPEDA*. [paras. 1-2]

An adjudication of a claim of privilege by the Commissioner, who is an administrative investigator not an adjudicator, would be an infringement of the privilege. Client confidence is the underlying basis for the solicitor-client privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The objection is all the more serious where, as here, there is a possibility of the privileged information being made public or used against the person entitled to the privilege. Furthermore, in pursuit of its mandate, the administrative officer may become adverse in interest to the party whose documents it wants to access. Not only may it take the resisting party to court but it may decide to share compelled information with prosecutorial authorities without court order or the consent of the party from whom the information was compelled. [paras. 20-21] [para. 23]

Here, the only reason the Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. In the Commissioner's view, piercing the privilege would become the norm rather than the exception in the course of her everyday work. Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes [page577] the necessity of doing so to fairly decide the issue. [para. 17]

The Commissioner has not made out a case that routine access to solicitor-client confidences is necessary to achieve the ends sought by *PIPEDA*. There are other less intrusive remedies. Firstly, she may, at any point in her investigation, refer a question of solicitor-client privilege to the Federal Court under s. 18.3(1) of the *Federal Courts Act*. Secondly, within the framework of *PIPEDA* itself, the Commissioner has the right to report an impasse over privilege in her s. 13 report and, with the agreement of the complainant, bring an application to the Federal Court for relief under s. 15. The court is empowered, if it thinks it necessary, to review the contested material and determine whether the solicitor-client privilege has been properly claimed. This procedure permits verification while preserving the privilege as much as possible. [para. 31] [paras. 33-34]

Cases Cited

Referred to: *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC

31; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Englander v. TELUS Communications Inc.*, [2005] 2 F.C.R. 572, 2004 FCA 387; *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13; *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, [1993] 5 W.W.R. 710; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127; [page578] *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673, 2005 FCA 199.

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Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.3(1).

Interpretation Act, R.S.C. 1985, c. I-21, s. 31(2).

Lobbyists Registration Act, R.S.C. 1985, c. 44 (4th Supp.), s. 10.4.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, ss. 4(1)(a), (b), 7(1)(b), 9(3), 11 to 16, 17(1), (2), 20(1), (3), (4), (5), Sch. I, clause 4.9.

Privacy Act, R.S.C. 1985, c. P-21, s. 34(2).

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Sharlow, Pelletier and Malone JJ.A.), [2007] 2 F.C.R. 561, 274 D.L.R. (4th) 665, 354 N.R. 302, 61 Admin. L.R. (4th) 1, 53 C.P.R. (4th) 273, [2006] F.C.J. No. 1544 (QL), 2006 CarswellNat 3294, 2006 FCA 334, reversing a judgment of Mosley J., [2005] 4 F.C.R. 34, 265 F.T.R. 276, 40 C.P.R. (4th) 7, 133 C.R.R. (2d) 124, [2005] F.C.J. No. 406 (QL), 2005 CarswellNat 612, 2005 FC 328. Appeal dismissed.

Counsel:

Steven Welchner and Patricia Kosseim, for the appellant.

[page579]

Eugene Creighton, Q.C., Gary Befus and Ken McLeod, for the respondent.

Christopher Rupar, for the intervener the Attorney General of Canada.

Bruce T. MacIntosh, Q.C., Angus Gibbon and Garner A. Groome, for the intervener the Federation of Law Societies of Canada.

Marlys Edwardh, Daniel Brunet and Diane Therrien, for the intervener the Information Commissioner of Canada.

Christian Whalen, for the intervener the New Brunswick Office of the Ombudsman.

Susan E. Ross, for the intervener the Information and Privacy Commissioner of British Columbia.

William S. Challis and Stephen McCammon, for the intervener the Information and Privacy Commissioner of Ontario.

Benjamin Zarnett and Julie Rosenthal, for the intervener the Advocates' Society.

Mahmud Jamal and Craig Lockwood, for the intervener the Canadian Bar Association.

Ritu Khullar and Vanessa Cosco, for the intervener the Information and Privacy Commissioner of Alberta.

The judgment of the Court was delivered by

1 BINNIE J.:-- This appeal requires the Court to resolve a conflict between, on the one hand, the Privacy Commissioner's statutory power to have access to personal information about a complainant for the purpose of ensuring compliance with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"), and, on the other hand, the right of the target of the [page580] complaint (in this case a former employer of the complainant) to keep solicitor-client confidences confidential. In my view, when the appropriate principles of statutory interpretation are applied to the general language of *PIPEDA*, the right of the individual or organization that is the target of the complaint to keep solicitor-client confidences confidential must prevail.

2 Section 12 *PIPEDA* gives the Privacy Commissioner express statutory authority to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information ... whether or not it is or would be admissible in a court of law". She therefore argues that, as is the case with a court, she may review documents for which solicitor-client privilege is claimed to determine whether the claim is justified. I do not agree. The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a regulator or other statutory official to "pierce" the privilege. Such clear and explicit language does not appear in *PIPEDA*. This was the view of the Federal Court of Appeal and I agree with it. I would dismiss the appeal.

I. Facts

3 Annette Soup was dismissed from her employment with the Blood Tribe Department of Health, [page581] in the spring of 2002. At the time of dismissal, the employer sought legal advice from its solicitors. Ms. Soup's employment file thus included the correspondence between the employer and its solicitors. There is no suggestion that this consultation was in any way improper in purpose or in content.

4 Following her dismissal, Ms. Soup asked to have access to her personnel file because she suspected that the employer had improperly collected inaccurate information and used that information to discredit her before its board. The employer denied Ms. Soup's request for access

without giving reasons. Ms. Soup then filed a complaint with the Privacy Commissioner seeking access to her personal employment information. The Privacy Commissioner requested Ms. Soup's employment records. The employer provided some documents but withheld what it described as a "bundle of letters" from its solicitors over which a claim of solicitor-client privilege was advanced, relying on s. 9(3)(a) *PIPEDA*, which provides:

9. ...

(3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege;

5 The Privacy Commissioner, through her General Counsel, responded on July 16, 2003, as follows:

In your letter you have framed the legal issue as "Is the Blood Tribe required by law to provide access to the solicitor-client privileged documents to the Office of the Privacy Commissioner?"

Our answer to that question is an unqualified yes... [The Privacy Commissioner takes the position that] in order to fulfil his mandate according to his standards he must be absolutely certain that the [s.] 9(3)(a) exemption has been properly invoked. In order to be certain either [page582] the Commissioner or his delegate *must* be provided with access to the documents in question. [Emphasis in original.]

The Privacy Commissioner then ordered production of the privileged documents pursuant to s. 12(1)(a) and (c) *PIPEDA*. The employer brought an application for judicial review to challenge the legality of the Privacy Commissioner's order. The application for judicial review was dismissed by the motions judge, but the Federal Court of Appeal allowed the appeal, set aside the decision of the Federal Court and vacated the Privacy Commissioner's order for production of solicitor-client records.

II. Relevant Statutory Information

6 See Appendix.

III. Judicial History

A. *Federal Court*, [2005] 4 F.C.R. 34, 2005 FC 328

7 Mosley J. noted that, pursuant to s. 12(1)(c) *PIPEDA*, the Privacy Commissioner may receive and accept any evidence and other information "whether or not it is or would be admissible in a court of law". He found that this language suggested that Parliament did not intend the Privacy Commissioner's investigations to be fettered by questions of privilege. The judge drew an analogy with the *Privacy Act*, S.C. 1980-81-82-83, c. 111, Sch. II (now R.S.C. 1985, c. P-21), in which courts have determined that the Privacy Commissioner is given the authority to review information to decide whether an exemption for reasons of national security has been properly claimed. Mosley J. observed that "this is an indication of Parliament's confidence in the [Privacy] Commissioner's ability to protect sensitive information" (para. 55). The Privacy Commissioner is given extraordinary powers to allow her to conduct investigations effectively and these powers can be exercised "in the same manner and to the same extent as a superior court of record" (s. 12(1)(a)). Mosley J. noted that a superior court has the power to compel production [page583] of documents to assess claims of solicitor-client privilege. Further, "[h]ad Parliament intended to prevent the Commissioner from verifying claims of privilege, it could have specifically excluded this power, as it has done under several other Acts" (para. 57).

B. *Federal Court of Appeal (Sharlow, Pelletier and Malone JJ.A.)*, [2007] 2 F.C.R. 561, 2006 FCA 334

8 Malone J.A., writing for the court, noted the Privacy Commissioner's request of the employer's records was framed "in very broad terms" (para. 7). In his view, a statutory abrogation of solicitor-client privilege requires clear and express language: *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31. Moreover, "[o]n the present record, there have been no facts alleged that demonstrate why the privileged documents are in any way necessary to the Commissioner's investigation" (para. 18). Malone J.A. further noted that s. 20(5) *PIPEDA* states that the Privacy Commissioner may disclose information relating to the commission of an offence to an attorney general. Although s. 12(1)(a) *PIPEDA* gives the Privacy Commissioner similar powers to a superior court, it did not constitute a grant of the jurisdiction of a superior court, but merely allowed the Privacy Commissioner to issue subpoenas and orders that have the force of law for matters otherwise within her investigative jurisdiction. In his view, at para. 29, "[l]anguage that allows a tribunal to compel evidence in the same manner and to the same extent as a superior court ... does not extend the jurisdiction of a tribunal or commission" into matters of solicitor-client privilege.

[page584]

IV. Analysis

9 Solicitor-client privilege is fundamental to the proper functioning of our legal system. The

complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":

[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

(*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36.)

It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.

10 At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business [page 585] counsellor or in some other non-legal capacity: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 885-87; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18, at paras. 40-47; *McClure*, at paras. 23-27; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39, at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8. A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Campbell*, [1999] 1 S.C.R. 565. The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35).

11 To give effect to this fundamental policy of the law, our Court has held that legislative

language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents: *Lavallee*, at para. 18; *Pritchard*, at para. 33. This case falls squarely within that principle.

A. *The PIPEDA Complaints Procedure*

12 *PIPEDA* makes specific reference to "personal information that ... is about an employee [page586] of [an] organization ... that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business" (*PIPEDA*, s. 4(1)(b)). If an individual believes that such a business or organization has breached *PIPEDA* by denying a proper request for access to his or her own personal information, that individual has the right to file a written complaint under s. 11(1). Once a complaint is filed, s. 12 *PIPEDA* requires the Privacy Commissioner to investigate its merits. Following her investigation, the Privacy Commissioner prepares a report containing findings and recommendations (s. 13). The report must be prepared within one year after the day on which the complaint was filed. Even where the Privacy Commissioner finds that an organization has improperly refused access to personal information, she has no authority to order an organization such as the respondent to provide it. She makes findings and recommendations. The complainant then has the option of seeking a remedy in the courts (s. 14), which alone can order an organization such as the respondent to provide the complainant with access to his or her personal information: *Englander v. TELUS Communications Inc.*, [2005] 2 F.C.R. 572, 2004 FCA 387. Section 15 permits the Privacy Commissioner to apply to the Federal Court in relation to any matter described in s. 14, with the consent of the complainant and within the time limit set out in that section. At that point, if not before, the Privacy Commissioner is in an adversarial relationship with the business or organization being complained about.

B. *The Need for Independent Verification*

13 Individuals are often unaware of the nature and extent of information about themselves being collected and stored by numerous private organizations, including employers. Some of this information may be quite inaccurate.

Not only is information circulated from unknown or out-of-date sources, but it is mixed and matched with other information purportedly relating to the same individuals. Digitalized attributes of one consumer [page587] may be mixed and matched with those of others who subjectively appear to belong to the same category of socioeconomic behaviour. Few data "subjects" ever see the information being held and exchanged under their names; fewer still are able to correct this information or have it withdrawn from circulation.

(I. B. Lawson, *Privacy and Free Enterprise* (2nd ed. 1997), at p. 32)

Accordingly, Parliament recognized that a corollary to the protection of privacy is the right of individuals to access information about themselves held by others in order to verify its accuracy.

14 *PIPEDA* itself provides in Sch. I, at clause 4.9, of its statement of principles that

[u]pon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

15 The Privacy Commissioner argues that

this case is about calling the private sector to account for its claims of privilege over documents containing personal information of others. Whether their claims turn out to be completely right, honestly equivocal, overly broad, inadvertently wrong, or intentionally misleading, they must be independently verified in order to give proper meaning to the fundamental right of access to one's personal information. [Transcript, at p. 2]

I agree. However, the question raised by the appeal is whether the proper forum for this independent verification in the first instance is the court or the Privacy Commissioner herself.

[page588]

C. *The Sweeping Nature of the Privacy Commissioner's Argument*

16 It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42). There was no cross-examination on the employer's affidavit. There was no basis in fact put forward by the Privacy Commissioner to show that the privilege was not properly claimed. As to the complainant, her concern was about what the employer *did*, not about the legal advice (if any) upon which the employer did it.

17 The only reason the Privacy Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Privacy Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the

necessity of doing so to fairly decide the issue: see e.g. *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct. (Gen. Div.)), at para. 20. In the Privacy Commissioner's view, however, piercing the privilege would become the norm rather than the exception in the course of her everyday work.

D. *The Privacy Commissioner's Argument Rests on a False Analogy Between It and the Court*

18 It is common ground that *PIPEDA* does not *expressly* grant to the Privacy Commissioner the [page589] power to review documents in respect of which solicitor-client privilege is claimed -- either to verify the privilege claim, or for any other purpose. The question is thus whether the legislation *implicitly* grants that power.

19 In support of her position, the Privacy Commissioner stresses the independence of her office from the parties and refers to the grant of some court-like powers under s. 12 *PIPEDA*. She argues that acknowledging a power to review claims to privilege would be consistent with Parliament's objective of creating an inexpensive and expeditious process: "Just as courts must verify claims of privilege to ensure the integrity and proper functioning of the justice system", she argues, "the [Privacy] Commissioner must verify claims of solicitor-client privilege to ensure the integrity and proper functioning of the legislative scheme protecting fundamental privacy rights" (A.F., at para. 38).

20 The Privacy Commissioner is an officer of Parliament who carries out "impartial, independent and non-partisan investigations": *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13, at para. 33. She is an administrative investigator not an adjudicator. Yet she argues that a "common sense approach would recognize that the requisite *express* legislative authority need not exist in language as *specific* and *explicit* as the Court of Appeal would require, nor be assessed in total isolation from the overall legislative scheme and context" (A.F., at para. 64 (emphasis in original)). In her view, s. 12(1)(a) could hardly be broader, as it grants the Privacy Commissioner the same powers as a superior court of record. A superior court of record has the power to compel the production of, and to inspect, documents over which privilege is claimed. Accordingly, she argues, the Privacy Commissioner is vested with a similar authority in relation to documents [page590] over which solicitor-client privilege is claimed. The Information Commissioner, intervening in support of the Privacy Commissioner, points out that "verification of the privilege is the very object of the [Privacy] Commissioner's statutory ombudsperson function and not merely a preliminary step to determine the record's use for another purpose" (I.F., at para. 21).

21 I do not accept the validity of the analogy between the Privacy Commissioner and a court in this respect. The Privacy Commissioner is a stranger to the privilege. She argues that because of her independence from the parties her adjudication of a claim of privilege would not be an infringement of the privilege. I do not agree. Client confidence is the underlying basis for the privilege, and

infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The objection is all the more serious where (as here) there is a possibility of the privileged information being made public or used against the person entitled to the privilege: *Lavallee*, at para. 44; *Goodis*, at para. 21; *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, [1993] 5 W.W.R. 710 (Alta. C.A.). While s. 12 gives the Privacy Commissioner some court-like procedural powers, she is not a court of law. The words of s. 12(1)(a) confer a power to compel production of

any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;

This amounts to a general production provision. In *Pritchard*, the Court dismissed a similar argument [page591] concerning s. 10 of the Ontario *Judicial Review Procedure Act*. We held that a general production provision that does not specifically indicate that the production must include records for which solicitor-client privilege is claimed is insufficient to compel the production of such records (*Pritchard*, at para. 35). On the other branch of her argument, the Privacy Commissioner points out that s. 12(1)(c) permits her in the course of exercising her powers of investigation to

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

The authority to *receive* a broad range of evidence cannot be read to empower the Privacy Commissioner to *compel production* of solicitor-client records from an unwilling respondent. The language of s. 12 is simply incapable of carrying the Privacy Commissioner to her desired conclusion.

22 In any event, a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.

E. *The Privacy Commissioner May Be Adversarial in Interest*

23 A major distinction between the Privacy Commissioner and a court, for present purposes, is that in pursuit of her mandate the Privacy Commissioner may become adverse in interest to the party whose documents she wants to access. This is not true of a court. Not only may she take the resisting employer to court but she may decide [page592] to share compelled information with prosecutorial authorities without court order or the consent of the party from whom the information was compelled. Although the general rule is non-disclosure, s. 20(5) *PIPEDA* provides for such an

exception:

20. ...

(5) The Commissioner may disclose to the Attorney General of Canada or of a province, as the case may be, information relating to the commission of an offence against any law of Canada or a province on the part of an officer or employee of an organization if, in the Commissioner's opinion, there is evidence of an offence.

It is true, as mentioned earlier, that at common law privilege does not attach to communications criminal in themselves or intended to further a criminal purpose, but the wording of s. 20(5) ("information *relating to* the commission of an offence") is much broader than the narrow common law exception, and would authorize disclosure to a prosecutor of much that the common law would regard as solicitor-client confidences.

24 To meet the s. 20(5) objection, the Privacy Commissioner is obliged to resort to an argument that in my opinion contradicts the position she takes on s. 12 which (she says) should be read *broadly* to *include* documents over which solicitor-client privilege is claimed. On the other hand, she says, s. 20(5) should be read *narrowly* to *exclude* solicitor-client confidence because its wording "is not clearly and unambiguously intended to authorize the Commissioner to disclose privileged documents to the Attorney General" (A.F., at para. 48). However, such a distinction between ss. 12 and 20(5) cannot be made because both sections use words of the same level of generality and there is no persuasive reason to [page593] apply a contradictory approach to their interpretations.

25 Interestingly, the argument made by the Privacy Commissioner in support of reading down s. 20(5) is essentially the same as the argument the respondent makes in respect of a narrow reading of s. 12, namely, that clear and unambiguous statutory language is required to overcome solicitor-client privilege. Of course, if, as the employer contends, s. 12 does not grant the Privacy Commissioner access to solicitor-client documents in the first place, there is no need to read down s. 20(5) to forestall the onward transmission of such confidence to the Crown prosecutors.

26 It is the very generality of the language of s. 12, which does *not* advert to issues raised by solicitor-client privilege, that shows the importance of *Pritchard's* prohibition against abrogation by inference. A search of Parliament's use of the expression "in the same manner and to the same extent" as a court reveals that there are about 14 other federal statutes with substantially identical wording to s. 12(1) *PIPEDA*, including the *Public Service Employment Act*, S.C. 2003, c. 22, s. 99; the *Lobbyists Registration Act*, R.S.C. 1985, c. 44 (4th Supp.), s. 10.4; the *Employment Equity Act*, S.C. 1995, c. 44, s. 29; the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 50; and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 50. Looking at these provisions in their different statutory contexts shows that it certainly cannot be said that in all these instances Parliament intended to abrogate solicitor-client privilege. As the intervener Attorney General of

Canada concedes in his factum:

... Parliament must be mindful of the importance of that privilege in the administration of justice. Consequently, if Parliament seeks to abrogate solicitor-client privilege it must do so in clear, precise and unequivocal language. Any ambiguity in the language of the legislation at issue must be resolved in favour of protecting the privilege and against any abrogation of the privilege. [para. 1]

Therefore, the Attorney General of Canada submits, "[t]he ordinary and grammatical meaning of the words used in s. 12(1) of *PIPEDA* taken in their full and proper context, do not support the conclusion of the Commissioner" (para. 2). I agree.

[page594]

F. *The Privacy Commissioner Argues by Analogy With Her Powers Under the Privacy Act*

27 The Privacy Commissioner criticizes the Court of Appeal's decision in this case for introducing "unfounded discrepancies between the Commissioner's powers of investigation under the *Privacy Act* and *PIPEDA*, contrary to ... the plain language of these *Acts*" (A.F., at para. 120). She invokes the "principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter": *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 327-28; P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 288-89. She argues that Parliament could not have intended that the Commissioner's virtually identical powers of investigation be contradictory as between these constituent pieces of legislation.

28 However, the powers of the Privacy Commissioner under *PIPEDA* and the *Privacy Act* are not the same. For present purposes, as observed by the Federal Court of Appeal, it is sufficient to note that *PIPEDA* does not contain explicit language granting access to confidences such as is [page595] found in s. 34(2) of the *Privacy Act*, R.S.C. 1985, c. P-21:

34. ...

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under

the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

29 The scope of the Privacy Commissioner's powers under s. 34(2) in relation to solicitor-client confidences has been the subject of divergent interpretations by the Federal Court of Appeal: see *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127, at para. 11; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673, 2005 FCA 199, at paras. 25-26. Its scope is not in issue here. There is no equivalent of s. 34(2) in *PIPEDA*. The Privacy Commissioner seeks to explain its absence on the basis that s. 34(2) "was enacted solely to address issues of Crown privilege, which do not arise in the private sector" (A.F., at para. 124). The fact is, however, that solicitor-client privilege regularly arises in *both* the public and private sectors, and there is no language in *PIPEDA* comparable to s. 34(2) even to provide the Privacy Commissioner with an argument that "[n]otwithstanding ... any privilege" she may examine privileged information in the hands of a private business or organization. The proper interpretation of s. 34(2) must await a case in which it is squarely raised. Its only relevance to the present appeal is its absence from *PIPEDA*, an absence from which we may draw an adverse inference. It is not there because Parliament either did not put its collective mind to the solicitor-client issue or because Parliament had [page596] no intention of giving the Privacy Commissioner the power she now claims.

G. *Reliance Is Placed on a "Contextual Reading" of Section 9(3) PIPEDA*

30 The Information Commissioner, intervening in support of the Privacy Commissioner, contends that by "including solicitor-client privilege [in s. 9(3)] as one of the six enumerated grounds for refusing access to requested personal information, Parliament clearly indicated its intention that the Privacy Commissioner would administer and verify claims of exemption based on solicitor-client privilege *in the same manner as she administers and verifies claims based on the other five exemption grounds*" (I.F., at para. 24 (emphasis in original)). This presupposes that there is a parity of legal status and importance among the s. 9(3) grounds, which include not only solicitor-client privilege but "confidential commercial information" and information collected "without the knowledge or consent" of an individual for enumerated purposes (s. 7(1)(b)). There is no such parity of legal status and importance. Solicitor-client privilege "commands a unique status within the legal system... . [It] is integral to the workings of the legal system itself" (*McClure*, at para. 31; *Gruenke*, at p. 289). An argument that equates the status of solicitor-client privilege with "confidential commercial information" is simply a denial of its fundamental importance and illustrates the slippery slope on which the appellant's position would place its future health and vitality in the regulatory context.

H. *Reliance on Section 31 of the Interpretation Act*

31 Reference was made to s. 31(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that:

31. ...

(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

The *Interpretation Act* is a statute of general application. It does not address solicitor-client confidences. The reality is that all of the appellant's arguments for "implied powers" or a "purposive interpretation" of *PIPEDA* are arguments for an abrogation by inference. The Privacy Commissioner's position is that her review of solicitor-client documents is "routinely necessary" in all cases where solicitor-client privilege is claimed. However, such routine access would contradict the principles explained in *Descôteaux* over 25 years ago:

When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that [solicitor-client] confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation. [Emphasis added; p. 875.]

The Privacy Commissioner has not made out a case that routine access to solicitor-client confidences is "absolutely necessary" to achieve the ends sought by *PIPEDA*. There are other less intrusive remedies, as will now be referred to.

[page598]

I. *The Privacy Commissioner Has Alternate Effective Remedies to Have Solicitor-Client Privilege Verified*

32 Parliament has provided the Privacy Commissioner with at least two alternative effective and expeditious means "of exercising [her] authority" to ensure that *PIPEDA* requirements are met.

33 Firstly, as the Privacy Commissioner conceded in the hearing of the appeal, she may, at any point in her investigation, refer a question of solicitor-client privilege to the Federal Court under s. 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides that:

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

34 Secondly, within the framework of *PIPEDA* itself, the Privacy Commissioner has the right to report an impasse over privilege in her s. 13 report and, with the agreement of the complainant, bring an application to the Federal Court for relief under s. 15. The court is empowered, if it thinks it necessary, to review the contested material and determine whether the solicitor-client privilege has been properly claimed. This procedure permits verification while preserving the privilege as much as possible. The requirement that the court application "be heard and determined without delay and in a summary way unless the Court considers it inappropriate to do so" (s. 17(1)) is designed to expedite access to justice for the complainant. The legislative scheme, thus interpreted, permits the objectives of *PIPEDA* to be met while preserving solicitor-client privilege "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35).

[page599]

V. Disposition

35 I would dismiss the appeal with costs in this Court.

* * * * *

APPENDIX

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

4. (1) This Part applies to every organization in respect of personal information that

(a) the organization collects, uses or discloses in the course of commercial activities; or

(b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal

work, undertaking or business.

...

9. ...

(3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege;

(b) to do so would reveal confidential commercial information;

(c) to do so could reasonably be expected to threaten the life or security of another individual;

(c.1) the information was collected under paragraph 7(1)(b); or

(d) the information was generated in the course of a formal dispute resolution process.

However, in the circumstances described in paragraph (b) or (c), if giving access to the information would reveal confidential commercial information or could reasonably be expected to threaten the life or security of another individual, as the case may be, and that information is severable from the record containing any other information for which access is requested, the organization shall give the individual access after severing.

...

[page600]

12. (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may

(a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;

(b) administer oaths;

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

...

13. (1) The Commissioner shall, within one year after the day on which a complaint is filed or is initiated by the Commissioner, prepare a report that contains

(a) the Commissioner's findings and recommendations;

(b) any settlement that was reached by the parties;

...

14. (1) A complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause ... of Schedule 1

...

15. The Commissioner may, in respect of a complaint that the Commissioner did not initiate,

(a) apply to the Court, within the time limited by section 14, for a hearing in respect of any matter described in that section, if the Commissioner has the consent of the complainant;

(b) appear before the Court on behalf of any complainant who has applied for a hearing under section 14; or

(c) with leave of the Court, appear as a party to any hearing applied for under section 14.

[page601]

16. The Court may, in addition to any other remedies it may give,

(a) order an organization to correct its practices in order to comply with sections 5 to 10;

(b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph *(a)*; and

(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

17. (1) An application made under section 14 or 15 shall be heard and determined without delay and in a summary way unless the Court considers it inappropriate to do so.

(2) In any proceedings arising from an application made under section 14 or 15, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings in camera, to avoid the disclosure by the Court or any person of any information or other material that the organization would be authorized to refuse to disclose if it were requested under clause 4.9 of Schedule 1.

...

20. (1) Subject to subsections (2) to (5), 13(3) and 19(1), the Commissioner or any person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part.

...

(3) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose, information that in the Commissioner's opinion is necessary to

(a) conduct an investigation or audit under this Part; or

(b) establish the grounds for findings and recommendations contained in any report under this Part.

(4) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction [page602] of the Commissioner to disclose, information in the course of

(a) a prosecution for an offence under section 28;

(b) a prosecution for an offence under section 132 of the *Criminal Code* (perjury) in respect of a statement made under this Part;

(c) a hearing before the Court under this Part; or

(d) an appeal from a decision of the Court.

(5) The Commissioner may disclose to the Attorney General of Canada or of a province, as the case may be, information relating to the commission of an offence against any law of Canada or a province on the part of an officer or employee of an organization if, in the Commissioner's opinion, there is evidence of an offence.

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Solicitor for the appellant: Welchner Law Office, Ottawa.

Solicitors for the respondent: Walsh Wilkins Creighton, Calgary.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: MacIntosh, MacDonnell & MacDonald, New Glasgow, N.S.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

Solicitor for the intervener the New Brunswick Office of the Ombudsman: New Brunswick Office of the Ombudsman, Fredericton.

Solicitor for the intervener the Information and Privacy Commissioner of British Columbia: Susan E. Ross, Victoria.

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Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Information and Privacy Commissioner of Alberta: Chivers Carpenter, Edmonton.

cp/e/qllls

Indexed as:
R. v. Campbell

John Campbell and Salvatore Shirose, appellants;
v.
Her Majesty The Queen, respondent.

[1999] 1 S.C.R. 565

[1999] S.C.J. No. 16

File No.: 25780.

Supreme Court of Canada

1998: May 28 / 1999: April 22.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory,
McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law -- Abuse of process -- Stay of proceedings -- Reverse sting operation involving police "sale" of illegal drugs to drug organization executives -- Whether reverse sting operation abuse of process -- Narcotic Control Act, R.S.C., 1985, c. N-1, ss. 2 "traffic", 4 -- Narcotic Control Regulations, C.R.C., c. 1041, s. 3(1) -- Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, s. 37.

Evidence -- Privilege -- Solicitor-client privilege -- Reverse sting operation involving police "sale" of illegal drugs to drug organization executives -- RCMP officer consulting Department of Justice lawyer as to legality of planned reverse sting operation -- Claim made that reverse sting operation predicated on its being considered legal -- Defence wanting to test disclosure of legal advice received by RCMP -- Whether communications between RCMP and Department of Justice lawyer should be disclosed.

The RCMP were alleged to have violated the Narcotic Control Act by selling a large quantity of hashish to senior "executives" in a drug trafficking organization as part of a reverse sting operation.

The appellants, as purchasers, were charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose. The trial judge found the appellants guilty as charged but, before sentencing, heard their motion for a stay of any further steps in the proceeding. The appellants argued that the reverse sting constituted illegal police conduct which "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention". The stay was refused by the courts below.

As part of their case for a stay the appellants sought, but were denied, access to the legal advice provided to the police by the Department of Justice on which the police claimed to have placed good faith reliance. The Crown's position implied that the RCMP acted in accordance with legal advice.

At issue here is the effect, in the context of the "war on drugs", of alleged police illegality on the grant of a judicial stay of proceedings, and related issues regarding the solicitor-client privilege invoked by the RCMP and pre-trial disclosure of solicitor-client communications to which privilege has been waived.

Held: The appeal should be allowed in part.

At this stage of the proceedings, the door is finally and firmly closed against both appellants on the question of guilt or innocence notwithstanding the contention of one appellant that the conspiracy alleged by the Crown, and encompassed in the indictment, was a larger agreement than his demonstrated involvement. The appellant was clearly able to ascertain the conspiracy alleged against him from a plain reading of the indictment as was required by the jurisprudence.

The effect of police illegality on an application for a stay of proceedings depends very much on the facts of a particular case. This case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation. Here, the RCMP acted in a manner facially prohibited by the Narcotic Control Act. Their motive in doing so does not matter because, while motive may be relevant for some purposes, it is intent, not motive, that is an element of a full mens rea offence.

A police officer investigating a crime occupies a public office initially defined by the common law and subsequently set out in various statutes and is not acting as a government functionary or as an agent. Here, the only issue was the status of an RCMP officer in the course of a criminal investigation and in that regard the police are independent of the control of the executive government.

Even if the police could be considered agents of the Crown for some purposes, and even if the Crown itself were not bound by the Narcotic Control Act, in this case the police stepped outside the lawful ambit of their agency, and whatever immunity was associated with that agency was lost. Parliament made it clear that the RCMP must act "in accordance with the law" and that illegality by

the RCMP is neither part of any valid public purpose nor necessarily "incidental" to its achievement. If some form of public interest immunity is to be extended to the police to assist in the "war on drugs", it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available.

Even if it should turn out here that the police acted contrary to the legal advice provided by the Department of Justice, there would still be no right to an automatic stay. The trial judge would still have to consider any other information or explanatory circumstances that emerge during the inquiry into whether the police or prosecutorial conduct "shocks the conscience of the community". A police force that chooses to operate outside the law is not the same thing as a police force that made an honest mistake on the basis of erroneous advice. There was no reason to think the RCMP ignored the advice it was given, but as the RCMP did make an issue of the legal advice it received in response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated.

The RCMP must be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Here, the officer's consultation with the Department of Justice lawyer fell squarely within this functional definition, and the fact that the lawyer worked for an "in-house" government legal service did not affect the creation or character of the privilege. Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

An exception to the principle of confidentiality of solicitor-client communications exists where those communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime. Here, the officer sought advice as to whether or not the operation he had in mind was lawful. The privilege is not automatically destroyed if the transaction turns out to be illegal.

Destruction of the solicitor-client privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator". The RCMP, by adopting the position that the decision to proceed with the reverse sting had been taken with the participation and agreement of the Department of Justice, belatedly brought itself within the "future crimes" exception and put in question the continued existence of its privilege.

Another exception to the rule of confidentiality of solicitor-client privilege may arise where adherence to that rule would have the effect of preventing the accused from making full answer and defence. Although the entire jeopardy of the appellants remained an open issue until disposition of the stay application, the appellants were not providing "full answer and defence" to the stay application. They were the moving parties of an application being defended by the Crown. The appellants' initiative in launching a stay application does not, of itself, authorize a fishing expedition

into solicitor-client communications to which the Crown is a party.

The RCMP put the officer's good faith belief in the legality of the reverse sting in issue, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP thus waived the right to shelter the contents of that advice behind solicitor-client privilege. It is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communications of which it forms a part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. Non-disclosure of information clearly relevant to the good faith reliance issue here cannot properly be disposed of by adverse inferences. The appellants were entitled to disclosure of legal advice with respect to: (1) the legality of the police posing as sellers of drugs to persons believed to be distributors of drugs; (2) the legality of the police offering drugs for sale to persons believed to be distributors of drugs; and (3) the possible consequences to the members of the RCMP who engaged in one or both of the above, including the likelihood of prosecution. If there is a dispute concerning the adequacy of disclosure, the disputed documents or information should be provided by the Crown to the trial judge for an initial determination whether this direction has been complied with. The trial judge should then determine what, if any, additional disclosure should be made to the appellants.

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APPEAL from a judgment of the Ontario Court of Appeal (1997), 32 O.R. (3d) 181, 96 O.A.C. 372, 115 C.C.C (3d) 310, 5 C.R. (5th) 391, [1997] O.J. No. 120 (QL), affirming a judgment of the Ontario Court (General Division), [1995] O.J. No. 431 (QL) denying the appellants' application for a stay of proceedings. Appeal allowed in part.

Alan D. Gold, for the appellant John Campbell.

Irwin Koziobrocki, for the appellant Salvatore Shirose.

Robert W. Hubbard, Fergus C. O'Donnell and John North, for the respondent.

Solicitors for the appellant Campbell: Gold & Fuerst, Toronto.

Solicitor for the appellant Shirose: Irwin Koziobrocki, Toronto.

Solicitor for the respondent: The Attorney General of Canada, Toronto.

The judgment of the Court was delivered by

1 BINNIE J.-- In this appeal the Court is asked to consider some implications of the constitutional principle that everyone from the highest officers of the state to the constable on the beat is subject to the ordinary law of the land. Here the police were alleged to have violated the Narcotic Control Act, R.S.C., 1985, c. N-1, by selling a large quantity of hashish (cannabis resin) to senior "executives" in a drug trafficking organization as part of what counsel called a "reverse sting" operation. The appellants, as purchasers, were charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose. The trial judge found the appellants guilty as charged but, before sentencing, heard the appellants' motion for a stay of any further steps in the proceeding. The appellants argued that the reverse sting constituted illegal police conduct which "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention" (see *R. v. Power*, [1994] 1 S.C.R. 601, at p. 615). The stay was refused by the courts below.

2 As part of their case for a stay the appellants sought, but were denied, access to the legal advice provided to the police by the Department of Justice on which the police claimed to have placed good faith reliance. The Crown indicated that the undisclosed advice assured the police, rightly or wrongly, that sale of cannabis resin in the circumstances of a reverse sting was lawful. The appellants argue that the truth of this assertion can only be tested by a review of the otherwise privileged communications.

3 We are therefore required to consider in the context of the "war on drugs", the effect of alleged

police illegality on the grant of a judicial stay of proceedings, and related issues regarding the solicitor-client privilege invoked by the RCMP and pre-trial disclosure of solicitor-client communications to which privilege has been waived.

Facts

4 In the autumn of 1991, the RCMP initiated a reverse sting operation involving undercover officers posing as large-scale hashish vendors. This operation was undertaken after Corporal Richard Reynolds of the RCMP became aware of the decision of the Quebec Superior Court in *R. v. Lore* (an unreported decision of Pinard J., March 8, 1991, No. 500-01-013926-891) which, in Cpl. Reynolds' view, gave implicit approval to a reverse sting operation in which police offered to sell narcotics to suspected drug traffickers. Cpl. Reynolds contacted Mr. James Leising, an experienced senior lawyer employed by the Department of Justice in Toronto, to obtain professional advice as to the legality of a reverse sting operation. Seven or eight meetings were held between Cpl. Reynolds and the Department of Justice lawyer in relation to the proposed operation. In September of 1991, approval by senior RCMP officers was given to initiate the reverse sting. Using the help of a police informant, the police contacted two groups of potential purchasers through the appellant Shirose. Negotiations with these groups included showing the hashish to prospective purchasers. However, the RCMP was careful not to provide any samples, despite requests to do so. The hashish remained under the control of the RCMP at all times. The appellant Campbell eventually participated in the negotiations as a financier for one of the two groups and in January 1992, the appellant Campbell, with the help of the appellant Shirose, agreed to pay \$270,000 for 50 kilograms of cannabis resin. The retail value of these drugs at street level, as found by the trial judge, was close to \$1 million. Instead of receiving the expected 50 kilograms of cannabis resin in exchange for payment, however, the appellants were arrested and charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for the purpose of trafficking.

5 In advance of the trial, to support their submission that if convicted, the proceedings should be stayed, the appellants sought to subpoena Mr. Leising from the Department of Justice to testify about the communications that had occurred with Cpl. Reynolds with respect to the legality of the reverse sting operation. The trial judge quashed the subpoena on the grounds that the communications were protected by solicitor-client privilege and did not fall within one of the recognized exceptions. Subsequently, during the application to stay the proceedings, counsel for the appellants sought to examine Cpl. Reynolds on the content of his communications with the Department of Justice. Again the trial judge upheld the assertion of solicitor-client privilege and denied the appellants' application to force disclosure of these communications. Based on the admissible evidence, the trial judge then dismissed the stay of proceedings application. The appellant Shirose was sentenced to six years in penitentiary. The appellant Campbell was sentenced to nine years in penitentiary, plus forfeiture of the purchase price paid to the police. The Court of Appeal dismissed the appellants' appeal except to remit the issue of forfeiture to the trial judge to await an application by the Attorney General, if he sees fit to make it, for forfeiture of the purchase price under s. 462.37 of the Criminal Code, R.S.C., 1985, c. C-46.

Evidence of Police "Good Faith"

6 On the return of the stay motion, the Crown set out to establish that the police had at all stages acted in good faith and in the belief that the reverse sting was legal. At the application for a stay of proceedings hearing, counsel for the Crown questioned Cpl. Reynolds as follows:

Q. Was your project [the reverse sting operation] tailored on the outlines of the project or [sic] the Lore case?

A. Yes, sir.

Q. And it was your understanding as a result of the Lore case that that was lawful behaviour?

A. Yes, sir.

It emerged that Cpl. Reynolds had consulted the Department of Justice about the legality of the reverse sting. Appellants' counsel pursued this issue with Cpl. Reynolds as follows:

Q. So to return then, based upon this [Lore] decision coming to your attention, did you also obtain any other advice regarding any concerns you might have had about this type of an operation?

A. Sought legal advice.

Q. And from whom did you seek legal advice?

A. The Department of Justice, Toronto.

Q. And was it one individual or more than one individual?

A. One individual.

Q. And who was that?

A. Mr. Leising.

The precise purpose of obtaining this legal advice came out under further questioning from appellants' counsel, as follows:

Q. Now that you know what I am reading from sir, what I asked was, "The issues for which advice was sought concerned the propriety of the police posing as sellers of drugs to persons believed to be distributors of drugs." Is that accurate?

A. That's correct.

Q. "The propriety of the police offering hashish for sale to persons believed to be distributors of hashish." Is that correct?

A. Yes, sir.

Q. "The release of a sample of hashish to certain of those persons." Is that correct?

A. Yes, sir.

Q. "The possible consequences to the members who engaged in such conduct." Is that correct?

A. Yes, sir.

...

Q. When you went to Mr. Leising, were you concerned about any of the members of your force who did engage in this operation, being prosecuted?

A. That would have been one of the issues.

Q. And then to return to Officer Plomp's certificate, the last thing he said is, "and the issue of entrapment." Was that one of the items on the agenda with Mr. Leising?

A. Yes, sir.

The Crown successfully objected to counsel for the appellants questioning Cpl. Reynolds with respect to the actual advice given because of the claim of solicitor-client privilege. The appellants' counsel then attempted to use this objection to narrow the potential ambit of the Crown's "good faith" argument:

So it is my respectful submission that the Crown certainly cannot argue that the police acted in good faith because they acted on legal advice, because we don't know what legal advice they got. We don't know what qualifications or conditions were attached. We don't know whether they were told, 'This is going to be illegal and you're on your own. You're at risk.' We don't know if they were told, 'It's illegal but don't worry, we'll never prosecute you.'

So, with respect, I certainly don't want to hear the argument that, 'Oh well, the police acted in good faith because they acted on legal advice.' because then I would like to know what that advice was so I can see whether that's true or not. So in my submission, if they are going to rely on solicitor/client privilege, then that issue has to drop completely out of the case.

THE COURT: Well I am sure the Crown will have something to say about that.

MR. GOLD: Well my suspicion is that they probably won't because they might be aware that that might open the door to further proceedings to an argument for disclosure of it, but I guess I will have to wait and see Your Honour. [Emphasis added.]

Judgments

Ontario Court (General Division), [1995] O.J. No. 431 (QL)

Ruling on Application for Stay of Proceedings

7 Caswell J. divided her analysis of the stay application into two parts. In the first part, she dealt with the issue of entrapment as a sub-issue of the abuse of process doctrine. In the second part, she dealt with prosecutorial conduct more generally as giving rise to potential abuses of process.

8 In discussing entrapment, Caswell J. considered the judgment of this Court in *R. v. Mack*, [1988] 2 S.C.R. 903, in which Lamer J. (as he then was) pointed out that a stay of proceedings is not

to be considered as a method of disciplining the police or the prosecution, but rather, that the Court is concerned with the larger issue of maintenance of public confidence in the judicial process. The trial judge noted that entrapment may be established where (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides*, or (b) having a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing a mere opportunity and actually induce the commission of an offence. Caswell J. held that the police had acted with reasonable suspicion with respect to both appellants. She noted that the appellant Shirose had been involved in a search for a large-scale supplier of hashish long before the RCMP began its operation. She considered that the appellant Campbell volunteered himself "out of the woodwork" and joined the conspiracy completely on his own initiative. As to the allegation that the RCMP had induced the commission of the offences, Caswell J. concluded, based on the criteria set out in *Mack*, that the police conduct had not induced the offence or otherwise gone beyond "the limits that society deems proper". Accordingly, there was no entrapment on the facts of this case.

9 In considering the broader aspects of the doctrine of abuse of process, Caswell J. concluded that it was not necessary for her to decide whether or not the reverse sting operation was illegal. Instead, she posed the question whether this is one of the "clearest cases" in which the proceedings are so overwhelmingly unfair that to proceed would be contrary to the interests of justice. After reviewing various cases involving police conduct that did not result in stays of proceedings, and measuring the conduct of the police and Crown counsel in this case against the criteria set out in *Mack*, *supra*, *R. v. Conway*, [1989] 1 S.C.R. 1659, *R. v. Showman*, [1988] 2 S.C.R. 893, and *Power*, *supra*, Caswell J. concluded that it was in the interest of justice to proceed to enter the conviction and impose sentence. In her view, society would not be offended by the acts of the prosecution. Society would be offended by the imposition of a stay.

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10 Carthy J.A. disagreed with the conclusion of the trial judge that it was not necessary to determine the legality of the police conduct. Also basing himself on the judgment of Lamer J. in *Mack*, *supra*, Carthy J.A. considered that police illegality was an important factor to be weighed in evaluating an accused's claim of abuse of process and, indeed, he considered that illegality may in certain instances be determinative.

11 After setting out the relevant portions of the Narcotic Control Act, Carthy J.A. noted that the Narcotic Control Regulations, C.R.C., c. 1041, s. 3(1), saves the police harmless where possession of a narcotic results from sting operations. There is no corresponding regulation giving the police immunity when they are offering to sell a narcotic. Carthy J.A. concluded that the RCMP's offer to sell a narcotic to the appellants constituted trafficking, and that it was irrelevant that the RCMP had no intention of completing the sale. Therefore, on the face of the statute, the conduct of the RCMP in this case was, in Carthy J.A.'s view, illegal.

12 Carthy J.A. then considered the Crown's arguments about extending public interest immunity

to the RCMP and concluded that the Crown does not exercise sufficient de jure control over the activities of RCMP members to justify such immunity from prosecution for breach of the criminal law as it relates to narcotics. As to the related concept of immunity derived from Crown agency, Carthy J.A. considered that, while members of the RCMP are entitled to seek out criminality through a variety of different methods, this mandate does not extend to methods that would be illegal if done by any other person. Carthy J.A. examined *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. When Crown agents act within the scope of the public purposes they are statutorily empowered to pursue, they may be entitled to claim Crown immunity, he held, but in this case the RCMP officers had stepped outside the scope of any agency relationship that may have existed.

13 Carthy J.A. agreed with the trial judge that there was no entrapment. He went on, however, to consider whether the RCMP conduct amounted to an abuse of process for reasons other than entrapment. He noted that the illegal conduct of the RCMP did not involve a trifling amount of drugs. Further, he noted that the illegal conduct was authorized at all levels of the RCMP. He was prepared to infer that the reverse sting was considered lawful by the Department of Justice, and he treated this as an aggravating factor because "the full might of the Crown resources were set upon the task of illegal conduct" (p. 197). Carthy J.A. noted an alternate possibility that the police were acting on their own as "mavericks" contrary to legal advice. While he doubted that this was in fact the case, Carthy J.A. at p. 197 considered this would be

... an aggravating factor against the Crown of about equal weight to the first assumption [i.e., of equal weight to the assumption that the RCMP did follow the legal advice].

14 A third possibility, he considered, was that the RCMP had been advised that the reverse sting would be legal provided no drugs were passed to the appellants as part of a "sale". If so, the RCMP had complied with the advice rendered, even though failure to complete the transaction did not change its illegality. Carthy J.A. recognized that all three scenarios were necessarily speculative on his part. He said, at p. 200, that had he been the trial judge he "would have directed production of the documents and evidence of the Crown law officer". However, while "[i]t obviously would have been better if the [Department of Justice] information had been conveyed [to the appellants] at trial" (p. 200), no miscarriage of justice occurred because even assuming "the worst" against the Crown no stay could be justified in the circumstances of this case. It was not one of the clearest cases, nor did it involve conduct that would cause the public conscience to be shocked if the convictions were permitted to stand. He concluded, at pp. 198-99, that "[h]aving condemned the actions of the R.C.M.P. and having held up [his] hand against repetition, it would, in [his] view, be sanctimonious to say that the rule of law ha[d] been eroded by these convictions and sentences". The Court of Appeal dismissed the other grounds of appeal, save for the technical variation in the order for forfeiture previously mentioned.

Analysis

Reverse Sting Operations

15 There is a general recognition that "[i]f the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police" (Mack, *supra*, per Lamer J., at p. 916). In a "sting" operation, the police pose as willing purchasers of narcotics to obtain evidence against traffickers. The Narcotic Control Regulations accept the legitimacy of this technique by deeming police possession in these circumstances to be authorized under that Act. The problem is that traffickers caught by ordinary "sting" purchases are generally minor street level personnel whose conviction has little deterrence effect on the day-to-day operations of the drug organization as a whole. As pointed out by Cpl. Reynolds in this case, the "executives" up the chain of command of large-scale drug organizations are able to insulate themselves from sting operations. The street level pushers apprehended by the police are easily sacrificed and easily replaced. For the purpose of more effective law enforcement, the police therefore devised what counsel referred to as "reverse sting" operations whereby the police became vendors rather than purchasers, i.e., the roles of vendor and purchaser were reversed within the sting operation. Because of the amount and value of drugs involved, reverse sting operations brought the police "vendors" into direct contact with the executive purchasers in the large drug organizations. It has proved to be an effective technique. It also, however, brought the police into conflict with the very law that they were attempting to enforce. Neither the Narcotic Control Act nor its regulations authorize the police to sell drugs. The appellants, as stated, purport to be shocked at the illegality of police conduct, and ask the Court to hold that the conduct so violates the community's fundamental sense of decency and values that it should result in a stay of proceedings against them.

Guilt or Innocence of the Appellants

16 This appeal was directed almost entirely at the conduct of the abuse of process application following the finding of the trial judge that the appellants were guilty as charged. The only surviving issue on the issue of guilt or innocence is the contention of the appellant Campbell that the conspiracy alleged by the Crown, and encompassed in the indictment, was a larger agreement, different in time and place, than his demonstrated involvement. The counts in the indictment span the period November 1, 1990 to January 15, 1992, whereas it appears Campbell first became involved on November 21, 1991. The counts in the indictment refer to activity in Windsor, London, Mississauga, Toronto, and elsewhere in Ontario, whereas Campbell's demonstrated involvement took place only in Mississauga. Campbell further contends that the evidence shows that he and Shirose were not related co-conspirators, because they were members of separate and distinct groups, acting without a common purpose or enterprise. I think the Crown is correct that the decision of this Court in *R. v. Douglas*, [1991] 1 S.C.R. 301, is fatal to this objection. After noting at pp. 315-16 that "[w]hile the offence of conspiracy is inherently difficult to frame, the indictment must be set forth with such reasonable precision as to inform the accused of the fundamental nature of the conspiracy charged". Cory J. nevertheless concluded, at p. 322, that:

... it is not incumbent upon the Crown to prove the involvement of every

member alleged to be part of the conspiracy. . . . If the conspiracy proven includes fewer members than the number of accused or extends over only part of the period alleged, then the conspiracy proven can still be said to be the same conspiracy as that charged in the indictment. In order to find that a specific conspiracy lies within the scope of the indictment, it is sufficient if the evidence adduced demonstrates that the conspiracy proven included some of the accused, establishes that it occurred at some time within the time frame alleged in the indictment, and had as its object the type of crime alleged.

The appellant was clearly able to ascertain the conspiracy alleged against him from a plain reading of the indictment and, in accordance with this Court's decision in *Douglas*, this ground of appeal must be dismissed.

17 For reasons to be discussed, it is important to note that, at this stage of the proceedings, the door is finally and firmly closed against both appellants on the question of guilt or innocence. The remaining issue is whether, notwithstanding the guilt of the appellants, the proceedings against them should be stayed because of abuse of process.

The Rule of Law

18 It is one of the proud accomplishments of the common law that everybody is subject to the ordinary law of the land regardless of public prominence or governmental status. As we explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at p. 240, the rule of law is one of the "fundamental and organizing principles of the Constitution", and at p. 258, it was further emphasized that a crucial element of the rule of law is that "[t]here is ... one law for all". Thus a provincial premier was held to have no immunity against a claim in damages when he caused injury to a private citizen through wrongful interference with the exercise of statutory powers by a provincial liquor commission: *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Professor F. R. Scott, who was counsel for the successful plaintiff, *Roncarelli*, in that case, subsequently observed in *Civil Liberties & Canadian Federalism* (1959), at p. 48:

... it is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law.

The principle was famously enunciated by Professor A. V. Dicey in *Introduction to the Study of the Law of the Constitution* (8th ed. 1927) as the second aspect of the "rule of law". This principle was noted with approval in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, at p. 1366:

It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty

of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

19 The argument of the appellants is that not only are the police subject to prosecution for their participation in the very transaction that gave rise to the charges on which the appellants have been found guilty, but (more importantly from their perspective) police illegality should deprive the state of the benefit of a conviction against them. It is relevant that in s. 37 of the Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, Parliament has specifically imposed on RCMP officers the duty to stay within the law, as follows:

37. It is incumbent on every member

- (a) to respect the rights of all persons;
- (b) to maintain the integrity of the law, law enforcement and the administration of justice;
- (c) to perform the member's duties promptly, impartially and diligently, in accordance with the law and without abusing the member's authority;

...

- (e) to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue.... [Emphasis added.]

It is recognized, of course, that police officers gain nothing personally from conduct committed in good faith efforts to suppress crime that incidentally violates the law the police are attempting to enforce. Nevertheless, the seeming paradox of breaking a law in order to better enforce it has important ramifications for the rule of law.

Test for Abuse of Process

20 In *R. v. Jewitt*, [1985] 2 S.C.R. 128, the Court set down what has since become the standard formulation of the test for abuse of process, per Dickson C.J., at pp. 136-37:

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young* [(1984), 40 C.R. (3d) 289], and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

This general test for abuse of process has been repeatedly affirmed: see *R. v. Keyowski*, [1988] 1

S.C.R. 657, at pp. 658-59; Mack, *supra*, at p. 941; Conway, *supra*, at p. 1667; R. v. Scott, [1990] 3 S.C.R. 979, at pp. 992-93; Power, *supra*, at pp. 612-15; R. v. T. (V.), [1992] 1 S.C.R. 749, at pp. 762-63; R. v. Potvin, [1993] 2 S.C.R. 880, at p. 915; and most recently in R. v. O'Connor, [1995] 4 S.C.R. 411, at p. 455.

21 Entrapment is simply an application of the abuse of process doctrine. Lamer J., in Mack, *supra*, set out the applicable test as follows, at pp. 964-65:

... there is entrapment when,

- (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
- (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

The trial judge concluded that she was "satisfied that the police acted on reasonable suspicion. That being so, the police were fully entitled to provide both accused with opportunities to commit the offences". There was ample evidence to support her finding. She also found that the police had not crossed the boundary line from providing opportunity to commit the offence into the forbidden territory of inducing commission of the offence. The appellants needed no inducement. Once the opportunity presented itself, they, not the police, were the driving force behind the making of the deal.

22 In the absence of any plausible case for entrapment, the appellants can only succeed on the more general ground of a serious violation of "[the community's sense of] fair play and decency ... disproportionate to the societal interest in the effective prosecution of criminal cases" (Conway, *supra*, at p. 1667). In this regard, the centrepiece of the appellants' argument, as stated, is the allegation of police illegality, and the refusal of the courts below to order disclosure of what the appellants consider to be relevant communications between Cpl. Reynolds and Mr. Leising of the Department of Justice relied on by the police to establish their "good faith".

The Issue of Police Illegality

23 The allegation that the police have put themselves above the law is very serious, with constitutional ramifications beyond the boundaries of the criminal law. This was not a trivial breach. In the end, the transaction was for 50 kilograms, but at the outset the police were trying to organize the sale of over a ton of cannabis resin. The failure of the police to make a deal on that scale was not for want of trying.

24 The effect of police illegality on an application for a stay of proceedings depends very much

on the facts of a particular case. This case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation. The problem confronting the police was well described by the Alberta Court of Appeal in *R. v. Bond* (1993), 135 A.R. 329 (leave to appeal refused, [1993] 3 S.C.R. v), at p. 333:

Illegal conduct by the police during an investigation, while wholly relevant to the issue of abuse of the court's processes, is not per se fatal to prosecutions which may follow: *Mack*; supra at 558. Frequently it will be, but situational police illegality happens. Police involve themselves in high speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess, and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary but, patently illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotelroom transoms and keyholes or waiting patiently at police headquarters to receive the confessions of penitent drug-traffickers.

The Crown contends, as it did in the courts below, that the police did not violate the Narcotic Control Act which at the time the reverse sting was initiated provided in s. 4 as follows:

4. (1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.

(2) No person shall have in his possession any narcotic for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for life.

"Traffic" is defined in the Narcotic Control Act as follows:

2. In this Act,

...

"traffic" means

(a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or

(b) to offer to do anything referred to in paragraph (a)

otherwise than under the authority of this Act or the regulations. [Emphasis added.]

25 The conclusion that the RCMP acted in a manner facially prohibited by the Act is inescapable. Their motive in doing so does not matter because, while motive may be relevant for some purposes, it is intent, not motive, that is an element of a full mens rea offence: see *Lewis v. The Queen*, [1979] 2 S.C.R. 821, at p. 831. The actus reus of the offence of trafficking is the making of an offer, and when accompanied by intent to do so, the necessary mens rea is made out: see *R. v. Mancuso* (1989), 51 C.C.C. (3d) 380 (Que. C.A.), at p. 390, leave to appeal refused, [1990] 2 S.C.R. viii. There is no need to prove both the intent to make the offer to sell and the intent to carry out the offer: see *R. v. Mamchur*, [1978] 4 W.W.R. 481 (Sask. C.A.). See also, e.g., *R. v. Sherman* (1977), 36 C.C.C. (2d) 207 (B.C.C.A.), at p. 208, upholding a conviction where there was evidence that the accused had offered to sell heroin to a person he knew was an undercover police officer, with a view to "rip off" the officer and not complete the sale. *Sherman* was later followed on this point in *Mancuso*, supra, at pp. 389-90, where the accused argued unsuccessfully that he did not intend actually to sell narcotics to a police informer, but really wished to steal his money.

Public Interest Immunity

26 The Crown submits that even if the conduct of the RCMP was facially prohibited by the terms of the Narcotic Control Act, no offence was committed because members of the RCMP are either part of the Crown or are agents of the Crown and as such partake of the Crown's public interest immunity. Such an argument is difficult to square with s. 3(1) of the Narcotic Control Regulations which authorizes the police to possess narcotics that come to them from "sting" operations:

3. (1) A person is authorized to have a narcotic in his possession where that person has obtained the narcotic pursuant to these Regulations and

...

(g) is employed as an inspector, a member of the Royal Canadian Mounted Police, a police constable, [or] peace officer ... and such possession is for the purposes of and in connection with such employment. . . .

Even though the authority is contained in a regulation rather than the Act itself, it is clear that the Regulation would be entirely unnecessary and superfluous if the Act did not apply to the police in the first place.

The Status of the Police

27 The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. In the case of the RCMP, one of the relevant statutes is now the Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10.

28 Under the authority of that Act, it is true, RCMP officers perform a myriad of functions apart from the investigation of crimes. These include, by way of examples, purely ceremonial duties, the protection of Canadian dignitaries and foreign diplomats and activities associated with crime prevention. Some of these functions bring the RCMP into a closer relationship to the Crown than others. The Department of the Solicitor General Act, R.S.C., 1985, c. S-13, provides that the Solicitor General's powers, duties and functions extend to matters relating to the RCMP over which Parliament has jurisdiction, and that have not been assigned to another department. Section 5 of the Royal Canadian Mounted Police Act provides for the governance of the RCMP as follows:

5. (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the [Solicitor General], has the control and management of the Force and all matters connected therewith.

29 It is therefore possible that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown. In this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law, was recognized by this Court in relation to municipal forces as long ago as *McCleave v. City of Moncton* (1902), 32 S.C.R. 106. That was a civil case, having to do with potential municipal liability for police negligence, but in the course of his judgment Strong C.J. cited with approval the following proposition, at pp. 108-9:

Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.

30 At about the same time, the High Court of Australia rejected the notion that a police constable was an agent of the Crown so as to enjoy immunity against a civil action for wrongful arrest. Griffith C.J. had this to say in *Enever v. The King* (1906), 3 C.L.R. 969, at p. 977:

Now, the powers of a constable, quâ peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him. If he arrests in a case in which the arrest may be made on view, the view must be his view, not that of someone else. ... A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.

31 Over 70 years later, Laskin C.J. in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at p. 322, speaking with reference to the status of a probationary police constable, affirmed that "we are dealing with the holder of a public office, engaged in duties connected with the maintenance of public order and preservation of the peace, important values in any society" (emphasis added). See also *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), at p. 65.

32 Similar sentiments were expressed by the Judicial Committee of the Privy Council in *Attorney-General for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457 (P.C.), another civil case dealing with the vicarious liability of the Crown, in which Viscount Simonds stated, at pp. 489-90:

[A constable's] authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master.

33 While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. As Lord Denning put it in relation to the Commissioner of Police in *R. v. Metropolitan Police Comr.*, *Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769:

I have no hesitation, however, in holding that, like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are

to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [Emphasis added.]

34 To the same effect, see the more recent Canadian cases of *R. v. Creswell*, [1998] B.C.J. No. 1090 (QL) (S.C.), which involves facts closer to those in the present appeal; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1989), 58 D.L.R. (4th) 396 (Ont. H.C.), affirmed (1990), 74 O.R. (2d) 225 (Div. Ct.); and *Perrier v. Sorgat* (1979), 25 O.R. (2d) 645 (Co. Ct.). A contrary conclusion was reached by Bielby J. of the Alberta Court of Queen's Bench in *Rutherford v. Swanson*, [1993] 6 W.W.R. 126, but her decision, I think, suffers from the frailty of failing to differentiate the different functions the RCMP perform, and the potentially different relationship of the RCMP to the Crown in the exercise of those different functions.

35 While these cases generally examine the relationship between the police and various governments in terms of civil liability, the statements made are of much broader import. It would make no sense in either law or policy to hold the police to be agents of the Crown for the purposes of allowing the Crown to shelter the police under its immunity in criminal matters, but to hold the police not to be Crown agents in civil matters to enable the government to resile from liability for police misconduct. The Crown cannot have it both ways.

36 Parenthetically, it should be noted that Parliament has provided in the Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50, s. 36, that:

36. For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown. [Emphasis added.]

A "deeming" section would not be necessary if it were the case that, at law, an RCMP officer was in any event a Crown servant for all purposes.

The Limitations on Crown Agency Expressed in *R. v. Eldorado Nuclear Ltd.*

37 Even if the police could be considered agents of the Crown for some purposes, and even if the Crown itself were not bound by the Narcotic Control Act, I agree with the Ontario Court of Appeal that in this case the police stepped outside the lawful ambit of their agency, and whatever immunity was associated with that agency was lost. This principle was elaborated upon by this Court in two cases decided in 1983, namely *Eldorado Nuclear*, *supra*, and *Canadian Broadcasting Corp. v. The Queen*, [1983] 1 S.C.R. 339. In the latter case, the CBC, which by its enabling statute is expressly constituted a Crown corporation, was nevertheless held subject to prosecution for broadcasting an

obscene film. This Court held that the CBC's conduct put it outside the scope of its agency, per Estey J., at p. 351:

... even if Crown immunity may be attributed to the appellant [CBC] in some circumstances, and the actions of the appellant in such circumstances attributed to the Crown, it does not necessarily follow that the immunities attendant upon the status of Crown agency will flow through to the benefit and protection of the appellant in all circumstances.

38 In *Eldorado Nuclear*, on the other hand, the Court concluded that two Crown corporations, namely *Eldorado Nuclear Limited* and *Uranium Canada Limited*, who were accused of being parties to an unlawful uranium cartel, could not be prosecuted under the *Combines Investigation Act*. They were acting pursuant to their corporate objects set out by Parliament in their respective constitutive statutes, and, in respect of acts done in furtherance of their statutory objects, the *Combines Investigation Act* had no application to them.

39 While it may be convenient and expeditious for the police to enforce the *Narcotic Control Act* by breaking it themselves under "controlled circumstances", such a strategy in the present case was not necessary to accomplish the RCMP's statutory mandate (*Eldorado Nuclear*, supra, at p. 568). Parliament made it clear in s. 37 of the *Royal Canadian Mounted Police Act*, that the RCMP must act "in accordance with the law". Parliament has made it clear that illegality by the RCMP is neither part of any valid public purpose nor necessarily "incidental" to its achievement. If some form of public interest immunity is to be extended to the police to assist in the "war on drugs", it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available, as indeed was done in 1996, after the events in question here, in s. 8 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

40 The respondent raises one further argument concerning the legality of the RCMP's conduct in engaging in the reverse sting operation. This argument consists of the bald assertion that the police have available to them a so-called "necessity" justification or defence as that term was used in *R. v. Salvador* (1981), 59 C.C.C. (2d) 521 (N.S.C.A.), per Macdonald J.A., at p. 542:

Generally speaking, the defence of necessity covers all cases where non-compliance with law is excused by an emergency or justified by the pursuit of some greater good.

It is not alleged that the RCMP conduct is such that it could be said to fall within one of the established "justification" defences (e.g., self-defence or defence of third parties) and the Crown offers no authority for the proposition that there exists (or should exist) in Canada a so-called "law enforcement" justification defence generally. The United States experience is mixed: see G. Greaney, "Crossing the Constitutional Line: Due Process and the Law Enforcement Justification" (1992), 67 *Notre Dame L. Rev.* 745. In any event, the author points out that the law justification defence "only applies if the 'conduct is within the reasonable exercise of the policeman's duty ...'"

(p. 784) and "... courts also look to an officer's adherence to state and federal laws when examining the reasonableness of the officer's conduct" (p. 787). The law enforcement justification is frequently raised in the United States in the context of federal law enforcement activity that complies with federal laws but breaches state laws. In such cases, the United States Supreme Court held in *In re Neagle*, 135 U.S. 1 (1890), per Miller J., at p. 68 and following, that the officer claiming the law enforcement justification must be performing an act that he or she is authorized by federal law to perform as part of police duties and that actions in violation of state law must be carefully circumscribed so as to do no more than is necessary and proper. See *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982), per Wood J., at p. 1350. It would therefore appear that in the United States a police officer would not be entitled to the law enforcement justification where, as here, the constitutive statute of the police force imposes on its members the duty to act "in accordance with the law" (Royal Canadian Mounted Police Act, s. 37).

41 In this country, it is accepted that it is for Parliament to determine when in the context of law enforcement the end justifies means that would otherwise be unlawful. As Dickson J. (as he then was) put it in *Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 248:

The Criminal Code has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function.

While it is true that Dickson J. was not addressing the issue of police illegality in that case, a general "law enforcement justification" would run counter to the fundamental constitutional principles outlined earlier. It should be emphasized that the police in this case were not acting in an emergency or other exigent circumstances. This was a premeditated, carefully planned attempt to sell a ton of hashish. If the Crown wishes to argue for specific relief against criminal or civil liability of the police in emergency or other exigent circumstances in a future case on facts where the argument fairly arises, the issue will be more fully addressed at that time. Such arguments have no application here.

Evidence of Police "Good Faith"

42 The conclusion that the police conduct in undertaking a reverse sting is, on the facts of this case, illegal does not of itself amount to an abuse of process or, to take it a step further, entitle the appellants to a stay. The legality of police action is but a factor, albeit an important factor, to be considered in the determination of whether an abuse of process has taken place: see *R. v. Lore* (1997), 116 C.C.C. (3d) 255 (Que. C.A.), at p. 271; *R. v. Matthiessen* (1995), 172 A.R. 196 (Q.B.), at pp. 209-10; and *Bond*, supra, at p. 333. Where the courts have found that the illegality or other

misconduct amounts to an abuse of process, it has by no means followed that a stay of proceedings was considered the appropriate remedy. In *R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Que. C.A.), for example, a stay was refused despite the finding that the police had participated in conduct that was said to be totally unacceptable, per Brossard J.A., at p. 371.

43 I should make it clear that even if it should turn out here that the police acted contrary to the legal advice provided by the Department of Justice (and we have no reason at this stage to believe this to be the case), there would still be no right to an automatic stay. Apart from everything else, the trial judge would still have to consider any other information or explanatory circumstances that emerge during the inquiry into whether the police or prosecutorial conduct "shocks the conscience of the community". In *Mack*, supra, Lamer J. considered that the need to grant some leeway to law enforcement officials to combat consensual criminal offences such as drug trafficking must be weighed against the courts' concern about law enforcement techniques that involve conduct that the citizenry would not tolerate. The underlying rationale of the doctrine of abuse of process is to protect the integrity of the courts' process and the administration of justice from disrepute: see *Mack*, at pp. 938 and 940. Lamer J. stated, at p. 939, that "the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens".

Relevance of Legislative Change

44 It was considered in the court below, and by the Quebec Court of Appeal in *Lore*, supra, at p. 271, that the immunity provisions of the new Controlled Drugs and Substances Act should be seen as confirmation that the use of reverse stings would not shock the conscience of the community in such a way as to constitute an abuse of process. The fact that Parliament has now enacted specific legislation permitting (in defined circumstances) the police to engage lawfully in the type of conduct at issue in this appeal confirms that the police conduct was not considered lawful by Parliament prior to the amendments' being made. The Interpretation Act, R.S.C., 1985, c. I-21, s. 10, provides that "[t]he law [is] always speaking", and Parliament's view at the relevant time was embodied in its then existing enactments. At the material time, Parliament had enacted that conduct otherwise illegal could be done lawfully "under the authority of this Act or the regulations", and under the regulations the police were authorized to possess but not to sell controlled drugs. Judicial notice can certainly be taken of continuing public concern about the drug trade, and in a general way of the difficulties of successfully employing traditional police techniques against large-scale crime organizations. There is little need in this case to resort for evidence of public concern to legislative amendments that were not made until two years after the trial. Nevertheless, given that the test in *Mack* calls for a broad inquiry into the balance of public interests, I would not want to exclude the possibility that after-the-fact legislation may throw some light on community acceptance of a reverse sting operation. It was but a short step from the existing regulatory authority to possess drugs as a result of a sting to the desired regulatory authority to sell drugs in the context of a reverse sting. One of the purposes of the balancing exercise discussed by L'Heureux-Dubé J. in *O'Connor*, supra, at paras. 129-30, is to put misconduct by the authorities, worrisome as it may be, in a larger societal perspective.

45 The point here, however, is slightly different. Superadded to the issue of illegal conduct is the possibility of a police operation planned and executed contrary to the advice (if this turns out to be true) of the Department of Justice. The suggestion is that the RCMP, after securing the relevant legal advice, nevertheless put itself above the law in its pursuit of the appellants. The community view of the police misconduct would, I think, be influenced by knowing whether or not the police were told in advance by their legal advisers that the reverse sting was illegal. Standing by itself, therefore, the subsequent 1996 enactment addresses only part of the issue.

The Assertion of Police Good Faith Was Based in Part on Advice Received from the Department of Justice

46 Counsel for the Crown has invited the Court to evaluate the police conduct throughout the reverse sting and submits their actions do not constitute an abuse of process. One of the issues is good faith, as discussed in A. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993), at pp. 107-118. As evidence of the fact that the reverse sting was undertaken "with the purest of motives", the Crown has pointed out that the reverse sting proposal went through between 9 and 14 stages of approval before finally being authorized. The reverse sting operation was carefully planned, narrowly targeted, and ensured that no hashish actually changed hands, and thus never entered the criminal black market. Most importantly for present purposes is the fact that the Crown emphasized the good faith reliance of the police on legal advice. In the factum prepared for the Ontario Court of Appeal, for example, the argument was put as follows:

26. The conduct of the R.C.M.P. in the present case falls far short of conduct that has hitherto received the courts' seal of approval. In the case at bar, as in the aforementioned case law, there has been no abuse of process or any conduct by the police that could "shock the conscience of the community". In particular, regard must be had to the following considerations:

...

- (f) The R.C.M.P. based, at least in part, the legality of there [sic] investigatory techniques on valid case law (R. v. Lore, unreported, Quebec Superior Court, 26 February, 1991, Pinard, J.S.C.) and consulted with the Department of Justice with regard to any problems of illegality. [Emphasis added.]

The RCMP's reliance on legal advice was thus invoked as part of its "good faith" argument. The privilege belonged to the client, and the RCMP joined with the Crown to put forward that position. While not explicitly stated in so many words, the plain implication sought to be conveyed to the appellants and to the courts was that the RCMP accepted the legal advice they were given by the Department of Justice and acted in accordance with it. The credibility of a highly experienced departmental lawyer was invoked to assist the RCMP position in the abuse of process proceedings.

47 The Crown now says that the content of communications between the police and the Department of Justice could not affect the issue as to whether the conduct of the RCMP gave rise to an abuse of process. The Crown says it does not matter what the RCMP were told as to the legality of the reverse sting operation the RCMP planned. Assuming the worst, the Crown says, no stay is warranted. On this point they rely on the analysis of the Court of Appeal, already quoted at para. 13, that if it were shown that the RCMP "moved ahead on their own as mavericks" (p. 197) despite legal advice to the contrary, it would be "of about equal weight" to a situation where the RCMP acted on a positive legal opinion that what they proposed to do would be lawful. With respect, I do not agree. A police force that chooses to operate outside the law is not the same thing as a police force that made an honest mistake on the basis of erroneous advice. We have no reason to think the RCMP ignored the advice it was given, but as the RCMP did make an issue of the legal advice it received in response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated.

48 It appears, therefore, that the only satisfactory way to resolve the issue of good faith is to order disclosure of the content of the relevant advice. This should be done (for the reasons to be discussed) on the basis of waiver by the RCMP of the solicitor-client privilege. It would be convenient, however, to address beforehand three additional contentions by the appellants. They say that disclosure of the communications between Cpl. Reynolds and the Department of Justice ought never to have been withheld in the first place because (a) no solicitor-client relationship exists between Department of Justice lawyers and police officers and therefore no privilege ever arose in this case, or, if such a relationship did exist, the communications at issue in the present case fell within either (b) the future crimes or (c) full answer and defence exceptions to the privilege.

(a) Existence of a Solicitor-Client Relationship between the RCMP Officers and Lawyers in the Department of Justice

49 The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. As Lamer C.J. stated in *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289:

The prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication....

See also *Smith v. Jones*, [1999] 1 S.C.R. 455, per Cory J., at para. 46, and per Major J., at para. 5. This Court had previously, in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 872, adopted

Wigmore's formulation of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality (Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), sec. 2292, at p. 554):

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived. [Emphasis and numerotation deleted.]

Cpl. Reynolds' consultation with Mr. Leising of the Department of Justice falls squarely within this functional definition, and the fact that Mr. Leising works for an "in-house" government legal service does not affect the creation or character of the privilege.

50 It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), per Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:

[I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that Mr. Leising is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges. This rule is well established, as set out in *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise* (No. 2), [1972] 2 All E.R. 353 (C.A.), per Lord Denning, M.R., at p. 376:

Many barristers and solicitors are employed as legal advisers, whole time, by a

single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.

51 It is true that the Minister of Justice, who is ex officio the Attorney General of Canada, has a special legislated responsibility to ensure that "the administration of public affairs is in accordance with law", and in that respect he or she is not subject to the same client direction as private clients: see Department of Justice Act, R.S.C., 1985, c. J-2, s. 4. We are not, however, concerned in this case with any conflict that may arise between the Minister and one of the "client departments". Here, the Attorney General and the RCMP are united in asserting the privilege.

52 In the United States, the courts have recognized that solicitor-client privilege attaches to communications between government employees and government lawyers that fulfill the Wigmore conditions mentioned in Descôteaux, supra. The point is made, for example, by the authors of the Restatement (Restatement (Third) of the Law Governing Lawyers, sec. 124 (Proposed Final Draft No. 1, 1996)), as follows:

Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization ... and of an individual officer ... of a governmental organization.

It is possible that in the United States the application of the privilege to government counsel may be circumscribed differently than in this country owing to the structure of the United States Constitution and government: see, e.g., the discussion of the U.S. Court of Appeals, District of Columbia Circuit, in the context of an investigation of alleged criminal conduct by government officials in *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998). In this country as well, the solicitor-client privilege may operate differently in some respects because of the public interest aspect of government administration, but such differences are not relevant to this appeal.

53 In support of their assertion that no privilege exists in respect of communications between the police and Crown counsel in the course of a criminal investigation, the appellants rely upon *Re Girouard and the Queen* (1982), 68 C.C.C. (2d) 261 (S.C.B.C.), and *R. v. Ladouceur*, [1992] B.C.J. No. 2854 (QL) (S.C.). *Girouard* concerned the admissibility of the details of a conversation between Crown counsel and a police officer who was to be a Crown witness in the hallway outside the courtroom on the day of a preliminary inquiry. The conversation was overheard by defence counsel. The B.C. Supreme Court held, *inter alia*, that because the conversation had been overheard, any privilege that might have existed had been waived.

54 *Girouard* advocates the proposition that communications as to the question of identification between a police officer who is to be a Crown witness and Crown counsel are not protected by solicitor-client privilege. This seems to be based on the Court's view that because a police officer was not an agent of the Attorney General, no solicitor-client relationship could exist between a Crown counsel and a police officer. I disagree with this analysis. The existence of an agency relationship is not essential to the creation of solicitor-client privilege. In seeking advice from a lawyer about the exercise of his original authority that "cannot be exercised on the responsibility of any person but himself" (*Enever*, *supra*, p. 977), Cpl. Reynolds satisfied the conditions precedent "to the existence of the right of the lawyer's client to confidentiality" (*Descôteaux*, *supra*, p. 872). Subject to what is said below, when Mr. Leising of the Department of Justice initially advised Cpl. Reynolds about the legality of a reverse sting operation, these communications were protected by solicitor-client privilege.

(b) The "Future Crimes and Fraud" Exception

55 It is well established, as the appellants argue, that there is an exception to the principle of confidentiality of solicitor-client communications where those communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime. The exception was noted by Dickson J. in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 835-36:

More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

56 The Court of Appeal concluded, at p. 200, that the "future crimes" exception applied because it was a "fair inference" from a memorandum dated June 1991 "that the lawyer was offering advice which, even given the utmost good faith, was being utilized by Corporal Reynolds in the planning of the venture". A distinction must be drawn, I think, between the evidence of Cpl. Reynolds and related documents, on the one hand, and the position taken by the Crown and the RCMP before the

courts in this case, on the other hand. The testimony of Cpl. Reynolds was that he did not require legal advice "to plan the venture". He already knew about reverse sting operations. Nor did he seek the advice to "facilitate" the crime. He sought advice as to whether or not the operation he had in mind was lawful. This is the sort of transaction advice sought every day from lawyers. In my view, the privilege is not automatically destroyed if the transaction turns out to be illegal. As noted above, Dickson J., in Solosky, at p. 835, referred to *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, as "[t]he classic case" on this point. In that case, a judgment debtor consulted a solicitor about the vulnerability of assets to seizure. The solicitor's advice was essentially that it could not be done without a bona fide sale of the property in question. Later, when the judgment creditor attempted to realize against the assets, they had been sold. It was alleged that the sale was fraudulent as having been entered into in an attempt to deprive the judgment creditor of the fruits of his judgment. The solicitor was called as a witness and compelled to testify about the advice he had given. Stephen J., for the court on appeal, after affirming the importance of the solicitor-client privilege, went on to discuss the limits of this doctrine as follows, at p. 168:

In order that the rule [the solicitor-client privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.
[Emphasis added.]

The court found in that case that although the solicitor was not an active part of the conspiracy to defraud the creditor, he had been duped by his clients, and the privilege was destroyed.

57 The language of the court in *Cox and Railton* ("... if the client has a criminal object in view in his communications with his solicitor..") implied that this exception can only apply where a client is knowingly pursuing a criminal purpose, and it is so laid down by Professor Wigmore (*Wigmore on Evidence*, supra, sec. 2298, at p. 573) where he gives an affirmative answer to the question, "Must . . . the advice be sought for a knowingly unlawful end?" (Emphasis in original.)

58 Although the issue has apparently not been directly considered in the Canadian case law, the Wigmore view was subsequently espoused by the authors of "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 Harv. L. Rev. 730, where they state as follows, at pp. 730-31:

The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is

sought in activity that the client knows to constitute a crime or tort. [Emphasis added.]

The scope of the "future crimes" exception is circumscribed on a public policy basis, as explained at p. 731:

The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged. Moreover, counseling against unfounded claims or illegal projects is an important part of the lawyer's function. [Emphasis added.]

59 This explanation is consistent with the statement of the principle of Lamer J. in *Descôteaux*, *supra*, at p. 881:

Confidential communications, whether they relate to financial means or to the legal problem itself, lose that character if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime.

The exception to the formation of the privilege was elaborated upon by Lord Parmoor in *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at p. 621:

The third point relied on by the appellant, as an answer to the claim of professional privilege, is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle, there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud, or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. [Emphasis added.]

60 A leading U.S. case that considers this question is *State ex rel. North Pacific Lumber Co. v. Unis*, 579 P.2d 1291 (Or. 1978). In that case, it was alleged that an employer illegally eavesdropped on an employee's telephone conversations. The employer stated that before undertaking this eavesdropping, it had sought legal advice and it claimed solicitor-client privilege over these communications. The employee sought the disclosure of this advice, but disclosure was refused. The court made the following pertinent comment, at p. 1295:

We approve of the requirement that, in order to invoke the exception to the

privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper. [Emphasis added.]

61 In the present case, the only evidence of RCMP knowledge, constructive or otherwise, is the testimony of Cpl. Reynolds who insists that he believed the reverse sting operation to be lawful. In light of his prior study of the Superior Court decision in *Lore*, supra, it cannot fairly be said that Cpl. Reynolds "knew or should have known that the intended conduct was unlawful" at the time he approached Mr. Leising. Nor does the evidence establish that Mr. Leising was a "conspirator or a dupe". There is therefore no basis in Cpl. Reynold's evidence to suggest that in this case the solicitor-client privilege never came into existence.

62 The question remains whether the privilege was destroyed when the RCMP sold hashish to the appellants. It is argued by the authors of "The Future Crime or Tort Exception to Communications Privileges", supra, at p. 731, that a "subsequent formation of criminal intent should be held to destroy a preexisting privilege". This would suggest that proof of a crime which, except in offences of absolute liability, entails proof of intent, would automatically destroy the privilege in every case. Such a proposition could have a very broad impact, for example, in the field of regulatory crimes and offences. In my view, destruction of the privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator". The evidence of Cpl. Reynolds does not establish such things, but the formal position of the Crown, with the support of the RCMP, goes beyond his evidence. The RCMP position before the Court was that the decision to proceed with the reverse sting had been taken with the participation and agreement of the Department of Justice. By adopting this position, the RCMP belatedly brought itself within the "future crimes" exception, and put in question the continued existence of its privilege.

63 If there had been no waiver of privilege by the RCMP in this case, I would have taken the view that any papers documenting the legal advice (or, if there was no contemporaneous documentation, an affidavit setting out the content of the relevant advice) ought to be provided in the first instance to the trial judge. If he or she were satisfied, either on the basis of the documents themselves or on the basis of the documents supplemented by other evidence, that the documented advice could be fairly said in some way to have facilitated the crime, the documents would then be provided to the appellants. If the lawyer had merely advised about the legality of the operation, and thereby made himself neither dupe nor conspirator in the facilitation of a crime, the proper course would have been to return the papers to the RCMP.

64 In this case, however, I think the RCMP did waive the privilege, as discussed below. The relevant solicitor-client communications that came within the scope of the waiver ought therefore to

be turned over directly to the appellants without the need in the first instance of a two-stage procedure involving the trial judge.

(c) Full Answer and Defence

65 Another exception to the rule of confidentiality of solicitor-client privilege may arise where adherence to that rule would have the effect of preventing the accused from making full answer and defence: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 340; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at p. 43; *R. v. Gray* (1992), 74 C.C.C. (3d) 267 (B.C.S.C.), at pp. 273-74. The Crown concedes the validity of the principle, but suggests that it is irrelevant to an abuse of process application because it applies only where "innocence is at stake", which is no longer the case in the present appeal. Where innocence is not at stake, the Crown contends, the accused's right to make full answer and defence is not engaged. In this connection, the Crown relies upon *R. v. Seaboyer*, [1991] 2 S.C.R. 577, per McLachlin J., at p. 607, and *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, per L'Heureux-Dubé J., at p. 561. I do not think these cases can be taken as deciding an issue that was not before the Court on those occasions. The Ontario Court of Appeal concluded at p. 200 that the full answer and defence exception applied because "the entire jeopardy of the appellants remained an open issue until disposition of the stay application". This may be true, but the appellants were not providing "full answer and defence" to the stay application. On the contrary, the appellants are the moving parties. The application is being defended by the Crown. The appellants' initiative in launching a stay application does not, of itself, authorize a fishing expedition into solicitor-client communications to which the Crown is a party.

66 As stated, the present appeal is decided on the basis of waiver of solicitor-client privilege and I leave for another day the decision whether, in the absence of waiver, full answer and defence considerations may themselves operate to compel the disclosure of solicitor-client privilege of communications in an abuse of process proceeding and, if so, in what circumstances.

Waiver of Solicitor-Client Privilege

67 The record is clear that the RCMP put in issue Cpl. Reynolds' good faith belief in the legality of the reverse sting, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP factum in the Ontario Court of Appeal has already been quoted in para. 46. In my view, the RCMP waived the right to shelter behind solicitor-client privilege the contents of the advice thus exposed and relied upon. I characterize the RCMP rather than Cpl. Reynolds as the client in these circumstances because even though he was exercising the duties of his public office as a police officer, Cpl. Reynolds was seeking the legal advice in the course of his RCMP employment. The identification of "the client" is a question of fact. There is no conceptual conflict between the individual responsibilities of the police officer and characterizing the "client" as the RCMP. Despite the existence of the Royal Canadian Mounted Police Act and related legislation, I believe the relationship among individual policemen engaged in criminal investigations is accurately set out in Halsbury's Laws of England (4th ed. 1981), vol. 36, at p. 107:

The history of the police is the history of the office of constable and, notwithstanding that present day police forces are the creation of statute and that the police have numerous statutory powers and duties, in essence a police force is neither more nor less than a number of individual constables, whose status derives from the common law, organised together in the interests of efficiency.

If Cpl. Reynolds himself were characterized as the client, it could be said that sharing the contents of that advice with his fellow officers would have breached the confidentiality and waived the privilege, which would be absurd. At the same time, if the legal advice were intentionally disclosed outside the RCMP, even to a department or agency of the federal government, such disclosure might waive the confidentiality, depending on the usual rules governing disclosure to third parties by a client of communications from its solicitor.

68 It is convenient to recall at this point that at the time of the original disclosure motions, the position of the appellants was clear, i.e., disclose the communications or forswear reliance upon them. Notwithstanding this caution, the RCMP and their legal counsel chose to rely upon the communications to support their argument of good faith reliance. In doing so, the privilege was waived.

69 In *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A.), the bank put a defaulting customer into receivership, and the customer sued both the bank and the receiver, who then launched third party proceedings at each other. The bank said it had relied on the receiver's advice in putting the customer into receivership. The receiver denied detrimental reliance on its advice, and wanted to know what other professional advice the bank had received at the relevant time. In particular, the receiver wanted to know what legal advice the bank had received from its own lawyers, MacKimmie Matthews. The bank claimed solicitor-client privilege over this correspondence. In rejecting the bank's claim of privilege, the court, per Hutcheon J.A., stated as follows, at p. 513:

The issue in this case is not the knowledge of the bank. The issue is whether the bank was induced to take certain steps in reliance upon the advice from the receiver on legal matters. To take one instance, the receiver, according to the bank, advised the bank that it was not necessary to allow Abacus [the plaintiff debtor] time for payment before the appointment of the receiver. A significant legal decision had been rendered some months earlier to the opposite of that advice. The extent to which the bank had been advised about that decision, not merely of its result, is important in the resolution of the issue whether the bank relied upon the advice of the receiver. [Emphasis added.]

The Court goes on to adopt the reasoning of the United States District Court for the District of Columbia in *United States v. Exxon Corp.*, 94 F.R.D. 246 (1981) as follows, at pp. 248-49:

Most courts considering the matter have concluded that a party waives the

protection of the attorney-client privilege when he voluntarily injects into the suit the question of his state of mind. For example, in *Anderson v. Nixon*, 444 F.Supp. 1195, 1200 (D.D.C. 1978), Judge Gesell stated that as a general principle "a client waives his attorney-client privilege when he brings suit or raises an affirmative defense that makes his intent and knowledge of the law relevant."

...

Thus, the only way to assess the validity of Exxon's affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon's interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives.

It appears the court in *Rogers* found that any privilege with respect to correspondence with the bank's solicitors had been waived as necessarily inconsistent with its pleading of reliance, even though the bank itself had not referred to, much less relied upon, the existence of advice from its own solicitors.

70 The present case presents a stronger argument for waiver than *Rogers*. The Crown led evidence from Cpl. Reynolds about his knowledge of the law with respect to reverse sting operations - he testified that he had read the Superior Court decision in *Lore*, supra, and was of the view that the operation in question was legal. But Cpl. Reynolds also testified, in answer to the appellants' counsel, that he sought out the opinion of Mr. Leising of the Department of Justice to verify the correctness of his own understanding. The appellants' counsel recognized that this alone was not enough to waive the privilege. Cpl. Reynolds was simply responding to questions crafted by the appellants, as he was required to do. Appellants' counsel accepted that he had no right at that point to access the communications. His comment to the judge was simply that "I certainly don't want to hear the argument that 'Oh well, the police acted in good faith because they acted on legal advice'". The critical point is that the Court did hear that precise argument from the Crown at a later date. The RCMP and its legal advisers were explicit in their factum in the Court of Appeal, where it was argued that "regard must be had to the following considerations ... (f) The R.C.M.P. ... consulted with the Department of Justice with regard to any problems of illegality" (emphasis added). We understand that the same position was advanced to the trial judge. As *Rogers*, supra, shows, it is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communications of which it forms a part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. The clear implication sought to be conveyed to the court by the RCMP was that Mr. Leising's advice had assured the RCMP that the proposed reverse sting was legal.

71 Cpl. Reynolds was not required to pledge his belief in the legality of the reverse sting operation (comparable to the bank's putting in issue its belief in the correctness of the advice it was obtaining from the receiver in Rogers, *supra*). Nor was it necessary for the RCMP to plead the existence of Mr. Leising's legal opinion as a factor weighing against the imposition of a stay of proceedings (which went beyond what was done in Rogers). The RCMP and the Crown having done so, however, I do not think disclosure of the advice in question could fairly be withheld.

Result of Non-Disclosure

72 Having found that the requested communications ought to have been disclosed at trial, the Court of Appeal nevertheless excused non-disclosure on the basis that it was willing to "assume the worst" against the Crown, observing at p. 197 that "[o]n any version there is no avoiding that this was very serious misconduct which should not be condoned by the courts in the sense of giving any encouragement to its repetition".

73 I do not agree, with respect, that non-disclosure of information clearly relevant to the good faith reliance issue can properly be disposed of by adverse inferences. The appellants were entitled to disclosure. The Court of Appeal said that it was prepared to assume the worst against the RCMP and on that basis felt able to use s. 686(1)(b)(iii) of the Code to uphold the decision of the trial judge. The difference between my approach and that of the Court of Appeal is that in my view, with respect, a Department of Justice opinion pronouncing the reverse sting to be unlawful would weigh differently in the balancing of community values than a Department of Justice opinion to the opposite effect. Police illegality of any description is a serious matter. Police illegality that is planned and approved within the RCMP hierarchy and implemented in defiance of legal advice would, if established, suggest a potential systemic problem concerning police accountability and control. The RCMP position, on the other hand, that the Department of Justice lent its support to an illegal venture may, depending on the circumstances, raise a different but still serious dimension to the abuse of process proceeding. In either case, it is difficult to assume "the worst" if neither alternative has been explored to determine what "the worst" is. Because the RCMP made a live issue of the legal advice it received from the Department of Justice, the appellants were and are entitled to get to the bottom of it.

Disclosure Direction

74 The relevant legal advice received by Cpl. Reynolds should be disclosed to the appellants. This is not an "open file" order in respect of the RCMP's solicitor and client communications. The only legal advice that has to be disclosed is the specific advice relating to the following matters identified by Cpl. Reynolds:

1. The legality of the police posing as sellers of drugs to persons believed to be distributors of drugs.
2. The legality of the police offering drugs for sale to persons believed to be distributors of drugs.

3. The possible consequences to the members of the RCMP who engaged in one or both of the above, including the likelihood of prosecution.

While Cpl. Reynolds also sought advice from Mr. Leising about other matters, including the legality of any release of a sample of hashish to potential buyers, advice in these respects need not be disclosed as they do not relate to a live issue at this stage of the case. If the relevant advice is documented, those portions of the documents that deal with extraneous matters or that describe police methods of criminal investigation may be masked. All that is required is disclosure to the appellants of the bottom line advice to confirm or otherwise the truth of what the courts were advised about the legal opinions provided by the Department of Justice. If there is a dispute concerning the adequacy of disclosure, the disputed documents or information should be provided by the Crown to the trial judge for an initial determination whether this direction has been complied with. The trial judge should then determine what, if any, additional disclosure should be made to the appellants.

75 If it turns out that Mr. Leising simply erred in connection with this particular opinion, disclosure will support the RCMP officers' claim that they acted in good faith on legal advice, and the application for a stay of proceedings will have to be dealt with on that basis.

Nature of the New Trial

76 Even if it is established that the RCMP proceeded with the reverse sting contrary to the legal advice from the Department of Justice, the result would not automatically be a stay of proceedings. The test in *Mack* would still apply. The RCMP used its alleged good faith reliance on the Department of Justice legal advice to neutralize or at least blunt any finding of police illegality. If it were determined that the police did not rely on Department of Justice advice, the result would be a finding of police illegality without extenuating circumstances. As discussed in paras. 42 and 43, police illegality does not automatically give rise to a stay of proceedings.

77 If it should turn out that the reverse sting was launched despite legal advice to the contrary, I think this would be an aggravating factor. However, to repeat, it will be up to the trial judge to determine whether or not a stay is warranted in light of all the circumstances, including the countervailing consideration that police conduct did not lead to any serious infringement of the accused's rights, the RCMP was careful to keep control of the drugs and ensure that none went on the market, and the acknowledged difficulty of combatting drug rings using traditional police methods.

78 In *R. v. Pearson*, [1998] 3 S.C.R. 620, this Court accepted that in entrapment applications where the innocence of the accused is no longer a live issue, a new trial may be limited to the stay of proceedings application. The authority to make such an order under ss. 686(2) and (8) is explained in *Pearson*, at para. 16:

... the quashing of the formal order of conviction does not, without more, entail

the quashing of the underlying verdict of guilt. In most successful appeals against conviction, the court of appeal which quashes the conviction will also overturn the finding of guilt; however, the latter is not a legally necessary consequence of the former. Under s. 686(8), the court of appeal retains the jurisdiction to make an "additional order" to the effect that, although the formal order of conviction is quashed, the verdict of guilt is affirmed, and the new trial is to be limited to the post-verdict entrapment motion.

As entrapment is simply one form of abuse of process, the same approach should be adopted in the present case.

Conclusion

79 The appeal is allowed in part, a new trial is ordered limited to the issue of whether a stay of proceedings should be granted for abuse of process. The respondent is ordered to disclose to the appellants the materials referred to in para. 74 of these reasons in advance of the retrial.

cp/d/hbb

Case Name:

Telus Communications Inc. v. Canada (Attorney General)

Between

**Telus Communications Inc., appellant, and
Attorney General of Canada, respondent**

[2004] F.C.J. No. 1918

[2004] A.C.F. no 1918

2004 FCA 380

2004 CAF 380

329 N.R. 96

135 A.C.W.S. (3d) 219

Docket A-364-04

Federal Court of Appeal
Ottawa, Ontario

Linden J.A.

Heard: In writing.

Judgment: November 12, 2004.

(23 paras.)

Practice -- Discovery -- What documents must be produced -- Privileged documents, attorney-client communications.

Application by the applicant Telus Communications for full disclosure of a memorandum by the respondent Canadian Radio-television and Telecommunications Commission. A previous order required the CRTC to deliver two memoranda, dated March 26, 2004 and April 7, 2004 to Telus, subject to any claims of privilege. The CRTC delivered the April 7, 2004 memorandum in its entirety but delivered the March 26, 2004 memorandum in an abridged fashion, claiming

solicitor-client privilege over the excised portion. The excised portion was drafted by legal counsel in the telecommunications directorate of the CRTC and referred to staff analysis and recommendations. The CRTC relied on the telecommunications directorate to obtain legal advice and forward it to the responsible officials.

HELD: Application dismissed. The telecommunications directorate was not a third party as it obtained legal advice on behalf of the CRTC. It was akin to an agent. The paragraphs were written by legal counsel in his capacity as counsel and not in some other government capacity. The legal advice was intended to be confidential. The privilege was not lost merely because the communication of the legal advice to the CRTC was done by an agent.

Counsel:

Written representations by:

John Lowe, for the appellant/applicant.

John S. Tyhurst, for the respondent.

REASONS FOR ORDER

1 LINDEN J.A.:-- This application by Telus Communication Inc. ("TCI") follows an Order dated September 23, 2004, whereby I ordered that two memoranda, dated March 26, 2004 and April 7, 2004, be delivered by Canadian Radio-television and Telecommunications Commission ("CRTC") to the Registry and served on TCI, subject to any claims of privilege. Pursuant to that order, the CRTC has delivered the April 7, 2004 memorandum in its entirety, but has delivered the March 26, 2004 memorandum (the "memo") in an abridged fashion claiming solicitor-client privilege over the excised portion, specifically, paragraphs 16 to 21 of the memo. This application seeks the release of the entire memorandum on the basis that the privilege does not protect the material in question.

FACTS

2 The undisputed affidavit evidence is that paragraphs 16 to 21 of the memo were actually drafted by James Wilson, Legal Counsel in the Legal Directorate of the CRTC. Counsel in the Legal Directorate routinely provide legal advice to the CRTC and appear on behalf of the CRTC in its proceedings and before the courts.

3 The material contained in paragraphs 16 to 21 was prepared at the request of Rosemary Bernath and Brenda Stevens following a meeting between them and Mr. Wilson. Ms. Bernath and Ms.

Stevens both work in the Telecommunications Directorate of the CRTC. The evidence suggests that the Commission relies on the Telecommunications Directorate, to obtain legal advice on its behalf and to forward that advice in the form of a recommendation. Therefore, part of the work done by the Telecommunications Directorate for the Commission is obtaining legal advice and transmitting it to the Commission.

4 The memo in question, which I have viewed in confidence, is addressed to "Telecommunications Committee" and states that it is from "Rosemary Bernath". It is signed by Shirley Soehn -- Executive Director Telecommunications. It is 21 paragraphs in length. The excised section of the memo, paragraphs 16 to 21, has as a heading underlined "Staff Analysis and Recommendations". In the upper right hand corner of the memo the word "PROTECTED" appears in capitals in a box entitled "Security Classification".

THE LAW OF SOLICITOR-CLIENT PRIVILEGE IN BRIEF

5 Solicitor-client privilege is essential to the Canadian Justice system. All clients of the legal profession must be able to obtain full and frank legal advice without the fear that their communications will be used against them.

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented (See *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 2).

6 In *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860 at 892-93, Lamer C.J. summarized the privilege in this way:

In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communication are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

7 While privilege is often discussed in terms of protecting from disclosure the communications

made by the client to the lawyer, communications by the lawyer to the client is equally protected by the privilege.

...if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist if what they said could be used in evidence against him. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. (emphasis added -- paragraph 9 of *Susan Hosiery Ltd. v. Canada (Minister of National Revenue)*, [1969] 2 Ex. C.R. 27 per Jockett P.).

8 Privilege applies not only where legal advice is given to clients by legal practitioners in the realm of private law or criminal law, but also by in-house counsel, including government in-house counsel:

It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is 'in house' does not remove the privilege, or change its nature. (*Pritchard v. Ontario Human Rights Commission*, [2004] S.C.J. No. 16, 2004 SCC 31 at para. 21.)

9 In fact, courts have recognized the importance of legal counsel in advising governmental decision makers:

Statutory decision-makers, who are often persons with technical expertise in a particular area but not lawyers, need confidential legal advice with respect to the interpretation of relevant legislation and other legal issues in order to facilitate candid discussions. (See *Pritchard v. Ontario Human Rights Commission* (2003), 63 O.R. (3d) 97, at p. 111.)

10 Since in-house and government lawyers are often employed in multiple capacities it is important to bear in mind that only communications in their capacities as lawyers can be privileged. Communications for other purposes, such as the giving of business or policy advice, does not fall within the umbrella of privilege. (*R. v. Campbell*, [1999] 1 S.C.R. 565.) Whether a particular communication is covered by privilege in this context has to be assessed on a case by case basis. It will depend "on the nature of the relationship, the subject matter of the advice and the circumstance in which it is sought and rendered" (*Minter v. Priest*, [1929] 1 K.B. 655 (C.A.) at pp. 668-669 as cited in *R. v. Campbell* at paragraph 50).

11 Both sides agree that the criteria required to establish privilege are set out by Dickson J. in

Solosky v. The Queen, [1980] 1 S.C.R. 821, at p. 837:

- (I) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice, and (iii) which is intended to be confidential by the parties.

12 Once privilege is established it is broad and all-encompassing. It will cover all communications that fall within the usual and ordinary scope of the professional relationship. Both oral and written communications are covered by the doctrine of privilege.

COMMUNICATION BETWEEN SOLICITOR AND CLIENT

13 The undisputed evidence is that the material in paragraphs 16 to 21 was authored by Mr. Wilson, an in-house lawyer. It was then provided to the Telecommunications Directorate which in turn passed it on to the Commission by incorporating it unchanged into the memorandum in question. That is, the legal advice prepared by Mr. Wilson was merely forwarded to the Commission through its Telecommunications Directorate.

14 It is necessary to determine whether the Telecommunications Directorate should be considered a third party or whether it is more properly described as an agent of the Commission, as legal advice made through an agent is treated differently than legal advice made through a third party.

15 Legal advice that is disclosed to a third party may lose its privileged status. On the other hand, legal advice that is communicated to the client through an agent will normally be treated as legal advice to the client themselves. In *Susan Hosiery (supra)* communications between two accountants and a lawyer were deemed to be privileged because the accountants were obtaining legal advice on behalf of the client.

16 Similarly, in a more recent case, legal documents prepared by an accountant were held to be privileged to the extent that they consisted of "passing along to the principal legal advice given to the agent, notes made of legal advice given at meetings with counsel and legal strategy based on the legal advice" (*Alberta (Provincial Treasurer) v. National Bank of Canada* (1995), 172 A. R. 282 at para. 113). Again, the accountant was found to be acting as an agent of the client.

17 In *Sunwell Engineering Co. et al v. Mogilevsky et al* (1986), 9 C.P.R. (3d) 479, two documents were found to be privileged. The first was a letter written by a solicitor but sent first to a patent agent before being passed on to the client. The second was a letter from the patent agent to the client. Both documents were held to be privileged since the patent agent was found to be an agent of the client. Master Peppiatt explained the rationale behind the agency rule:

...when a solicitor deals with a client through an agent those communications are just as privileged as if they were directly between the solicitor and the client,

notwithstanding the fact that the communications between the agent and the client would not be privileged.

I think that this is a common sense principle. Little would be accomplished if a client in order to give his solicitor the benefit of his accountant's knowledge had to have the accountant tell it to him, either orally or in writing, to be passed on to the solicitor and, when the solicitor finds it necessary to communicate with the client's accountant he must communicate with the client to be passed on to the accountant, a process which would increase time and expense as well as the risk of misunderstanding. (see page 485).

18 These principles apply here. The Telecommunications Directorate is not a third party. The Commission relies on its Telecommunications Directorate to obtain legal advice and to forward it to the responsible officials. The Telecommunications Directorate obtains legal advice on behalf of the Commission. To require the Commission to deal with its Legal Directorate and its Telecommunications Directorate separately would be inefficient and burdensome. The Telecommunications Directorate is akin to an agent in this context.

SEEKING OR GIVING OF LEGAL ADVICE

19 The paragraphs in question were written by legal counsel upon the request for legal advice by Commission staff. They were written by legal counsel in his capacity as counsel and not in some other government capacity. The applicant has suggested that some portions of the paragraphs might not constitute legal advice. I have reviewed the paragraphs in question and am satisfied that the paragraphs contain legal advice and nothing else. In fact, the paragraphs simply pass on to the Commission Mr. Wilson's legal advice.

20 While it might have been preferable to differentiate more precisely the advice of the Telecommunications Directorate from that of the Legal Directorate, this is not necessary. Privilege is not lost merely because the communication of the legal advice to the client is done by an agent. It is the substance of the situation that matters not the form.

CONFIDENTIALITY

21 I am satisfied that the legal advice in question was intended to be confidential. The word "Protected" appears at the top of the memo. While it might have been better to label the document with the word "Confidential", I am satisfied on the affidavit evidence that this was meant to convey the idea that the material was to be kept confidential, and it has been since that time. The word "Protected", is in my view, synonymous with the word "confidential" or "private" in this situation.

CONCLUSION

22 Having found that paragraphs 16 to 21 are merely the transmitting of legal advice by counsel to his client through the Telecommunications Directorate in a manner akin to an agent, I conclude that the paragraphs in question are privileged and need not be disclosed.

23 The application will be dismissed with costs.

LINDEN J.A.

cp/e/qw/qlaim/qlhcs

Indexed as:

Quebec (Attorney General) v. Canada

Between

**Attorney General of Quebec, plaintiff, and
Her Majesty the Queen in Right of Canada, defendant**

[2001] F.C.J. No. 198

[2001] A.C.F. no 198

2001 FCT 51

2001 CFPI 51

200 F.T.R. 239

109 A.C.W.S. (3d) 389

Court No. T-2834-96

Federal Court of Canada - Trial Division
Québec, Quebec

Blais J.

Heard: January 10 and 11, 2001.

Judgment: February 12, 2001.

(192 paras.)

Quebec procedure -- Discovery -- Documents, what documents must be produced -- Privileged documents -- Solicitor-client privilege.

Motion by the defendant, Canada, for an order that the plaintiff, the Attorney General of Quebec, be required to disclose documents for which it had claimed privilege. The Attorney General brought an action to determine the extent of the federal government's obligations to the Quebec government pursuant to the Canada Assistance Plan. The Attorney General claimed solicitor-client privilege on 71 documents listed in its affidavit of documents. It claimed that the documents consisted of

strategy negotiations, the disclosure of which would confer an unfair advantage on the federal government if the case were settled and would adversely affect the conduct of federal-provincial relations. The Attorney General also claimed privilege on the grounds that the documents were intended for the provincial Cabinet. Canada challenged the claims of privilege. The parties agreed that the issue was to be determined in accordance with article 308 of the Quebec Code of Civil Procedure.

HELD: Motion allowed in part. The opposing interests of the proper administration of justice and the public interest in confidential government activities not being disclosed had to be weighed to determine whether disclosure was warranted pursuant to article 308. The court inspected each document, filed under confidential seal, individually and ruled on each document. Some documents, which did not fall within the areas of claimed privilege, were to be disclosed. Other documents were determined to be covered by solicitor-client privilege, or confidentiality privilege because their disclosure would have given the federal government an unfair advantage if the case were settled, and disclosure could have adversely affected the conduct of relations between Quebec and the federal government. Those documents were not to be disclosed.

Statutes, Regulations and Rules Cited:

Canada Assistance Plan.

Federal Court Rules, 1998, Rules 223, 227.

Quebec Code of Civil Procedure, Article 308.

Counsel:

Luc Chamberland, for the plaintiff.

René Leblanc and Vincent Veilleux, for the defendant.

1 BLAIS J. (Reasons for Order and Order):-- This is a motion by the defendant opposing the privileges of non-disclosure claimed by the plaintiff.

FACTS

2 The plaintiff brought an action by statement of claim to determine the scope of the defendant's obligations pursuant to the Canada Assistance Plan, R.S.C. 1985, c. C-1.

3 In accordance with Rule 223 of the Federal Court Rules, 1998, the parties exchanged their respective affidavits of documents and the documents listed therein, except for those in respect of

which the parties claimed a privilege of non-disclosure.

4 The plaintiff served on the defendant three affidavits of documents, namely the affidavit of Serge Audet, the affidavit of Claude Wallot and the affidavit of Jacques Lafontaine.

5 The defendant challenged the privileges of non-disclosure claimed by the plaintiff on 71 documents, a list of which was submitted to the Court at the hearing.

6 The privileges claimed by the plaintiff in respect of these 71 documents were claimed as solicitor-client privilege and negotiating strategy, as negotiating strategy and/or internal analysis and as documents intended for the provincial Cabinet.

7 A [TRANSLATION] "notice of constitutional question" was served but it was mutually agreed that it was not necessary to raise this question at the hearing.

DEFENDANT'S ARGUMENTS

8 The defendant maintained that pursuant to Rule 227 of the Federal Court Rules, 1998 this Court has the power on motion by the parties to the case to inspect the adequacy or accuracy of an affidavit of documents and if necessary to direct that an adequate or accurate affidavit be served and filed.

9 That argument was not disputed by the plaintiff.

10 The defendant maintained that the substantive rules relating to determination of the merits of the plaintiff's claims of privilege should be applied pursuant to art. 308 of the Quebec Code of Civil Procedure. That was also not disputed by the plaintiff.

11 Accordingly, in the defendant's submission, the Court must balance the opposing interests of confidentiality in governmental matters on the one hand and the proper administration of justice on the other. To do this, the Court will consider in general, but not exclusively, six factors:

[TRANSLATION]

- (a) the relevance of the information and documents in question and the feasibility of filing them so that the case can be adequately and fairly argued;
- (b) the decision-making level in question;
- (c) the exact nature of the public interest protection of which is sought by non-disclosure;
- (d) the precise content of the information and documents in question;
- (e) the time that has elapsed since the documents in question or the information sought originated;

- (f) the importance of the issue.

12 The defendant maintained that the burden of establishing the validity of a claim of privilege rests on the party relying on the privilege.

13 The defendant alleged that this burden of proof required the filing of detailed affidavits to show:

[TRANSLATION]

- (i) the precise nature of the public interest likely to be affected by the disclosure of information in respect of which a privilege is claimed;
- (ii) how that public interest would be affected by the disclosure of the information in question; and
- (iii) how the public interest should take priority over the interests of the proper administration of justice.

14 The defendant maintained that simply having the opinion of a Minister and that of a public servant do not suffice to meet the burden of proof imposed on the party claiming privilege.

15 The defendant alleged that the plaintiff had not discharged his burden of proof. According to the defendant, the four affidavits filed by the plaintiff in response to the instant motion essentially contain [TRANSLATION] "standard form" opinions of their respective authors that disclosure of the documents concerned in the motion:

[TRANSLATION]

- (i) would confer an unfair advantage on the defendant in the event of a settlement of the case at bar; or
- (ii) would probably adversely affect the conduct of federal-provincial relations;
- (iii) would in some cases adversely affect the principle of confidentiality of documents intended for the Cabinet.

16 The defendant maintained that the affidavits in reply cast no light on the facts or explanations which might support the opinions given therein.

17 Accordingly, the four affidavits in reply submitted by the plaintiff should only have a very low evidentiary value in this Court.

18 She accordingly argued that the plaintiff had not discharged his burden of showing that disclosure of the documents would give the defendant an unfair advantage in the event that the case

at bar is settled or that disclosure would be likely to adversely affect the conduct of federal-provincial relations.

19 The defendant also added that suggesting that a document falls within the class of Cabinet documents is not as such sufficient to justify denying its release for purposes of litigation.

20 According to the defendant, the plaintiff, in order to justify its claim of privilege for the documents intended for the Quebec Cabinet, must show as a matter of fact:

- (i) the precise nature of the public interest likely to be affected by the disclosure;
- (ii) how that public interest would be affected by the disclosure; and
- (iii) how the public interest should take priority over the interests of the proper administration of justice.

PLAINTIFF'S ARGUMENTS

21 The plaintiff maintained that the following portions of the affidavits in reply of Jacques Lafontaine, Serge Audet, Claude Wallot and Pierre Roy set out the specific reasons supporting the claim of the privilege of non-disclosure in respect of the documents or part of documents mentioned by the defendant:

- (i) [TRANSLATION] "disclosure would give the federal government an unfair advantage if the case at bar is settled. It would be likely to adversely affect the conduct of relations between the Government of Quebec and the federal government;
- (ii) the documents should [TRANSLATION] "be covered by the privilege of confidentiality as documents intended for members of the Cabinet of the Government of Quebec";
- (iii) the documents include [TRANSLATION] "legal opinions and discussions of legal opinions, which should benefit from the privilege of confidentiality as professional secrets between a solicitor and his client".

22 The plaintiff maintained that the nature and the scope of the immunity of the Crown in right of Quebec, guaranteed by s. 308 of the Quebec Code of Civil Procedure, should be interpreted in light of the common law precedents on the point.

23 The plaintiff cited the applicable tests set out in *Carey v. Ontario*, [1986] 2 S.C.R. 637, and indicated that the following tests should be considered:

[TRANSLATION]

- (a) the decision-making level;

- (b) the nature of the policy concerned and the particular contents of the documents;
- (c) the time when disclosure is requested;
- (d) the interests of the administration of justice in the production of the documents (the importance of the case, the need and desirability of producing the documents to ensure that the case can be adequately and fairly presented).

24 On the decision-making level, the plaintiff alleged that several of the documents sought are intended for the highest decision-making level of the Government of Quebec, namely the Cabinet.

25 Although it is true that a majority of the documents sought were prepared by professionals working on the administration of the federal-provincial agreements on health and social services, that should not have the effect of diminishing the importance of the documents.

26 As to the nature of the policy concerned and the precise contents of the documents, the plaintiff maintained that the policy affected the conduct of relations. The great majority of the documents consisted of analyses and recommendations regarding the position the Government of Quebec should adopt on federal government decisions dealing with the sharing of health and social services costs.

27 In the plaintiff's submission, the public interest favoured preserving the confidentiality of the documents concerned by the motion, which are likely to directly affect present and future federal-provincial relations.

28 The plaintiff further argued that in most of the cost-sharing agreements between the federal government and the governments of the provinces, the provinces have a duty to justify their claims in order to obtain reimbursement from federal funds. As the federal government does not always give reasons for refusing to reimburse the expenditures claimed, access by the defendant to the documents sought would give the latter an unfair advantage.

29 Further, disclosure of the documents sought could endanger the principle of the duality and autonomy of the Crown and destroy the political balance that should exist in a federal system.

30 The plaintiff argued that the conduct of federal-provincial relations was a policy of the same type as diplomatic relations, which have consistently justified confidentiality of documents associated with that kind of policy.

31 The plaintiff argued that the documents sought by the defendant related to the judicial proceeding between them in the principal case, although that does not make them relevant.

32 The information contained in these documents thus preserves an actual and ongoing interest because the parties are still opposed in the principal proceeding.

33 The fact that since March 31, 1996 the agreement is no longer in effect and that certain

documents were prepared in 1972 does not in any way alter the fact that the information is important.

34 In the plaintiff's submission, disclosure of the documents would give the defendant an unfair advantage both in prosecuting the case and in the event that the parties initiate discussions to settle the issue.

35 Further, the documents requested by the defendant are not relevant to the evidence that should be presented by the parties to the case. The documents do not provide evidence in themselves as they are opinions.

36 In the plaintiff's submission, it is neither necessary nor useful for the defendant to use the documents to establish the validity of its refusal to reimburse the cost of the services provided.

37 The plaintiff explained that the fact the documents are listed in its affidavits of documents does not constitute an admission of their relevance.

38 The plaintiff argued that the question of relevance in public interest matters should be decided by different tests from those set out in the Federal Court Rules, 1998. That decision should actually be made at a later stage, thus allowing the opposing party to be aware of the actual existence of the documents.

39 According to the plaintiff, the affidavits in reply are quite sufficient to allow the parties to argue the points raised. Further, the affidavits in reply could hardly be more detailed, as they would then be likely to impinge on the privilege of non-disclosure.

40 The plaintiff maintained that the defendant's argument reflected excessive and somewhat archaic formalism when it required that each of the plaintiff's documents repeat the following formula:

[TRANSLATION]

- (i) the precise nature of the public interest likely to be affected by the disclosure; (ii) how that public interest would be affected by the disclosure; and (iii) how the public interest should take priority over the interests of the proper administration of justice.

41 The plaintiff further added that it is in the very nature of an affidavit in reply to contain an opinion on the privilege of the documents and that this objection by the defendant is not valid. However, the plaintiff admitted that this opinion is not binding on this Court.

DEFENDANT'S REPLY TO PLAINTIFF'S ARGUMENTS

42 Contrary to what was argued by the plaintiff, the defendant maintained that as the documents did not fall in the class of Cabinet documents they should not be given a confidentiality rating equivalent to what the latter are usually given.

43 The defendant also noted that the sole purpose of the rule that Cabinet documents are confidential is to safeguard [TRANSLATION] "the confidentiality of the government's decision-making process", a rule which clearly does not apply to government documents not intended for the Cabinet, and in the plaintiff's submission these make up a [TRANSLATION] "majority" of the documents concerned in the motion.

44 In this connection the defendant noted that only nine of the 101 documents the plaintiff wishes to cover by privilege are Cabinet documents.

45 The defendant maintained that in the current state of the law the rules applicable to privileged information dealing with the conduct of diplomatic relations cannot in any way be likened to those governing information on the conduct of federal-provincial relations.

46 In the defendant's submission, it is well settled that information on the conduct of federal-provincial relations does not fall into the class of information (national security, defence, diplomatic relations and Cabinet secrets) which the courts generally treat with special sensitivity when an objection is made to their release.

47 On the question of the "time of disclosure", the defendant noted that this factor was not developed by the courts in order to protect a party to litigation from the disclosure of information that might be prejudicial to its case.

48 The factor exists in order to protect the confidentiality of information prepared in developing a governmental project or policy which is being worked out at the time their disclosure is sought, or the content of which is of such importance at that time to the public that disclosing it would be likely to interfere with the functioning of government.

49 According to the defendant, this factor is of no assistance to the plaintiff since the case at bar turns essentially on the administration of a federal-provincial program which ceased in March 1996 and the first indications of which date back over 30 years.

50 Further, the fact that disclosure of the documents concerned in the motion could be harmful to the plaintiff's case is not a defence under the Federal Court Rules, 1998 and so cannot serve as a basis for his claim of privilege.

51 As to the relevance of the documents at issue, the defendant maintained that at this stage of the proceeding the Court is not required to consider the admissibility or evidentiary value of a document, which is in any case found to be relevant at the "discovery" stage by the party refusing disclosure.

52 The defendant added that it is well settled that a government which has an interest in the outcome of litigation and objects to the disclosure of certain information in connection with that litigation is in a potential conflict of interest situation and this affects whether justice is seen to be done.

53 Consequently, the courts should exercise great caution when a government which has entered into litigation claims privilege.

POINT AT ISSUE

54 Should the documents in question be disclosed by the plaintiff?

ANALYSIS

Should the documents in question be disclosed by the plaintiff?

General rules regarding privilege

55 Article 308 of the Quebec Code of Civil Procedure provides:

Similarly, government officials cannot be obliged to divulge what has been revealed to them in the exercise of their functions provided that the judge is of the opinion, for reasons set out in the affidavit of the Minister or deputy minister to whom the witness is answerable, that the disclosure would be contrary to public order.

* * *

De même, ne peut être contraint de divulguer ce qui lui a été révélé dans l'exercice de ses fonctions le fonctionnaire de l'État, si le juge est d'avis pour les raisons exposées dans la déclaration assermentée du ministre ou du sous-ministre de qui relève le témoin, que la divulgation serait contraire à l'ordre public.

56 Article 308 of the Quebec Code of Civil Procedure codified the common law rule relating to privilege.

57 In *Carey v. Ontario*, [1986] 2 S.C.R. 637, the Supreme Court of Canada explained the basis for the privilege for non-disclosure:

It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest. The general balance between these two competing interests

has shifted markedly over the years. At times the public interest in the need for government secrecy has been given virtually absolute priority, so long as a claim to non-disclosure was made by a Minister of the Crown. At other times a more even balance has been struck.

This difference in emphasis resulted in part from the manner in which the interests collided in particular cases. The need for secrecy in government operations may vary with the particular public interest sought to be protected. There is, for example, an obvious difference between information relating to national defence and information relating to a purely commercial transaction. On the other side of the equation, the need for disclosure may be more or less compelling having regard to the nature of the litigation (e.g. between a criminal and civil proceeding) and the extent to which facts may be proved without resort to information sought to be protected from disclosure.

58 Article 308 of the Quebec Code of Civil Procedure was also explained by the Supreme Court of Canada in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60:

I do not dispute that art. 308 is a codification of the common law, as is s. 41 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, then in force, subject to the special features of the latter provision, which is limited to the production of documents and which resolves in a slightly different manner the question of whether the executive or judiciary is supreme: my brother Chouinard J., who wrote the unanimous reasons of the Court in *Commission des droits de la personne v. Attorney General of Canada*, [1982] 1 S.C.R. 215, recognized this at pp. 225 and 226. What is to be determined here, however, is the scope of this codification.

The way I see it, art. 308 was intended to solve two problems.

First, it recognized the supremacy of the judiciary over the executive as regards the priority that must be given to either Crown privilege or the administration of justice, in the event of a conflict between them. The Quebec legislator thus adopted the constitutional rule which this Court had indicated a preference for in *R. v. Snider*, [1954] S.C.R. 479, and *Gagnon v. Commission des Valeurs Mobilières du Québec*, and it rejected the solution adopted by the Quebec Court of Appeal in *Minister of National Revenue v. Die-Plast Co.* and by the House of Lords in *Duncan v. Cammell, Laird and Co.* before the latter changed its opinion in *Conway v. Rimmer*, [1968] A.C. 910.

Second, article 308 of the Code of Civil Procedure ratifies, for cases where it is appropriate, the procedure of an affidavit of the Minister which had often been used in practice in claiming Crown privilege, and which had already been outlined in the paragraph added to art. 332 in 1958.

59 It is accordingly the function of the judiciary to determine what should be disclosed. In order to arrive at a conclusion in this regard, the Court may direct that the disputed documents be entered in court for inspection by the Court. In *Carey*, *supra*, the Supreme Court of Canada indicated:

I would, therefore, order disclosure of the documents for the court's inspection. This will permit the court to make certain that no disclosure is made that unnecessarily interferes with confidential government communications. Given the deference owing to the executive branch of government, Cabinet documents ought not to be disclosed without a preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice.

... .

It seems to me that in a claim of public interest immunity which, like the present, seems doubtful, the court should feel free to examine the documents. There has, for a long period now, been a far more open and flexible attitude towards discovery in this country than in England. I think deciding the issue on a bare *prima facie* case of a public interest in non-disclosure, such as the Court of Appeal did here, is out of place in Canadian practice.

60 Although this was said with reference to Ontario, the rules indicated above are applicable for purposes of art. 308. In *Fabien v. Dimanche-Matin Ltée*, [1979] S.C. 879, Chevalier J. indicated:

[TRANSLATION]

The rules relating to art. 308 C.C.P. may be summarized as follows:

- (1) as the body responsible for public safety and well-being, the government has a duty to see that no facts are disclosed either by witnesses or by the filing of documents which in its opinion would affect those public interests;

... .

- (7) it is well settled that the courts have the necessary authority to conduct a preliminary *ex parte* inspection of documents and evidence which a litigant intends to submit or file in order to decide on the importance or priority that should be given to the public interest as against that of the litigant.

61 In *Carey*, *supra*, the Supreme Court agreed with the remarks of Woodhouse P. in the New Zealand case *Fletcher Timber Ltd. v. Attorney General*, [1984] 1 N.Z.L.R. 290 (C.A.):

At page 295, he made the following statement with which I am in total agreement:

If the balance of public interest can be seen to support the claim of immunity without prior inspection by the Judge then the consequential decision against production will be made without further ado. In that regard the certificate itself should demonstrate with sufficient particularity what is the nature and the significance of the documents both in terms of any need to preserve their confidentiality on the one hand and for the actual litigation on the other. But where this is not the position, where the Judge has been left uncertain, it is difficult to understand how his own inspection could affect in any way the confidentiality which might deserve protection. And in that situation I think it would be wrong to put aside such a direct and practical means of resolving the difficulty. Indeed if it were to happen the primary responsibility of the Courts to provide informed and just answers would often depend on processes of sheer speculation, leaving the Judge himself grasping at air. That cannot be sensible nor it is necessary when by the simple act of judicial reconnaissance a reasonably confident decision could be given one way or another.

See also Richardson J., especially at pp. 301-02 and McMullin J., especially at pp. 307-08. These judges make it clear, in McMullin J.'s words at p. 308, that:

... once the documents are admitted to relate to the case, as they are here, they should be available for inspection unless there is some reason shown why in the interests of public policy that course should not be followed. And the onus of establishing that they should not be produced for inspection must lie on the party which seeks a departure from the general rule.

62 The Court will consider several factors in weighing the opposing interests of the proper administration of justice and the public interest in confidential information on government activities

not being disclosed. These factors were listed in *Quebec (Procureur général) v. Dorion*, [1993] R.D.J. 88 (C.A.):

[TRANSLATION]

First, I think it is now well established that it is not for the Crown to ultimately decide what may and must remain confidential, but for the Court hearing the case. The Supreme Court has rejected the argument that certain classes of document are secret as such. For example, it has acknowledged, as La Forest J. wrote in *Carey*, echoing in this Wilson J.'s opinion in *Smallwood*, "that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest". Accordingly, it is the public interest which must be the judge's guide and this assessment will involve the inspection and consideration of several points, such as the decision-making level, the exact contents of the document, the time of its disclosure, its importance to the administration of justice and the reasons for non-disclosure. In this connection, La Forest J. made an important reservation when documents deal with areas such as national security or diplomatic relations: in that event, the judge may then agree to exclude them, even without inspecting them, since, he wrote, "on such issues, it is often unwise even for members of the judiciary to be aware of their contents, and the period in which they should remain secret may be very long". In any event, the judge must act with caution before ordering the filing of documents which should be kept confidential in the public interest.

In the case at bar, I do not doubt that the judge had the power and the right to inspect the document the filing of which was sought. The Court can only decide if the document, whether issued by the office of the Attorney General or by that of a Minister, is confidential, and if so, whether there is an overriding public interest that it be excluded from the evidence.

63 In *Carey*, *supra*, the Supreme Court of Canada said on this point:

That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the document are, I would have thought, even more important. So far as the protection of the decision-making process is

concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.

64 Accordingly, whatever the class of documents the factors mentioned above will be considered in weighing the opposing interests.

65 In the case at bar, the parties discussed the fact that several documents were intended for the highest decision-making level of the Quebec government, namely the Cabinet. However, most of the documents were prepared by public servants working for lower levels of the government.

66 The defendant argues that since most of the documents were prepared by public servants working for lower levels of the government, there should not be a claim of privilege for the documents.

67 The plaintiff argued that the fact that the documents were prepared by public servants working for lower levels of the government should not have the effect of reducing the importance of those documents, since their purpose was primarily to define the Quebec government's position in relation to the government.

68 In this regard, I feel that the Supreme Court has dealt with the parties' concerns in *Carey*, supra. The Supreme Court of Canada indicated that the fact that documents may concern the decision-making process at the highest level of government cannot be ignored. Accordingly, the courts must proceed with caution when ordering that they be produced. However, the Supreme Court added that the level of the decision-making process is only one of the variables to be taken into account.

69 As a result this test, though important, does not necessarily take priority over the other tests. Indeed, in *Carey*, supra, the Supreme Court indicated:

Rather, these cases indicate that the period of protection solely for preserving the confidentiality of the government decision-making process will be relatively short. While it may be true as the Court of Appeal states that the government policy concerns - the tourist and recreational industry in northwestern Ontario - may still be ongoing, I find it difficult to accept its conclusion that the advice given and decisions taken respecting the transaction involved in this case have not so lost their immediacy that a court must concern itself about them. We are talking about a transaction that took place over twelve years ago in connection with what by any measure can scarcely be regarded as high government policy.

Sworn statements by Minister or Deputy Minister mentioned in art. 308 of Quebec Code of Civil Procedure, affidavits of documents and affidavits in reply

70 Article 308 of the Quebec Code of Civil Procedure provides that the Minister or Deputy Minister to whom the witness is answerable shall set out in an affidavit the reasons why the disclosure would be contrary to public order.

71 The defendant argued that the Deputy Minister's statement in the case at bar is only a general opinion, essentially the same as those given in the other three affidavits in reply, without specific reference to the documents covered by the motion and based, first, on a partial review of the documents concerned and, second, on what was reported to him by Messrs. Audet, Lafontaine and Wallot, who allegedly [TRANSLATION] "explained the content of the documents sought by the motion".

72 According to the defendant, this statement is lacking in real evidentiary value.

73 In *Gagnon v. Quebec (Commission des valeurs mobilières)*, [1965] S.C.R. 73, the Supreme Court of Canada said concerning notices given pursuant to art. 332 of the Quebec Code of Civil Procedure (now art. 308):

[TRANSLATION]

In my view - and this makes it unnecessary for me to consider any other point - the written certificate provided by the Attorney General, relying on the exception to the rule, does not entirely and fully meet the requirements of the foregoing questions. I concur with the opinion of Hyde J. and would say that the precise questions which the trial judge ordered the secretary of the Commission to answer did not by themselves indicate that public order was concerned, and like the learned judge I feel that, in his words, the Attorney General's certificate was not related to the facts on which the appellant wished to examine the witness, as it ought to be in order to meet the requirement for there to be privilege, but is a general formula applicable to all cases, regardless of the facts on which a witness

is to be questioned.

74 In *Carey*, *supra*, the Supreme Court said regarding affidavits pleading public interest immunity with reference to Ontario:

In making a claim of public interest immunity, the Minister (or official) should be as helpful as possible in identifying the interest sought to be protected. Examples of how this should be done appear in *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R. 700 (H.L.), and *Goguen v. Gibson*, [1983] 2 F.C. 463 (C.A.), where the Minister described with as much detail as the nature of the subject matter would allow the precise policy matters sought to be protected from disclosure.

Counsel for *Carey* argued that Dr. Stewart's affidavit is inadequate in that it does not set forth with sufficient particularity the interests sought to be protected. I suppose the point may be put in this way. Certainly the grounds advanced for protection are, as some cases have put it, somewhat amorphous and as Thorson J.A. pointed out, less helpful than they might be. Nonetheless, it seems to me that Thorson J.A. was correct in his view that in substance what was sought was the protection as a class of what he generally described as "Cabinet documents", i.e. documents prepared by government departments and agencies in formulating government policies, decisions made by Cabinet, and the like. That being so, Dr. Stewart did not see it as necessary to particularize the nature of the information sought to be protected as would necessary if the claim for protection was based on the nature of the contents of the documents. Essentially what the certificate argues is that the process by which government policy is determined by the Executive Council must remain confidential whatever the policy may be and however much time (save when it has become of historical interest only) has elapsed since the policy was developed ...

So viewed, the question is not so much whether the affidavit is insufficient as whether the substance of the claim is one to which the courts should give effect.

75 The question for the Court here is whether the plaintiff's claims regarding the public interest justify granting a privilege of non-disclosure for the documents concerned.

76 The Court must make its decision by applying various tests. However, the defendant's arguments on these tests are very relevant. For example, the defendant properly maintained that several documents date from some thirty years ago and that the plaintiff presented no evidence by affidavits of documents and affidavits in reply that it was in the public interest not to disclose them.

77 Nonetheless, the plaintiff's affidavits of documents indicate the name of the documents and date and the affidavits in reply give an explanation of the privilege claimed. However, this explanation is framed in general terms and it may be that those general terms do not suffice to identify the document in the affidavits of documents. Also, the explanation may not be sufficient in view of the aforementioned tests. For example, when the document is nearly thirty years old does it suffice for the explanation to be framed in general as follows:

[TRANSLATION]

Document No. 16 of my affidavit of documents should in part be covered by the privilege of confidentiality because its disclosure would give the federal government an unfair advantage in the event that the case at bar is settled. It would be likely to adversely affect the conduct of relations between the Government of Quebec and the federal government.

78 Document No. 16 is that which appears in Serge Audet's affidavit and which is identified as follows:

[TRANSLATION]

16. 71-05-19

Memorandum explaining draft order - Negotiating strategy -
Legal opinion

79 It may in fact be difficult to decide, without consulting the documents, whether these documents should be covered by privilege.

80 At the hearing counsel for the plaintiff filed the 71 documents in question with the Court under confidential seal. The parties agreed that if the judge came to the conclusion that he had to inspect the documents in order to decide on their disclosure, he would make his decision in general terms both as to the relevancy of the documents and individually as to their disclosure.

81 I did not accept either the plaintiff's argument that the documents were related to the case although not relevant or the contention that the information contained in those documents had some interest for the case although they could not be disclosed.

82 I accordingly conclude that prima facie relevance was established by the defendant for all the 71 documents in question.

83 I therefore concluded that I should inspect each of the documents individually to decide whether the Court should grant the privilege of confidentiality for any of them.

84 Before proceeding to the individual analysis of each document, I should mention that in some cases they constitute legal opinions, documents intended for Cabinet, exchanges between various public servants and documents containing appendices and that those documents extend over a period of more than 25 years.

85 It was easier to decide when the documents were legal opinions or discussions of legal opinions, or were ministerial documents for the Cabinet.

86 It was less easy to determine the need to preserve the confidentiality of certain documents which in some cases were a medley of financial documents, strategic opinions and continual updates of a federal-provincial interplay lasting over 30 years and involving para-governmental organizations which have since disappeared and the implementation of a federal-provincial agreement which has not been in force for five years now.

87 I have therefore decided not to combine the questions but to give an individual decision on each document.

AFFIDAVIT OF SERGE AUDET

Document No. 17

88 This is an internal memorandum from the Associate Deputy Minister to the Deputy Minister regarding the draft order. The memorandum is dated July 1, 1971. In my view, there is no need for this document to be covered by the confidentiality privilege claimed, as I am not persuaded that its disclosure could give the federal government an unfair advantage if the case at bar is settled. The disclosure of this document also does not appear to me to adversely affect the conduct of relations between the Government of Quebec and the federal government. I also could see in this document no legal opinion or discussion of a legal opinion indicating that the document should be covered by the confidentiality privilege as a professional secret between a solicitor and his client.

Document No. 23

89 This is a memorandum on the position Quebec was to take in a forthcoming federal-provincial conference, and the document is dated November 27, 1973: I do not feel that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage in the event that the case at bar is settled. The disclosure would not in my opinion adversely affect the conduct of relations between the Government of Quebec and the federal government and the document contains no discussion of a legal opinion to justify coverage by the confidentiality privilege as a professional secret between a solicitor and his client.

Document No. 24

90 This is a memorandum from Paul Périard to the Minister of Social Affairs titled

[TRANSLATION] "for reference" and dated March 12, 1974. Although this document originates at the Department of Justice, the signatory does not appear to be a lawyer and the document does not appear to be a legal opinion in whole or in part. I was not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage in the event that the case at bar is settled or that a disclosure would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 35

91 This is a letter from the Minister of Social Affairs seeking a legal opinion following the receipt of a letter from the federal Minister of Health. In my opinion, this is a request for a legal opinion, which should be covered by the confidentiality privilege as a professional secret between a solicitor and his client. The confidentiality privilege will therefore be granted.

Document No. 38

92 This is a memorandum dated November 12, 1974 and addressed to the Associate Deputy Minister, Planning, Young Offenders Act, Aubert Ouellet, by Paul Périard, director. It is a document which reviews the background to the problem and a possible strategy for the Government of Quebec. The document was prepared over 26 years ago and I am not persuaded that the document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that the disclosure would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 128

93 This is a memorandum from Michel Hamelin of the federal-provincial agreements branch to André Bédard and Claude Turgeon, whose department is not identified. I am not persuaded that this document and the paragraph identified should be covered in whole or in part by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that the disclosure would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 131

94 This is a memorandum by Jean-Claude Deschênes, Deputy Minister at the Department of Social Affairs, prepared for the Minister of Social Affairs and dated February 16, 1993. It is an internal memo on strategy with a problem outline and recommendations on the position the Government of Quebec should take toward the federal government.

95 On reading the document I am persuaded that this document should be covered by the confidentiality privilege as a document intended for members for the Government of Quebec's

Cabinet. I also agree that the document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and that disclosure could adversely affect the conduct of relations between the Government of Quebec and the federal government. The confidentiality privilege will therefore be maintained.

Document No. 132

96 This is a covering letter signed by the director of social service policies at the social services programs branch of the Quebec Department of Social Affairs dated February 16, 1983 to Jeanne d'Arc Vaillant, Associate Deputy Minister at the Department of Social Affairs: a draft memorandum for the signature of the Deputy Minister Jean-Clause Deschênes, addressed to Pierre-Marc Johnson, Minister of Social Affairs, is attached.

97 This is a document for a Cabinet member dealing very intimately with Quebec's position and the Government of Quebec's strategy toward the federal government and I am persuaded that the covering letter and the draft memorandum should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government. The confidentiality will therefore be maintained.

Document No. 141

98 This is a summary of a meeting held on April 26, 1983. Five persons were present at the meeting, representing four different departments. The meeting was to take action on a letter written by the Deputy Minister, though this was not the subject of a claim for confidentiality since it also appears in the list attached to the affidavit of documents, with No. 139. As the Deputy Minister Deschênes' letter has already been disclosed, there is nothing in document No. 141 that could convince me that disclosure of the document would give the federal government an unfair advantage if the case at bar is settled or that it could adversely affect the conduct of relations between the Government of Quebec and the federal government. The confidentiality privilege will therefore be disallowed in this case.

Document No. 144

99 This is a telex sent to Jean-Claude Deschênes, Deputy Minister at the Department of Social Affairs, by R.M. MacDonald, Deputy Minister, Ontario Ministry of Community and Social Services, and a letter from R.M. MacDonald, Deputy Minister, to Germain Hallé, Associate Deputy Minister, Administration, at the Quebec Department of Justice.

100 The letter concerns the negotiating strategy to be used by the various provinces in dealing with the federal government.

101 I am persuaded that these two documents should be covered by the confidentiality privilege

because the disclosure of this document could give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government. Document No. 144 must therefore be covered by the confidentiality privilege.

Document No. 151

102 This is an unsigned document dated June 9, 1983 which originated with the federal-provincial agreements branch. This document, described as a strategy document, in fact discusses an action plan. However, I was not persuaded that the document should be covered by the confidentiality privilege and that its disclosure could give the federal government an unfair advantage if the case at bar is settled or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 153

103 This is a document titled [TRANSLATION] "note to file" signed by Michel Hamelin and dealing with a meeting of responsible Deputy Ministers in Ottawa on June 22, 1983. The document covers discussions with the Deputy Minister of Social Affairs as well as Germain Hallé, Associate Deputy Minister, administration, at the Department of Justice.

104 I was persuaded from reading this document that it should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government. Document No. 153 will therefore remain confidential.

Document No. 154

105 This document is an identical copy of document No. 153 and, contrary to their designation in the affidavit of documents, of the same date, that is with respect to a meeting held on June 22, 1983, but both dated June 23, 1983. Document No. 154 will remain confidential for the reasons given in the preceding paragraph.

Document No. 172

106 This is an internal memorandum from Jacques Lamonde, Deputy Minister, budget and financial control*, to Jean-Claude Deschênes, Deputy Minister, and the memo is dated August 18, 1983. It is a document setting out the situation and negotiating strategy with the federal government, and reading the document persuaded me that it should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government.

* French reads "Budget des contrôles financiers" - TR.

Document No. 174

107 This is a letter from the Deputy Minister of Social Affairs, Jean-Claude Deschênes, to Robert Normand, Deputy Minister of Finance, dated September 7, 1983. It is a document on negotiating strategy which mentions discussions between several Ministers in the Quebec government. Reading the document persuaded me that it should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 181

108 This is a letter from Jean-Claude Deschênes, Deputy Minister of Social Affairs, to Robert Normand, Deputy Minister of Finance. This letter, which is a follow-up to the preceding one, also refers to discussions between members of the Cabinet and to the Government of Quebec's particular strategy. Reading the document persuaded me that it should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 185

109 This is a document titled [TRANSLATION] "analysis of the progress of federal-provincial discussions on young offenders" and is signed by Michel Hamelin of the federal-provincial agreements branch, dated October 11, 1983. As its title indicates, it is an analytical document and I am not persuaded that this document should be covered by the confidentiality privilege, that its disclosure could give the federal government an unfair advantage if the case at bar is settled or that it adversely affects the conduct of relations between the Government of Quebec and the federal government. The document will not therefore be privileged.

Document No. 205

110 This document, dated February 13, 1984, also originated with Michel Hamelin of the federal-provincial agreements branch and is a summary of the situation at February 10, 1984. Reading the document did not persuade me that it should be covered by the confidentiality privilege because its disclosure could give the federal government an unfair advantage if the case at bar is settled or that disclosure would adversely affect the conduct of relations between the Government of Quebec and the federal government. The document will not therefore be privileged.

Document No. 208

111 This is a memorandum for the Cabinet prepared jointly by the Minister of Justice, the Minister of Social Affairs and the Minister of Intergovernmental Affairs and dated February 23, 1984. The purpose of the document is to define the mandate of the Quebec delegation to the [TRANSLATION] "Conference of Ministers Responsible for Justice Affecting Young Persons" to be held on February 28, 1984.

112 In my opinion, this document should be covered by the privilege of confidentiality because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct [of] relations between the Government of Quebec and the federal government.

Document No. 210

113 This is a document prepared by the federal-provincial agreements branch and dated February 23, 1984. It is titled [TRANSLATION] "summary of negotiations for a new cost-sharing agreement". I have inspected the document and in my opinion I was not persuaded that the document should not be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government. There was also no mention that the document was intended for members of the Government of Quebec's Cabinet, nor was it signed or addressed to anyone in particular.

Document No. 216

114 This is one paragraph from a five-paragraph letter for which confidentiality was sought. It was a letter signed by the Deputy Minister of Finance Robert Normand and addressed to the Deputy Minister of Social Affairs, Jean-Claude Deschênes, on March 20, 1984.

115 This paragraph mentions discussions between the Quebec Minister of Finance and the federal Minister of Finance and I was persuaded from reading the document that the paragraph should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government. The second paragraph of the letter will therefore be covered by the confidentiality privilege.

Document No. 218

116 This is a memorandum on the state of negotiations with the federal government on the Young Offenders Act at March 23, 1984: the said document was signed jointly by Michel Hamelin of the Department of Social Affairs, Anne Marek of the Department of Justice with the assistance of Alain Gauthier of the Department of Finance, and Jean Chouinard of the Department of Canadian Affairs, dated March 23, 1984. The document contains a description of the background to the problem and an assessment of the federal government's proposal as well as certain

recommendations. However, I was not persuaded that this document should be covered by the confidentiality privilege because its disclosure could give the federal government an unfair advantage if the case at bar is settled or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 222

117 This is a document signed by Michel Hamelin of the federal-provincial agreements branch, dated April 6, 1984 and titled [TRANSLATION] "note to young offenders file". It is a general memorandum following a meeting between the two Ministers, federal and provincial, in Ottawa on the preceding April 4. Reading the document did not persuade me that it should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 223

118 This is a memorandum regarding the signature by Quebec of the agreement in principle proposed by the federal government in connection with the Young Offenders Act and the provisions for implementing a final agreement on young offenders. This unsigned document was prepared by the federal-provincial agreements branch and dated April 17, 1984. The document discusses possible implementation provisions, recommendations and a number of points raised if the document is signed. Reading the document did not persuade me that it should be covered in whole or in part by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that disclosure would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 224

119 This is a letter from the Deputy Minister of Social Affairs, Jean-Claude Deschênes, to Daniel Jacoby, Deputy Minister of Justice, with a copy to Robert Normand, Deputy Minister of Finance. The letter is also accompanied by a memorandum on federal cost-sharing for young offenders from 1979 to 1984, prepared by the federal-provincial agreement branch and dated April 13, 1984. Reading these two documents persuades me that they should be covered by the confidentiality privilege since [their] disclosure could give the federal government an unfair advantage if the case at bar is settled and disclosure could adversely affect the conduct of relations between the Government of Quebec and the federal government. Further, the document contains a discussion of a legal opinion and a request for a legal opinion which should be covered by the confidentiality privilege as a professional secret between a solicitor and his client. The document will therefore be privileged.

Document No. 225

120 This is the same letter from Mr. Deschênes to Mr. Jacoby, with a copy to Mr. Normand, dated April 19, 1984. However, no document is attached. For the reasons given in the preceding paragraph, reading the document persuaded me that it should be covered by the confidentiality privilege.

Document No. 230

121 This is a letter to the Minister of Justice from the budget and financial control branch of the Department of Social Affairs, the signatory of which is not identified. Attached to this letter is a summary memorandum to the Minister of Justice from the federal-provincial agreements branch of the Department of Social Affairs, dated May 24, 1984. I have examined both documents and am persuaded that they should be covered by the confidentiality privilege because [their] disclosure would give the federal government an unfair advantage if the case at bar is settled and disclosure would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 234

122 This is a memorandum from Jean Chouinard, Cabinet counsel, to the Canadian Intergovernmental Affairs Secretariat, addressed to Jean-Louis Desrochers, director of the DASEC, dated August 9, 1984 and relating to a reply by the federal Minister to a letter from the Quebec Minister of Justice regarding the agreement on young offenders.

123 I have inspected the document and I am not persuaded that the document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that it would be likely to adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 255

124 This is an internal memorandum from Michel Hamelin to Jean-Louis Desrochers regarding an interdepartmental meeting between the Department of Social Affairs, the Department of Justice, the Department of Finance and the Canadian Intergovernmental Affairs Secretariat held on June 12, 1985 about the young offenders question. It is an internal memorandum noting the federal government's refusal to negotiate further. On reading the document I am not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 256

125 This document is identical to document 255. I accordingly conclude that it should be covered by the confidentiality privilege, for the reasons mentioned in the preceding paragraph.

Document No. 257

126 This is a memorandum from Madeleine Farley to Marc Boucher, director, federal-provincial agreements branch, and dated September 4, 1985. It is a legal opinion prepared by counsel. The document should therefore be covered by the confidentiality privilege as a professional secret between a lawyer and her client.

Document No. 279

127 This is a legal opinion prepared by Madeleine Farley for Marc Boucher, director, federal-provincial agreements branch, which as a legal opinion should be covered by the confidentiality privilege as a professional secret between a lawyer and her client.

Document No. 281

128 This is a legal opinion prepared by Thomas Dupéré and addressed to Germain Hallé, Associate Deputy Minister. The legal opinion is attached to a Cabinet memorandum regarding the federal-provincial sharing of costs for services to young offenders.

129 In my view, the legal opinion should be covered by the confidentiality privilege as a professional secret between a lawyer and his client and the Cabinet memorandum should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 283

130 This is a document prepared by Madeleine Farley, counsel to the federal-provincial agreements branch, and is a note to file attached to another information document titled [TRANSLATION] "Probation in Quebec".

131 The note to file signed by Ms. Farley is not a legal opinion and should not be covered by the confidentiality privilege. However, the paragraph identified on page 1 of the document [TRANSLATION] "probation in Quebec" should be covered by the confidentiality privilege as a professional secret between a lawyer and her client. That part of the document will therefore not be disclosed.

Document No. 298

132 This is an internal memorandum consisting of a report on a federal-provincial meeting on multi-functional institutions prepared by André D'Astous, acting Director General, budget and administration, for Réjean Cantin, Deputy Minister. The document attached is a note on the meeting in Quebec of various officials, and was prepared by Marc Boucher of the federal-provincial agreements branch.

133 I inspected both documents and was not persuaded that these documents should be covered in whole or in part by the confidentiality privilege because [their] disclosure would give the federal government an unfair advantage if the case at bar is settled or that they would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 299

134 This is a document titled [TRANSLATION] "Notes on the special Quebec-Ottawa meeting of December 10, 1986" in Ottawa, mentioning the presence of six officials, which is not signed and dated December 15, 1986; however, the letters "MB" could suggest that the document was signed by Marc Boucher. In any event, I inspected the document and was not persuaded that the document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or would be likely to adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 302

135 This document is identical to document No. 299 and, for the same reasons, the document should not be covered by the confidentiality privilege.

Document No. 304

136 This document is identical to document No. 298 above and, for the same reasons given earlier, I do not feel that this document should be covered by the confidentiality privilege.

Document No. 305

137 This is a document entitled [TRANSLATION] "rough notes on certain discussion points with Ottawa representatives regarding the multi-functional CAR": the document is dated January 7, 1987 and not signed, but has the initials "MB" at the end.

138 I was not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 306

139 This is a document prepared by Mireille Fillion, director of community, family and youth services, and addressed to Paulin Dumas, acting Director General, prevention and community services and André D'Astous, acting Director General, budget and administration, and dated January 8, 1987.

140 The document is a memorandum in preparation for the federal-provincial meeting of January

9, 1987 on the qualification of Quebec for the CAP program on cost sharing in multi-functional CAR. I do not think the document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that it would be likely to adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 308

141 This is a document titled [TRANSLATION] "notes in preparation for the meeting of the Minister of Health and Social Services with federal Ministers, Jake Epp of Health and Welfare and James Kelleher, Solicitor General", dated January 21, 1987. This document contains several handwritten additions and personal notes in the margin. The document is signed by Michel Hamelin and dated January 19, 1987. I do not think that this document contains privileged information which, after fourteen years, should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 318

142 This is a document signed by Serge Audet and Jean-Marc Neault of the federal-provincial agreements branch and dated September 9, 1987, titled [TRANSLATION] "points that must be covered by a reserve clause". According to the plaintiff's reply record and the certificates of members in good standing of the Quebec Bar filed, it would not appear that Serge Audet was a member of the Quebec Bar. I therefore cannot conclude that this document, signed both by a lawyer and by someone who is not a member of the Bar, could be regarded as a legal opinion or even a discussion of a legal opinion.

143 I have inspected the document and I also do not feel that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 327

144 This is an internal memorandum to Michel Hamelin, dated January 22, 1988 and signed by Marc Boucher, chief of the agreements administration and negotiation section. The document refers both to a memorandum by Jean-Paul Dupéré and another note by Jeanne Houde of the Department's legal services, dated the day before.

145 This document discusses several points contained in two legal opinions and should be covered by the confidentiality privilege as a professional secret between a solicitor and his client.

Document No. 332

146 This is a memorandum to the Cabinet prepared by Thérèse Lavoie-Roux, Minister of Health and Social Services, and Gilles Rémillard, Minister responsible for Canadian Intergovernmental Affairs, dated March 16, 1988.

147 As this document was intended for members of the Quebec government's Cabinet and contains a discussion of legal opinions, it should also be covered by the confidentiality privilege as a professional secret between a solicitor and his client, because its disclosure would give the federal government an unfair advantage if the case at bar is settled, and would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 338

148 This is an internal memorandum from Pierre-Paul Veilleux to André d'Astous of the budget and administration branch, dated July 19, 1989. Several handwritten annotations appear in the margins of the document. The memorandum is first a covering letter for another document which consists of a memorandum from Jean-Marc Neault, attorney, to Pierre-Paul Veilleux, and the latter document is further to a legal opinion already given to the Department on "sharing" under the CAP and the cost of YOA services for the period 1979-84.

149 I have no hesitation in saying that the document should be covered by the confidentiality privilege as a professional secret between a lawyer and his client.

Document No. 339

150 This is a letter from André D'Astous, Associate Deputy Minister, budget and administration, at the Department of Health and Social Services, to Diane Wilhelmy, Secretary General at the Canadian Intergovernmental Affairs Secretariat and dated August 31, 1989.

151 Another identical letter, dated the same day, is addressed to Jacques Chamberland, Deputy Minister of the Department of Justice, and Claude Séguin, Deputy Minister at the Department of Finance.

152 These three letters set out a legal opinion obtained from the Department of Justice and I have no hesitation in concluding that three documents should be covered by the confidentiality privilege because their disclosure would give the federal government an unfair advantage if the case at bar is settled, and would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 340

153 This document is titled [TRANSLATION] "comments by the Quebec Department of Finance on the document for presentation to the CIRB concerning Quebec's claim to the CAP for the YOA".

This document originated with the federal-provincial financial policy branch and is dated November 23, 1989, not signed and has the notation [TRANSLATION] "preliminary" at the top of the document. The document is over eleven years old and not signed or addressed. I am therefore persuaded that this document should not be covered by the confidentiality privilege.

Document No. 341

154 This is a memorandum from the Government of Quebec's committee for coordination and intergovernmental relations. The document contains sensitive notes regarding the Government of Quebec's negotiating strategy and it seems to me that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, and is likely to adversely affect the conduct of relations between the Government of Quebec and the federal government. Additionally, the document refers at length to a legal opinion from the Department of Justice dated April 14, 1989 and should also be covered by the confidentiality privilege as a professional secret between a lawyer and his client.

Document No. 347

155 This is a memorandum from Pierre-Paul Veilleux to André D'Astous, Associate Deputy Minister, dated February 11, 1992. I am not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 350

156 This is an internal memorandum from Serge Audet to Jeanne Houde of legal services requesting a legal opinion on Quebec probation services.

157 I am persuaded that this document contains both a discussion of a legal opinion and a request for legal opinion, which should be covered by the confidentiality privilege as a professional secret between a lawyer and her client.

Document No. 354

158 This is a letter from Jean-Roch Pelleret of federal-provincial affairs to the budget and administration branch, addressed to Julie Grignon of the Department of Finance, and the documents accompanying it are a legal opinion by Jean Demontigny of the Department of Justice, a memorandum prepared pursuant to that legal opinion by the Department of Justice, a summary of the legal opinion and a summary of the status of the file.

159 I have no hesitation in considering that all the documents should be covered by the confidentiality privilege, and just as document No. 341 above was covered by the confidentiality

privilege, all the documents, which contain both a discussion of a legal opinion and a legal opinion and other documents likely to give the federal government an unfair advantage, should be covered by the confidentiality privilege.

Document No. 355

160 I have inspected the document titled [TRANSLATION] "summary analysis" which gives a description of events occurring in the file from 1983 to 1995, with reference to a number of documents which were produced after that date. The document is not signed and there is also no addressee. I was not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 359

161 This is an internal memorandum from Associate Deputy Minister Cécile Cléroux to Luc M. Malo, Deputy Minister at the Department of Health and Social Services, dated January 26, 1996. I am not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it is likely to adversely affect the conduct of relations between the Government of Quebec and the federal government. Additionally, Associate Deputy Minister Cléroux makes only a passing reference to the fact that legal opinions favourable to the defence of Quebec's position have been received, giving no further details and not identifying who drafted these legal opinions and when. This document therefore does not have to be regarded as a discussion of a legal opinion which should be covered by the confidentiality privilege as a professional secret between a lawyer and his client.

Document No. 363

162 This is an internal memorandum from Marcel Gagné to John Gauvreau of the Department of Health and Social Services, dated May 7, 1996. In my opinion, it is simply a letter from one official to another, asking that the file be activated, and I am not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it is likely to adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 369

163 This is an information note to the Cabinet concerning the CAP, prepared by Jean Rochon, Minister of Health and Social Services, Bernard Landry, Quebec's Minister of State for the Economy and Finance, and Jacques Brassard, Minister responsible for Canadian Intergovernmental Affairs, and it is dated October 1996. This information note contains a number of appendices all

relating to Quebec's position and the various legal opinions to the government in support of its position. I am therefore persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, and would adversely affect the conduct of relations between the Government of Quebec and the federal government, and it is also a document intended for the Quebec Cabinet members and contains a discussion of legal opinions, which should be covered by the confidentiality privilege as a professional secret between a lawyer and his client.

Document No. 370

164 This is an explanatory note for the Cabinet session of December 3, 1996. The said note was to be used as a reference document for the Minister of State for the Economy and Finance and the Minister responsible for Canadian Intergovernmental Affairs. This document also contains a discussion of legal opinions directly related to the Government of Quebec's position.

165 I have no hesitation in considering that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, and it would adversely affect the conduct of relations between the Government of Quebec and the federal government, and it also contains a discussion of legal opinions and thus should be covered by the confidentiality privilege as a professional secret between a lawyer and his client.

AFFIDAVIT OF JACQUES LAFONTAINE

Document No. 40

166 This is a memorandum from Jean-Roch Pelleret to Pierre-Paul Veilleux, director of federal-provincial affairs at the Department of Health and Social Services, dated November 16, 1992 and dealing with a proposal to the CAP on housing resources. I have inspected the document and it is essentially an analytical document and a summary of the situation with regard to [TRANSLATION] "housing resources". Although the document contains certain proposals, it is an exchange of information between two officials and is not legal in nature. I do not feel that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 80

167 This is essentially the same document as document No. 369, attached to the affidavit of Serge Audet, which was regarded in its entirety as a document to be covered by the confidentiality privilege. Document No. 80 will therefore also be covered by the confidentiality privilege for the same reasons.

AFFIDAVIT OF CLAUDE WALLOT

Document No. 57

168 This is a memorandum from André Bédard to Claude Garcia, Associate Deputy Minister, planning, which is dated November 22, 1977. I have inspected the document, and in particular the last part of the final paragraph of the letter, for which confidentiality is sought. This is a comment on the percentage of eligible activities or of probable eligible clientele (my emphasis). This document originated over 23 years ago and I am not persuaded that a part of the document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 60

169 This is a letter dated December 9, 1977 from Thomas Dupéré to Claudine Sotiau, with a copy to André Bédard.

170 This document was prepared over 23 years ago and consists essentially of comments on the federal-provincial sharing of SSC costs. Although Thomas Dupéré is a lawyer, I cannot come to the conclusion that all or part of this document is a legal opinion from Thomas Dupéré and that it should accordingly be regarded as privileged. I therefore conclude that this document should not be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government, nor that all or part of the document is a legal opinion from Thomas Dupéré and may be covered by the confidentiality privilege as a professional secret between a lawyer and his client.

Document No. 63

171 This is a memorandum from André Bédard, Chief, federal-provincial agreements section, to Claude Garcia, Associate Deputy Minister, planning, on January 18, 1978 with regard to LCSC sharing under the CAP. This document consists essentially of an evaluation of the services provided by the LCSCs and a description of methodology.

172 The parts identified as requiring privilege are essentially only the percentages established from surveys made in the LCSCs and recommendations regarding the possible participation of the federal government. Appendix C is an estimate of the cost of operating the LCSCs and the federal contribution for the 1971-1972 and 1977-1978 fiscal years. I was not persuaded that the parts of this document and Appendix C should be covered by the confidentiality privilege because [their] disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 64

173 This document is dated January 24, 1978 and is a reply by Claude Garcia, Associate Deputy Minister, to André Bédard, chief, federal-provincial agreements section. It is essentially an answer to the letter received earlier (document No. 63) and a comment on the negotiation with the federal government.

174 I am not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 71

175 This is a memorandum from André Bédard to Gilles Desrochers, dated April 21, 1978. It is an internal analysis made over 22 years ago of a reply received from the federal government, which has several handwritten notes and at the very end indicates the desire to discuss the question further.

176 I am not persuaded that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 116

177 This is an internal memorandum from Jacques Lamonde, Associate Deputy Minister, budget and financial control, to Jean-Claude Deschênes, Deputy Minister at the Department of Social Affairs, dated March 24, 1982. The document deals with social services in schools and contains a highly strategic comment on negotiating related to an assessment of the arguments of the two parties concerned.

178 In the circumstances, I consider that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled and would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 119

179 This is a letter from Roger Ladouceur, executive assistant to the Deputy Minister of Social Affairs, addressed to Jacques Lamonde, Associate Deputy Minister, budget and financial control. The document deals with social services in the schools. As the previous document, No. 116, was regarded as privileged and this letter from Mr. Ladouceur is a reply to the previous letter, and also refers to the points discussed in Mr. Lamonde's letter to Mr. Deschênes, I consider that this

document should also be covered by the confidentiality privilege for the reasons given above.

Document No. 127

180 This is a letter from André Bédard, Director, federal-provincial agreements, to Jacques Lamonde, Associate Deputy Minister, at the budget and financial control branch of the Department of Social Affairs, dated May 9, 1984, on the subject of federal cost sharing for SSCs and LCSCs.

181 I have inspected the document, which was written over 16 years ago, and which discusses in particular the possibility of conducting surveys among SSC and LCSC users, and in particular suggests continuing discussions in this regard. I conclude that this document should be covered by the confidentiality privilege since its disclosure would not give the federal government an unfair advantage if the case at bar is settled, nor would it adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 131

182 This is a letter from André V. Bergeron, chief, agreement administration section, to Marc Lecours, Director, financial system and policy, at the Department of Health and Social Services, which is dated August 31, 1988. It is an exchange between two officials on the possibility of reviewing the allocation of social service costs in the schools. This memo is over twelve years old and ultimately contains only a suggestion that there should be consultations about a particular problem.

183 I do not think that this document should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 132

184 This is a memorandum from Jean-Guy Tremblay, intergovernmental negotiation and coordination, to Jean-Roch Pelletier, the subject of which is [TRANSLATION] "social services in the schools". It is essentially an internal analysis of school social services which could possibly become part of the negotiation. The document is nine years old and I am not persuaded that it should be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 133

185 This is a memorandum from Diane Grenier to Jean-Roch Pelletier on social services in the schools, dated January 16, 1992. Confidentiality was requested for pages 13 and 14 of the

document. Those pages are an internal analysis of various aspects of the question of social services in the schools and the various financial results associated with these costs. It is essentially an analytical document communicated between two officials with the possibility of discussion with such partners as the Fédération des CLSC et des CSS de Montréal. The document was prepared over nine years ago and I am not persuaded that it should be covered in part by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 135

186 This is a memorandum from Pierre-Paul 'Veilleux to Léonard Gilbert, dated December 9, 1992, dealing with social services in the schools. Once again, it is an internal analytical document sent by one official to another on possible action to be taken in the schools in future. This document does not refer to a legal opinion or to specific recommendations on negotiation. I conclude that this document should not be covered by the confidentiality privilege because its disclosure would give the federal government an unfair advantage if the case at bar is settled, or that it would adversely affect the conduct of relations between the Government of Quebec and the federal government.

Document No. 138

187 This document is an identical copy of document No. 369 in the affidavit of documents of Serge Audet and document No. 80 in the affidavit of documents of Jacques Lafontaine.

188 These two documents were held to be confidential and, for the reasons mentioned above with regard to the other two documents, document No. 138 should also be covered by the confidentiality privilege. I note also that the notification dated November 23, 1996, signed by the three Ministers Rochon, Landry and Brassard, and addressed to the three Ministers Pettigrew, Martin and Dion, and the page attached, will not be covered by the confidentiality privilege for obvious reasons.

189 Accordingly, THE COURT ORDERS the plaintiff to serve on the defendant within ten days of expiry of the appeal deadline the documents for which the claim of privilege has not been approved.

190 Those of the documents inspected by the Court for which privilege was approved will be returned to the plaintiff within ten days of expiry of the appeal deadline.

191 The other documents will be retained in the Court's file under seal marked [TRANSLATION] "confidential" until the conclusion of the instant proceeding, or until the Court decides otherwise.

192 The whole without costs on the motion, in view of the special circumstances of the case.

Certified true translation: Suzanne M. Gauthier, LL.L. Trad. a.

cp/d/qlcvd

Case Name:

Xentel DM Inc. v. Schroder Ventures US Fund L.P. 1.

Between

**Xentel DM Incorporated, Michael P. Platz, Geoffrey J.
Pickering, All West Productions Ltd., and Eleemosynary
Directions Inc., Plaintiffs, and
Schroder Ventures US Fund L.P. 1., Schroder Ventures US
Fund L.P. 2., XDM Holding, Inc., XDM Holding II, Inc.,
3073398 Nova Scotia Company, and Schroder Venture
Partners LLC, Defendants**

[2008] O.J. No. 1788

165 A.C.W.S. (3d) 1002

Court File No.: 03-CV-250704-CM2

Ontario Superior Court of Justice

S. Chapnik J.

Heard: April 30, 2008.

Judgment: May 5, 2008.

(13 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Production and inspection of documents -- Solicitor-client privilege -- Appeals -- From Masters' decisions -- Appeal of Master's decision that certain questions posed to the defendants did not have to be answered as they were protected by solicitor-client privilege dismissed -- The Master was not in error in determining that the plethora of documentary evidence and evidence from transcripts touching on the disputed matters were sufficient to permit her to make the ruling that she did -- She was entitled, in the circumstances, to endorse the plaintiffs' allegations of the existence of solicitor-client privilege based on the relationship of Schroder Partners and the other defendants.

Appeal by plaintiffs of Master's decision that certain questions posed to the defendants did not have to be answered as they were protected by solicitor-client privilege. The plaintiffs alleged that the

Master erred by assuming evidence not on the record and by failing to require the defendants to prove not only that communications were privileged but to identify what type of privilege was being relied upon. The plaintiffs alleged the Master also erred in not finding sufficient evidence of unlawful conduct to require answers to the plaintiffs' questions in that regard, for purposes of discovery.

HELD: Appeal dismissed with \$10,000 in costs. There was no obligation when claiming privilege that one file an affidavit or produce the impugned documents for scrutiny by the court. The Master was not in error in determining that the plethora of documentary evidence and evidence from transcripts touching on the disputed matters were sufficient to permit her to make the ruling that she did. The Master was entitled, in the circumstances, to endorse the plaintiffs' allegations of the existence of solicitor-client privilege based on the relationship of Schroder Partners and the other defendants. She was further entitled to find the plaintiffs' claim of bad faith against the defendants to be speculative in nature and that the solicitor's advice as to the Merger Agreement that formed part of a corporate/commercial transaction, even if it related to investment advice, was protected by solicitor-client privilege. The decision did not clearly dispose of a vital issue between the parties such as to justify a re-hearing. The order was certainly not clearly wrong in any respect. It contained no error of law or fact. The Master's conclusions were well supported by the evidence.

Counsel:

Joel D. Watson, for the Plaintiffs.

Douglas Harrison and Lesley Mercer, for the Defendants.

ENDORSEMENT

S. CHAPNIK J.:--

THE BACKGROUND AND MASTER'S DECISION

1 The plaintiffs moved before Master Brott on July 18 and August 20, 2007, for an order directing the defendants to answer certain questions and produce certain documents. By order dated January 31, 2008, the Master ordered some of the questions to be answered and delivery of a better and further affidavit of documents by all parties. She declined to order other questions answered on the basis of privilege.

2 The plaintiffs appeal her decision as to the denials. They allege that the Master erred by assuming evidence not on the record and by failing to require the defendants to prove not only that communications were privileged but to identify what type of privilege was being relied upon. She

also erred in not finding sufficient evidence of unlawful conduct to require answers to the plaintiffs' questions in that regard, for purposes of discovery.

3 Upon hearing the submissions of counsel and reviewing the materials filed, including the Master's reasons, I was satisfied that there was no merit in this appeal. I advised counsel after the hearing that the motion would be dismissed and undertook to provide reasons. Contained herein are my reasons for dismissing the appeal.

STANDARD OF REVIEW

4 Some conflict exists in the case law regarding the proper standard of review to be applied to an appeal of a Master's decision. The moving plaintiffs rely on the decision in *Dublin v. Montessori Jewish Day School of Toronto*, [2007] O.J. No. 1062 (S.C.J.), in which this Court adopted the formula set out in *Bank of Nova Scotia v. Liberty Mutual Insurance Co.*, [2003] O.J. No. 4474 (Div. Ct.). The Court in that case, essentially held that matters of discretion or law not vital to the disposition of the lawsuit should not be interfered with unless clearly wrong, whereas matters of law deemed vital to the disposition of the lawsuit attract a standard of correctness. The plaintiffs submit that the appropriate standard in the instant case is correctness. The defendants advocate for a more deferential standard, citing the "clearly wrong" test articulated in *Marleen Investments Ltd. v. McBride* (1979), 23 O.R. (2d) 125 (H.C.J.).

5 In summary, the applicable standard of review turns on the facts of each case, having regard to whether the decision represents an exercise in discretion and whether it is dispositive of issues raised in the proceedings. If it is not, a Master's decision is entitled to considerable deference unless it is clearly wrong or based on palpable and overriding error. See also, *Noranda Metal Industries Ltd. v. Employer's Liability Assurance Corp.* (2000), 49 C.P.C. (4th) 336 (S.C.J.) and *Visram v. Chandarana*, [2008] O.J. No. 1407 at para. 22 (Div. Ct.).

ANALYSIS

Sufficiency of Evidentiary Record

6 I am satisfied that there is no obligation when claiming privilege that one file an affidavit or produce the impugned documents for scrutiny by the Court. Though the evidentiary record needs to be reasonable, the Master was not in error in determining that the plethora of documentary evidence and evidence from transcripts touching on the disputed matters, were sufficient to permit her to make the ruling that she did. See *Belgravia Investments Ltd. v. Canada*, [2002] F.C.J. No. 870 (F.C.T.D.) (quoting Dunnet J. in *R. v. Morra*, 5 O.R. (3d) 255 at para. 11 (Gen. Div.)).

Valid Claim of Privilege

7 Master Brott was entitled, in the circumstances, to endorse the plaintiffs' allegations of the existence of solicitor-client privilege based on the relationship of Schroder Partners and the other

defendants. She was further entitled to find the plaintiffs' claim of bad faith against the defendants to be speculative in nature and that the solicitor's advice as to the Merger Agreement that formed part of a corporate/commercial transaction, even if it related to investment advice, was protected by solicitor-client privilege.

8 To put that decision in context, she found the defendants had consistently claimed privilege over some communications from the outset and in production of documents and undertakings. The Master also noted that the defendants did disclose relevant, non-privileged information to the plaintiffs.

Waiver of Privilege

9 The learned Master found that there was no waiver of the privilege by the defendants either by selective disclosure during the examination or impliedly through placing "state of mind" in issue. She directed herself to relevant Divisional Court authority, specifically, *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512, wherein waiver of privilege was discussed. See also *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp Canada* (2004), 245 D.L.R. (4th) 443 (B.C.C.A.) regarding "state of mind".

CONCLUSION

10 The Master's decision in this case is interlocutory and discretionary in nature, dealing with documentary production. I cannot conclude that the Master's decision clearly disposes of a vital issue between the parties such as to justify a rehearing. As noted in the case law, Masters, and in particular, as here, those who case manage complex matters, must have fair and reasonable control over their process. The matters in issue are routinely decided by them and their expertise and competence in this field must be recognized and given deference. It is noted in passing that the plaintiffs raised essentially the same arguments before the case management Master as they have on this appeal.

11 In any event, it is not necessary for me to determine the standard of review that applies in this case since even if the standard were correctness, I would not interfere with the Master's order. It certainly is not "clearly wrong" in any respect.

12 I can find no error of fact or law in the Master's well-reasoned decision. She was alive to the issues and gave careful consideration to each argument raised by the plaintiffs. Her conclusions are well-supported by the evidence.

13 The plaintiffs' appeal is dismissed. Costs to the defendants in the sum of \$10,000 payable forthwith.

S. CHAPNIK J.

cp/e/qlmxm/qlclg/qlmzp/qlcxm/qlaxw

Case Name:

Xentel DM Inc. v. Schroder Ventures US Fund L.P.

Between

Xentel DM Incorporated et al., Plaintiffs/Defendants

by Counterclaim, and

Schroder Ventures US Fund L.P. et al.,

Defendants/Plaintiffs by Counterclaim

[2008] O.J. No. 4044

168 A.C.W.S. (3d) 58

Docket: 282/08

Court File No. 03-CV-250704-CM2

Ontario Superior Court of Justice
Divisional Court

J.D. Carnwath J.

June 26, 2008.

(6 paras.)

Counsel:

Joel D. Watson for the Plaintiffs/Defendants by Counterclaim.

ENDORSEMENT

1 J.D. CARNWATH J.:-- Leave to appeal is denied.

2 The standard of review to be applied by Chapnik J. to the decision of Master Brott is that set out on Zeitoua, Chapnik J. made no error in law when she found in her reasons at para. 11 "Even if

the standard were correctness, I would not interfere with the Master's order." Further in para. 12 "I find no error of fact or law."

3 Chapnik J. made no error in law in determining that the "plethora" of evidence on the disputed matters of privilege was sufficient to permit the Master to make the ruling she did. I find no merit in this argument that the Master used the word "paucity" where Chapnik J. used "plethora". They were addressing two different issues, one specific, one general.

4 The issue of unlawful conduct was put to the Master. She was not satisfied in the evidence that an illegal [...] was made out. She was entitled to so find. That finding was not an error in law. Chapnik J. made no error in law by refusing to disturb the Master's findings. [Editor's note: [...] in this paragraph indicates places where the photocopy of this decision was missing one or more words.]

5 I find nothing in this dispute that requires the scrutiny of a panel of the Divisional Court. The parties should get on to trial where the issues between them will be resolved by a trial of those issues in a complete evidentiary foundation.

6 Costs to the Respondents fixed in a partial indemnity scale fixed at \$5000.00 for fees plus disbursements and G.S.T. payable 30 days.

J.D. CARNWATH J.

cp/t/qlrxc/qlcnt

Indexed as:
Canada v. Solosky

**William (Billy) Solosky (Plaintiff), Appellant; and
Her Majesty The Queen (Defendant), Respondent.**

[1980] 1 S.C.R. 821

Supreme Court of Canada

1979: June 13 / 1979: December 21.

**Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson,
Beetz, Estey, Pratte and McIntyre JJ.**

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Prisons -- Censorship of prisoners' mail -- Right of prison inmates to communicate in confidence with their solicitors -- Solicitor-client privilege -- Inmate failing to establish entitlement to a declaration -- Penitentiary Service Regulations, SOR/62-90 -- Canadian Bill of Rights, 1960 (Can.), c. 44, ss. 1(b), (d), 2(c)(ii).

The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court of Canada for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened". The action was dismissed and on appeal to the Federal Court of Appeal the pleadings were amended to request a declaration "..... that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The appeal failed, and at the opening of the appeal in this Court counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law".

In accordance with the Penitentiary Act, R.S.C. 1970, c. P-6, and Regulations thereunder, an institutional head of a penitentiary may order censorship of inmate correspondence to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the

institution. The main ground upon which the appellant rested his case was solicitor-client privilege.

Held: The appeal should be dismissed.

Contrary to the views expressed by the Court below, the important issues raised in this case should not be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

There could be no doubt that there was a real, and not a hypothetical, dispute between the parties. The declaration sought was a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order. Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case. The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written. However poorly framed the prayer for relief may be, even as twice amended, the present claim was clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege.

Recent case law has taken the traditional doctrine of solicitor-client privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. However, while there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, the concept has not been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. The appellant's suggestion that privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property", was not accepted. Without the evidentiary connection, which the law now requires, the privilege cannot be invoked.

The statutory disciplinary regime, described in this case, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant was seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

In aid of his main submission, appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedom recognized in the Canadian Bill of Rights by s. 1(b) (the right

of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). This argument also failed.

One could depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law. In that context, the Court was faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219.

It was submitted there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution. The third such interpretation was as follows: "he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". This alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

The "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication.

Per Estey J.: As to the above item (iii) in the catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege", any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law.

Cases Cited

[Mellstrom v. Garner, [1970] 1 W.L.R. 603, distinguished; Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A.C. 438; Pyx Granite Co. v. Ministry of

Housing and Local Government, [1958] 1 Q.B. 554; Pharmaceutical Society of Great Britain v. Dickson, [1970] A.C. 403; Re Director of Investigation and Research and Shell Canada Ltd. (1975), 22 C.C.C. (2d) 70; Greenough v. Gaskell (1833), 39 E.R. 618; Anderson v. Bank of British Columbia (1876), 2 Ch. 644; Re Director of Investigation and Research and Canada Safeway Ltd. (1972), 26 D.L.R. (3d) 745; Re Presswood et al. and International Chemalloy Corp. (1975), 65 D.L.R. (3d) 228; Re Borden and Elliot and The Queen (1975), 30 C.C.C. (2d) 337; Re BX Development Inc. and The Queen (1976), 31 C.C.C. (2d) 14; Re B and The Queen (1977), 36 C.C.C. (2d) 235, referred to.]

APPEAL from a judgment of the Federal Court of Appeal [[1978] 2 F.C. 632, 86 D.L.R. (3d) 316], dismissing an appeal from a judgment of Addy J. who dismissed the appellant's application for a declaration. Appeal dismissed.

Ronald Price, Q.C., and David P. Cole, for the appellant. E. Bowie and J.-Paul Malette, for the respondent.

Solicitor for the plaintiff, appellant: David P. Cole, Toronto.
Solicitor for the defendant, respondent: Roger Tassé, Ottawa.

The judgment of Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Pratte and McIntyre JJ. was delivered by

DICKSON J.:-- This case concerns the censorship of prisoners' mail and the right of an inmate of a federal penitentiary to communicate in confidence with his solicitor. The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened".

I

Prison Disciplinary Regime

The penitentiary authorities rely upon the following statutes and Regulations as authorizing restrictions upon the personal correspondence of prison inmates. Section 660(1) of the Criminal Code, R.S.C. 1970, c. C-34, provides that a sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. Section 29(1) of the Penitentiary Act, R.S.C. 1970, c. P-6, empowers the Governor in Council to make

regulations for the custody, treatment, training, employment, and discipline of inmates, and, generally, for carrying into effect the purposes and provisions of The Penitentiary Act. Section 29(3) authorizes the Commissioner of Penitentiaries to make rules, known as Commissioner's directives, for the custody, treatment, training, employment, and discipline of inmates, and the good government of penitentiaries.

Pursuant to the foregoing, Penitentiary Service Relations SOR/62-90, were passed, which provide in part, as follows:

Institutional Heads

1.12(1) The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein.

Visiting and Correspondence

2.17

The visiting and correspondence privileges that may, in accordance with directives, be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate.

Censorship

2.18

In so far as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

It will be observed then that the Regulations, the validity of which are not challenged by the appellant, expressly recognize the authority of the institutional head of a penitentiary to order censorship of inmate correspondence to the extent considered necessary or desirable for the security of the institution. These Regulations are implemented by Commissioner's Directive No. 219 (as amended following the date of issuance of the statement of claim in these proceedings, but prior to the date of trial). The following paragraphs are pertinent to the present inquiry:

Directive

- 5.a. Penitentiary staff shall promote and facilitate correspondence between inmates and their families, friends, and other individuals and agencies who can be expected to make a contribution to the inmate's rehabilitation within the institution and to assist in his subsequent and eventual return to the community.
- c. Subject to the provisions of paragraph 14 every inmate shall be permitted to correspond with any person, and shall be responsible for the contents of every article of correspondence of which he is the author. There shall be no restriction to the number of letters sent or received by inmates, unless it is evident that there is mass production.

Paragraph 5 d. makes provision for inspection for contraband, in these terms:

- d. Subject to the provisions of paragraph 8, every item of correspondence to or from an inmate may be opened by institutional authorities for inspection for contraband.

Censorship, dealt with in para. 7, is defined as any examination (other than for the express purpose of searching for contraband) and includes the reading, reproducing, extracting, or withdrawing of inmate correspondence. Paragraph 7 b. makes the point that censorship in any form is to be avoided, but reserves to the Commissioner of Penitentiaries and to the Institutional Director the authority to censor for one of two purposes, the rehabilitation of the inmate, or the security of the institution.

Paragraph 7 b. reads:

Censorship of correspondence in any form shall be avoided, but nothing herein shall be deemed to limit the authority of the Commissioner to direct, or the Institutional Director to order, censorship of correspondence in any form, to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. (PSR 2.18). Any form of censorship shall be undertaken only with the approval of the Institutional Director.

The Directive seeks to maintain the confidentiality of the contents of correspondence. Paragraph 7 c. states that only authorized staff shall be allowed to read inmate mail, when necessary, and further provides that no comments, other than those required for official duties, shall be made to other members of the staff on the contents of the correspondence.

Paragraph 8 of Directive 219 speaks of "privileged correspondence", defined as "properly identified and addressed items directed to and received from" any of a lengthy list of persons including, among others, members of the Senate, members of the House of Commons, members of

provincial legislatures, and provincial ombudsmen. Conspicuous is the absence of any reference to inmates' legal representatives. Privileged correspondence is forwarded to the addressee unopened with the proviso that in exceptional cases, where institutional staff suspect contraband in such privileged correspondence, the Commissioner's approval shall be obtained before it is opened. Paragraph 8 clearly countenances the maintenance of uncensored channels of mail for complaints and grievances. But the restricted listing of destinations assures that the channels through which grievances pass are limited to internal procedures (Solicitor General, Commissioner of Penitentiaries, Correctional Investigator) or political outlets (Members of Parliament and Senators). Lawyers are mentioned in paragraph 10 c. of Directive No. 219, "Use of Telephone and Telegraph", which reads:

- c. In urgent cases where lawyers call their inmate clients, and wish to communicate privately with them, the institutional authorities shall ask the lawyer to leave his name and telephone number and, following verification of the lawyer's identity, a call shall originate from the institution.

For the purposes of trial, an agreed statement of facts was filed. Paragraphs 4 and 5 of the statement are in the following terms:

- 4. Pursuant to section 6 paragraph (b) [s. 7(b), as amended,] of Directive No. 219, John Dowsett, Director of Millhaven Institution has ordered that William (Billy) Solosky's mail be opened and read. This order has been applied to mail originating from his solicitor David Cole.
- 5. William (Billy) Solosky's mail is being read because it is John Dowsett's opinion that William (Billy) Solosky's conduct, activities and attitude cause him to believe that attention should be paid to his incoming and outgoing correspondence. Those letters which are deemed to be significant with respect to the security of the institution are being brought to the attention of John Dowsett.

Paragraph 5 of the statement of defence clarifies any obscurity in para. 5 of the agreed statement of facts. The statement of defence reads "The security of the Millhaven Institution has required that the Plaintiff's mail be opened."

II

Judicial History

Mr. Justice Addy, at trial, was of the view that solicitor and client privilege, upon which the appellant founds his case, can only be claimed document by document and that each document is privileged only to the extent it meets the criteria which would support the privilege. Whether a letter does, in fact, contain a privileged communication cannot be determined until it has been opened and read. There is no logical nor legal justification for permitting correspondence which appears to have emanated from, or to be addressed to, a solicitor to enjoy any special aura of protection. Mr. Justice

Addy relied upon these propositions in dismissing the appellant's action, with costs. He buttressed his conclusion by the argument that in this situation it would be too easy for a person to obtain envelopes and letterheads bearing the name and title of a real or fictitious solicitor, and equally as easy for a prisoner to camouflage the true identity of an addressee.

The appellant appealed to the Federal Court of Appeal. In that Court, his counsel amended the pleadings to request a declaration "... that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The revised form of declaration differs little from that appearing in the amended statement of claim. Both are defective, at least to this extent--it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected. That a privilege may not encompass all solicitor and client communications is clearly illustrated by the correspondence exhibited in the present case. Some of the letters concerned the appellant's parole review. Others merely contained criticism of the administration, information about other inmates, and prison gossip. One letter enclosed a second letter with the request that the second letter be forwarded to a named magazine for publication.

The Federal Court of Appeal dismissed the appeal, holding that a declaration that all correspondence between the appellant and his solicitor be declared privileged would extend considerably the ambit of the solicitor-client privilege as it is generally known and understood. To grant the declaration sought would be to give to the appellant an extension of the privilege afforded to the ordinary citizen. As a second ground for rejecting the appeal, the Court held that by issuing an order relating to correspondence not yet written, the court would be granting relief on the basis of purely hypothetical issues, and in futuro. Assuming jurisdiction, the case was not one where jurisdiction should be asserted.

III

Declaratory Relief

At the opening of the appeal in this Court, counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law". The amended form of prayer seems to have been conceived with a view to meeting the point, taken by the Federal Court of Appeal, that the relief earlier sought would relate to letters not yet written.

With great respect for the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [[1921] 2 A.C. 438], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [[1958] 1 Q.B. 554], (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):

... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in *Pharmaceutical Society of Great Britain v. Dickson* [[1970] A.C. 403 (H.L.)], a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be ultra vires its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

In the instant case, *Mellstrom v. Garner* [(1970), 1 W.L.R. 603], was cited in the Federal Court of Appeal in support of the proposition that courts will not grant declarations regarding the future. There, a chartered accountant and former partner of the defendant sought a declaration as to the true construction of the agreement by which the partnership had been dissolved. The plaintiff asked whether, having regard to a clause in the agreement, he would be in breach were he to solicit clients or business of the 'continuing partners'. Karminski L.J. held that declarations concerning the future ought to be approached with considerable reserve. Since neither the plaintiff nor the defendants had broken the provisions of the clause in question, nor sought to do so, there was no useful purpose to be gained in granting the declaration. The application was dismissed. That is a

very different case from the present one.

As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:

The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)

Here there can be no doubt that there is a real and not a hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order.

Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written.

However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: see de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973, p. 431). Further, s. 50 of the Supreme Court Act allows the Court to make amendments necessary to a determination of the "real issue", without application by the parties.

Solicitor-Client Privilege

As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly stated in *Re Director of Investigation and Research and Shell Canada Ltd.* [(1975), 22 C.C.C. (2d) 70, [1975] F.C. 184], at pp. 78-9:

... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

The history of the privilege can be traced to the reign of Elizabeth I (see *Berd v. Lovelace* [(1577), 21 E.R. 33] and *Dennis v. Codrington* [(1580), 21 E.R. 53]). It stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in *Greenough v. Gaskell* [(1833), 39 E.R. 618], at p. 620:

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The rationale was put this way by Jessel M.R. in *Anderson v. Bank of British Columbia* [(1976), 2 Ch. 644], at p. 649:

The object and meaning of the rule is this: that as, by reason of the complexity

and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, Evidence (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, *O'Shea v. Woods* [[1891] P. 286], at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. See *Re Director of Investigation and Research and Canada Safeway Ltd.* [(1972), 26 D.L.R. (3d) 745 (B.C.S.C.)]; *Re Director of Investigation and Research and Shell Canada Ltd.*, *supra*; *Re Presswood et al. and International Chemalloy Corp.* [(1975), 65 D.L.R. (3d) 228 (Ont. N.C.)], *Re Borden and Elliot and The Queen* [(1975), 30 C.C.C. (2d) 337], (affirmed on other grounds [(1975), 30 C.C.C. (2d) 345 (Ont. C.A.)]; *Re BX Development Inc. and The Queen* [(1976), 31 C.C.C. (2d) 14 (B.C.C.A.)]; *Re B and The Queen* [(1977), 36 C.C.C. (2d) 235 (Ont. Prov. Ct.)].

While there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, I do not think the concept has been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. In the factum of the appellant, it is suggested that the privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property". The cases cited in support of this proposition, however, all involved search warrants that caught documents to which the privilege unquestionably attached. In those cases, such as *Re Borden & Elliot and The Queen*, *supra*, the search warrant led to the seizure of documents believed "to afford evidence." If privilege were to attach to the documents, then such material could not afford evidence at trial and hence the evidentiary connection remained. The judgments can be rationalized as merely shifting the time at which the privilege can be asserted. As the comment by Kasting in (1978), 24 McGill L.J. 115, "Recent Developments in the Law of Solicitor-Client Privilege" suggests, the shift away from the strict rule-of-evidence-at-trial approach has taken place by logical extensions. Chassé, in his annotation at (1977), 36 C.R.N.S. 349, *The Solicitor-Client Privilege and Search Warrants*, asserts that the privilege is being looked upon "as more akin to a rule of property rather than merely as a rule of evidence" (p. 350), but the privilege, in my view, is not yet near a rule of property. That is what the privilege must become if the appellant is to succeed.

There is no suggestion in the materials in the case at bar that the authorities intend to employ the letters or extracts obtained therefrom as evidence in any proceeding of any kind. Much as one might well wish to analogize from the search warrant cases to the censorship order here impugned, as a form of blanket search warrant upon appellant's mail, the order cannot be characterized as being directed to obtaining or affording evidence in any proceeding. Without the evidentiary connection, which the law now requires, the appellant cannot invoke the privilege.

As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is

intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

The complication in this case flows from the unique position of the inmate. His mail is opened and read, not with a view to its use in a proceeding, but by reason of the exigencies of institutional security. All of this occurs within prison walls and far from a court or quasi-judicial tribunal. It is difficult to see how the privilege can be engaged, unless one wishes totally to transform the privilege into a rule of property, bereft of an evidentiary basis.

In my view, the statutory disciplinary regime, which I have earlier described, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant is seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

V

In aid of his main submission, resting upon privilege, counsel for the appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedoms recognized in the Canadian Bill of Rights by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). The authorities relied upon by counsel were, in the main, breathalyzer cases dealing with the right of a motorist to communicate with his counsel in private and without delay. These, and other cases cited, give little assistance to the resolution of the issue now before the Court, due to the difference in factual context and relevant considerations. The question in this case is whether the appellant's right to retain and instruct counsel is incompatible with the right of prison authorities to prevent threat to the security of the institution. In my view, there is no such incompatibility provided the exercise of authority is not greater than is necessary to support the security interest. This, as I read it, is precisely the effect of para. 7b. of Directive 219.

With respect to s. 1(b) of the Bill, it has been held by this Court that equality before the law does not require "that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective": Martland J., giving the unanimous reasons of this Court in *Prata v. Minister of Manpower and Immigration* [[1976] 1 S.C.R. 376], at p. 382.

It is difficult to attack the validity of Penitentiary Service Regulation 2.18 or Directive 219 with a freedom of speech argument, having regard to the will of Parliament, as reflected in the Penitentiary Act and in the Penitentiary Service Regulations, which preserves a limited right of censorship by penitentiary authorities in the interests of security and, at the same time, affords

inmates a right to communicate freely through uncensored channels with members of Parliament and provincial legislatures, and the many persons listed in para. 8 of Directive 219.

VI

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

In that context, the Court is faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219. Section 2.18 of the Regulations, as earlier noted, undoubtedly reserves the authority of the institutional head to order censorship of correspondence to the extent considered necessary or desirable for the security of the institution. As a general rule, I do not think it is open to the courts to question the judgment of the institutional head as to what may, or may not, be necessary in order to maintain security within a penitentiary. On the other hand, it is to be noted that Penitentiary Service Regulation 2.18 and Commissioner's Directive No. 219 speak in general terms, in their reference to the reading of correspondence and to other forms of censorship, without express mention of solicitor-client correspondence. The right to privacy in solicitor-client correspondence has not been expressly taken away by the language of the Regulations and the Directive.

Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate's solicitor. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.

The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.

The difficulty is in ensuring that the correspondence between the inmate and his solicitor, whether within the doctrine of solicitor-client privilege or not, is not cloaking the passage of drugs, weapons, or escape plans. There must be some mechanism for verification of authenticity. That seems to be generally accepted. Yet, no one has so far suggested what third party mechanism might be adopted, or by what authority the courts could impose such a mechanism upon penitentiary

authorities.

Counsel for the Crown submits there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution:

- (a) he may nonetheless permit the letter to be delivered unopened and unexamined to the inmate;
- (b) he may suspend the inmate's privilege to receive mail, in respect of that letter, pursuant to sections 2.17 and 2.18 of the Penitentiary Service Regulations.
- (c) he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.

Counsel contends that to interpret the Regulations as requiring the first of these alternatives is to leave the institutional head without the authority he requires to control the potential passage of contraband, or of correspondence which may endanger the safety of the institution, under the guise of confidential communications passing between inmate and solicitor. I agree. I would also reject the second as providing no solution. I agree that the third alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. Paragraph 7c. of Directive 219 underlines this point.

The appellant has failed to establish entitlement to a declaration in any of the three forms he has advanced in these proceedings. The appeal must be dismissed. The respondent is entitled to costs in this Court.

The following are the reasons delivered by

ESTEY J.:-- I have had the opportunity of reading the reasons for judgment of my brother Dickson and I concur therein. I only wish to add to item (iii) in his catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". Item (iii) reads as follows:

- (iii) the letter only should be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to confirm the bona fides of the communication;

In my respectful view, any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law. Any mechanics adopted for their examination should, subject only to special circumstances indicating an overriding necessity for intervention by the authorities, safeguard communications flowing under the protection of the privilege so as to ensure that the privilege is left in a practical, workable condition; for example, a covering letter from a solicitor forwarding a sealed communication which the solicitor states to be a communication of legal advice should ordinarily shield the enclosure from examination by the authorities. I would dispose of the appeal as proposed by Dickson J.

Appeal dismissed with costs.

Indexed as:

Globe and Mail v. Canada (Attorney General)

**Globe and Mail, a division of CTVglobemedia Publishing Inc.,
Appellant;**

v.

**Attorney General of Canada and Groupe Polygone Éditeurs inc.,
Respondents, and**

**Fédération professionnelle des journalistes du Québec, Ad
IDEM/Canadian Media Lawyers Association, Astral Media Radio
Inc., Groupe TVA inc., La Presse ltée, Médias Transcontinental
inc., Canadian Broadcasting Corporation and Canadian Civil
Liberties Association, Intervenors.**

And

**Globe and Mail, a division of CTVglobemedia Publishing Inc.,
Appellant;**

v.

**Attorney General of Canada and Groupe Polygone Éditeurs inc.,
Respondents, and**

**Barreau du Québec, Gesca ltée, Joel-Denis Bellavance and
Canadian Civil Liberties Association, Intervenors.**

And

**Globe and Mail, a division of CTVglobemedia Publishing Inc.,
Appellant;**

v.

**Attorney General of Canada and Groupe Polygone Éditeurs inc.,
Respondents, and**

**Fédération professionnelle des journalistes du Québec, Ad
IDEM/Canadian Media**

[page593]

**Lawyers Association, Astral Media Radio Inc., Groupe TVA inc.,
La Presse ltée, Médias Transcontinental inc. and Canadian
Broadcasting Corporation, Intervenors.**

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[2010] 2 R.C.S. 592

[2010] S.C.J. No. 41

[2010] A.C.S. no 41

2010 SCC 41

File Nos.: 33114, 33097, 32975.

Supreme Court of Canada

Heard: October 21, 2009;

Judgment: October 22, 2010.

**Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish,
Abella, Charron, Rothstein and Cromwell JJ.**

(102 paras.)

Appeal From:

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC AND THE COURT OF APPEAL
FOR QUEBEC

Catchwords:

Constitutional law -- Canadian Charter -- Human rights -- Quebec Charter of human rights and freedoms -- Evidence -- Journalist-source privilege -- Freedom of expression -- Access to information -- Professional secrecy -- Newspaper journalist receiving information from confidential unauthorized government source concerning company retained by federal government under Sponsorship Program -- Newspaper publishing information alleging misuse and misdirection of public funds -- Journalist compelled on cross-examination to answer questions possibly leading to identity of source -- Newspaper objecting -- Whether relationship protected by class-based journalist-source privilege -- Whether basis for privilege constitutional or quasi-constitutional rooted in Canadian Charter and Quebec Charter rights -- Whether common law framework to recognize case-by-case privilege relevant for civil litigation proceedings under Quebec law -- Canadian Charter of Rights and Freedoms, s. 2(b) -- Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 3, 9, 44.

Constitutional law -- Charter of Rights -- Freedom of expression -- Publication ban -- Newspaper journalist receiving information from confidential unauthorized government source concerning company retained [page594] by federal government under Sponsorship Program -- Information published including details about confidential settlement negotiations between government and

company -- Court making order prohibiting journalist from reporting and publishing further details concerning settlement negotiations -- Whether order having effect of limiting journalist's freedom of expression rights under Canadian Charter -- Whether publication ban necessary to prevent serious risk to proper administration of justice -- Whether salutary effects of publication ban outweigh deleterious effects -- Canadian Charter of Rights and Freedoms, s. 2(b).

Summary:

These three appeals have as their origin the litigation flowing from what is known as the Sponsorship Scandal. In March 2005, the Attorney General of Canada filed a motion in the Quebec Superior Court seeking to recover the money paid by the federal government under the Sponsorship Program. The proceedings were instituted against several of the companies and individuals retained by the Program and implicated in the Scandal, including Groupe Polygone. In response, Groupe Polygone advanced a defence of prescription under the *Civil Code of Québec*. As the litigation proceeded, and in support of its prescription defence, Groupe Polygone obtained orders requiring that certain persons, including several federal government employees, answer questions aimed at identifying the source of a journalist's information. Based primarily on information received from a confidential unauthorized government source, L, a Globe and Mail journalist, had written a series of articles about the Sponsorship Program, alleging the misuse and misdirection of public funds. The Globe and Mail brought a revocation motion in respect of the orders issued by the Superior Court judge, arguing that their effect would be to breach journalist-source privilege. L testified on the motion and was cross-examined by counsel for Groupe Polygone. Counsel for the Globe and Mail objected to a number of questions posed to L, on the basis that they were either irrelevant, or that his answering them would lead to a breach of journalist-source privilege. The judge refused to recognize the existence of a journalist-source privilege and the objections were dismissed. Leave to appeal was denied by the Court of Appeal ("journalist-source privilege appeal"). Rather than have its journalist answer the questions, the Globe and Mail sought to discontinue the revocation proceedings. The judge refused to allow the discontinuance, and the Quebec Court of Appeal dismissed the appeal ("discontinuance [page595] appeal"). Meanwhile, during the hearing of the discontinuance proceedings, Groupe Polygone complained about leaks dealing with the content of confidential settlement negotiations in which it was engaged with the Attorney General, the details of which were reported by L and published by the Globe and Mail. In response, and on his own motion, the Superior Court judge made an order prohibiting L from further reporting and publishing on the state of the negotiations. While the Globe and Mail objected to what it insisted was a publication ban, and one issued without the benefit of hearing from either party, the judge maintained that the order was not a publication ban, providing no further written or oral reasons for his decision. The Quebec Court of Appeal again rejected the Globe and Mail's application for leave to appeal ("publication ban appeal").

In the journalist-source privilege appeal in this Court, the Globe and Mail argued that a class-based journalist-source privilege is rooted in the *Canadian Charter* and the *Quebec Charter*. In the

alternative, it contended that the common law Wigmore doctrine to establish privilege on a case-by-case basis, but modified to account for the civil law tradition, is applicable. The *Globe and Mail* also challenged the order prohibiting the publication of information related to the settlement negotiations, as well as the order denying the discontinuance.

Held: The journalist-source privilege appeal should be allowed and the matter remitted to the Superior Court of Quebec for consideration in accordance with the reasons for judgment. The publication ban appeal should be allowed and the order prohibiting the publication of information relating to the settlement negotiations quashed. The discontinuance appeal should be dismissed as moot.

There is no basis for recognizing a class-based constitutional or quasi-constitutional journalist-source privilege under either the *Canadian Charter* or the *Quebec Charter*. For reasons set out in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, and in particular the difficulty in defining such a heterogeneous and ill-defined group of writers and speakers with the necessary degree of certainty, freedom of expression under [page596] the *Canadian Charter* and the *Quebec Charter* cannot constitute the basis for recognizing journalist-source privilege. Similarly, s. 44 of the *Quebec Charter*, which protects access to information, does not broaden the scope of the right beyond what is defined by the provision itself. While the s. 44 right can inform the protection of the confidential relationship between journalists and their sources, it cannot constitute the basis for recognizing the privilege. Finally, because journalists are not bound to professional secrecy by law, s. 9 of the *Quebec Charter*, which protects professional secrecy, cannot ground a quasi-constitutional right to the protection of media sources. There is, however, a basis in the laws of Quebec for a journalist-source privilege or an exemption from the general obligation to give evidence in civil cases. Despite its common law origins, the use of a Wigmore-like framework to recognize the existence of case-by-case privilege in the criminal law context is equally relevant for civil litigation matters subject to the laws of Quebec; recognition would result in consistency across the country, while preserving the distinctive legal context under the *Civil Code of Québec*. This case-by-case approach is consistent with the overarching principles set out in the *Civil Code*, the *Quebec Charter* and the *Canadian Charter*, and conforms with the law of evidence in Quebec as found in the *Civil Code* and the *Code of Civil Procedure*. It is also sufficiently flexible to take into account the variety of interests that may arise in any particular case.

Therefore, under the proposed test, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate first that the questions are relevant. If the questions are relevant, the court must then consider the four Wigmore factors: (1) the relationship must originate in a confidence that the source's identity will not be disclosed; (2) anonymity must be essential to the relationship in which the communication arises; (3) the relationship must be one that should be sedulously fostered in the public interest; and (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth. At the crucial fourth Wigmore factor, the court must balance the importance of disclosure to the administration of justice, against the public interest

in maintaining journalist-source confidentiality. This balancing must be conducted in a context specific manner, having regard to the particular demand for disclosure at issue. The considerations relevant at [page597] the fourth Wigmore stage include: the stage of the proceeding when a claim of privilege is raised; the centrality of the issue to the dispute; whether the journalist is a party to the litigation, or simply a witness; whether the facts, information or testimony are available by any other means; the degree of public importance of the journalist's story; and whether the story has been published and therefore already in the public domain. In this case, the Superior Court judge erred in concluding that it was preferable to compel L's answers on cross-examination. L was entitled to have the questions put to him challenged for relevancy, and his claim for privilege rigorously tested against the Wigmore criteria. In particular, if the judge concluded that the first three factors favoured disclosure, he was then required to ask whether, on balance, the public interest in maintaining journalist-source confidentiality outweighed the importance of disclosure to the administration of justice. The public interest here, is based largely on whether the questions would tend to reveal the identity of L's confidential source. Ultimately, these matters are for the judge to determine, but in this case they were never considered because neither party was permitted to make submissions or tender evidence on the issue.

With respect to the publication ban appeal, the Superior Court's order must be assessed for what it is: a court-ordered publication ban which had the effect of limiting L's s. 2(b) freedom of expression *Canadian Charter* rights. The Superior Court judge therefore erred in not applying the *Dagenais/Mentuck* framework. The order was made without notice, without application and without the benefit of formal submissions from either party. By proceeding in this manner, in a case where there was no suggestion of urgency or delay inherent in hearing submissions that would prejudice either party, the Superior Court violated one of the fundamental rules of the adversarial process: it denied the parties an opportunity to be heard before deciding an issue that affected their rights. This, in itself, is sufficient to allow the appeal. Considering the publication ban on its merits, maintaining the confidentiality of settlement negotiations is a public policy goal of the utmost importance. However, confidentiality undertakings bind only the parties and their agents. Neither L nor the *Globe and Mail* was a party to the settlement negotiations. The wrong was committed by the government source who provided L with the information. Nothing in the record suggests that L was anything other than a beneficiary of [page598] the source's desire to breach confidentiality. L was not required to ensure that the information was provided to him without the source breaching any of her legal obligations and he was under no obligation to act as her legal adviser. In any event, Groupe Polygone offered no tangible proof that its ability to effectively engage in settlement negotiations with the government has been irreparably harmed, nor has it offered any evidence of a serious risk to the administration of justice. At the time L's article was published, the fact that the parties were engaged in settlement negotiations was already a matter of public record. Even if the ban were necessary to prevent a serious risk to the administration of justice, its salutary effects do not outweigh its deleterious effects which are serious. Upholding the order would prevent the story from coming to light, stifling the media's exercise of their constitutionally mandated role to report stories of public interest, such as one where the federal government is seeking to recover a considerable amount of public money because of an alleged fraud against a government program.

Given the result in the journalist-source privilege and publication ban appeals, the discontinuance appeal is moot.

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History and Disposition:

[33114] APPEAL from an order of the Superior Court of Quebec (de Grandpré J.) dismissing objections to evidence. Appeal allowed.

[33097] APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Doyon and Duval Hesler JJ.A.), 2009 QCCA 235, [2009] J.Q. no 713 (QL), dismissing an application for leave to appeal from an order of de Grandpré J. prohibiting the publication of information. Appeal allowed.

[32975] APPEAL from a judgment of the Quebec Court of Appeal (Otis, Forget and Côté JJ.A.), 2008 QCCA 2464, [2008] J.Q. no 13554 (QL), [page601] 2008 CarswellQue 12763, dismissing an application for leave to appeal from an order of de Grandpré J. refusing to grant a discontinuance of proceedings. Appeal dismissed.

Counsel:

William Brock, Guy Du Pont, David Stelow and Brandon Wiener, for the appellant.

Claude Joyal, for the respondent the Attorney General of Canada.

Patrick Girard, Louis P. Bélanger, Q.C., and Frédéric Pierrestiger, for the respondent Groupe Polygone Éditeurs inc.

Christian Leblanc, Marc-André Nadon and Chloé Latulippe, for the interveners Fédération professionnelle des journalistes du Québec, Ad IDEM/Canadian Media Lawyers Association, Astral Media Radio Inc., Groupe TVA inc., La Presse ltée, Médias Transcontinental inc., the Canadian Broadcasting Corporation, Gesca ltée and Joel-Denis Bellavance.

Jamie Cameron, Christopher D. Bredt and Cara F. Zwibel, for the intervener the Canadian Civil Liberties Association.

Michel Paradis, François-Olivier Barbeau, Gaston Gauthier and Sylvie Champagne, for the

intervener Barreau du Québec.

The judgment of the Court was delivered by

LeBEL J.:--

I. Introduction

1 It is a general and well-accepted rule of evidence that witnesses who are called to testify are obliged to answer the questions put to them, so long as they are relevant. *The Globe and Mail* ("Globe and Mail") seeks an exception to this rule for the benefit of one of its journalists, Mr. Daniel Leblanc, on the basis that his testimony would reveal the identity of a confidential source and thereby infringe his s. 2(b) rights under the *Canadian Charter of Rights and Freedoms*. The Globe and Mail also asks this [page602] Court to quash an order prohibiting it from publishing any information, however obtained, regarding confidential settlement negotiations involving the Government of Canada and Groupe Polygone Éditeurs inc.

2 These appeals all have as their origin the litigation flowing from what is now known as the "Sponsorship Scandal". More broadly, however, these appeals raise questions concerning access to the information provided by sources to journalists, and the confidentiality of their relationship, in the context of civil litigation subject to the law of Quebec. While some of these questions are analogous to those recently considered by this Court in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, which also dealt with the confidentiality of the journalist-source relationship, although in the context of a criminal investigation, these appeals also require this Court to consider the propriety of ordering a ban on the publication of settlement negotiations. A related procedural issue, in respect of an attempted discontinuance of procedures before the Superior Court of Quebec, is also before our Court in a third appeal.

3 For the reasons that follow, the appeals dealing with the confidentiality of the journalist-source relationship and the publication ban are allowed. Because this result renders the discontinuance appeal moot, that appeal is dismissed.

II. Source of the Litigation and Its Procedural History

4 Following the results of the 1995 referendum on Quebec sovereignty, the federal Cabinet created the Sponsorship Program ("Program"), which was designed to counteract the sovereignty movement and increase the visibility of the federal government in Quebec. Based primarily on information [page603] he received from a confidential source - who later became known by the alias MaChouette - a Globe and Mail journalist, Daniel Leblanc, wrote a series of articles on the

Program. Mr. Leblanc focussed primarily on several problematic activities relating to the Program's administration. His most significant allegations targeted the misuse and misdirection of public funds. Throughout the course of his communication with MaChouette, Mr. Leblanc agreed to protect her confidentiality and anonymity.

5 In response to the articles written by Mr. Leblanc and others who picked up the story, considerable media and public interest was directed toward the Sponsorship Program. Following a scathing report from the Auditor General, a Royal Commission (the "Gomery Inquiry") was struck to investigate what had become known colloquially as the "Sponsorship Scandal".

6 In 2006, Mr. Leblanc took an unpaid leave of absence from the Globe and Mail in order to author a book about the Sponsorship Scandal, which he eventually published under the title *Nom de code: MaChouette: l'enquête sur le scandale des commandites* (2006). While the Globe and Mail authorized the reproduction of articles that it had published and for which it held the copyright, it was not Mr. Leblanc's book publisher. Nor did the Globe and Mail have any financial stake in the book's publication.

7 In March 2005, the Attorney General of Canada filed a motion, in the Quebec Superior Court, seeking to recover the money paid by the federal government under the impugned Program, which amounted to over \$60 million. The proceedings were instituted against several of the companies and individuals retained by the Program and implicated in the Sponsorship Scandal, including the entities that collectively form Groupe Polygone. Since these proceedings were initiated, the Attorney General has maintained that it was not until May 2002 - after receiving the Auditor [page604] General's report - that the government began to suspect fraud. The full extent of the fraud and the identity of its perpetrators, the government says, crystallized only with the revelations disclosed by the Gomery Inquiry.

8 In response, Groupe Polygone, maintaining that the Government of Canada had earlier knowledge of the scandal, sought to advance a defence of prescription under the *Civil Code of Québec*, R.S.Q., c. C-1991 ("*Civil Code*" or "*C.C.Q.*"). As the litigation proceeded, and in support of its prescription defence, Groupe Polygone applied for an order requiring that certain persons, including several federal government employees, answer questions aimed at identifying Mr. Leblanc's source. In a series of orders, Hébert J. instructed the individuals identified by Groupe Polygone to answer the questions in writing and to keep the matter confidential. At the request of the Attorney General, he also appointed counsel to act as advisor to those named individuals. Hébert J. then extended his initial order to answer questions to an additional group of individuals.

9 Almost a year later, the Globe and Mail brought a revocation motion in respect of the orders issued by Hébert J., arguing that their effect would be to breach journalist-source privilege. It asked that these orders be quashed. Mr. Leblanc testified on the motion, argued before de Grandpré J., and he was cross-examined by counsel for Groupe Polygone. Counsel for the Globe and Mail objected to a number of questions posed to Mr. Leblanc, on the basis that they were either irrelevant, or that

his answering them would lead to a breach of journalist-source privilege (the "objection motion"). De Grandpré J. dismissed these objections, orally, and refused to recognize the existence of a journalist-source privilege. Leave to appeal was denied by a single judge of the Court of Appeal, on the basis that the court lacked jurisdiction to hear the appeal. Rather than have its journalist answer the questions, the *Globe and Mail* sought to discontinue the revocation proceedings. [page605] De Grandpré J. refused to allow the discontinuance, and the Quebec Court of Appeal dismissed the appeal (2008 QCCA 2464 (CanLII)).

10 In October 2008, Mr. Leblanc, in an article entitled "Sponsorship firm moves to settle with Ottawa", *The Globe and Mail*, October 21, 2008, at p. A11, reported that Groupe Polygone had made a \$5 million offer to settle its portion of the lawsuit. He also reported that the federal government had rejected the offer, and was in negotiations to obtain an additional \$10 million from Groupe Polygone. Mr. Leblanc obtained the information at the heart of this article from an unauthorized government source.

11 During the hearing of the discontinuance proceedings, counsel for Groupe Polygone complained intently about the leaks dealing with the content of the confidential settlement negotiations, and about repeatedly finding Groupe Polygone the subject of news articles and stories. In response, and on his own motion, de Grandpré J. made an order prohibiting Mr. Leblanc from further reporting and publishing on the state of the confidential settlement negotiations between the Attorney General and the defendants in the principal litigation. While the *Globe and Mail* objected vigorously to what it insisted was a publication ban, and one issued without the benefit of hearing from either party, de Grandpré J. maintained that the order was not a publication ban. He provided no further written or oral reasons for his decision, and the Quebec Court of Appeal again rejected the *Globe and Mail's* application for leave to appeal (2009 QCCA 235 (CanLII)).

12 A few months later, de Grandpré J. ordered a similar publication ban against *La Presse* and one of its journalists, Joel-Denis Bellavance. It forbade the publication of any information related to the confidential settlement negotiations. On this occasion, [page606] he provided written reasons (2009 QCCS 1624 (CanLII)). The Quebec Court of Appeal quashed this decision (*Gesca ltée v. Groupe Polygone Éditeurs inc. (Malcom Média inc.)*, 2009 QCCA 1534, [2009] R.J.Q. 1951), and an application for leave to appeal is currently before this Court.

13 The legal issues raised by the appeals concerning journalist-source privilege in the civil litigation context and the publication ban warrant their own consideration. I will consider each appeal in its own right.

III. The Objections and Questions Relating to the Confidentiality of Sources

A. *Nature of the Appeal*

14 The first appeal (33114) deals with the questions put to Mr. Leblanc in the course of his examination with respect to the revocation matter. The issue raised by this appeal is whether the relationship between Mr. Leblanc and MaChouette is protected by journalist-source privilege, and

thereby exempts Mr. Leblanc from answering any questions that would lead to her identification.

15 The Globe and Mail argues that the basis of the journalist-source privilege is a constitutional one, rooted in s. 2(b) of the *Canadian Charter* and s. 3 of the *Quebec Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). The privilege will arise when a person (1) is engaged in newsgathering; and (2) has provided an undertaking of confidentiality to his or her source, without which it is reasonable to assume that the source would not have come forward. Recognizing that no constitutional right is absolute, the Globe and Mail argues that s. 9.1 of the *Quebec Charter* requires a weighing of the right not to disclose the identity of a confidential source, against the "democratic values, public order and the general well-being of the citizens of Québec". In the absence of a competing *Quebec Charter* right to obtain all relevant [page607] evidence in civil proceedings, the balancing must tip in favour of freedom of the press. The Globe and Mail argues that a wide range of factors are relevant to this balancing exercise: whether the cause of action is patrimonial or extra-patrimonial; whether the action is for damages, or some other form of relief; whether the journalist is a party to the proceedings; whether the issue is central to the resolution of the dispute; whether the story was published, and if so, its degree of public importance; and the potential consequences of disclosure.

16 According to the Globe and Mail, the party seeking to pierce the privilege must then demonstrate (1) that the identity of the source is necessary to establish a particular fact; and (2) that establishing that particular fact is necessary for disposing of an issue in the dispute. Requiring a journalist to reveal the identity of a confidential source, under testimonial compulsion, should be a matter of last resort, not one of mere convenience. A recognition of the privilege, the Globe and Mail argues, translates into an evidentiary privilege, and thereby operates in a manner analogous to the right to professional secrecy under s. 9 of the *Quebec Charter*. However, if this Court rejects the existence of a stand-alone right, then the Globe and Mail argues, in the alternative, that the Wigmore doctrine, developed under the common law, however modified so as to account for the civil law tradition, is appropriate.

17 Groupe Polygone argues ardently against the recognition of constitutional protection for the journalist-source relationship. Rather, the Wigmore test or a similar test developed under the civil law, and more specifically a recognition of the privilege on a case-by-case basis, is preferable. For the privilege to be recognized in a particular case, a journalist must demonstrate, on the facts, that the benefits of maintaining the privilege outweigh the [page608] prejudicial effects on the rights of parties to civil litigation, and those of society in the quest for truth and the proper administration of justice. Pursuant to this approach, Groupe Polygone says, disclosure should be the rule and testimonial immunity the exception.

18 The Attorney General of Canada argues that, prior to determining whether a privilege of any kind exists, a court must first consider whether the proposed questions are relevant. If they are not, then there is no need to consider the existence of a privilege. As to the nature of journalist-source privilege, the Attorney General advances that, in the context of civil proceedings under the *Civil*

Code, the court cannot resort to the Wigmore framework. The applicable framework must be grounded in the *Civil Code* and the *Quebec Charter*, and involve an assessment and balancing of competing interests. A journalist seeking to have the privilege recognized must demonstrate: that he or she was performing the work of a journalist; that the source requested anonymity and the journalist agreed to protect the source's identity; that the protection has not been waived; that the questions put to the journalist, if answered, would disclose the identity; and that the prejudice caused to freedom of the press outweighs any prejudice to the fairness of the trial. By contrast, a party seeking disclosure must demonstrate: that the questions are relevant, and not simply a fishing expedition; that there is no other means of obtaining the information; that the cause of action or defence is well-founded in law; that the questions do not infringe unnecessarily on the right to privacy; and that the failure to answer the questions will necessarily jeopardize the fairness of the trial.

B. *The Scope and Reach of R. v. National Post*

19 In *R. v. National Post*, this Court recently addressed the question of whether journalist-source privilege exists in Canada and, more importantly, the methodological framework through which it [page609] should be assessed. *R. v. National Post* involved the sending to the *National Post* newspaper, and its investigative reporter Andrew McIntosh, of a document that appeared to implicate then Prime Minister Jean Chrétien in a serious financial conflict of interest. The document in question, upon further investigation, appeared to be a forgery. The *National Post* found itself in possession of physical evidence, which in the view of the Crown was reasonably linked to a serious crime, and possibly the *actus reus* or *corpus delicti* of the alleged offences. The RCMP sought and obtained a search warrant and assistance order, which compelled the *National Post* to assist in locating the document, in order to conduct forensic and DNA testing on it and, it was hoped, identify the alleged forger. The *National Post* applied to have the warrant and assistance order quashed, partly on the basis that its disclosure, and the subsequent forensic testing, would "out" Mr. McIntosh's confidential source.

20 The Court was presented with three possibilities for recognizing the journalist-source privilege in the context of a criminal investigation: a constitutional privilege rooted in s. 2(b) of the *Canadian Charter*; a class-based privilege, analogous to solicitor-client privilege; or a privilege recognized on a case-by-case basis according to the four-factored Wigmore framework. The Court, unanimously, rejected the first two options. With respect to a constitutional privilege, Justice Binnie, writing for the majority, found that it carried the argument too far to suggest that specific newsgathering techniques are constitutionally entrenched. Furthermore, this Court had avoided conferring constitutional status on testimonial immunities more generally. Finally, the Court was unprepared "[t]o throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever 'sources' they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it" (para. 40). The Court also held that, while there was a need for the law to protect the identity of confidential sources in some [page610] circumstances, the purpose of free expression guaranteed in s. 2(b) could be met without

granting a broad constitutional immunity to journalistic sources. Therefore, an order compelling a journalist to identify a source would generally not violate s. 2(b) (para. 41).

21 The Court also rejected the existence of a class-based privilege, on the basis that there is no formal accreditation or licensing process for journalists in place, as there is for lawyers for example, and no professional organization regulates the profession and maintains professional standards (para. 43). Nor is it clear, when dealing with this type of privilege, whether the journalist or the source is the "holder" of the privilege (para. 44), and no one had been able to suggest "workable criteria for the creation or loss of the claimed immunity" (para. 45). Finally, because a class-based privilege is more rigid than a privilege recognized on a case-by-case basis, it would "not lend itself to the same extent to be tailored to fit the circumstances" (para. 46) as they arise in individual cases.

22 The Court concluded that the case-by-case approach, based on the Wigmore criteria and infused with *Canadian Charter* values, provided "a mechanism with the necessary flexibility to weigh and balance competing public interests in a context-specific manner" (para. 51), and would allow the "opportunity for growth that is essential to the proper function of the common law" (para. 55). Therefore, in order for journalist-source privilege to be recognized in a particular case, the claimant must satisfy all four Wigmore factors: (1) the relationship must originate in a confidence that the source's identity will not be disclosed; (2) anonymity must be essential to the relationship in which the communication arises; (3) the relationship must be one that should be sedulously fostered in the public interest; and (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth (para. 53).

[page611]

23 Justice Binnie put particular emphasis on the significance of the third and fourth factors, in the journalist-source context. The third factor, whether the relationship is one that the community should sedulously foster (para. 57), introduces a certain degree of flexibility in the evaluation of the different types of sources and different types of journalists. He suggested that whether the relationship is between a source and a blogger, or between a source and a professional journalist, will impact upon the court's weighing exercise. But, according to Justice Binnie, the fourth factor does the lion's share of the work, and the court's task is to "achieve proportionality in striking a balance among the competing interests" (para. 59).

24 As in this case, the Court in *National Post* was presented with an argument that, after a journalist has established the first three Wigmore criteria, the onus ought to shift to the party seeking disclosure to demonstrate, on a balance of probabilities, why it should be ordered. The Court rejected this argument. Given that the evidence is presumptively compellable and admissible, the burden of persuasion remains on the media to show that the public interest in protecting a secret source outweighs the public interest in criminal investigations. The Court ultimately concluded that

every claim to journalist-source privilege - be it in the face of testimonial compulsion or the production of documents - is situation specific, with the public's interest in the freedom of expression always weighing heavily in the court's balancing exercise.

25 While this appeal raises issues similar to those addressed in *National Post*, the context is nevertheless different. This case involves civil litigation, not the criminal investigative process. It involves testimonial compulsion, and not the production of documents or other physical evidence. The parties' dispute is subject to the laws of Quebec and the *Quebec Charter*. These factors must be [page612] considered in determining how, and to what extent, the majority reasons in *National Post* are equally applicable to the issues raised by this appeal.

C. *National Post and the Law of Civil Procedure and Evidence in the Context of the Civil Law of Quebec*

26 There is no question that the Wigmore case-by-case approach to journalist-source privilege applies in the context of ordinary civil litigation subject to the laws of the common law provinces. However, it was argued before us that, given the civil law tradition in the province of Quebec, it would be inappropriate for this Court to introduce into the Quebec law of civil procedure and evidence a framework for considering journalist-source privilege which originates entirely in the common law.

27 The question of how to address the problem of the relationship between the media and their sources, in the context of civil litigation in Quebec, raises difficult issues and warrants careful consideration. It requires yet another examination of the sources of the law of civil procedure and evidence in the province of Quebec. At issue is the relationship between Quebec's civil law, its *Civil Code*, its system of procedure and its *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), the *Quebec Charter* and, in some instances, the *Canadian Charter*. An added dimension of the problem is that Quebec's rules of procedure and evidence are nevertheless applied by a court system that reflects the British common law tradition, and is largely similar to the court organization in the common law provinces of Canada.

28 As in the criminal law, the relationship between journalists and their sources in the context of civil litigation may engage basic constitutional and societal values relating to freedom of expression and the right to information in a democratic society. A proper framework to address them must be established, which is consistent with the [page613] normative structure of Quebec law and with its civil tradition. But it must be acknowledged that the law of procedure and civil evidence in the province of Quebec reflects a hybrid legal tradition and culture, with rules and principles originating in both the common law and the civil law (D. Jutras, "Culture et droit processuel: le cas du Québec" (2009), 54 McGill L.J. 273). This is also an area of the law which is deeply influenced by constitutional and quasi-constitutional instruments.

29 Section 2(b) of the *Canadian Charter* applies in the province of Quebec, within the scope of s. 32. The *Quebec Charter* enjoys quasi-constitutional status (s. 52) (see *Quebec (Commission des*

droits de la personne et des droits de la jeunesse) v. *Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665, at paras. 27-28), and protects several important rights that may be at stake in a claim of journalist-source privilege: s. 3, freedom of expression; ss. 4 and 5, the protection of the dignity of the person and of his private life; and s. 9, professional secrecy. Under the *Quebec Charter*, these rights are both public and private. In addition, the *Civil Code*, in force since 1994, constitutes a fundamental component of the legal structure. Its preliminary provision affirms that it is the "*jus commune*" of Quebec:

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication.

(See also *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862.)

Several provisions of the *Civil Code* itself protect aspects of the fundamental rights of the person, such as the right to life and integrity of the person (art. 3) and his reputation (art. 35). It also includes a whole book, Book Seven, arts. 2803 to 2874, on the law of civil evidence.

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30 Civil procedure is also codified. Civil procedure in Quebec is primarily made up of the laws adopted by the National Assembly, found in the *C.C.P.*, and not of judge-made rules. In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, this Court confirmed the fundamental importance of the *C.C.P.* It is the primary source of the principles and rules of the law of civil procedure in Quebec. But the codification of civil procedure does not mean that civil procedure, as administered by the courts of Quebec, is completely detached from the common law model. The structure of the court system itself remains basically the same, as I mentioned above. Superior courts enjoy the constitutional protection of s. 96 of the *Constitution Act, 1867*. Moreover, as this Court indicated in *Lac d'Amiante*, not everything is found in the *C.C.P.* It leaves room for rules of practice. It also allows for targeted judicial intervention, and the authority to issue orders that address the particular context of court cases, particularly under arts. 20 and 46 of the *C.C.P.*

31 The law of evidence is applied by the Quebec courts in this context. With respect to the problems raised by freedom of expression and the right to information, the judges of the province of Quebec must address the same challenge of reconciling conflicting values and interests as their colleagues in other provinces. The *Civil Code* sets out the legal framework and the essential rules of the law of civil evidence. But it does not resolve every issue that the application of the laws of evidence and procedure may ultimately give rise to. General principles and rules that belong to other areas of the law, particularly constitutional law, may have to be considered or should inform

the solution crafted by the courts. A solution to the complex problem of the existence, nature and scope of journalist-source privilege will have to be found within this complex environment, bringing together its many strands.

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D. *Journalist-Source Privilege Under the Quebec Charter*

32 It was argued before us that ss. 3, 9 and 44 of the *Quebec Charter* can constitute the basis for a class-based, quasi-constitutional journalist-source privilege in the province of Quebec, analogous to the claim of a constitutional class privilege rooted in the *Canadian Charter* that was argued in *National Post*.

33 Section 3 of the *Quebec Charter* protects, among other rights, freedom of expression:

Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

However, for the reasons set out in *National Post*, and in particular the difficulty in defining such a "heterogeneous and ill-defined group of writers and speakers" subject to the privilege in the province of Quebec with the necessary degree of certainty, freedom of expression under the *Quebec Charter* cannot constitute the basis for recognizing a class-based, quasi-constitutional journalist-source privilege. It can, of course, inform the analysis.

34 But the *Globe and Mail* also suggests that another provision of the *Quebec Charter* is relevant to the analysis. It argues that unlike the *Canadian Charter*, s. 44 of the *Quebec Charter* expressly protects access to information: "Every person has a right to information to the extent provided by law." However, s. 44 does not confer a fundamental right. Rather, it belongs to a class of social and economic rights, the scope of which is defined by the law itself (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429). This right is limited to the extent that access to information is already provided for by law. Section 44 does not broaden the scope of the right, and cannot be the source of a quasi-constitutional right to the protection of journalists' sources. While the s. 44 right [page616] can also inform the protection of the confidential relationship between journalists and their sources, it cannot constitute the basis for recognizing that privilege.

35 That leaves a consideration of s. 9, which protects professional secrecy:

Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

Professional secrecy applies only to those professionals bound to it by law, and is currently restricted to the 45 professional orders subject to the Quebec *Professional Code*, R.S.Q., c. C-26 (see, e.g., N. Vallières, "Le secret professionnel inscrit dans la Charte des droits et libertés de la personne du Québec" (1985), 26 C. de D. 1019, at pp. 1022-23). This list does not include journalists, even though their inclusion was contemplated, but yet ultimately rejected, by the National Assembly (see *Journal des débats: Commissions parlementaires*, 3rd Sess., 30th Leg., No. 6, January 22, 1975, at p. B-322; Ministry of Justice, *Justice Today*, by J. Choquette (1975), at pp. 232-35). Accordingly, professional secrecy cannot ground a quasi-constitutional right to the protection of media sources.

36 In my view, there is no basis for drawing an analogy between professional secrecy and journalist-source privilege. Firstly, the associations of journalists are not regulated. Any person can become a member, and importantly not all journalists are members of the associations that exist, like the Fédération professionnelle des journalistes du Québec (see online: www.fpqj.org). The Fédération has no monopoly over the practice and regulation [page617] of journalism in the province. Nor is journalism a profession which the legislature has, in the public interest, sought to regulate directly or to which it has sought to delegate the authority of self-regulation.

37 More importantly, journalism is not a profession of the type that professional secrecy traditionally purports to protect. Professor Ducharme has described the two criteria that must be satisfied before a professional will be made subject to professional secrecy:

[TRANSLATION] First, there must be a law that imposes an obligation of silence on an individual and, second, that obligation must be rooted in a helping relationship. In our view, only members of professional orders governed by the Professional Code meet this twofold condition. [Emphasis added.]

(*L'administration de la preuve* (3rd ed. 2001), at p. 94)

The second criterion is an important one: that the obligation of silence be rooted in a relationship where the beneficiary of the privilege seeks out the professional for personal help or assistance. In other words, the obligation of confidentiality is [TRANSLATION] "in the exclusive interest of the person who disclosed [the information], and in the context of a helping relationship" (Ducharme, at

p. 97). Given this emphasis on "helping relationship", and the fact that some 45 professions are already by law subject to s. 9, Ducharme suggests that [TRANSLATION] "no member of any other profession would meet this twofold condition" (p. 97).

38 The relationship between journalists and their sources is not one that would often result in such a "helping relationship". What is more, the legislature has not seen fit to include journalists in the list of professions subject to professional secrecy. It has spoken, and done so clearly.

39 In my view, there is no basis for recognizing journalist-source privilege in the rest of the *Quebec [page618] Charter*. The basis for recognizing the privilege must be found in other parts of the law.

E. *Testimonial Privilege Under the Civil Law of Quebec*

40 This Court has on many occasions recognized the mixed nature of Quebec procedural law (see, e.g., *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456; *Lac d'Amiante*; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60). Generally speaking, the sources of the *Civil Code's* substantive evidentiary rules are derived from the French law tradition (see J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 22-23 and 39). However, many of the procedural and evidentiary rules - those dealing with testimony, the administration of justice, and the exclusion of evidence, for example - have their source in the old common law rules (see Royer, at pp. 317-18; *Bisaillon*; *Foster Wheeler*, at paras. 28-29). As was noted in *Foster Wheeler*, "[t]hese mixed origins are without doubt at the root of the semantic, if not conceptual problems that continue to affect this field of law" (para. 23).

41 Article 1206 of the *Civil Code of Lower Canada* ("C.C.L.C.") explicitly allowed Quebec judges, in commercial matters, to resort to common law rules and principles of evidence when there was no otherwise applicable Code provision relating to the proof of a particular fact. When the C.C.L.C. was repealed and replaced with the C.C.Q., no substantive equivalent to art. 1206 was included. The parties all argue that the effect of the repeal of the C.C.L.C., and its replacement with the C.C.Q., is that it is now impossible to resort to common law legal principles to fill any gaps present in the *Civil Code*. It is on this basis, primarily, that they argue that the Wigmore framework cannot be imported into the law of Quebec as a basis for recognizing journalist-source privilege.

[page619]

42 There is an academic and jurisprudential divide on this particular issue. On the one hand, Ducharme is of the view that [TRANSLATION] "when it came into force, the Code repealed the old French law and English law as the suppletive law of evidence" (*Précis de la preuve* (6th ed. 2005), at p. 5). By contrast, Royer states that [TRANSLATION] "[t]he new provisions of the *Civil Code of Québec* that apply to such matters do not alter the former law. They merely restate it and

clarify it. They are therefore interpretive rules that can apply even to juridical acts from before January 1, 1994" (p. 41).

43 From a jurisprudential perspective, the Quebec Court of Appeal has accepted Wigmore as the appropriate framework for dealing with claims of privilege raised on a case-by-case basis: *Société d'énergie de la Baie James v. Lafarge Canada Inc.*, [1991] R.J.Q. 637 (litigation privilege); *Boiler Inspection and Insurance Company of Canada v. Corporation municipale de la paroisse de St-Louis de France*, [1994] R.D.J. 95 (litigation privilege). However, these cases predate the coming into force of the *Civil Code*.

44 The Superior Court is divided on whether Wigmore is applicable in Quebec, in a number of judgments rendered since the coming into force of the *Civil Code*. The doctrine was explicitly rejected in *Grenier v. Arthur*, [2001] R.J.Q. 674, *Centre de réadaptation en déficience intellectuelle de Québec v. Groupe TVA inc.*, [2005] R.J.Q. 2327, and *Drouin v. La Presse ltée*, [1999] R.J.Q. 3023. In each case the court preferred to rely on the *Civil Code* and a balancing of applicable *Quebec Charter* rights. By contrast, Wigmore was expressly used to recognize a case-by-case privilege in *Tremblay v. Hamilton*, [1995] R.J.Q. 2440, and *Landry v. Southam Inc.*, 2002 CanLII 20587. *Tremblay* dealt specifically with the recognition of journalist-source privilege.

45 When the mixed source of the Quebec law of procedure and evidence, and in particular the [page620] common law source of many exclusionary rules of evidence, is properly recognized, it becomes difficult to accept the argument that there is no residual role for common law legal principles in the development of this part of Quebec law. Quebec is, after all, a mixed jurisdiction. If the ultimate source of a legal rule is the common law, then it would be only logical to resort to the common law, in the process of interpreting and articulating that same rule in the civil law. Even if the rule was transplanted and naturalized in the civil law context, it remains interesting and relevant to consider how the rule is evolving in the Canadian common law system, in order to frame an appropriate interpretation in the civil law system:

[TRANSLATION] However, the rules set out in the *Civil Code of Québec* are rooted in French law and in the common law, which means that French law and the common law can continue to be used to interpret those rules.

...

This could justify maintaining certain common law privileges associated with the accusatorial and adversarial nature of trials even though those privileges are not formally recognized in the articles of the *Code of Civil Procedure*.

(Royer, at p. 39)

This is, of course, premised on the fact that the interpretation and articulation of such a rule would

not otherwise be contrary to the overarching principles set out in the *C.C.Q.* and the *Quebec Charter*.

F. *Development of an Analytical Framework*

46 Neither the *Civil Code* nor the *Code of Civil Procedure* explicitly provides for the recognition in the civil litigation context of journalist-source privilege, which now exists in the common law jurisdictions. A gap in the codified law exists, and the question becomes one of determining the appropriate way of filling it. Of course, the judiciary's authority to go beyond the written codes and legislation, in the event of a gap, is far more [page621] circumscribed under the civil law tradition than it is under the common law:

A Quebec court may not create a positive rule of civil procedure simply because it considers it appropriate to do so. In this respect, a Quebec court does not have the same creative power in relation to civil procedure as a common law court, although intelligent and creative judicial interpretation is often able to ensure that procedure remains flexible and adaptable. Although Quebec civil procedure is mixed, it is nonetheless codified, written law, governed by a tradition of civil law interpretation. (See J.-M. Brisson, "La procédure civile au Québec avant la codification: un droit mixte, faute de mieux", in *La formation du droit national dans les pays de droit mixte* (1989), 93, at pp. 93 to 95; also by the same author: *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867*, *supra*, at pp. 32-33.) In the civil law tradition, the Quebec courts must find their latitude for interpreting and developing the law within the legal framework comprised by the Code and the general principles of procedure underlying it. The dissenting opinion written by Biron J.A. quite correctly reminds us of these characteristics of a codified legal system and accurately identifies the nature of the method of analysis and examination that applies in this case.

(*Lac d'Amiante*, at para. 39; see also *Foster Wheeler*.)

47 The only provision in the *C.C.Q.* dealing with the discretion of a judge to exclude otherwise relevant evidence is art. 2858:

The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.

The latter criterion is not taken into account in the case of violation of the right of professional privilege.

Because journalist-source privilege is not a quasi-constitutional privilege under the *Quebec Charter*, a judge cannot exempt a journalist from testifying as to the identity of a confidential source, on the basis that doing so would constitute a violation of either s. 3 or s. 44 of the *Quebec Charter*.

[page622]

48 Nevertheless, constitutional rights under the *Canadian Charter* and quasi-constitutional rights under the *Quebec Charter* are engaged by a claim of journalist-source privilege. Some form of legal protection for the confidential relationship between journalists and their anonymous sources is required. Conflicting rights and interests arise under the *Quebec Charter* and must be addressed and reconciled. This case also raises important questions related to the development of human rights in Quebec. The creation of a framework to address these issues represents a legitimate and necessary exercise of the power of the court to interpret and develop the law.

49 In my view, a helpful analogy can be drawn between the journalist-source privilege at issue in this case, and police-informer privilege, which is also a judicially created "rule of public policy" (*Bisaillon*, at p. 90, citing *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.), at p. 498). Indeed, I find that, admittedly in a very broad sense, police-informer privilege is more analogous to journalist-source privilege than is the professional secrecy contemplated by s. 9 of the *Quebec Charter*, although it arose in the context of criminal procedure within the common law.

50 Police-informer privilege, like professional secrecy and solicitor-client privilege, is a class-based privilege. In this sense, it is unlike journalist-source privilege, which is clearly a case-by-case privilege. However, it has its roots as a common law rule of public policy, aimed at facilitating the investigation of crime. As Beetz J. noted in *Bisaillon*:

The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest [page623] in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. [pp. 91-92]

(Quoting *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171 (H.L.), at p. 218, *per* Lord Diplock.)

51 In *Bisaillon*, Beetz J. also took note of the structure of the privilege: "... at common law the secrecy rule regarding police informers' identity has chiefly taken the form of rules of evidence

based on the public interest ..." (p. 93). When police-informer privilege is successfully established, "relevant evidence is excluded in the name of a public interest regarded as superior to that of the administration of justice" (p. 96). Therefore, the manner in which the exclusionary rule operates is also analogous to journalist-source privilege.

52 Importantly, for the purposes of this appeal, this Court held in *Bisaillon* that the common law rule of police-informer privilege applies in the province of Quebec. An issue in that case, among others, was whether the Commissioner investigating aspects of police conduct during the F.L.Q. crisis could compel the disclosure of an informant's identity, contrary to the common law rule. It had been argued that the *C.C.P.* was comprehensive, and because a testimonial exception for police informants was not included, the Commissioner could compel the disclosure. Beetz J., for a unanimous Court, disagreed. Notably, the *C.C.P.* provision relied upon as displacing police-informer privilege was not nearly specific enough:

However, in my opinion the scope of this codification is limited to these two aspects which it mentions expressly: it does not extend to the secrecy rule regarding police informers' identity, as to which it is silent. In other words, the codification of art. 308 applies only to the part of the common law which is included in the law [page624] on Crown privilege, but not to the specific legal system relating to the secrecy rule regarding police informers.

The law had itself decided that it is always contrary to the public interest for a peace officer to be required to disclose the identity of a police informer, and that this aspect of the public interest must always take precedence over the need to do more complete justice, subject to a single exception in criminal law. To decide as the Court of Appeal did would mean that by adopting such a general provision as art. 308, the legislator intended simply to obliterate this final judgment made by the law and the absolute rule which results from it [pp. 102-3]

Beetz J. concluded that, because the origin of police-informer privilege is the common law, the rule remained a part of Quebec law unless it had been overturned by a validly adopted statutory provision:

Unless overturned by validly adopted statutory provisions, these common law rules must be applied in an inquiry into the administration of justice, which is thus a matter of public law. Moreover, the point at issue concerns the power to compel a witness to answer, by contempt of court proceedings if necessary, the source for which is also the common law [p. 98]

Beetz J. then turned to a consideration of whether the common law rule had been altered by the *C.C.P.* Having found that it had not, Beetz J. concluded that the common law rule remained a part

of Quebec law in its original form.

53 There is therefore a basis in the laws of Quebec for a journalist-source privilege or an exemption from the general obligation to give evidence in civil cases. Despite its common law origins, the use of a Wigmore-like framework to recognize the existence of the privilege in the criminal law context, as established in *National Post*, is equally relevant for litigation subject to the laws of Quebec. This approach conforms both with s. 2(b) of the *Canadian Charter* and ss. 3 and 44 of the *Quebec Charter*. Indeed, I reject the submission of the intervener Canadian Civil Liberties Association that the Wigmore framework cannot [page625] differentiate between relationships that have a constitutional dimension and those that do not. It is clear that it does so already (*R. v. Gruenke*, [1991] 3 S.C.R. 263; *National Post*). This approach also accords with the law of evidence in Quebec. The *C.C.Q.* grants judges the authority to exclude evidence or testimony in the event of a breach of the *Quebec Charter*. It is not inconsistent, either in principle or in fact, to give judges the authority to exempt a journalist from testifying, when his s. 2(b) *Canadian Charter* and s. 3 *Quebec Charter* rights are found to be paramount. Indeed, I would add that art. 46 of the *C.C.P.*, which provides for the general powers of the Superior Court, appears to provide its judges with the necessary authority to do so on a case-by-case basis:

The courts and judges have all the powers necessary for the exercise of their jurisdiction.

They may, at any time and in all matters, whether in first instance or in appeal, issue orders to safeguard the rights of the parties, for such time and on such conditions as they may determine. As well, they may, in the matters brought before them, even on their own initiative, issue injunctions or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to deal with cases for which no specific remedy is provided by law.

54 Whether they rely explicitly on the Wigmore framework or not, what the lower court decisions ultimately demonstrate is the need for a balancing exercise between the competing rights or interests at stake. To paraphrase my colleague Justice Binnie in *National Post*, this all sounds very much like Wigmore where, at the crucial fourth step, the question is whether the public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth. Indeed, the Wigmore framework itself, when stripped to its core, is simply a taking into account of competing interests. The Wigmore criteria can therefore shape the structure of the analysis and the elements to be [page626] considered, in claims of journalist-source privilege brought in matters engaging the laws of Quebec.

55 It is also a framework that is sufficiently flexible to take into account the variety of interests that may arise in any particular case, and those that are certain to arise in civil proceedings taking place in the common law provinces. The overarching issues raised by this appeal are of course not

unique to the province of Quebec. The news media's reach is borderless. This is further support for an approach that would result in consistency across the country, while preserving the distinctive legal context under the *Civil Code*.

56 As mentioned at the outset, this case deals with testimonial compulsion and not, as in *National Post*, with the production of documents or other physical evidence. Nevertheless, in civil litigation proceedings, the presumption is that all relevant evidence is admissible and that all those called to testify with respect to relevant evidence are compellable. On this point, art. 2857 of the *Civil Code* is relevant: "All evidence of any fact relevant to a dispute is admissible and may be presented by any means." It therefore goes almost without saying that if the party seeking disclosure of the identity of the source cannot establish that this fact is relevant, then there will be no need to go on to consider whether the privilege exists. The threshold test of relevance plays, as it does in many other contexts, an important gatekeeping role in the prevention of fishing expeditions. (See, e.g., *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 (holding that the production of medical records must be inextricably linked to the ability to prepare a full defence and go to the central issue in the proceeding, and that there must be no other means for proving the case). See also *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81, at para. 3, *per* Sharpe J.A.; *Charkaoui (Re)*, 2008 FC 61, [2009] 1 F.C.R. 507, at paras. 70-71 and 74, *per* Noel J.; *Tremblay*, at p. 2442.) It also constitutes an added buffer against [page627] any unnecessary intrusion into aspects of the s. 2(b) newsgathering rights of the press.

57 As Justice Binnie noted in *National Post*, it is the fourth Wigmore factor that will do most of the grunt work in the analysis of any claim for journalist-source privilege. He set out a number of relevant considerations in the determination of whether physical evidence must be disclosed in the criminal context (see paras. 61-62). It is therefore helpful, particularly given that this issue is being remitted to the Superior Court for reconsideration, to highlight some of the considerations that will be relevant to the court's balancing exercise at the fourth Wigmore stage, in claims arising in the context of civil litigation.

58 The first two considerations are related: the stage of the proceedings, and the centrality of the issue to the dispute between the parties. With respect to the stage of the proceedings, several points may be observed. On the one hand, the early stage of the proceedings - such as the examination for discovery stage in this case - might militate in favour of recognizing the privilege. The case will be at its preliminary stages only, and will yet to have reached the stage of determining the liability or the rights of the parties. This is a variation on the U.K. "newspaper rule" (*Attorney-General v. Mulholland*, [1963] 2 Q.B. 477), whereby journalists are allowed to protect their sources during the discovery stage, because at this point the procedural equities do not outweigh the freedom of the press, but may be required to disclose at trial. On the other hand, given the overall exploratory aims of examinations for discovery and the confidentiality with which they are cloaked, in principle, the testimony may be capable of providing a more complete picture of the case and have the potential to resolve certain issues prior to going to trial. [page628] This would militate in favour of not recognizing the privilege at this stage.

59 I recognize that, pursuant to art. 398.1 *C.C.P.*, the party conducting the discovery may file the transcript in evidence. Therefore, should a situation arise where a court orders the journalist to answer questions on examination for discovery, and the opposing party later in fact decides to file the transcript pursuant to art. 398.1, then, given that the testimony would no longer be confidential, the journalist should be entitled to again raise the issue of privilege before the court and highlight any change in circumstances that the filing of the transcript would have made.

60 The centrality of the question to the dispute will also be a relevant consideration. While the identity of a confidential source may be relevant to the dispute, particularly given the broad definition of relevancy in civil proceedings, that fact may nevertheless be so peripheral to the actual legal and factual dispute between the parties that the journalist ought not to be required to disclose the source's identity.

61 Another consideration, related to the centrality of the question to the dispute, is whether the journalist is a party to the litigation, or simply an ordinary witness. For example, whether it is in the public interest to require a journalist to testify as to the identity of a confidential source will no doubt differ if the journalist is a defendant in a defamation action, for example, as opposed to a third party witness, compelled by subpoena to testify in a matter in which he or she has no personal stake in the outcome. In the former context, the identity of the source is more likely to be near the centre of the dispute between the parties. When a journalist is called as a third party witness, there is likely to be more of a question whether the source's identity is central to the dispute.

62 A crucial consideration in any court's determination of whether the privilege has been made out will be whether the facts, information or [page629] testimony are available by any other means. As the Court recognized in *National Post*, "[t]he 'alternate sources' principle has been part of Canadian law since *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.), as it has been in the U.K." (para. 66). Indeed, courts in the United Kingdom have endorsed this necessity requirement, and held that mere administrative convenience is insufficient (*Secretary of State for Defence v. Guardian Newspapers Ltd.*, [1985] 1 A.C. 339; *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985*, [1988] 1 A.C. 660; *Cross and Tapper on Evidence* (11th ed. 2007), at p. 501).

63 This, of course, makes perfect sense. If relevant information is available by other means and, therefore, could be obtained without requiring a journalist to break the undertaking of confidentiality, then those avenues ought to be exhausted. The necessity requirement, like the earlier threshold requirement of relevancy, acts as a further buffer against fishing expeditions and any unnecessary interference with the work of the media. Requiring a journalist to breach a confidentiality undertaking with a source should be done only as a last resort.

64 Other considerations that may be relevant in a particular case include the degree of public importance of the journalist's story, and whether the story has been published and is therefore already in the public domain. This list is, of course, not comprehensive. In the end, context is

critical.

G. *Summary of the Proposed Test*

65 In summary, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate that the questions are relevant. If the questions are irrelevant, that will end the inquiry and there will be no need to consider the issue of journalist-source privilege. However, if the questions are relevant, then the court must go on to consider the four Wigmore factors and determine whether the journalist-source privilege [page630] should be recognized in the particular case. At the crucial fourth factor, the court must balance (1) the importance of disclosure to the administration of justice against (2) the public interest in maintaining journalist-source confidentiality. This balancing must be conducted in a context-specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking to establish the privilege to demonstrate that the interest in maintaining journalist-source confidentiality outweighs the public interest in the disclosure that the law would normally require.

66 The relevant considerations at this stage of the analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and, perhaps most importantly, whether the information is available through any other means. As discussed earlier, this list is not comprehensive. I will now consider whether a claim of privilege could be established in this case.

H. *Application of the Framework*

67 After a cursory mention of the four Wigmore factors, de Grandpré J. rejected the Globe and Mail's claim of journalist-source privilege. His oral reasons on this issue, in their entirety, are as follows (A.R. (32975 and 33114), at pp. 13-14):

[TRANSLATION]

MARK BANTEY:

But ... so, you're dismissing them only ...

THE COURT:

On the basis that the answers to the questions will be relevant, regardless of the ...

MARK BANTEY:

Regardless of the privilege.

THE COURT:

... the privilege invoked by the witness. Are we agreed? So, I have very quickly (*vite, vite, vite*) analysed the four (4) criteria from ...

[page631]

SYLVAIN LUSSIER:

Wigmore.

THE COURT:

... from *Wigmore*, and I conclude that, in the circumstances, it would be preferable that the evidence be entered in the record. Is that all right?
[Emphasis added.]

68 I agree with the Globe and Mail that de Grandpré J. erred in concluding, [TRANSLATION] "very quickly", that it was "preferable" to compel Mr. Leblanc's answers on cross-examination. Mr. Leblanc was entitled to have the questions put to him challenged for relevancy, and his claim for privilege rigorously tested against the Wigmore criteria, rather than having his claims left to the simple determination that it would be "preferable" that the questions be answered (*St. Elizabeth Home Society*, at paras. 38 and 52). In particular, if de Grandpré J. concluded that the first three factors favoured disclosure, he was then required to ask whether, on balance, the public interest in maintaining journalist-source confidentiality outweighed the importance of disclosure to the administration of justice.

69 In the present case, it appears that the public interest in confidentiality would be based largely on the degree to which specific questions would tend to reveal the identity of MaChouette. It therefore follows that Mr. Leblanc could not refuse to answer a question that could materially advance Groupe Polygone's prescription defence, but which could not threaten the identity of MaChouette. Accordingly, evidence as to the likelihood that an answer to a particular question would tend to reveal MaChouette's identity would be of assistance. Only where there would be a real risk that Mr. Leblanc's answer would disclose MaChouette's identity, should the judge ask himself whether, after an assessment of the relevant considerations, the balance of interests favours privilege over disclosure. For example, at the far end of the spectrum, if Mr. Leblanc's answers were almost certain to identify MaChouette then, bearing in mind the high societal interest in investigative journalism, it might [page632] be that he could only be compelled to speak if his response was vital to the integrity of the administration of justice. Ultimately, these matters will be

for the judge to determine, but he must consider them.

70 I would therefore allow the appeal, with costs throughout, and quash the decision of the Superior Court. Given that neither party was permitted to make submissions or tender evidence on the issue of journalist-source privilege, particularly with respect to the balancing of interests at the fourth stage, I would remit the matter to the Superior Court for a consideration of Mr. Leblanc's claim, in accordance with these reasons.

IV. The Publication Ban (33097)

A. *Overview*

71 During the course of the discontinuance proceedings incidental to the revocation motion, counsel for Groupe Polygone provided de Grandpré J. with a copy of an article written by Mr. Leblanc and published by the Globe and Mail on October 21, 2008, entitled "Sponsorship firm moves to settle with Ottawa". Counsel for Groupe Polygone then proceeded with the following complaint, in respect of the breach of confidentiality with respect to the negotiations between his client and the federal government (reproduced in *Globe and Mail v. Canada (Procureur général)*, 2008 QCCA 2516 (CanLII), at para. 9, *per* Bich J.A.):

[TRANSLATION] Not only do I not have the right to defend myself, but now I also have a problem even negotiating because, as you and I both know, when ... the very principle of confidentiality of negotiations, it's to allow parties to discuss things freely, say things to each other that they would not say in public, to explain their positions, which they would not necessarily state in public. And that is also why mediation is strictly confidential, and why agreements to that effect must be signed.

[page633]

So I can't defend myself, and I can no longer negotiate because Mr. Leblanc still has a source in the government who is leaking information whose truth I can neither confirm nor deny, but, you know, we don't even have the right to put it before a judge. The trial judge shouldn't even see it. In your case, it's a bit different, you aren't the trial judge.

But can you see the sort of prejudice - and this is something I must bring to your attention - the sort of prejudice that my client has to suffer in the circumstances? At some point, we have to put our foot down and draw the line. To what extent can journalist-source privilege, when anonymous sources are

quoted, prevent parties from defending themselves, throwing a wrench in the works when they try to negotiate? How far can it go before it tears the basic fabric of the proper administration of justice?

And I think I have a serious problem with what's happening here, especially with the way my colleague's client is exercising its right to journalist-source privilege. It's doing so in such a way as to trample on my client's rights, whether the right to defend itself or the right to negotiate in confidence.

72 Counsel for Groupe Polygone made no specific request, and appeared content at this point simply to voice his obvious frustration. Counsel for the Globe and Mail offered no response, and the discontinuance proceedings proceeded accordingly. At its conclusion, de Grandpré J. made the following order, which included a complete publication ban on all proceedings then pending before the court (A.R. (33097), at p. 55):

[TRANSLATION] So, although I am most reluctant to let cases be managed through procedural wrangling, I'm going to let you go across the street. And as for Mr. Leblanc, I'm going to prohibit you from publishing anything whatsoever regarding the proceedings pending before the Court.

73 The order was made without notice, without an application, and without the benefit of formal submissions from either party. Moreover, de Grandpré J. insisted that it was not a publication ban. Both the fact of the order and its characterization were met with understandable surprise by counsel for the Globe and Mail. The transcript [page634] reveals the following exchange (A.R. (33097), at pp. 55-56):

[TRANSLATION]

MARK BANTEY:

Then, Mr. Justice, before that, I'm going to have some submissions to make. That ...

THE COURT:

No, no. That, I ...

MARK BANTEY:

... you're issuing -- Mr. Justice, pardon me, with respect, you're issuing a publication ban. Before issuing a publication ban, you have to ...

THE COURT:

It is not a publication ban.

MARK BANTEY:

Mr. Justice, before issuing a publication ban, you have to give us a chance to make submissions.

THE COURT:

What I don't want to hear and what I don't want to read in the newspapers is an article like the one that appeared in *The Globe and Mail* on October 21.

MARK BANTEY:

Mr. Leblanc has an absolute right to publish what he did, Mr. Justice.

THE COURT:

If he does it, he must do it in accordance with the strict letter of the law. In that regard, you'll inform me when the Court of Appeal has made its decision.

MARK BANTEY:

So, Mr. Justice, just to make sure I understand, you've issued a publication ban?

THE COURT:

Yes.

inherent in hearing submissions that would prejudice either [page635] party, de Grandpré J. violated one of the fundamental rules of the adversarial process: he denied the parties an opportunity to be heard before deciding an issue that affected their rights. In so concluding, I should not be taken as departing from *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, and *National Post*, where it was held that, in some cases, the question of journalist-source privilege may be determined without hearing from the media in advance of making the order. However, as I stated at the outset of these reasons, the *Globe and Mail*, which was representing Mr. Leblanc's interests, was already a party to these proceedings. The circumstances for the exemption from notice and hearing contemplated by *Toronto Star* and *National Post* are simply not present in this appeal.

75 Given these circumstances, the fact that de Grandpré J. made the impugned order on his own motion and without having heard submissions from either party is sufficient to allow the appeal. While I recognize that art. 46 of the *C.C.P.* gives Superior Court judges the authority to make orders *ex proprio motu*, it is incumbent on the judge to do so to "safeguard the rights of the parties". A publication ban, which by its very nature infringes the constitutional rights of the party against whom it is imposed, cannot, absent extraordinary circumstances not present here, be imposed *ex proprio motu*. However, because the question of the publication ban has yet to be considered on its merits, I will proceed with a complete analysis.

B. *Fundamental Questions Raised by This Appeal*

(1) The Importance of Confidentiality at the Pre-Trial Stage

76 It is important to pause and reiterate here the importance placed, by both the judiciary and the [page636] legislature, on confidentiality at the pre-trial stage, whether the proceedings are examinations for discovery, mediation or settlement negotiations. It is also important to note that the rationale animating the confidentiality undertaking in all of these contexts is the same.

77 In *Lac d'Amiante*, this Court concluded that there was an implied undertaking of confidentiality concerning the evidence obtained or provided in examinations on discovery. This undertaking is meant to allow the parties to obtain as full a picture of the case as possible, without the fear that disclosure of the information will be harmful to their interests, privacy-related or otherwise:

It appears that the preferred approach is a far-reaching and liberal exploration that allows the parties to obtain as complete a picture of the case as possible. In return for this freedom to investigate, an implied obligation of confidentiality has emerged in the case law, even in cases where the communication is not the subject of a specific privilege... . The aim is to avoid a situation where a party is reluctant to disclose information out of fear that it will be used for other purposes. The aim of this procedure is also to preserve the individual's right to privacy.

...

... the purpose of the examination is to encourage the most complete disclosure of the information available, despite the privacy imperative. On the other hand, if a party is afraid that information will be made public as a result of an examination, that may be a disincentive to disclose documents or answer certain questions candidly, which would be contrary to the proper administration of justice and the objective of full disclosure of the evidence. [paras. 60 and 74]

It is difficult for the parties, at the examination on discovery stage, to assess the relevancy of the evidence, and the confidentiality undertaking helps to ensure that the parties will be full and frank in exercising their examination on discovery obligations.

78 This same rationale applies in the context of pre-trial settlement negotiations and mediation. In [page637] *Kosko v. Bijimine*, 2006 QCCA 671 (CanLII), the Quebec Court of Appeal commented on the rationale animating confidentiality undertakings - similar to those in the context of examination on discovery - in the context of judicial mediation:

The protection of the confidentiality of these "settlement discussions" is the most concrete manifestation in the law of evidence of the importance that the courts assign to the settlement of disputes by the parties themselves. This protection takes the form of a rule of evidence or a common law privilege, according to which settlement talks are inadmissible in evidence.

The courts and commentators have unanimously recognized that, first, settlement talks would be impossible or at least ineffective without this protection and, second, that it is in the public interest and a matter of public order for the parties to a dispute to hold such discussions. [paras. 49-50]

79 In Quebec, the *C.C.P.* provides a mechanism for settlement conferencing presided over by a judge of the Superior Court (art. 151.14). Article 151.16 provides that those conferences are meant to facilitate a dialogue, aimed at exploring mutually satisfactory solutions to the dispute, and are to be held in private. Article 151.21 more specifically provides that "[a]nything said or written during a settlement conference is confidential". Similar rules exist in the common law provinces (*Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-1(2) (offers to settle), r. 9-2(1) and (3) (settlement conferences); *Alberta Rules of Court*, Alta. Reg. 390/68, r. 173 (compromise using court process); Saskatchewan, *The Queen's Bench Rules*, r. 181(3) (offer to settle), r. 191(14) and (15) (judicial pre-trials); *Queen's Bench Rules*, Man. Reg. 553/88, r. 49.06(1) and (2) (offer to settle), r. 50.01(9) and (10) (judicial pre-trials); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.14 (mandatory mediation), r. 49.06 (offer to settle), rr. 50.09 and 50.10 (judicial pre-trial); Nova Scotia *Civil Procedure Rules*, r. 10.13(4)(a) (ordinary settlement), r. 10.14(4)(a) (judicial pre-trial), and r. 10.16).

[page638]

80 Even in the absence of a legislated rule of procedure, the common law has long recognized that, in order to encourage parties to resolve their disputes through settlement negotiations, those negotiations must remain confidential. Indeed, the privilege dates back to at least the 1790s when, in *Waldridge v. Kennison* (1794), 1 Esp. 143, 170 E.R. 306, Lord Kenyon C.J. observed:

... any admission or confession made by the party respecting the subject matter of the action, obtained while a treaty was depending, under faith of it, and into which the party might have been led, by the confidence of a compromise taking place, could not be admitted to be given in evidence to his prejudice

This approach has translated into a rule of evidence, whereby the contents and substance of settlement negotiations are, should a dispute ultimately proceed to trial, inadmissible (*Histed v. Law Society of Manitoba*, 2005 MBCA 106, 195 Man. R. (2d) 224, at para. 44; *Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93, 198 D.L.R. (4th) 633). In Quebec, the Court of Appeal in *Gesca* held recently that settlement negotiations held outside the framework provided by the *C.C.P.* - in other words those not presided over by a judicial mediator - similarly benefit from the protection of confidentiality (para. 47).

81 Maintaining the confidentiality of settlement negotiations is a public policy goal of the utmost importance, and nothing in these reasons should be interpreted as derogating from that position. However, it must be noted that these confidentiality undertakings bind only the parties to settlement negotiations and their agents. Provided a journalist has not participated in the breach of confidentiality, a publication ban will only be appropriate in cases where the balancing test otherwise favours non-publication.

(2) Preliminary Questions and Legal Framework

82 As a preliminary matter, I must address Groupe Polygone's submission that Mr. Leblanc, [page639] in publishing the content of the confidential settlement negotiations between itself and the federal government, committed a civil fault. Groupe Polygone relies on art. 36(2) of the *C.C.Q.*:

36. The following acts, in particular, may be considered as invasions of the privacy of a person:

...

(2) intentionally intercepting or using his private communications;

Groupe Polygone argues that the Globe and Mail and its journalist "interfered" with its privacy

rights, and have therefore committed the civil wrong contemplated by art. 36(2). I cannot accept this submission.

83 The wrong contemplated by art. 36(2) in this case was committed by the government source, whoever he or she may be, who provided Mr. Leblanc with the information that ultimately made its way into the article published on October 21, 2008. Nothing in the record suggests that Mr. Leblanc was anything other than a beneficiary of the source's desire to breach confidentiality. There is no "interference", as suggested by Groupe Polygone, on the part of Mr. Leblanc in the confidential negotiations and communications of the parties. No proof was made of any illegal acts on the part of the Globe and Mail or Mr. Leblanc leading to the discovery of the information. Groupe Polygone's remedy, in terms of the commission of a civil fault, is more properly viewed as being against the source, or its negotiating partner more generally.

84 Moreover, there are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources. The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process. History is riddled with examples. In my view, it would also be [page640] a dramatic interference with the work and operations of the news media to require a journalist, at the risk of having a publication ban imposed, to ensure that the source is not providing the information in breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.

85 Such a legal policy is consistent with what has come to be known as the U.S. "*Daily Mail* principle". In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the United States Supreme Court held that if a newspaper obtains truthful information about a matter of public importance, and does so in a lawful manner, then, absent a higher order public interest, the state cannot punish the publication of that information. This principle was extended, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), to situations where the published information about an important public issue had been unlawfully intercepted, and where the press knew or ought to have known that the information had been intercepted by a third party, but had not participated in the interception. Justice Stevens, for the majority, held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern" (p. 535).

86 I must also address Groupe Polygone's submission that de Grandpré J.'s order was not a publication ban and, therefore, the *Dagenais/Mentuck* framework is both inapplicable and inappropriate (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442). Groupe Polygone says that the remedy sought was a ceasing of a serious violation of privacy and reputation, caused by the media. I cannot accept this submission.

87 De Grandpré J.'s order must be assessed for what it looks like, sounds like and in fact is: a court-ordered publication ban. As this Court held in *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2

S.C.R. 332, [page641] the *Dagenais/Mentuck* framework "is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings" (para. 31). In my view, Groupe Polygone takes too narrow a view of "judicial proceedings". The impugned order in this case was made in the context of discontinuance proceedings incidental to a revocation motion. While its target or substance - the content of the parties' settlement negotiations - is indeed not a judicial proceeding, that is no matter. The order itself was made in the context of a judicial proceeding, and had the effect of infringing on the Globe and Mail's and Mr. Leblanc's respective s. 2(b) rights. The order was issued in a civil proceeding, is a publication ban and therefore engages s. 2(b) *Canadian Charter* rights.

88 Groupe Polygone cites a number of trial level cases from across the country, which it says demonstrate that the *Dagenais/Mentuck* framework is both inappropriate and inapplicable in this context. Using *Dagenais/Mentuck* in this case, Groupe Polygone says, would be unprecedented. I disagree. All of the jurisprudence cited by Groupe Polygone is distinguishable on the basis of having been decided before the release of *Dagenais* (*Peat Marwick Thorne v. Canadian Broadcasting Corp.* (1991), 5 O.R. (3d) 747 (Gen. Div.); *Amherst (Town) v. Canadian Broadcasting Corp.* (1994), 133 N.S.R. (2d) 277 (C.A.)); the nature of the legal issue (*Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press*, [2000] N.S.J. No. 139 (QL) (S.C.): the media breached a statutory confidentiality obligation, and challenged the constitutionality of the provision itself); or the facts (*Calgary Regional Health Authority v. United Western Communications Ltd.*, 1999 ABQB 516, 75 Alta. L.R. (3d) 326: the media were in physical possession of confidential hospital records, of which the hospital sought the return, and the case involved the safety and security concerns of doctors who performed abortions). *K. v. K. (E.)*, 2004 ABQB 847, 37 Alta. L.R. (4th) 118, [page642] involved the review of a previously ordered publication ban, and did in fact analyse the issue by way of the *Dagenais/Mentuck* framework.

89 De Grandpré J.'s order was a discretionary one, made pursuant to his authority under art. 46 of the *C.C.P.*, and had the effect of limiting the s. 2(b) rights of Mr. Leblanc and the Globe and Mail. He therefore erred in not applying the *Dagenais/Mentuck* framework prior to making the order.

(3) Application of the *Dagenais/Mentuck* Framework

90 I now move on to a consideration of the *Dagenais/Mentuck* framework:

- (a) Is the order necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk?
- (b) Do the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression and the efficacy of the administration of justice?

I will assess each of these elements in turn.

91 The article that prompted de Grandpré J. to order the publication ban was published on October 21, 2008. However, on August 27, 2008, lawyers for Groupe Polygone filed with the Registrar of the Quebec Superior Court a motion requesting a change in the trial dates. The trial between Groupe Polygone and the Attorney General had originally been set to run between September and December 2008. The principal reason given for the requested postponement was that the parties wanted to attempt [page643] settlement negotiations. It was anticipated that the negotiations would be long and complex, and therefore not likely to be completed before September 2008. The motion was granted on October 14, 2008, by Wery A.C.J., [TRANSLATION] "[f]or the reasons set out in the motion". Therefore, when the impugned article was published on October 21, 2008, the *fact* that Groupe Polygone and the Attorney General were engaged in settlement negotiations was already a matter of public record, by virtue of the public court file. It is only the contents of those negotiations - the amount being discussed and the federal government's position with respect to it - that could be said to be confidential. Furthermore, the Attorney General has authorized disclosure, by virtue of publication on the Public Works and Government Services Canada website, of the full terms of any settlement that it reaches in Sponsorship Scandal-related litigation.

92 Groupe Polygone also argues that its reputation has been irreparably harmed in the eyes of the public, who will interpret Groupe Polygone's willingness to engage in settlement negotiations as an admission of fault or liability. Again, this submission cannot be supported by the record. Firstly, Groupe Polygone offers no evidence of this specific harm. Secondly, and more importantly, the fact that the parties intended to pursue settlement negotiations was already a matter of public record, by virtue of Groupe Polygone's own motion in the Superior Court to postpone the trial dates.

93 I am not prepared to accept Groupe Polygone's bald assertions, without more, that its ability to negotiate a settlement with the federal government has been irreparably harmed. That it is now in the public domain that the parties are attempting to negotiate a settlement cannot affect the discussions between the parties themselves. Moreover, as I indicated above, at the time when Mr. Leblanc's article was published, the fact that the parties were engaged in settlement negotiations was already a matter of public record, because it was the reason given by Groupe Polygone as the basis for a request [page644] to postpone the trial dates. Groupe Polygone suspended its negotiations on its own initiative.

94 Groupe Polygone has offered no tangible proof that its ability to effectively engage with the government has been irreparably harmed. Nor has it offered any evidence or proof of a serious risk to the administration of justice. Groupe Polygone's failure to do so is not surprising, given that it did not specifically apply for the ban imposed by de Grandpré J. But even if the parties did not ask for the production of evidence and did not apply for a remand of the case to the motion judge, the positions of both the Globe and Mail and Groupe Polygone with respect to the propriety of the ban were prejudiced by the manner in which de Grandpré J. chose to proceed. The conduct of the matter

by de Grandpré J. deprived them of the opportunity, at the time, to make argument about the application of the *Dagenais/Mentuck* test.

95 I note again that the breach of confidentiality in this case was made not by Mr. Leblanc, but by someone bound by the undertaking. Other avenues available to Groupe Polygone, which would not have any effect on freedom of the press, could have been directed against its negotiating partner, in the form of an injunction or an order for costs. Some other form of relief could also have been directed against the party directly responsible for the breach in this case, if its identity could be accurately established. Finally, the ban imposed by de Grandpré J. is, if nothing more, clearly overbroad. It is a blanket prohibition, and no indication was given as to when it would expire.

96 Even if I were convinced that the publication ban was necessary to prevent a serious risk to the administration of justice, I would not be convinced that its salutary effects outweigh its deleterious effects. The salutary effects of the ban are, primarily, a cessation of the breach of Groupe Polygone's s. 5 *Quebec Charter* privacy rights and, indirectly, [page645] a breach of its right to negotiate a settlement confidentially. I say indirectly, of course, because the media are not the party responsible for the breach of confidentiality. However, I am not convinced that such a breach, in the circumstances of this case, led to a failure in the negotiations and can therefore justify a publication ban.

97 On the other hand, the deleterious effects of the ban are serious. The Globe and Mail received information about settlement negotiations involving, as a party, the Government of Canada, which is seeking to recover a considerable amount of taxpayer money, on the basis of an alleged fraud against a government program. There is clearly an overarching public interest in the outcome of this dispute, and barring the Globe and Mail from publishing the information that it obtained in this regard would prevent the story from coming to light. In other words, upholding de Grandpré J.'s order would be to stifle the media's exercise of their constitutionally mandated role.

98 While not in any way wanting to diminish the importance that this Court places on the confidentiality of settlement negotiations, I again emphasize that the confidentiality undertakings are a binding only on the parties to negotiation. The obligation does not, and cannot, extend to the media. Neither Mr. Leblanc nor the Globe and Mail did anything - illegal or otherwise - to obtain the information published in the article. Mr. Leblanc did not even have to make any requests in this regard. As discussed earlier in these reasons, I am reluctant to endorse a situation where the media or individual journalists are automatically prevented from publishing information supplied to them by a source who is in breach of his or her confidentiality obligations. This would place too onerous an obligation on the journalist to verify the legality of the source's information. It would also invite considerable interference by the courts in the workings of the media. Furthermore, such an approach ignores [page646] the fact that the breach of a legal duty on the part of a source is often the only way that important stories, in the public interest, are brought to light. Imposing a publication ban in this case would be contrary to all these interests.

99 As we have seen, on the factual record before us, the ban was not necessary to prevent a serious risk to the proper administration of justice. Moreover, the salutary effects of the publication ban imposed in the court below do not outweigh its deleterious effects. I would thus allow the appeal and quash the publication ban imposed by de Grandpré J.

100 For all these reasons, the Globe and Mail's appeal is allowed, with costs throughout, and the order prohibiting the publication of anything relating to the settlement negotiations between the parties is quashed, with costs throughout.

V. The Discontinuance Proceedings (32975)

101 Given the appellant's success in the other two appeals, it is unnecessary to consider this issue. The appeal from the dismissal of the discontinuance proceeding is moot and is dismissed, without costs.

VI. Disposition

102 For these reasons, the appeals with respect to the confidentiality of journalist sources (33114) and the publication ban (33097) are allowed, with costs throughout. The issue of journalist-source privilege is remitted to the Superior Court for consideration in light of these reasons. The order prohibiting the publication of information relating to the settlement negotiations is quashed. The appeal concerning the discontinuance proceeding (32975) is dismissed as moot, without costs.

[page647]

Appeals 33114 and 33097 allowed with costs. Appeal 32975 dismissed without costs.

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cp/e/qlls