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November 15, 2011

Delivered by Email

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2701
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: CANDAS Application - OEB File No.: EB-2011-0120

Pursuant to Procedural Order No. 5, please find enclosed Toronto Hydro-Electric System Limited's responding submissions in respect of the motions brought by CANDAS and CCC to compel further and better answers to specify interrogatories.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Original signed by J. Mark Rodger

J. Mark Rodger

copy to: Amanda Klein, THESL
Helen T. Newland, CANDAS counsel
Michael Schafler, CANDAS counsel
Robert Warren, CCC counsel
Michael Janigan, VECC counsel

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EB-2011-0120

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

AND IN THE MATTER OF an Application by the **Canadian Distributed Antenna Systems Coalition** for certain orders under the *Ontario Energy Board Act*, 1998.

RESPONDING WRITTEN SUBMISSIONS OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

In Respect of Procedural Order No. 4

(To the Submissions of Canadian Distributed Antenna Systems Coalition and the Consumers Council of Canada)

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A. INTRODUCTION

1. Toronto Hydro-Electric System Limited ("THESL") makes these submissions to the Ontario Energy Board (the "Board") in response to the Canadian Distributed Antenna Systems Coalition ("CANDAS") motion, as amended, to compel further and better answers to CANDAS general interrogatories 1(h), 1(i), 2, 3(d), 4(a), 4(f), 5(e), 10(o), 10(p) and 10(q), CANDAS Starkey interrogatories 10(e) and 32, CANDAS Byrne interrogatory 15(g)(iv), and CANDAS Yatchew interrogatory 20(b)) (the "CANDAS Motion"), as well as the Consumers Council of Canada ("CCC") motion to compel further and better answers to CCC interrogatories 1, 2, 3, 4, 5, 6(d) and 7 (the "CCC Motion", and collectively the "Motions").

2. THESL would like to point out what appears to be an inadvertent error in the CANDAS Motion materials, which has lead to some confusion. In its amended motion, CANDAS identifies at paragraph 1 Starkey interrogatories 10(e) and 32 as subject to dispute. The interrogatory responses can be found at Tab 5.2, Schedule 10 and at Tab 5.2, Schedule 32. THESL submits that Mr. Starkey provided full and complete responses to CANDAS Starkey interrogatory 10, however the question as posed simply does not have a part (e). THESL further submits that Mr. Starkey provided a full and complete response to CANDAS Starkey interrogatory number 32. The CANDAS motion materials and submissions do not raise any deficiency in either of these interrogatory responses. Instead, the CANDAS Motion materials includes as an attachment Tab 5.3, Schedule 10(e) and Tab 5.3, Schedule 32. This corresponds to CANDAS general interrogatories 10(e) and 32. THESL is of the view that this likely reflects a typographical error in CANDAS original motion materials. CANDAS, in fact, appears to be challenging the sufficiency of THESL's responses to CANDAS general interrogatories 10(e) and 32 and not Starkey interrogatories 10(e) and 32. This is confirmed upon reviewing CANDAS' written submissions dated Nov. 9, 2011 which at paragraph 14 includes an excerpt of THESL's responses to CANDAS general interrogatories 10(e) and 32, and not Starkey interrogatories 10(e) and 32.

3. It is also unclear whether CANDAS continues to dispute THESL's response to CANDAS general interrogatory number 2. This interrogatory response was identified in paragraph 1 of CANDAS' Nov. 3rd Notice of Motion and is attached to that Notice of Motion, however this

interrogatory response was struck from paragraph 1 of CANDAS' Amended Notice of Motion dated Nov. 8, 2011 but was not identified by CANDAS in its cover letter setting out its reasons for the amendment, and it continues to be listed in CANDAS' grounds for its motion at paragraph 5(a)(i) of its Amended Notice of Motion. THESL submits that it provided a full and complete response to CANDAS interrogatory number 2. The CANDAS submissions do not raise any particular deficiency in THESL's interrogatory response. As a result, THESL submits that to the extent the CANDAS Motion seeks to compel a further response to CANDAS interrogatory number 2, it should be denied.

4. THESL has carefully considered the concerns raised by CCC and CANDAS in the Motions and is willing to provide additional responses to:[1]

a. CANDAS general interrogatories 4(a) and 4(f). THESL has considered CANDAS' submissions that THESL's answers are non-responsive.[2] That was not THESL's intent. In respect of interrogatory 4(a), THESL was concerned that its response could be misconstrued to imply that it has adopted a blanket "no wireless" policy – which is simply not the case. Setting aside this erroneous implication, THESL will re-answer this question to the extent it is relates to consultations that may have occurred with Canadian Carriers prior to the time it submitted its letter to the Board dated August 13, 2010 (the "THESL Letter"). In respect of interrogatory 4(f), the question is frankly poorly drafted (as THESL's response indicated). The intended scope of the term "parties" was unclear at the time (it could have meant parties to this proceeding, or parties to a particular attachment contract, or otherwise). CANDAS' submissions clarify the intended scope of the question sufficiently to permit THESL to now respond.

b. CANDAS Yatchew Interrogatory 20(b). The question itself is nonsensical, as Dr. Yatchew clearly differentiates in his evidence between wireless attachments and the wireline systems that those wireless attachments connect to. The former is the subject of this dispute, the latter is not. However, in light of CANDAS'

[1] Affidavit of Ivano Labricciosa sworn November 14, 2011 (the "Labricciosa Affidavit"), paras. 36-37.
[2] Written Submissions of CANDAS dated November 9, 2011, at para. 13.

submissions,[3] Dr. Yatchew has agreed to provide a further response to this interrogatory.

5. THESL acknowledges that there was a cross-referencing typo in its response to CANDAS general interrogatory 10(e), which should have made reference to THESL's response in Tab 5.3, Schedule 6 (rather than Tab 5.1, Schedule 6). THESL regrets the typographical error. The now referenced response provides information on the specific number of wireless attachments on THESL's poles. To determine the percentage, the affidavit of Mary Byrne at paragraph 3 indicates that THESL owns approximately 140,000 poles across its service area. To the extent this interrogatory seeks additional information, it will be addressed below as among the disputed interrogatories.

6. The remaining interrogatories that are the subject of the Motions seek, in general terms, the following information from THESL (collectively, the "Disputed Interrogatories"):

a. a breakdown of each wireless attachment (whether telecommunications, non-telecommunications or distribution) on each THESL Pole, including alpha-numerical cross-referencing, full descriptions of the attachment (in some cases, size, weight, dimensions and other physical specifications), photographs of the poles and attachments, copies of all agreements and disclosure of any rates and fees paid by third parties;

b. copies of communications between THESL and unrelated third parties regarding interpretation of the CCTA Decision, attachment of wireless to distribution poles and THESL's policy with respect to wireless attachments;

c. copies of all internal communications, reports and analyses, including reports to THESL's board of directors and management, regarding THESL's safety and operational concerns with hosting wireless attachments, anything underlying the August 13, 2010 letter that THESL wrote to the Board (the "August Letter"), drafts of the August Letter, THESL's policy with respect to wireless attachments,

[3] Written Submissions of CANDAS dated November 9, 2011, at para. 19.

and THESL's rejection of any wireless attachments, wireless plans of THESL, the City and any related/affiliated entities;

d. whether THESL sought and obtained legal advice in respect of the applicability of the CCTA Decision; and

e. all documents, including agreements, in respect of the terms and conditions upon which THESL permitted the One Zone network to be attached to its poles, as well as distribution pole attachment agreements as between Toronto Hydro and Toronto Hydro Telecom, THESL/Cogeco and THESI/Cogeco (regarding the One Zone network).

7. THESL has declined to answer the Disputed Interrogatories - CCC interrogatories 1, 2, 3, 4, 5, 6(d) and 7; CANDAS general interrogatories 1(h), 1(i), 3(d), 5(e), 10(e), 10(o), 10(p), 10(q) and 32; and CANDAS Byrne interrogatory 15(g)(iv) - raised by the Motions, in part or whole, on the basis:

a. that the information sought is not relevant to the matters in issue in this proceeding (Relevance);

b. that production of the information sought would be unduly onerous in relation to its probative value (Proportionality); and

c. that the information sought is protected by, in varying degrees, solicitor-client and litigation privilege (Privilege).

8. For the reasons set out below, THESL asks that the Motions be dismissed in respect of the Disputed Interrogatories.

9. In order to assist the Board, THESL will address the Motions and Disputed Interrogatories in four parts. In Part B, THESL sets out the context by which it submits the Board should be guided in making its decision in respect of the Disputed Interrogatories: the principle of proportionality. In Part C, THESL sets out the context for its claims of privilege. In sections D and E, THESL addresses CCC's and CANDAS' motion submissions respectively on

the Disputed Interrogatories, including their arguments regarding THESL's claims that the Disputed Interrogatories seek information that is not relevant, unduly onerous relative to the probative value (if any), and/or privileged.

B. PROPORTIONALITY

10. THESL submits that the starting point for the Board's consideration of the Disputed Interrogatories and the Motions is the principle of proportionality.

11. Important context for the proportionality principle is an observation regarding the type of proceeding that this is *not*. It is THESL's submission that CANDAS and CCC seek to use this administrative forum as if it were a commercial trial where they would get the benefit of the full panoply of discovery as active litigants. An administrative proceeding is, of course, distinct from a trial in the procedures by which matters are adjudicated, including timelines that are provided for. CANDAS chose to bring this matter before the Board rather than a court. It is not reasonable for it to now complain that it does not like the process that it has chosen and insist on being able to conduct a full discovery process as if this were a trial.

12. Moreover, even in matters before a court where trial proceedings are conducted on a more protracted basis than those before this Board (in part, so that parties may engage in the full panoply of discovery), parties are limited by the information to which they are entitled. This limitation arises as result of two related foundational rules that place reasonable limits on discovery: the rule of proportionality and the rule against fishing expeditions.

(i) Proportionality as a Governing Principle of Disclosure and Production

13. The principle espoused in Section 29.02(b) of the Board's *Rules of Practice and Procedure* (the "Rules") is often equated with the principle of proportionality, which acts as moderator for the rules and standards that govern general documentary disclosure and production obligations, and is designed to curtail unduly onerous and costly documentary discovery. Numerous courts have recognized that disclosure of material – even where that material is relevant - must be limited by: (a) the potential prejudice to the party being asked to disclose the material; and (b) the demands of efficient resolution of the proceeding.[4]

14. The legal profession's recent re-focus on this issue, including amendments to procedural rules in several provinces, has served to breathe new life into the proportionality principle: the

[4] See for example *Ontario (Attorney General) v. Stavro*, [1995] O.J. No. 3136 (Ont. C.A.), at para. 13. As noted, other courts have recognized this principle, including the following cases (not included in THESL's brief): *Rochester Midland Ltd. v. Wilson*, [1994] O.J. No. 1273 (Ont. Ct. Gen. Div), at para. 10; *Chadwick v. Canada (AG)*, [2008] B.C.J. No. 1706 (B.C.C.A.).

scope of information and documents litigants may have access to must be limited by practical concepts such as reasonableness and cost-benefit analysis.[5]

(ii) The Rule Against Fishing Expeditions

15. The related rule against fishing expeditions is that courts will not order production of information that is not appropriate nor necessary at the current stage of the proceedings.[6] This rule is designed to curtail the ability of litigants to obtain additional levels of discovery on evidence that is arguably not necessary to the decision makers' task, nor appropriate given the rule of proportionality. The common law has always been clear that a decision maker should not allow fishing expeditions where:

> "the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present."[7]

16. Of particularly analogous-significance to this matter, in a decision upheld by the Ontario Divisional Court on appeal, a case management judge recently found that the rules of proportionality and "no fishing" operated such that an applicant's challenge of questions refused by the respondent was dismissed. Central to the Court's findings were that:[8]

a. the proceeding was complex, moving on expedited timelines, and the record already spanned many volumes;

b. if the motion was granted, it would likely result in a postponement of the hearing;

c. the principle of proportionality is especially important in proceedings which move in "real time";

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[5] *More Marine Ltd. v. Shearwater Marine Ltd*., 2011 BCSC 166, at para. 11. See also *Ontario Civil Justice Reform Project*, Summary of Findings and Recommendations, Report of the Honourable Justice Osborne, Q.C. (which provided a basis for amendments to the Ontario rules of civil procedure), available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/. Both the Ontario and British Columbia rules of civil procedure have recently been amended to specifically take account of the principle of proportionality.

[6] See, for example, *Computershare Trust Co. of Canada v. Crystallex International Corp*., 2009 CarswellOnt 8860 (Ont S.C.J.), affirmed 2009 CarswellOnt 8449 (Ont. Div. Ct.) [*Crystallex*]. See also *Stavro, supra* note 4.

[7] *Intel Corp. v. 3395383 Canada Inc*. 2004 FC 218 (F.C.) at para. 23, citing Hennessy v. Wright (No. 2) (1888), 24 Q.B.D. 445 (C.A.).

[8] *Crystallex, supra* note 6 at paras. 2, 3, 5 and 7.

d. the moving party had chosen a procedure (an application) where the full panoply of discovery was not appropriate; and

e. although the moving party would "like" the information sought, it was not necessary nor appropriate to the judge's ability to make a decision on the issues before him.

(iii) The Proportionality and "No Fishing" Rules Favours The Board Dismissing the Motions

17. In addition to the observation that this is *not* a commercial trial where the full panoply of discovery would be attainable, the following considerations establish the relevant context for the Board in applying the proportionality principle to the information sought by the Disputed Interrogatories: (a) the type of administrative proceeding this is, including the expedited timelines demanded by CANDAS; and (b) the amount of resources and paper that this proceeding has already occupied.

18. This is not a rate case, in which a distributor such as THESL shows that its proposals regarding revenue requirement and rates are reasonable, prudent and in the public interest. Nor is this a compliance proceeding, in which the Board must determine, on the basis of evidence brought by the Board's compliance staff and in reply from the allegedly non-compliant entity, that a breach of compliance has in fact occurred (and if so, determine the appropriate remedy). CANDAS has not sought to enforce the terms of the CCTA Decision by seeking a compliance order against THESL.[9]

19. Rather, this proceeding is an application by CANDAS for mandated access to the poles of every electricity distributor in Ontario for the purpose of enabling CANDAS to further its own commercial interests. In particular, CANDAS chose to bring a generic application under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act, 1998* that raise important questions of public policy as to whether or not the CCTA Decision requires distributors to attach

[9] CANDAS Response to CCC Interrogatory 2.

wireless equipment, including DAS equipment, or in the alternative, whether the Board should issue a new order requiring distributors to attach wireless equipment to their power poles.[10]

20. Much like CCC, THESL is an intervenor with a particular interest in the outcome of this proceeding. To assist the Board in making a determination on the important public policy questions raised by the CANDAS Application, THESL has retained independent experts and has filed extensive intervenor evidence in this matter. Further, THESL has gone to considerable lengths to provide relevant information to assist the Board in response to the large volume of interrogatories it received, and has only refused to provide incremental information where to do so would be unduly onerous, violate THESL's legal privilege rights, or would otherwise produce irrelevant information.

21. There currently exists a substantial record. This proceeding has occupied 10 volumes of material to date. THESL received 677 questions by way of interrogatories (and declined just five percent),[11] and provided five witnesses at the technical conference. The Board has no doubt committed significant resources as well.

22. THESL contends that in any event, most, if not all, of the information sought is not relevant to this proceeding. However, even if the Board finds that such information is relevant, THESL submits that it is not necessary to the ability of the Board to make an informed decision in this matter, and is unduly onerous relative to its probative value, if any. THESL addresses the specific Disputed Interrogatories on an interrogatory-by-interrogatory basis in this regard below in Sections D and E.

23. A corollary of the fact that the information sought by CANDAS and CCC in the Motions is not necessary to the Board's decision-making ability, is that ordering THESL to disclose and/or produce the information is not appropriate in the circumstances on the basis that much of the information sought constitutes a fishing expedition.

24. For example, CANDAS' has made the following series of allegations against THESL:[12]

[10] See CANDAS Application at para 1.0(a) and (b).
[11] Labricciosa Affidavit, para. 6.
[12] See paragraphs 2.2 to 2.9 of its application materials filed April 21, 2011 (the "CANDAS Application").

a. "Until August of 2010, Toronto Hydro-Electric System Limited ("**THESL**") complied with the CCTA Order";

b. "All of this changed suddenly when, on August 13, 2010, THESL sent a letter to the Board advising of a new "policy" not to permit the attachment of wireless equipment to its power poles"; and

c. "If left unchecked, … electricity distributors [will] use their monopoly power to unduly discriminate among Canadian carriers by unilaterally deciding who may have access to regulated assets and who may not."

25. CANDAS, however, has tendered no evidence to support these allegations. It has simply taken a single letter from THESL out of context and then "spun" together a series of allegations on the basis of an uncharitable, and in THESL's submissions, an entirely untrue reading of that letter.

26. THESL has responded to the allegation that somehow its August Letter constitutes a public pronouncement of its "no wireless" policy. It has done so in response to interrogatories as well as at the November 4, 2011 technical conference. For example, THESL has stated:

a. In its response to CANDAS General Interrogatory 1:

> "[the allegation that THESL has no wireless policy] is an inaccurate summary of THESL's position with regard to wireless attachments. THESL's policy, clearly stated in the August 13, 2010 letter, is that THESL does not believe that DAS or any other wireless attachers have a right to attach wireless equipment to THESL poles pursuant to the CCTA Decision. The Board's 2005 CCTA Decision did not mandate Ontario distributors to accommodate wireless attachments on their distribution poles. In particular, the issue and subject of wireless attachments was not raised, considered or addressed in the CCTA Decision or the CCTA proceeding. The CCTA Settlement Agreement explicitly excluded wireless as an unsettled issue and the Board accepted that Settlement Agreement as part of the CCTA proceeding, and as such, the CCTA Decision did not encompass wireless."

b. In its response to CCC Interrogatory 1:

> "THESL disagrees with the premise of this question that "until August, 2010, THESL permitted access to its poles for wireless attachments." THESL currently

has a valid contract with DAScom regarding wireless attachments. [reference to CANDAS General Interrogatory 1]"

c. And at the technical conference, in a line of questioning between Dr. Schwartz from Energy Probe and Colin McLorg, witness for THESL:[13]

Q: "Does the THESL letter indicate that THESL refuses to attach any and all wireless equipment, I guess, as a matter of policy?

A: "No, sir, the letter indicates that THESL's position is that neither THESL nor other Ontario distributors - but I'll confine my comments to THESL - is obligated to attach wireless communications equipment pursuant to the CCTA decision.

Q: Can you tell me where it says that in your letter, please?

A: Well, it may have been one of those cases where we knew what we meant and assumed too much that others would. But I think that the immediately following paragraph that indicates that there's no conflict with the CCTA decision and the whole tone of the letter is indicative of our position that it's the obligation, the purported obligation, of THESL to attach such equipment pursuant to the CCTA that we reject."

27. THESL has also produced expert reports and answered dozens of interrogatories to show that it does not occupy a monopoly position in the siting market for wireless attachments and that LDC poles do not constitute essential facilities for wireless attachments.

28. However, CANDAS (and CCC) contend that THESL facing CANDAS' allegations head-on is somehow not enough. Because CANDAS not been able to produce or otherwise find the evidence they want to substantiate their otherwise bald allegations, they believe that they should be allowed to examine every wireless pole attachment agreement between THESL and third parties, and THESL's affiliate, THESI, and third parties, in order to find some evidence that THESL has been "using [its] monopoly power to unduly discriminate" against CANDAS members.[14]

29. Quite apart from the fact that THESL has no monopoly power over the wireless siting market, and that the information sought by CANDAS and CCC is not otherwise relevant to the Board's ability to make a decision in this proceeding, this is exactly the kind of situation where

[13] Transcript of Technical Conference held November 4, 2011, at p. 158-159.
[14] CANDAS General Interrogatories 32(a), 10(o), 10(p) and 10(q).

the Board should be inclined to analogously apply the related rules of proportionality and "no fishing expeditions".

30. The issue of proportionality and fishing expeditions becomes all the more acute when one considers the way in which many of the Disputed Interrogatories lack a proper evidentiary basis.

31. For example, THESL did not tender the August Letter as evidence in this proceeding. It is a document that was created well in advance of when the proceeding was commenced. THESL tendered a company affidavit as well as two expert reports in this proceeding intended to address the same issues that THESL raised in that letter, and to explain those issues in further detail.

32. THESL has answered hundreds of interrogatories on its evidence, put forward its experts, its company affiant, and two other key company personnel as witnesses at the technical conference, and intends to again put that panel forward at the hearing. Any information contained in that letter that may be relevant is also contained within the evidence that THESL filed in this proceeding – and questions relating to that evidence have been asked and answered.[15] CANDAS and CCC are simply trying to fish for more information to substantiate their otherwise bald and/or irrelevant claims.

33. By way of further example, and as detailed below in section D, *most* of the questions that CCC is challenging THESL's responses to (and at least one of CANDAS') were provided in the abstract and, contrary to the Board's rules, the moving parties provided absolutely no evidentiary basis for those interrogatories.[16] In some cases, the parties are now attempting – *post hoc* – to provide an evidentiary basis for those questions. For example, CCC now argues that interrogatory 2 seeks information relating to communications between THESL and the EDA on the basis that the "Information sought is necessary to explore the assertion by Dr. Yatchew that the treatment of pole space by utilities does not constitute anti-competitive behaviour". However, this too, is not appropriate: CCC is now attempting to take an excerpt of THESL's evidence out of context to allege anti-competitive behaviour and/or conspiracy among utilities as the basis to ask this question. No such allegation is the subject of these proceedings and the

[15] The following Disputed Interrogatories relate to the August Letter: CANDAS General Interrogatories 1(i) and 1(h) and CCC Interrogatory 1.
[16] Ontario Energy Board *Rules of Practice and Procedure*, r. 28.02.

Board is not the proper forum to raise such an allegation in any event. In addition to being clearly irrelevant,[17] such a question is, once again, a simple fishing expedition.

34. In short, appropriate limits must be placed on the ability of parties engaged in administrative proceedings to inappropriately demand layer after layer of unnecessary evidence and information. In the absence of CANDAS and CCC being reasonable with respect to where those lines should be drawn, is up to the Board to make the decision. THESL is asking only that the Board have regard to a practical cost-benefit analysis, and exercise its discretion to dismiss the relief that CANDAS and CCC seek on the basis that the information sought is neither necessary nor appropriate at this stage of the proceeding.

[17] However irrelevant and improper the allegation, for clarity, THESL denies it in its entirety.

C. PRIVILEGE

35. THESL also submits that CANDAS and CCC seek to conduct this proceeding as if THESL's rights of legal privilege should be ignored by the Board simply because CANDAS and CCC *want* access to the information and documents over which THESL claims privilege. In doing so, CANDAS and CCC are both obfuscating the way in which legal privilege operates in Canadian society, as well as asking the Board to take measures that are unnecessary and inappropriate in the circumstances.

(i) The Legal Basis for Privilege

36. Privilege is a core value of our legal system: as stated by the Supreme Court of Canada at numerous occasions, privilege is a fundamental civil and legal right.[18] Privilege overrides relevancy such that where information is privileged, is it protected from disclosure and production even where that information is relevant.

37. Two types of privilege are relevant to THESL's privilege claims regarding the Disputed Interrogatories: (a) solicitor-client privilege; and (b) litigation privilege.

38. Solicitor-client privilege is afforded so long as the communications is for the purpose of seeking legal advice and falls within the usual and ordinary scope of professional employment:

> "Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that 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."[19]

39. The privilege is broad and encompasses all information passed within the professional lawyer and client relationship.[20] This privilege also extends to in-house counsel: lawyers who are employed by a corporation and therefore have only one client are covered by the privilege provided that they are performing functions of a solicitor.[21]

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[18] Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (Markham: LexisNexis Canada, 2009) [*"Sopinka"*] at 926.
[19] Wigmore, *Evidence* (McNaughton rev., 1961), para. 2292 at 554, as cited in *Sopinka*, *ibid.*, at 931.
[20] *Sopinka, ibid.*
[21] *IBM Canada Ltd. v. Xerox of Canada Ltd*, [1978] 1 F.C. 513 (CA).

40. Further, communications protected by solicitor-client privilege have a *prima facie* presumption of inadmissibility: privilege remains unless the party seeking disclosure can show why the communications should not be privileged.[22]

41. Litigation privilege is, in one sense, even broader than solicitor-client privilege. It expands beyond communications passing between the client and its solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for solicitor's information for the purpose of pending or contemplated litigation.[23] Whereas solicitor-client privilege is for the purpose of protecting a clients' freedom to consult privately and openly with their solicitors, litigation privilege is founded upon the notion that: "counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel."[24]

42. Accordingly, where a party establishes, on a *prima facie* basis, that it prepared documents for the dominant purpose of assisting counsel in anticipated or contemplated litigation, those documents are protected from production.[25]

(ii) THESL Has Met the Tests to Establish Privilege

43. As noted above, the onus is on the party challenging the claim of solicitor-client privilege show why the communications should not be privileged. For litigation privilege, the party claiming it discharges its onus where it can establish a *prima facie* basis for the claim.

44. The Labricciosa Affidavit provides extensive, and in THESL's submissions, sufficient detail for THESL to discharge its obligations with respect to its claim of litigation privilege.[26]

45. Accordingly, THESL is not making a blanket claim of privilege as is alleged by CANDAS and CCC. Given the subject matter sought in the Disputed Interrogatories (which THESL has declined on the basis of privilege), THESL's claim of litigation privilege arises as a necessary fact of the circumstances that existed at the time documents were created and the

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[22] Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, Release No. 12 (Aurora: Canada Law Book, 2011) at para. 11.70.
[23] *General Accident v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[24] *Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co*. (1990), 74 O.R. (2d) 637 at para. 18.
[25] *The Law of Privilege in Canada*, *supra* note 22 at para. 12.180.
[26] Labricciosa Affidavit, at paras. 32-33. See also paras. 16-35 inclusive for a general description of the circumstances under which THESL's claim of litigation (and solicitor-client) privilege arose.

purpose for which they were created (i.e. contemplation or anticipation of litigation, or communications between solicitor and client for the purpose of seeking legal advice).[27] This is discussed in further detail in section D and E below on an interrogatory-by-interrogatory basis.

46. Indeed, CANDAS' refusal to allow THESL to produce copies of correspondence between THESL and certain members of CANDAS (that were exchanged during the period of time for which THESL claims litigation privilege) on the basis of settlement privilege is itself compelling evidence of the legitimacy of THESL's privilege claim.[28]

47. As communications protected by solicitor-client privilege have a *prima facie* presumption of inadmissibility, privilege remains unless the party seeking disclosure can show why the communications should not be privileged.[29] As CANDAS and CCC have not even attempted to discharge their onus in establishing that any communications exchanged between THESL and its counsel for the purpose of seeking legal advice are not protected by privilege, THESL must assume that they are only challenging the company's claim of litigation privilege.[30]

(iii) No "Free-Standing" Requirement to List Privileged Documents

48. In its submissions, CCC seeks to draw an analogy between what is required in civil law matters, and what *ought* to be required in administrative law matters. It is true that there are some relevant analogies to be drawn – the rule of proportionality as discussed above, for example.

49. Notwithstanding certain relevant analogies between civil procedure and administrative procedure (as discussed above), there is an important point of departure by virtue of the different procedural rules that govern Ontario courts and the Board. Unlike in civil matters, there is no "free-standing" obligation for parties before the Board to provide a list of the documents that they refuse to produce by reason of a claim of privilege. The decisions that CCC points to in this regard were all decided in the context of the Ontario *Rules of Civil Procedure*, which stipulate that a party is to list the documents it claims privilege over.[31]

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[27] See para. 33 of the Labricciosa Affidavit, in particular.
[28] Labricciosa Affidavit, at paras. 27-28.
[29] *The Law of Privilege in Canada*, *supra* note 22 at para. 11.70.
[30] In particular, both of CANDAS' and CCC's submissions focus only on THESL's claims for litigation privilege.
[31] Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.03(2)(b).

50. In other words, the requirement to provide a list of privileged documents is an artefact of procedural rules in the civil law context and is not applicable to matters before the Board. Proceedings before the Board are, of course, different than proceedings before a court. Indeed, this is evidenced by the way in which the Board has created (and been authorized to create) its own separate procedural rules. The Board's Rules provide no requirement for a party to list the documents which it claims privilege over. Accordingly, and contrary to what the CCC alleges, THESL has not failed to follow "protocol" in this regard.

(iv) THESL Should Not Otherwise Be Required to List its Privileged Documents

51. As to whether THESL should be required to produce a list of documents which it claims (litigation) privilege over regarding the Disputed Interrogatories (the "Privileged List"), THESL submits that the task of even producing such a list would be unduly onerous relative to its probative value (if any) and is unnecessary given that THESL has provided sufficient particulars to discharge its onus of establishing its claim of privilege.[32] THESL accordingly submits that the Board should decline to make such an order on the basis of considerations of proportionality.

52. The fact that the task of preparing a Privileged List is unduly onerous arises simply because THESL cannot produce a Privileged List until it has searched and catalogued its records in respect of the Disputed Interrogatories which seek privileged information. However, searching and cataloguing these records is itself an unduly onerous task, and in any event, not possible within the current timelines of this proceeding.[33] As also set out above, THESL submits that the fact that CANDAS and CCC seek to force THESL to provide the Privileged List is evidence of the way in which they are improperly engaging in a fishing expedition.

53. THESL also submits that producing a Privileged List is both unnecessary in the circumstances, and is not required in order to properly defend its substantive legal rights of privilege. In particular, and consistent with its obligations in this regard, THESL has provided sufficient detail[34] to establish that the information which it claims privilege over was either:

[32] Labricciossa Affidavit, paras. 16-35.
[33] Labricciosa Affidavit, paras. 8-11.
[34] See Labricciosa Affidavit, at paras. 16-35.

a. made when litigation was anticipated or contemplated, and that the dominant purpose of those communications was for use in, or advice concerning, the litigation; and/or

b. communications between solicitor and client for the purpose of seeking legal advice.

(v) If the Board Requires "More" to Be Satisfied of THESL's Claim of Litigation Privilege

54. While THESL submits that it is neither necessary nor appropriate in the circumstances, it recognizes the Board's power to make an order to further satisfy itself regarding THESL's claim of litigation privilege if the Board is not persuaded by THESL's submissions that to produce a Privileged List is inconsistent with the proportionality principle.

55. In this event, the next step is not, as CANDAS and CCC suggest, to simply order production of the information and documents sought. For the reason that the documents sought are privileged by virtue of their circumstances, what the moving parties are asking the Board to do is to ignore Parliament's express direction that the Board is prohibited from requiring disclosure of privileged documents.[35]

56. Rather, in such a case, the Board may adjourn the proceedings, and in the interim, order THESL to provide a Privileged List.

D. RESPONSE TO THE CCC MOTION

57. It is in this context described in A through C above that CCC has brought a motion to compel further and better answers to CCC interrogatories 1, 2, 3, 4, 5, 6(d) and 7. While it is THESL's submission that the Board should dismiss the relief that CCC seeks on the basis of the proportionality principle and the rule against fishing expeditions, THESL will address each of these interrogatories in-turn in respect of THESL's specific basis for declining to answer them, and CCC's arguments as to why THESL should be required to answer them.

CCC Interrogatory No. 1 (Tab 6, Schedule 1)

[35] *Statutory Powers Procedure Act*, R.S.O. 1990, c S.22, s. 5.4(2).

58. CCC seeks to obtain "copies of all reports, analyses, written communications including email, with respect to the policy referred to in the letter dated August 13, 2010" including "copies of all reports to THESL's management and board of directors with respect to that policy." The interrogatory does not contain a specific reference to any of THESL's evidence, contrary to Rule 28.02(b), and should be denied on this basis alone. Instead, CCC references the August 13, 2010 letter, which was filed by and is being relied upon by CANDAS as evidence in its application.

59. THESL declined this interrogatory on the basis that (a) it seeks information of questionable relevance (THESL fundamentally disagreed with the premise of the question); and (b) the materials and information sought are privileged as communications between solicitor and client and were prepared in contemplation of anticipated litigation.

60. *Not Relevant* – CCC takes the position that the information requested is necessary to examine the basis of an alleged contradiction between the position of THESL as expressed in the August 13, 2010 letter and the fact that THESL employees had previously processed and granted applications for wireless attachments to its poles.[36] THESL submits that the information requested is of questionable relevance at best. THESL is not the applicant in this proceeding and this is not a compliance proceeding. However, CCC is seeking through this interrogatory to turn this into a compliance proceeding and to put THESL on trial. The information requested will not advance the Board's determination of the specific public policy questions at issue in this proceeding. THESL has been abundantly clear about its position in respect of the applicability of the CCTA Decision to wireless attachments. An investigation into how THESL arrived at its position is simply not relevant to the matters at issue in this proceeding.

61. In particular, the Board has defined the matters at issue in this proceeding much more narrowly than what CCC (or CANDAS, for that matter) contends. In its September 14, 2011 letter, the Board clarified that the following are the totality of matters in issue for this proceeding:

[36] CCC submissions at para. 17 and the affidavit of Dina Awad at paragraphs 3-9.

a. Whether the CCTA applies, or whether in the alternative, the Board will amend distributors' licenses to require them to provide wireless attachers access to power poles; and

b. If the answer to (a) is in the affirmative, what terms and conditions are appropriate regarding providing wireless attachers access to power poles, including whether the current Board-approved attachments rate applies to wireless attachments.

62. Relevance is determined by reference to the matters in issue, not by reference to merely contextual assertions or allegations parties make in their evidence or the proceeding in general.

63. *Privileged Information* – CCC takes the position that THESL's claim of privilege amounts to a "blanket claim" of privilege. As discussed above in section C, THESL disagrees. This interrogatory is unique in that it asks for all reports, analyses and written communications related to THESL's August 13, 2010 letter (i.e., the August Letter). If it is not clear from the careful wording of the August Letter which THESL filed with the Board and related directly to a question of interpretation of a prior Board Decision, the Labricossa Affidavit confirms that the August Letter was prepared by THESL and its counsel for the dominant purpose of anticipated litigation and that all of the information sought by CCC in this interrogatory is protected by litigation privilege (in addition, much of the information is also protected by solicitor-client privilege). External counsel had been retained months before because of threatened litigation due to an ongoing dispute between THESL and the CANDAS member companies. CANDAS' own description of the events surrounding this acrimonious dispute, where litigation was repeatedly threatened, can be found at pages 15-25 of its Application. The applicability or non-applicability of the CCTA Decision is the basis of this dispute. The August Letter explains THESL's position that the CCTA Decision does not apply to wireless attachments, and THESL submits that the information requested if produced would violate THESL's fundamental civil and legal right to make the fullest investigation and research without risking disclosure of its opinions, strategies and conclusions to opposing counsel.

64. *The Privileged Document List* - CCC argues that in accordance with the *Rules of Civil Procedure*, THESL should be obligated to produce a list of specific documents over which it

claims privilege. As noted above in section C, there is no similar requirement to produce such a list in the Board's Rules. Because of the very broad scope of the interrogatory request, and as detailed in the Labricciossa Affidavit, the task of producing a list of specific documents which THESL claims privilege over regarding this disputed interrogatory is inconsistent with the proportionality principle, would be unduly onerous relative to its probative value, and in any event, would take THESL beyond the timelines in this proceeding to produce.[37] Furthermore, the creation of such a list is both unnecessary in the circumstances, and is not required in order to properly defend the substantive legal rights of privilege because THESL has provided sufficient particulars to establish that the information which it claims privilege over were made when litigation was anticipated or contemplated, and that the dominant purpose of those communications was for use in, or advice concerning, the litigation. In addition, much of the information constitutes communications between solicitor and client for the purpose of seeking legal advice.

CCC Interrogatory No. 2 (Tab 6, Schedule 2)

65. CCC seeks to obtain copies of "all communications" between THESL and the EDA or any of its members in respect of (i) the interpretation of the CCTA Decision; (ii) the attachment of wireless equipment to distribution poles; or (iii) the August Letter. The interrogatory does not contain a specific reference to any of the evidence in the proceeding, contrary to Rule 28.02(b), and should be denied on this basis alone.

66. THESL declined this interrogatory on the basis that (a) it seeks information of questionable relevance; and (b) the request was extremely broad and the burden of producing the information sought greatly outweighs its probative value (if any).

67. *Not Relevant* – CCC attempts to cover for its lack of an evidentiary pinpoint for this interrogatory by suggesting in its motion materials that the information is necessary to the explore the accuracy of Dr. Yatchew's assertion that "[t]he treatment of pole space as a valuable and limited resource by utilities does not constitute anti-competitive behaviour" and is relevant to assess whether there is a market for the provision of wireless attachments.[38] THESL submits

[37] Labricciosa Affidavit, paras. 8-11.
[38] CCC submissions at para 19 and 23 and the affidavit of Dina Awad at paragraphs 10-13.

that the information requested is of questionable relevance. THESL is not the applicant in this proceeding and this is not a compliance proceeding. However, CCC is seeking through this interrogatory to turn this into a compliance proceeding and put THESL on trial using allegations of anti-competitive behaviour (which, although irrelevant, THESL denies). In addition to the Board not being the appropriate forum to bring such a complaint, the information requested will not advance the Board's determination of the specific public policy questions at issue in this proceeding. THESL and its experts have put forth significant and substantial evidence about the existence of an alternative siting market for wireless attachments that excludes LDC poles. This evidence is also clear that the siting market for wireless attachments is location specific (akin to a real estate market). In this context, THESL submits that communications between neighbouring distributors that operate in different siting markets is **not** relevant to the questions at issue in this proceeding.

68. *Unduly Onerous* – The question asked is incredibly broad in scope, and is not limited to a specific period of time. To respond to it would require THESL to do an exhaustive search of all communications between THESL employees and (i) the EDA, or (ii) any EDA member; after which THESL would then need to review of each such correspondence to identify whether the subject of the correspondence related to (i) the interpretation of the CCTA Decision, (ii) the attachment of wireless equipment to distribution poles, or (iii) the August Letter . This is an incredibly broad request seeking correspondence between THESL and every LDC in Ontario, which goes back as far as 2005 (the date of the CCTA Decision), and is with respect to any correspondence at any time relating to the attachment of wireless equipment to distribution poles. It is in this context that THESL refused to answer the interrogatory on the basis that the burden of producing the information sought greatly outweighed its probative value (if any).

69. The Labricciosa Affidavit speaks to the particulars of the specific burden(s) that this request, and those like it, would put on THESL, including the fact that THESL cannot complete an exhaustive search of its records for this information within the timelines of this proceeding.

***CCC Interrogatory No. 3* (Tab 6, Schedule 3)**

70. CCC seeks to obtain copies of "all communications" between THESL and the City with respect to (i) the interpretation of the CCTA Decision, (ii) the attachment of wireless equipment

to distribution poles, or (iii) the August 13, 2010 letter. The interrogatory does not contain a specific reference to any of the evidence in the proceeding, contrary to Rule 28.02(b), and should be denied on this basis alone.

71. THESL declined this interrogatory on the basis that (a) the information it seeks is of questionable relevance; and (b) the request is extremely broad and the burden of producing the information sought greatly outweighs its probative value (if any).

72. *Not Relevant* – CCC argues that the information is necessary to examine whether there is a market for the provision of wireless attachments, and whether THESL's current use of its pole space is influenced by the City of Toronto.[39] THESL submits that the information requested is of questionable relevance. THESL has the discretion to and does permit non-distribution attachments to its poles and THESL has provided detailed evidence of these specific type and number of attachments in its interrogatory responses. However, this interrogatory requests correspondence between THESL and the City as it relates to (i) the interpretation of the CCTA Decision, (ii) the attachment of wireless equipment to distribution poles, or (iii) the August Letter. It is simply not clear how the requested information is relevant in light of CCC's explanation. The City of Toronto is not a "Canadian carrier" and the non-distribution attachments that it attaches to THESL Poles are not made pursuant to the CCTA Decision. The requested information does not relate to the issue of a broader market for the provision of wireless attachments beyond LDC poles. It appears that CCC is engaging in a fishing expedition to try and uncover as-of-yet unknown allegations regarding the City. THESL is not the applicant in this proceeding and this is not a compliance proceeding. It is not appropriate for CCC to try to turn this into a compliance proceeding and put THESL on trial using vague allegations of undue influence.

73. *Unduly Onerous* – The question asked is broad in scope and is not limited to a specific period of time. To respond to it would require THESL to do an exhaustive search of all communications between THESL and the City of Toronto; after which THESL would then need to review of each such correspondence to identify whether the subject of the correspondence related to (i) the interpretation of the CCTA Decision, (ii) the attachment of wireless equipment

[39] The affidavit of Dina Awad at paragraphs 14-16 and CCC submissions at paragraphs 19 and 23.

to distribution poles, or (iii) the August Letter. This is a very broad request seeking correspondence between THESL and its shareholder which goes back as far as 2005 (the date of the CCTA Decision) and is in respect of any correspondence at any time relating to the attachment of wireless equipment to distribution poles. It is in this context that THESL refused to answer the interrogatory on the basis that the burden of producing the information sought greatly outweighs its probative value (if any).

74. The Labricciosa Affidavit speaks to the particulars of the specific burden(s) that this request, and those like it, would put on THESL, including the fact that THESL cannot complete an exhaustive search of its records for this information within the timelines of this proceeding.[40]

CCC Interrogatory No. 4 **(Tab 6, Schedule 4)**

75. CCC seeks to obtain copies of all studies, reports and communications from the date of the CCTA Order to the present with respect to the wireless communications plans of THESL, the City of Toronto and any related or affiliated entities. The interrogatory does not contain a specific reference to any of the evidence in the proceeding, contrary to Rule 28.02(b), and should be denied on this basis alone.

76. THESL provided a direct and concise answer to this question to the extent that it asked for studies, reports and communications of THESL. The answer was clear that aside from THESL's SCADA system (which is explained elsewhere in the evidence), no such plans exist.

77. THESL declined the balance of this interrogatory on the basis that it was of questionable relevance (it asked for information of third parties, not THESL). THESL further declines to respond on the basis that the request was extremely broad and the burden of producing the information sought greatly outweighed its probative value (if any).

78. *Not Relevant* – CCC argues that the information is relevant to assess whether THESL's use of its poles for wireless attachments is affected by the needs or desires of the City of Toronto or any of its affiliates.[41] THESL refused to answer the question as it related to the City of Toronto because the information requested was not simply not in THESL's knowledge. The City of Toronto is not a party to this proceeding, and the requested information is not in THESL's

[40] Labricciosa Affidavit, paras. 5 to 15.
[41] The affidavit of Dina Awad at paragraphs 17-19 and CCC submissions at paragraphs 19 and 23.

knowledge. THESL refused to answer the question as it related to THESI on a similar basis. THESI is not a party to this proceeding, and the CCTA Decision does not apply to attachments to non-distribution poles. THESL addresses in more detail parties' requests of disclosure and production from THESI in its response to CANDAS General interrogatory 32 below. Further, the requested information is at best of questionable relevance to the matters at issue in this proceeding even in light of CCC's explanation. The requested information does not relate to the issue of a broader market for the provision of wireless attachments beyond LDC poles. It appears that CCC is engaging in a fishing expedition to try and uncover as-of-yet unknown allegations about the City and THESI. THESL is not the applicant in this proceeding and this is not a compliance proceeding. It is not appropriate for CCC to try to turn this into a compliance proceeding and put THESL on trial using allegations of undue influence, and indeed, THESL submits that this is another example of the CCC's attempt to "go fishing".

79. *Unduly Onerous* – The refused portion of the interrogatory is quite broad in scope and asks for information dating back to 2005. It also does not limit itself to inquiries about THESL (which was answered) but extends to third parties including the City of Toronto and any affiliate. THESL is simply unable to respond itself - it would need to ask third parties to conduct the relevant searches. Those third parties would, in-turn, have to do an exhaustive search to identify all studies, reports and communications from the date of the CCTA Order to the present with respect to any "wireless communications plans." The use of the term "wireless communications plans" is quite broad, and would appear to cover any plan regardless of whether such a plan would fall within the scope of the CCTA Decision or not. Notably, neither the City of Toronto nor THESI are "Canadian carriers" within the meaning of the CCTA Decision, nor does the CCTA Decision apply to them. It is in this context that THESL refuses to answer the interrogatory on the basis that the burden of producing the information sought greatly outweighed its probative value (if any).

80. The Labricciosa Affidavit speaks to the particulars of the specific burden(s) that this request, and those like it, would put on THESL, including the fact that THESL cannot complete an exhaustive search of its records for this information within the timelines of this proceeding.[42]

[42] Labricciosa Affidavit, paras. 5 to 15.

CCC Interrogatory No. 5 **(Tab 6, Schedule 5)**

81. CCC seeks to obtain copies of all reports, analysis and communications in support of the contention that wireless attachments impair operational efficiency and present incremental safety hazards to electricity distributors. The interrogatory does not contain a specific reference to any of THESL's evidence in the proceeding, contrary to Rule 28.02(b), and should be denied on this basis alone.

82. THESL declined this interrogatory on the basis that (a) the information it seeks is of questionable relevance; (b) the request is extremely broad and the burden of producing the information sought greatly outweighed its probative value (if any), and (c) the materials and information sought are privileged as communications between solicitor and client and were prepared in contemplation of anticipated litigation.

83. *Not Relevant* – CCC argues that the information is relevant to examine to what extent THESL's August Letter to the Board was based on considerations of safety precluding wireless attachments to its poles.[43] THESL disagrees. The August Letter speaks for itself and clearly identifies THESL's specific operational and safety concerns. THESL has provided detailed evidence, in the affidavit of Mary Byrne and in subsequent interrogatory and technical conference responses, outlining in great detail the particulars of THESL's operational and safety concerns. CCC has chosen not to ask specific interrogatories about the particulars of THESL's operational and safety concerns (which is what most other parties have done). It appears that CCC is engaging in a fishing expedition to try and uncover as-of-yet unknown allegations about THESL's well documented operational and safety concerns. THESL is not the applicant in this proceeding and this is not a compliance proceeding. It is not appropriate for CCC to try to turn this into a compliance proceeding and put THESL on trial using allegations of impropriety.

84. *Unduly Onerous* – The question asked is broad in scope and is not limited to a specific period of time. It is also not limited to THESL but would include any and all publically available reports, analysis and communications related to operational and safety concerns associated with wireless attachments in general. This is very broad request, and to respond to it would require THESL to do an exhaustive search of all of its internal records as well as publically available

[43] The affidavit of Dina Awad at paragraphs 20-24 and CCC submissions at paragraphs 18 and 22.

databases to try to identify any information that fell within the broad scope of requested materials. It is in this context that THESL refused to answer the interrogatory on the basis that the burden of producing the information sought greatly outweighed its probative value (if any).

85. The Labricciosa Affidavit speaks to the particulars of the specific burden(s) that this request, and those like it, would put on THESL, including the fact that THESL cannot complete an exhaustive search of its records for this information within the timelines of this proceeding.[44]

86. *Privileged Information and the Privilege List* – To the extent that the question seeks information related to THESL's preparation of the August Letter, it is quite similar to CCC IR#1 which seeks all reports, analyses and written communications related to THESL's August 13, 2010 letter. THESL adopts its submissions in respect of privilege and the privilege list as set out in respect of CCC IR#1 in this regard.

CCC Interrogatory No. 6(d) **(Tab 6, Schedule 6)**

87. CCC seeks with this interrogatory to obtain copies of all documentation related to applications for wireless attachments that have been rejected by THESL.

88. During the November 4, 2011 technical conference CCC asked a follow-up on this interrogatory, asking Ms. Byrne to explain on a generic basis why these applications were rejected (pages 192-193). Ms. Byrne responded (at pages 193-194) and discussed in general terms some of the reasons for rejection of an attachment request.

89. *Not Relevant* – CCC argues that the information is relevant to examine the basis upon which THESL rejected the subject applications, and is relevant to assessing THESL's assertion that it has operational, safety and cost concerns with wireless attachments to its poles.[45] During the technical conference, THESL supplemented its affidavit evidence and responses to interrogatories on these matters, and explained on a generic basis why it rejects certain attachment requests. In general, the application and permitting process is an administrative exercise, and the applications are often rejected for administrative reasons. In light of this additional information, THESL submits the requested documentation is not relevant to the

[44] Labricciosa Affidavit, paras. 5 to 15.
[45] The affidavit of Dina Awad at paragraphs 25-29 and CCC submissions at paragraphs 18 and 22.

subject matter of this dispute. Instead, it would add voluminous irrelevant information to an already large evidentiary record.

90. *Confidential Information* – To address the confidentiality concerns raised by this interrogatory, THESL would need to request the consent of DASCom pursuant to the terms of the commercial arrangement between the parties. If THESL or DASCom so requests, the information may need to be filed in confidence pursuant to the Board's confidential guidelines. It is noteworthy however that to-date DASCom has elected not to file this voluminous information. While it is difficult to speculate why this is the case, it is likely because DASCom also does not view the material as directly relevant to the matters at issue in this proceeding.

CCC Interrogatory No. 7 **(Tab 6, Schedule 7)**

91. CCC seeks with this interrogatory to obtain copies of all reports, analyses and communications between the date of the CCTA Decision and August 13, 2010 describing or reporting on the operational and safety concerns expressed by Ms. Byrne at paragraphs 42-46 in her affidavit.

92. THESL responded to this interrogatory by cross-referencing various interrogatory responses that dealt directly with the operational and safety concerns raised by Ms. Byrne in her affidavit. To the extent that the request sought additional information beyond these responses, THESL declined this interrogatory on the basis that (a) the information it seeks is of questionable relevance; (b) the request is extremely broad and the burden of producing the information sought greatly outweighed its probative value (if any), and (c) the materials and information sought are privileged as communications between solicitor and client and were prepared in contemplation of anticipated litigation.

93. This information requested in this interrogatory, and CCC's submissions in that regard are analogous to those CCC made in respect of CCC interrogatory number 5. THESL adopts its submissions in respect of relevance, proportionality and privilege as set out above in respect of CCC interrogatory 5 in this regard.

E. RESPONSE TO THE CANDAS MOTION

94. It is also in the context described in sections A through C above that CANDAS has brought a motion to compel further and better answers to CANDAS general interrogatories 1(h), 1(i), 3(d), 5(e), 10(e), 10(o), 10(p), 10(q) and 32 and CANDAS Byrne interrogatory 15(g)(iv). While it is THESL's submission that the Board should dismiss the relief that CANDAS seeks on the basis of the proportionality principle and the rule against fishing expeditions, THESL will address each of these interrogatories in-turn in respect of THESL's specific basis for declining to answer them, and CANDAS' arguments as to why THESL should be required to answer them.

CANDAS General Interrogatories No. 1(h), 1(i) and 3(d) (Tab 5.3, Schedule 1 and Tab 5.3, Schedule 3)

95. CANDAS seeks to obtain (i) copies of all presentations to the Board related to the August 13, 2010 letter, (ii) copies of all drafts, including notes to draft, of the August Letter, and (iii) information on whether THESL sought and obtained legal advice as to the application of the CCTA Decision to wireless attachments. The interrogatory does not contain a specific reference to any of THESL's evidence, contrary to Rule 28.02(b), and should be denied on this basis alone. Instead, CANDAS references the August Letter, which was filed by CANDAS in its application.

96. These interrogatories are, collectively, very similar in kind to CCC interrogatory number 1 (discussed above). THESL declined these interrogatories on the basis that the materials and information sought were privileged and were prepared in contemplation of anticipated litigation. To be consistent with THESL's response to CCC interrogatory number 1, THESL further expands the basis of its refusals because the information requested (a) is of questionable relevance; and (b) is privileged as communications between solicitor and client.

97. *Not Relevant* – CANDAS takes the position that THESL has admitted that the information requested is relevant. THESL disagrees (see THESL's response to CCC interrogatory number 1 above). CANDAS alleges that the information is necessary to understand whether there is a legitimate public interest basis in THESL's policy position, or whether the position is motivated by other considerations.[46] THESL submits that the information requested is of questionable relevance. THESL is not the applicant in this proceeding and this is not a

[46] CANDAS submissions at paragraph 7.

compliance proceeding. However, CANDAS is seeking through this interrogatory to turn this into a compliance proceeding and to put THESL on trial by questioning THESL's motivations. The information requested will not advance the Board's determination of the specific public policy questions at issue in this proceeding. THESL has been abundantly clear about its position in respect of the applicability of the CCTA Decision to wireless attachments. An investigation into how THESL arrived at its position is simply not relevant to the matters at issue in this proceeding.

98. *Privileged Information* – CANDAS alleges that THESL has failed to adduce any evidence in support its assertion of privilege, and as a result the claim should be denied. THESL discusses above how this confuses the issue by suggesting the rules of procedure in a civil litigation context apply in an administrative hearing (which they do not). THESL complied with the Board's Rules in providing its interrogatory responses. In accordance with the Board's Rules, CANDAS has now challenged the sufficiency of that response. Similar to CCC IR#1, these interrogatories are unique in that they ask for information related to THESL's August Letter and unabashedly ask about whether or not legal advice was sought about the applicability of the CCTA Decision. If it is not clear from the careful wording of the August Letter letter which THESL filed with the Board and related directly to a question of interpretation of a prior Board Decision, the Labricossa Affidavit confirms that the August Letter was prepared by THESL and its counsel for the dominant purpose of anticipated litigation and that all of the information sought by CANDAS in these interrogatory is protected by litigation privilege and, in addition, much of the information is also protected by solicitor-client privilege. External counsel had been retained months before because of threatened litigation due to an ongoing dispute between THESL and the CANDAS member companies. CANDAS' own description of the events surrounding this acrimonious dispute, where litigation was repeatedly threatened, can be found at pages 15-25 of its Application. The applicability or non-applicability of the CCTA Decision is the basis of this dispute. The August Letter explains THESL's position that the CCTA Decision does not apply to wireless attachments, and THESL submits that the information requested if produced would violate THESL's fundamental civil and legal right to make the fullest investigation and research without risking disclosure of its opinions, strategies and conclusions to opposing counsel.

99. In its submissions, CANDAS argues that a fact that a party sought legal advice on a matter is to be distinguished from the nature of the legal advice itself, and that the fact of seeking legal advice is not protected by privilege. CANDAS has however, not pointed at the relevant law. Courts have held that where a party puts its legal state of mind into issue, including disclosing whether it received legal advice regarding a matter relevant to the proceeding, such conduct may amount to an implied waiver of privilege over any legal advice received. In particular, privilege may be waived where a party voluntarily injects into the proceeding the question of its state of mind and in doing so uses the legal advice it has received as a reason for its conduct.[47]

100. On the basis of the risk of implied waiver of privilege associated with a party putting its legal state of mind in issue, THESL has accordingly declined CANDAS' interrogatory in order to protect its claim of legal privilege.

101. *The Privileged Document List* - Because of the very broad scope of the interrogatory request, and as detailed in the Labricciosa affidavit, the task of producing a list of specific documents which THESL claims privilege over regarding this disputed interrogatory is inconsistent with the proportionality principle, would be unduly onerous relative to its probative value, and in any event, would take THESL beyond the timelines in this proceeding to produce. Furthermore, the creation of such a list is both unnecessary in the circumstances, and is not required in order to properly defend the substantive legal rights of privilege because THESL has provided sufficient particulars to establish that the information which it claims privilege over were made when litigation was anticipated or contemplated, and that the dominant purpose of those communications was for use in, or advice concerning, the litigation; and that in addition, much of the information constitutes communications between solicitor and client for the purpose of seeking legal advice.

CANDAS General Interrogatory No. 10(e) **(Tab 5.3, Schedule 10)**

102. CANDAS seeks to obtain the percentage of THESL poles that currently have wireless attachments and a breakdown by pole type of the number and type of wireless attachments.

[47] Hubbard, *The Law of Privilege in Canada, supra* note 22 at 11-69.

103. THESL acknowledged above that there a typographical error in its response to this interrogatory, which should have made reference to THESL's response in Tab 5.3, Schedule 6 (rather than Tab 5.1, Schedule 6). The now referenced response provides information on the specific number of wireless attachments on THESL's poles. To determine the percentage, the affidavit of Mary Byrne at paragraph 3 indicates that THESL owns approximately 140,000 poles across its service area. This information is sufficient for CANDAS to complete its analysis of "scarcity". To the extent that this request continues to seek a breakdown by pole type, including the number and type of wireless attachments, THESL submits that this information is (a) not relevant to the matters at issue in this proceeding; and (b) would be unduly onerous to produce relative to its probative value, if any.

104. *Not Relevant and Unduly Onerous* – Beyond seeking information on the scarcity of THESL's pole resources (which is addressed above), CANDAS does not elaborate on the relevance of its request for a breakdown by pole type of the number and type of wireless attachments. THESL submits that this information is simply not relevant to the matters at issue in this proceeding. In any event, THESL does not have the information requested in a form that is readily producible. To respond to this interrogatory, THESL would need to send its crews out across the city to do inspections to identify the pole type and the number and type of wireless attachments – a process which THESL is undertaking in the ordinary course of business and which it estimates will take it two years to complete.[48] THESL submits that this information would be unduly onerous to produce relative to its probative value, if any.

***CANDAS General Interrogatories No. 32 (*Tab 5.3, Schedule 32)**

105. CANDAS seeks to obtain (i) any and all documents evidence the terms and conditions under which THESL (or any affiliates) permitted the One Zone network to be attached; and (ii) requesting information on the number of THESL (or its affiliates) poles currently utilized to hold TTC communications equipment, One Zone communications equipment, or any other telecommunications equipment.

106. The relevant context for this line of interrogatories, and all information sought of THESI, is that in addition to constituting a fishing expedition, being unduly onerous and irrelevant for

[48] Labricciosa Affidavit, para. 13.

reason of seeking information from a non-party, is the fact that in its initial Application, CANDAS included THESI as a party to this proceeding by seeking interim relief specifically against it. By letter dated May 3, 2011 to the Board, CANDAS notified the Board that it was no longer seeking any relief specifically against THESI. THESI is not an Ontario electricity distributor, and therefore the CCTA Decision does not apply to it and it is not otherwise a party to this proceeding. THESL submits that the Board should therefore deny CANDAS', or any other party's (for example, see CCC interrogatory 4, discussed above), attempt to seek disclosure and/or production of information from THESI.

107. In any event, THESL responded directly to interrogatory 32(a) to explain that it does not have a contract related to the One Zone network. To the extent that the question also sought information from THESL's affiliates, THESL explained that THESI is not a party in this proceeding and that THESI has declined to provide the information requested. THESL understands that THESI refuses this interrogatory on the basis of relevance. THESI is not subject to the Board's CCTA Decision, and any attachment agreements it has with third parties related to attachments to non-distribution poles is not properly the subject of this proceeding.

108. THESL also responded directly to interrogatory 32(b) in a manner that is generally accepted in Board proceedings of this nature by cross-referencing interrogatory responses that provide the requested information. Tab 5.3 Schedule 6 and Tab 5.1 Schedule 15 provides the best information available on the number of non-distribution attachments to THESL poles including wireless attachments. To the extent CANDAS is asking for additional information, THESL does not have this information available and as detailed in Labricossa Affidavit, submits that it would be unduly onerous to produce relative to its probative value, if any.

109. To the extent that this question also seeks information from THESL's affiliates, please see the response to interrogatory 32(a) above.

110. THESL responded to this interrogatory by explaining that it does not have the requested data available, that it is in the process of collecting such data, but that it would not be possible to have the information available for the purposes of the present proceeding. As a result, THESL declined this interrogatory on the basis that it would be unduly onerous to produce relative to its probative value, if any.

111. The Labricciosa Affidavit speaks to the particulars of the specific burden(s) that this request, and those like it, would put on THESL, including the fact that THESL cannot complete an exhaustive search of its records for this information within the timelines of this proceeding.[49]

CANDAS General Interrogatory No. 5(e), 10(o), 10(p) and 10(q) **(Tab 5.3, Schedule 5, Tab 5.3 Schedule 10) and** ***CANDAS Byrne Interrogatory No. 15(g)(iv)*** **(Tab 5.1, Schedule 15)**

112. In CANDAS Byrne IR#15(g)(iv), CANDAS is seeking information related to the size, weight, dimensions and other physical specifications of each SCADA wireless attachment. Despite the questionable relevance of the interrogatory, THESL responded to this interrogatory by providing a detailed listing of all of its SCADA equipment and radio equipment. However, THESL's database does not include a breakdown of the specific technical information requested by CANDAS. During the technical conference THESL refused to provide the technical specifics on the basis that the information requested was not relevant to the matter at issue.[50] CANDAS takes the position that this interrogatory relates to the extent to which THESL has permitted third parties to use its poles for the purposes of wireless attachments.[51] The requested technical information in this interrogatory does not relate to any third party arrangements. Instead CANDAS is seeking specific technical information about distribution equipment owned and operated by THESL that is used exclusively to provide a distribution function. THESL has already (and arguably unnecessarily) provided CANDAS a complete list of this equipment, even though this type of equipment is not governed pursuant to the CCTA Decision. THESL submits that this information is simply not relevant to the matters at issue in this proceeding, and that producing it would be unduly onerous relative to its probative value, if any.

113. In CANDAS General 10(o), 10(p) and 10(q), CANDAS is seeking copies of attachment agreements as between (i) THESL and THTI; (ii) THESL and Cogeco in respect of the One Zone network; and (iii) THESI and Cogeco in respect of the One Zone network. THESL declined to respond to 10(o) on the basis of relevance, and THESL further noted that the information sought is confidential. THESL directly answered 10(p) noting that it has no records of any agreement with Cogeco in respect of the One Zone network. It is simply unclear what other information

[49] Labricciosa Affidavit, paras. 5 to 15.
[50] Nov. 4, 2011 Technical Conference transcript at pg. 146, line 20 to pg. 147, line 17.
[51] CANDAS submissions at para. 20.

THESL could provide in response. THESL refused to answer 10(q) on the basis that THESI is not a party to this proceeding and the information sought is not relevant. CANDAS takes the position that this interrogatory relates to the extent to which THESL has permitted third parties to use its poles for the purposes of wireless attachments.[52] THESL disagrees, and submits that the requested information is not relevant, and as noted above in section (b), submits that CANDAS' attempt to gain access to it constitutes a fishing expedition. THESI is not subject to the Board's CCTA Decision, and any attachment agreements it has with third parties related to attachments to non-distribution poles is not properly the subject of this proceeding and in any event, are likely confidential. THESL relies also the submissions in made in response to CANDAS General Interrogatories No. 32 that CANDAS elected not to pursue any relief against THESI in this proceeding.

114. In CANDAS General 5(e), CANDAS sought all applicable agreements regarding third party wireless attachments to THESL poles. In response, THESL referred CANDAS to Tab 5.1 Schedule 15, which together with Tab 5.3 Schedule 6, provides the best information available on the number of non-distribution attachments to THESL poles including wireless attachments. Notably, the only wireless attachments identified in THESL's database are the DASCom attachments. The agreement related to these attachments is already on record in this proceeding. To the extent CANDAS is asking for additional information, THESL submits that it would be unduly onerous to produce relative to its probative value, if any.

115. The Labricciosa Affidavit speaks to the particulars of the specific burden(s) that this request, and those like it, would put on THESL, including the fact that THESL cannot complete an exhaustive search of its records for this information within the timelines of this proceeding.[53]

F. CONCLUSIONS

116. On the basis of the foregoing submissions, THESL requests that the orders sought in the Motions be denied. In addition, THESL submits that CANDAS and CCC should be denied their costs in respect of these Motions on the basis that they failed to contribute to a better understanding by the Board of one or more of the issues in this proceeding. CANDAS and CCC

[52] CANDAS submissions at para. 20.
[53] Labricciosa Affidavit, paras. 5 to 15.

could easily have raised their concerns during the technical conference, as THESL did,[54] but instead they have chosen to engage in conduct that has tended to unnecessarily expand the scope, complexity and duration of the hearing. Finally, THESL submits that the Board should also consider awarding all costs incurred by the parties (including the Board) in connection with the Motions against CANDAS and CCC if the Board is of the view that, in light of the foregoing submissions and the submissions of CCC and CANDAS taken as a whole, the Motions are frivolous and vexatious.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 15, 2011

Original signed by J. Mark Rodger

Borden Ladner Gervais
Lawyers for the Intervenor
Toronto Hydro-Electric System Limited

J. Mark Rodger

[54] See pages 53-54 of the Nov. 4, 2011 Technical Conference Transcript and Undertaking JTC1.3.

Schedule "A"
List of Authorities

Bryant, Alan W., Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (Markham: LexisNexis Canada, 2009).

Computershare Trust Co. of Canada v. Crystallex International Corp., 2009 CarswellOnt 8860 (Ont. S.C.J.), affirmed 2009 CarswellOnt 8449 (Ont. Div. Ct.).

General Accident v. Chrusz (1999), 45 O.R. (3d) 321 (C.A.).

Hubbard, Robert W., Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, Release No. 12 (Aurora: Canada Law Book, 2011).

IBM Canada Ltd. v. Xerox of Canada Ltd, [1978] 1 F.C. 513 (CA).

Intel Corp. v. 3395383 Canada Inc., 2004 FC 218 (F.C.).

More Marine Ltd. v. Shearwater Marine Ltd., 2011 BCSC 166.

Ontario (Attorney General) v. Stavro, [1995] O.J. No. 3136 (Ont. C.A.).

Ontario Civil Justice Reform Project, Summary of Findings and Recommendations, Report of the Honourable Coulter A. Osborne, Q.C. November 2007.

Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co., 74 O.R. (2d) 637.

Schedule "B"
Legislation Cited

Rules of Civil Procedure, R.R.O. 1990. Reg. 194, r. 30.03(2)(b)

AFFIDAVIT OF DOCUMENTS

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power. O. Reg. 438/08, s. 27 (1).

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location. R.R.O. 1990, Reg. 194, r. 30.03 (2); O. Reg. 438/08, s. 27 (2).

Statutory Powers Procedure Act, R.S.O. 1990 c S.22

Disclosure

5.4(1)If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1)The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2)Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

EB-2011-0120

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

AND IN THE MATTER OF an Application by the **Canadian Distributed Antenna Systems Coalition** for certain orders under the *Ontario Energy Board Act*, 1998.

AFFIDAVIT OF Ivano Labricciosa

(sworn November 15, 2011)

I, Ivano Labricciosa, in the Town of Pickering, Province of Ontario, **MAKE OATH AND SAY**:

1. I am the Vice President, Asset Management of Toronto Hydro-Electric System Limited ("THESL"), and therefore have knowledge of the matters to which I depose in this affidavit, unless stated to be on information and belief, in which case I state the source of my information and believe it to be true.

A. The Purpose of My Affidavit

2. The Canadian Distributed Antenna Systems Coalition ("CANDAS") and the Consumers Council of Canada ("CCC") have both brought motions against THESL to compel further and better answers from THESL to certain interrogatories submitted by CANDAS and CCC respectively (the "Motions"). In the Motions, CANDAS and CCC challenge THESL declining to answer certain interrogatories (collectively, the "Disputed Interrogatories"), in part or whole, on the basis:

a. that production of the information sought would be unduly onerous in relation to its probative value;

b. claims of solicitor-client and/or litigation privilege; and/or

c. that the information sought is not relevant to the matters in issue in this proceeding.

3. Below I explain in further detail categories (a) and (b) of THESL's reasons for declining the Disputed Interrogatories.

4. In order to assist the Board in understanding the context of THESL declining to produce certain information with respect to the Disputed Interrogatories, I attach to my affidavit as Exhibit "A" a chart that sets out the information requested by the Disputed Interrogatories, THESL's response (including, in some cases, the different or multiple grounds for declining them), and the factual context relevant to that response (the "IR Chart"). For ease of reference, below I will refer to the numbers in my IR Chart in explaining THESL's responses.

B. The Onerous Nature of Disclosure and Production

5. THESL declined to answer certain interrogatories of CANDAS and CCC on the basis that production of the information sought would be unduly onerous for THESL in relation to the probative value of that information (if any). As THESL noted in several responses to the Disputed Interrogatories, it is not possible for THESL to produce the information sought within the timelines of this proceeding. The Disputed Interrogatories in this regard seek the following information and materials from THESL:

a. a breakdown of each wireless attachment (whether telecommunications, non-telecommunications or distribution) on each THESL Pole, including alpha-numerical cross-referencing, full descriptions of the attachment (in some cases, size, weight, dimensions and other physical specifications), photographs of the poles and attachments, copies of all agreements and disclosure of any rates and fees paid by third parties;[1]

b. copies of communications between THESL and unrelated third parties regarding interpretation of the CCTA Decision, attachment of wireless to distribution poles and THESL's policy with respect to wireless attachments;[2] and

c. copies of all internal communications, reports and analyses, regarding THESL's safety and operational concerns with hosting wireless attachments.[3]

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[1] CANDAS General Interrogatories 10(e), 32(b), 32(c), 5(e) and CANDSA Byrne 15(g)(iv).
[2] CCC Interrogatories 2 and 3.

6. THESL was asked a total of 677 questions via interrogatories in this proceeding. It declined just five percent. As a result of those interrogatories, THESL staff undertook a review of their records in search of the requested information, and I estimate that THESL diverted hundreds of hours of employee resources - with many of those employees working overtime - to prepare THESL's answers to interrogatories. In addition to these efforts, for certain interrogatories (such as CANDAS Interrogatory of Ms. Byrne No. 24), THESL went so far as to send crews out into the field to perform visual inspections of each of the locations provided by CANDAS in which CANDAS alleged that the photos depicted power supplies attached to THESL Poles. Of the 18 photos provided, only 11 depicted CATV power supplies attached to THESL Poles.

(i) Disclosure and Production Would Require Substantial Resources

7. In order to uncover the information sought by the Disputed Interrogatories, THESL would be required to divert substantial employee resources away from their ordinary functions. In particular, a number of THESL employees in a number of departments across a number of office locations may have been involved in the matters with respect to which CANDAS and CCC seek information and materials in the Disputed Interrogatories. Some of those employees have moved positions within the company (which in some cases, raises the question of who might have certain information), or are no longer with the company.

8. Even producing lists of the documents within THESL's possession, such as a list of documents which THESL claims privilege over in respect of the Disputed Interrogatories, would place an extraordinary burden on THESL and require it to invest substantial resources.

9. I have read CCC's submissions in this matter and note that at paragraph 13, they state that "questions as to the volume of the material to be produced are practical ones that can be readily resolved once the material is properly identified." With respect, it is my view that CCC construes this exactly backwards. In order for THESL to provide any list(s) of documents, THESL must first search and catalogue its records. However, as searching and cataloguing records is itself an unduly onerous task, such is the same for producing a list of those documents.

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[3] CCC Interrogatories 5 and 7.

10. Indeed, in order to contend with the quantity and broad scope of the information demanded by CANDAS and CCC, THESL would likely be required to retain additional external service providers (and therefore additional costs) to assist in the process of searching, identifying and possibly producing the information and materials sought. For example, given the technical nature of electronic communication and document storage, THESL would likely need to retain specialized services to assist in the mining, generation and formatting of such data, some of which has been archived over time.

(ii) Disclosure and Production Would Take Longer than the Timelines of this Proceeding

11. I understand that this proceeding is currently scheduled to go to a hearing beginning on December 12, 2011. The process of searching, disclosing and producing the information and materials sought would take a significant amount of time, and as THESL noted in response to several of the Disputed Interrogatories, it would not be possible for THESL to produce the information (and in the case of document searches, even produce lists of documents) within the timelines of this proceeding.

12. For example, certain of the Disputed Interrogatories seek to gain information for which a complete process of searching, disclosure and production would require THESL to search as far back as six years into its records.[4] THESL estimates that searching and cataloguing its records in this regard will take it at least several months to complete, and well beyond mid-December, which is less than a month away.

13. By way of further example, other Disputed Interrogatories seek to gain information which THESL is in the process of generating in the ordinary course, but will likely take years to prepare. For example, THESL is in the process of conducting a survey of non-distribution attachments, including the type of attachment, attachment owner, attachment saturation, clearances and measurements, identifying insulator types, pole height, pole type and pole class (etc).[5] THESL estimates that this effort of visiting each of its 140,000 Poles and cataloguing

[4] See for example, CCC IR 2 and 3.
[5] See for example CANDAS General Interrogatories 10(e), 32(b), 32(c) and 5(e).

information in relation to each pole and attachments will take it approximately two years and at least a dozen staff to complete.

14. In short, and as THESL has stated in its response to the Disputed Interrogatories that I describe above in paragraph 5, quite apart from whether the interrogatories are relevant (which in certain cases, THESL denies), or whether they seek privileged information, THESL's position is that production of the information sought by CANDAS and CCC would be unduly onerous and burdensome for THESL, relative to the probative value of that information (if any).

15. If however, the Board is not persuaded that the information sought by the Disputed Interrogatories, including a list of privileged documents, is unduly onerous relative to its probative value, and such information is necessary to the Board's decision in this proceeding, then THESL will of course comply with the Board's order. The result of such compliance however would be that the proceeding would need to be adjourned.

C. THESL's Claims of Privilege

16. THESL declined to answer certain interrogatories of CANDAS and CCC on the basis that the materials and information sought are privileged as communications between solicitor and client and/or being in contemplation of litigation. The Disputed Interrogatories in this regard seek, in general terms, the following information and materials from THESL:

a. copies of all internal communications, reports and analyses, including reports to THESL's board of directors and management, regarding THESL's safety and operational concerns with hosting wireless attachments, anything underlying the August 13, 2010 letter that THESL wrote to the Board (the "August Letter"), drafts of the August Letter, THESL's policy with respect to wireless attachments, and THESL's rejection of any wireless attachments, wireless plans of THESL, the City and any related/affiliated entities;[6] and

[6] CCC Interrogatories 1, 5 and 7, as well as CANDAS General Interrogatories 1(h) and 1(i).

b. whether THESL sought and obtained legal advice in respect of the applicability of the CCTA Decision.[7]

17. Below I set out for the Board further information regarding THESL's claims of privilege over these materials.

(i) Background

18. THESL entered into a contract with DAScom dated August 1, 2009 (the "Contract") which provided that THESL would process DAScom's permit applications for a defined list of "attachments" in accordance with that agreement. In particular, the Contract provided a list of equipment that DAScom may attach to THESL Poles, but nowhere did it list wireless equipment (either in general, or of the specific nature that of the current DAScom attachments on THESL Poles). In particular, the Contract provides that:

> "Proposed Attachment" means any material, apparatus, equipment or facility owned, in full or in part, or controlled and maintained by the Licensee that Licensee is requesting permission from the Owner to Affix, without limitation:
>
> (i) Overlashed cable;
>
> (ii) Service Drops Affixed directly to the Owner's poles;
>
> (iii) Service Drops Affixed In-span to a Strand or Messenger supported by the poles of the Owner;
>
> (iv) Attachments owned by the Licensee that emanate from a cable not owned by the Licensee;
>
> (v) Messenger or Strand;
>
> (vi) Cable Riser/Dips; and
>
> (vii) Power Supply/Rectifiers; and
>
> (viii) other equipment as may be approved by the Owner, in its sole discretion."

19. THESL has stated that it intends to continue to issue permits in accordance with the terms of the Contract.[8]

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[7] CANDAS General Interrogatory 3(d).
[8] The information contained in paragraphs 18 through 21 was also provided in THESL's response to interrogatories, at tab 5.2, schedule 18. CANDAS produced a copy of the Contract pursuant to an interrogatory update (to Board Staff Interrogatory 8 and CCC Interrogatory 9) dated August 31, 2011.

20. Pursuant to negotiations between THESL and DAScom and the wording in the Contract, THESL expected that if DAScom wished to attach equipment not specifically enumerated in the Contract, that it would advise and seek approval from THESL's senior management of same.

21. In fact, CANDAS submitted permit applications for wireless equipment that was not specifically enumerated in the Contract (the "Unauthorized DAScom Attachments"), and THESL front line permit processing staff did not appreciate the distinction between this non-enumerated equipment and that which was enumerated in the Contract. THESL front line staff accordingly processed permit applications for wireless equipment, subject to it satisfying the permit application process requirements in the ordinary course.

(ii) The Public Mobile Meeting

22. I am advised by Anthony Haines (President and CEO of Toronto Hydro Corporation and President of THESL) and do believe, that in January 2010, THESL was contacted by the CEO of Public Mobile, Mr. Alex Krastajc, who, among other things, requested a meeting with Mr. Haines. As a result of Mr. Krastajc's request, senior executives of THESL met with representatives of Public Mobile on January 13, 2010 (the "Public Mobile Meeting"). Mr. Haines, and Mr. Lawrence Wilde (Vice-President, General Counsel and Corporate Secretary for Toronto Hydro Corporation) and I attended the meeting on behalf of THESL. In attendance on behalf of Public Mobile were Messrs. Brian O'Shaughnessy, Bob Boron and Jack Hooper.

23. At the time of the Public Mobile Meeting, THESL did not have a pole attachment agreement, or any other agreement, with Public Mobile. During the Public Mobile Meeting, Public Mobile advised that it was one of the companies which planned to introduce new cellular telephone services in Canada, and that, in order to deliver this service in the City of Toronto, it intended to affix wireless and fibre technology (the "Attachments") to THESL's distribution poles ("THESL Poles"). Public Mobile confirmed that it had retained Extenet to oversee the installation of the network, which in turn, retained DAScom to perform the installation of the wireless Attachments and Cogeco to install the fibre to connect the wireless Attachments. Public Mobile indicated to THESL that it had concerns about how long it was taking THESL to process applications for permits to attach the Attachments to THESL Poles.

24. THESL declined to discuss these matters at the Public Mobile Meeting on the basis that it did not have a pole attachment agreement with Public Mobile and, for reasons of confidentiality, could not discuss its contractual relationship with other customers unless those other customers expressly directed it to do so.

(iii) THESL's Claims of Privilege

25. Since the Ontario Energy Board (the "Board") released its CCTA Decision[9] in 2005, THESL interpreted it as only obligating distributors to grant *wireline* attachers access to THESL Poles. Prior to the Public Mobile Meeting, THESL's senior management had no knowledge of the Unauthorized DAScom Attachments existing on THESL poles, nor the relationship between Public Mobile, Extenet and DAScom. Accordingly, until the Public Mobile Meeting, the applicability of the CCTA Decision to *wireless* and the tranches of information sought in the Disputed Interrogatories referenced in paragraph 16(a) and (b) above were not matters that THESL had occasion to communicate, analyze or report on.[10]

26. Following the Public Mobile Meeting (on January 13, 2010), THESL engaged counsel in anticipation or contemplation of potential administrative and/or court proceedings, as well as for the purposes of seeking legal advice in relation to various matters that arose as a result of the Public Mobile meeting and related legal issues. If THESL's anticipation or contemplation of litigation did not crystallize immediately following the Public Mobile meeting, it certainly had by January 24, 2010, when THESL's external regulatory and litigation counsel became active in relation to this matter.

27. The potential fact and nature of THESL's anticipated or contemplated litigation, and the basis for seeking legal advice, is evident from the correspondence between THESL and certain members of CANDAS that was exchanged throughout the first half of 2010, following a meeting between THESL and DAScom on Feburary 5, 2010. Through its counsel, last week THESL

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[9] RP-2003-0249 dated March 7, 2005 (the "CCTA Decision").

[10] As I discuss in further detail above, to the extent that THESL may have pre-January 2010 information or materials regarding the information and materials sought by way of the Disputed Interrogatories CCC 5 and 7, THESL has declined production of that information on the basis that to do so would be unduly onerous relative to the probative value of that information (if any). As I also discuss in further detail above, and in any event, it is unlikely that THESL would be able to complete such a search, disclosure and production of the information sought within the timelines of this proceeding.

sought CANDAS' consent to disclose two examples of such correspondence in this proceeding (dated May 7 and June 10, 2010 respectively), however CANDAS' counsel advised that CANDAS would not consent on the basis of reasons including a claim of settlement privilege over such materials.

28. Although THESL does not necessarily agree with CANDAS' claim of settlement privilege over the above-mentioned correspondence, given that claim, I will not appeal to the contents of such correspondence in order to explain THESL's basis for its claim of litigation privilege. In any event, it is my view that the potential fact and nature of a dispute between THESL and certain members of CANDAS, and therefore the fact that THESL was anticipating or contemplating litigation, is evidenced by the tone and content of CANDAS' application itself.

29. In its application, CANDAS makes numerous allegations against THESL which, in addition to being unsubstantiated, seem to me to be ancillary to the issues in this proceeding. For example, at paragraphs 2.2 to 2.9 of its application materials filed April 21, 2011 (the "CANDAS Application"), CANDAS alleges the following:

a. "Until August of 2010, Toronto Hydro-Electric System Limited ("**THESL**") complied with the CCTA Order";

b. "All of this changed suddenly when, on August 13, 2010, THESL sent a letter to the Board advising of a new "policy" not to permit the attachment of wireless equipment to its power poles";

c. "Since the date of the THESL Letter, THESL has purported to be honouring existing pole access agreements with wireless attachers";

d. "In the result, investments in wireless networks that were made in reliance on the CCTA Order have become stranded"; and

e. "If left unchecked, the ability of electricity distributors to use their monopoly power to unduly discriminate among Canadian carriers by unilaterally deciding who may have access to regulated assets and who may not."

30. CANDAS also makes other allegations about THESL's conduct:

a. "it became apparent that Cogeco's fiber attachment applications and DAScom's node attachment applications were not being processed within the three to four weeks timeframe that had been promised"[11]

b. "As a result of the continuing delays in permit processing and the uncertainty as to when the Toronto DAS Network would be 100 percent completed, Public Mobile decided to launch its new Toronto service using "temporary" Macro Cell Sites"[12]

31. While I will not debate the lack of merit of CANDAS' allegations in this regard in detail in this affidavit, I reiterate THESL's denial of CANDAS' allegations, which THESL has addressed throughout its evidence in this proceeding.

32. Regardless, the acrimonious nature of the period after the Public Mobile Meeting, leading up to CANDAS filing its application in this proceeding with the Board (and of course, the period that has lasted throughout this proceeding), has meant that THESL has been concerned about legal proceedings since that time. Indeed, THESL continues to have the same concern today: preparing itself for what may be the second phase of a legal attack by members of CANDAS – whether that be before the Board or in a courtroom.

33. Because we believed either immediately or very soon after the Public Mobile Meeting that there was potential for litigation with certain members of CANDAS, any documents relating to the subject matter of what CANDAS and CCC seek in relation to the Disputed Interrogatories (for which THESL has declined on the basis of legal privilege) would have been created with that possible litigation in mind and for the main purpose of assisting THESL and its lawyers in preparing for such litigation. In particular:

> Copies of all internal communications, reports and analyses, including reports to THESL's board of directors and management, regarding THESL's safety and operational concerns with hosting wireless attachments, anything underlying the August Letter, drafts

[11] CANDAS Application, para. 7.2.
[12] CANDAS Application, para. 7.10.

of the August Letter, THESL's policy with respect to wireless attachments, and THESL's rejection of any wireless attachments, wireless plans of THESL, the City and any related/affiliated entities.[13]

34. Accordingly, any information sought by the Disputed Interrogatories listed in paragraph 16(a) above would have necessarily been generated after the Public Mobile Meeting and THESL claims privilege over any such information and materials. For the same reason, THESL claims privilege over the information sought by the Disputed Interrogatories CCC 5 and 7 (which are constitutive of my the description in paragraph 16(a)), to the extent that such information was generated after January 2010.[14] THESL has accordingly declined to answer these Disputed Interrogatories on the basis of solicitor-client and/or litigation privilege.

35. I understand that THESL's claim of privilege over any information requested via the Disputed Interrogatories that I have listed in paragraph 16(b) above will be addressed in THESL's written submissions in response to the Motions by way of legal argument. I also understand that in those submissions, THESL will make argument relating to the difference between solicitor-client and litigation privilege and how certain documents that I list in paragraph 16(a) may fall into one or both of those categories. As I am not a lawyer, I am not able to attest to any such matters of legal analysis or argument in this affidavit.

D. Other Matters

36. There are three interrogatories over and above the Disputed Interrogatories which are the subject of the Motions. In particular:

a. whether THESL consulted with any Canadian Carrier, including DAScom, Public Mobile, Rogers, Telus and Bell, prior to adopting its "no wireless" policy? If so, indicate whom did THESL consult, and what feedback was received and from whom;[15]

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[13] CCC Interrogatories 1, 5 and 7, as well as CANDAS General Interrogatories 1(h) and 1(i).
[14] And as noted at footnote 10 above, to the extent that THESL has information and materials related to the the Disputed Interrogatories CCC 5 and 7 from before the Public Mobile meeting, THESL's position is that production of such information is unduly onerous relative to its probative value, if any.
[15] CANDAS General Interrogatory 4(a).

b. whether THESL had any negotiations or discussions with any of the parties who have attached wireless equipment with respect to terms and conditions on which attachment will be available in the future;[16] and

c. whether Dr. Yatchew relies on any other sources for his understanding that wireless entities "do not require continuous corridors for placement of their wireless facilities."; if so, provide the all relevant references and specific excerpts upon which Dr. Yatchew relies.[17]

37. THESL is willing to re-answer these interrogatories as listed above in paragraph 36.

38. Finally, due to a typographical error, THESL's response to CANDAS' General Interrogatory 10(e) included an incorrect cross-reference. It should have made reference to THESL's response in Schedule 5.3, Tab 6 (rather than Schedule 5.1, Tab 6).

39. I make this affidavit in support of THESL's response to the motions of CANDAS and CCC for to compel further and better answers from THESL to certain interrogatories submitted by CANDAS and CCC respectively, and for no other or improper purpose.

SWORN BEFORE ME
at the City of Toronto,
in the Province of Ontario,
on November 15, 2011.

A Commissioner, etc.

Ivano Labricciosa

Kathleen Amanda Miles, a
Commissioner etc., Province of Ontario,
while a Student-at-Law.
Expires September 7, 2014.

[16] CANDAS General Interrogatory 4(f).
[17] CANDAS Yatchew Interrogatory 20(b).

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THE LAW OF EVIDENCE IN CANADA

THIRD EDITION

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Justice of the Superior Court of Justice for Ontario

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Justice of the Superior Court of Justice for Ontario

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Justice of the Superior Court of Justice for Ontario

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public interests, that recognizing a class privilege in criminal trials for private records relating to sexual assault complainants is not the best way to serve the interests of justice. Moreover, she concluded that an *ad hoc*, case-by-case privilege should not be utilized to protect the records since that approach would not serve the main policy consideration behind the granting of a privilege for sexual assault counselling communications, that is, that the complainants should be assured at the outset that information shared with the counsellors will be kept confidential. The case-by-case approach could not guarantee protection of privacy in advance of a ruling and thus would have a deterrent effect on those reporting incidents and seeking counselling. Justice L'Heureux-Dubé, therefore, advanced a methodology for the court to balance *Charter* values to privacy and equality of the sexual assault complainant with the accused's right to a fair trial and to full answer and defence. While similar to the approach of determining case-by-case privilege, it places the *Charter* rights of complainants on an equal footing with those of accused persons.

§14.41 The procedure involves a two-step process after the accused has notified all parties with an interest in the confidentiality of the documents for which production is sought. The accused must establish the likely relevance of the documents. Mere speculation or biased inferences about sexual assault complainants will not suffice. More must be shown. If the threshold of likely relevance is overcome, production of the records is made only to the Court for its inspection. The Court then is to decide which documents or part of documents contain information which is likely relevant and to weigh the effects of production on the complainants with those of the accused. In this process, the Court can consider any claim for privilege and, even where the claim is unsuccessful, the Court can exercise a discretion in respect of production after balancing the relevant *Charter* values.

C. Solicitor and Client

1. Rationale

§14.42 It has long been established that *prima facie* all four of Wigmore's prerequisites are met in a solicitor and client communication.[61] But the privilege's origin and development go back much further in history. The solicitor-client privilege is the oldest of the privileges for confidential communications with roots in the 16th century. The basis of the early rule was the oath and honour of the solicitor, as a professional man and a gentleman, to

[61] See, *e.g.*, *R. v. Fehr* (1984), 10 C.C.C. (3d) 321, at 329, [1984] A.J. No. 720 (Alta. Q.B.), affd (1985), 14 D.L.R. (4th) 128, [1985] A.J. No. 2601 (Alta. C.A.).

keep his client's secret.[62] Thus, the early privilege belonged solely to the solicitor,[63] and the client benefited from it only incidentally. By the 18th century, the courts regarded the ascertainment of truth to be more important than professional dignity, and oath and honour alone ceased to excuse lawyers from their civic duty to give testimony. In order to preserve the protection, however, the early rationale gave way to the view that the privilege was necessary, not in order to maintain the solicitor's reputation, but for the protection of the client. Effectual legal assistance, it was assumed, could only be given if clients frankly and candidly disclosed all material facts to their solicitors, which, in turn, was essential to the effective operation of the legal system. It was thought that this would not take place if the possibility existed that their confidences might be revealed.[64]

§14.43 A complete statement of the privilege has been given as follows:

> That rule as to the non-production of communications between solicitor and client says that where . . . there has been no waiver by the client and no suggestion is made of fraud, crime, evasion, or civil wrong on his part, the client cannot be compelled and the lawyer will not be allowed without the consent of the client to disclose oral or documentary communications passing between them in professional confidence, whether or not litigation is pending.[65]

The Supreme Court of Canada has elevated the privilege to a "fundamental civil and legal right".[66] The party asserting the right to solicitor-client privilege must establish, on the balance of probabilities, that the criteria for the privilege exist.[67]

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62 For example, see *Solosky v. Canada*, [1980] 1 S.C.R. 821, at 833-35, [1980] S.C.J. No. 130 (S.C.C.), *per* Dickson J. (as he then was).

63 *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, at 232, [1991] S.C.J. No. 53 (S.C.C.).

64 *Smith v. Jones*, [1999] 1 S.C.R. 455, [1999] S.C.J. No. 15, at para. 46 (S.C.C.); *R. v. Campbell*, [1999] 1 S.C.R. 565, [1999] S.C.J. No. 16, at para. 49 (S.C.C.); *Geffen v. Goodman Estate, ibid.*, at 231 (D.L.R.); *R. v. Gruenke*, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289, at 305, [1991] S.C.J. No. 80 (S.C.C.), *per* Lamer C.J.C.; *Greenough v. Gaskell* (1833), 1 My. & K. 98, 39 E.R. 618 (Ch.); *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, at 649 (C.A.); *Re Canada (Combines Investigation Act)*, [1975] F.C. 184, 55 D.L.R. (3d) 713, at 721-22, [1975] F.C.J. No. 38 (F.C.A.); *Flack v. Pacific Press Ltd.* (1970), 14 D.L.R. (3d) 334, at 336-40, [1970] B.C.J. No. 631 (B.C.C.A.).

65 *Re Combines Investigation Act* (1972), 26 D.L.R. (3d) 745, at 746, [1972] B.C.J. No. 100 (B.C.S.C.), *per* Munroe J. The criteria for the existence of solicitor client privilege were set out by the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, at para. 15 (S.C.C.). See also *Greenough v. Gaskell, ibid.*; *Kulchar v. Marsh*, [1950] 1 W.W.R. 272, at 274, [1949] S.J. No. 38 (Sask. Q.B.).

66 *Solosky v. Canada*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, at 760, [1980] S.C.J. No. 130 (S.C.C.); *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, at 232, [1991] S.C.J. No. 53 (S.C.C.); *Smith v. Jones*, [1991] 1 S.C.R. 455, [1999] S.C.J. No. 15 (S.C.C.).

67 *McCarthy, Tétrault v. Ontario* (1993), 95 D.L.R. (4th) 94, [1993] O.J. No. 1680 (Ont. Prov. Div.).

§14.44 Building on earlier cases,[68] the Supreme Court of Canada again reiterated in *R. v. McClure*,[69] *R. v. Brown*,[70] *Lavallée, Rackel & Heintz v. Canada (Attorney General)*,[71] *Pritchard v. Ontario (Human Rights Commission*[72] and *Blank v. Canada (Minister of Justice)*[73] and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*[73.1] that the solicitor-client privilege is a principle of fundamental justice, and a civil right of supreme importance that forms a cornerstone of our judicial system.

§14.45 In *Maranda v. Richer*,[74] LeBel J. stated:

> The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients.[75]

§14.46 The privilege transcends protection for an accused's right to have private communications with his or her lawyer. It also enhances the administration of justice overall. In *Lavallée*,[76] Arbour J. stated:

> ... the privilege favours not only the privacy interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process. In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it.[77]

§14.47 In *McClure*, the Court pointed out that the solicitor-client privilege, because of its unique status within the justice system and its being integral to its successful administration, has the status of a class privilege. In the absence of express legislative language, regulatory boards, agencies and commissions are not to review solicitor-client confidences to determine whether the privilege is properly claimed. Given the fundamental role of the privilege in the integrity of the justice system, such review is to be conducted only by the courts.[77.1] It

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68 *Solosky v. Canada*, [1980] 1 S.C.R. 821, [1980] S.C.J. No. 130 (S.C.C.); *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43 (S.C.C.); *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, [1991] S.C.J. No. 53 (S.C.C.); *Smith v. Jones*, [1999] 1 S.C.R. 455, [1999] S.C.J. No. 15 (S.C.C.).

69 [2001] 1 S.C.R. 445, [2001] S.C.J. No. 13 (S.C.C.).

70 [2002] 2 S.C.R. 185, [2002] S.C.J. No. 35 (S.C.C.).

71 [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61 (S.C.C.).

72 [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16 (S.C.C.).

73 [2006] 2 S.C.R. 319, [2006] S.C.J. No. 39, at para. 24 (S.C.C.).

73.1 [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45 (S.C.C.).

74 [2003] 3 S.C.R. 193, [2003] S.C.J. No. 69 (S.C.C.).

75 *Ibid.*, at para. 12.

76 [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61 (S.C.C.).

77 *Ibid.*, at para. 36.

77.1 *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45 (S.C.C.).

thereby stands apart from relationships that are not protected by a class privilege but that may still be protected on a case-by-case basis (as, for example, doctor/patient, psychologist/patient, journalist/informant and religious communications). The latter may be protected if, in a given situation, they satisfy the four criteria of the Wigmore test,[78] but otherwise communications within those relationships are susceptible to disclosure.

2. Confidential Nature of the Communication

(a) General

§14.48 A prerequisite for the creation of privilege is that the communication be made in confidence. Although some early Ontario cases have held that the mere fact that the communication was made between solicitor and client was sufficient to raise the privilege,[79] it was subsequently decided that, in addition to the professional character of the communication, it also had to be established that it was made confidentially.[80] The communication need not expressly be made in confidence, so long as the circumstances indicate that the parties intended to keep it secret.

(b) Presence of and Disclosure to Third Parties

§14.49 The presence of unnecessary third parties when the communication was made may serve to vitiate the privilege.[81] When a client or his solicitor admits into the privacy of their relationship an individual whose presence is not essential or of assistance to the consultation, then it may be presumed that the communication was not intended to be made in confidence. If it is reasonably necessary for the conduct of the lawyer's business that a clerk, agent, or

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78 *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, [2008] O.J. No. 983, at para. 24 (Ont. C.A.). See this chapter, § 14.271.

79 *Hamelyn v. Whyte* (1874), 6 P.R. 143 (Ch.); *Hoffman v. Crerar* (1897), 17 P.R. 404 (C.A.). In *Minter v. Priest*, [1930] A.C. 558, at 581, 99 L.J.K.B. 391 (H.L.), Lord Atkin stated that, if the communication is made in search of professional legal advice, "it must be deemed confidential". See also *R. v. Bennett* (1963), 41 C.R. 227, [1963] B.C.J. No. 67 (B.C.S.C.).

80 *Zielinski v. Gordon* (1982), 40 B.C.L.R. 165, [1982] B.C.J. No. 1804 (B.C.S.C.); *R. v. Bencardino* (1973), 2 O.R. (2d) 351, at 358, [1973] O.J. No. 2267 (Ont. C.A.); *Clergue v. McKay* (1902), 3 O.L.R. 478, [1902] O.J. No. 92 (Ont. Div. Ct.); *Naujokat v. Bratushesky*, [1942] 2 D.L.R. 721, at 731, [1942] S.J. No. 46 (Sask. C.A.); see also *O'Shea v. Wood*, [1891] P. 286, at 289 (C.A.), which followed *Gardner v. Irvin* (1878), 4 Ex. D. 49, at 53 (C.A.), in which the English Court of Appeal stated: "It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor; the letters must be professional communications of a confidential character for the purpose of getting legal advice." A list of the names of witnesses subpoenaed by defence counsel for the accused's case is not confidential so as to be privileged: *Re B. (J.D.)* (1996), 46 C.R. (4th) 389, [1996] O.J. No. 5073 (Ont. Gen. Div.).

81 8 Wigmore, *Evidence* (McNaughton rev., 1961), § 2311, at 601-603.

secretary be present, then that alone will not destroy the confidential nature of the interview. A more difficult question is whether the presence of a relative or friend of the client militates against confidentiality. That, it would appear, turns upon whether that person's presence at the consultation was required to advance the client's interests and whether there was an understanding that what transpired at the meeting would be kept in confidence. If the solicitor is authorized or instructed by the client to transmit a communication to others, then it cannot be said that the client desired it to be confidential. Thus, in *Fraser v. Sutherland*,[82] the Court ruled that communications made to a solicitor, which were intended to be and were put before the client's creditors as a compromise proposal, were not privileged. Similarly, in *Conlon v. Conlons Ltd.*,[83] the English Court of Appeal held that privilege did not extend to instructions given by a client to his solicitor for the purpose of presenting an offer of settlement to the opposite party.[84]

(c) Joint or Common Interests

§14.50 Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and, accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication.[85] Moreover, a client cannot claim privilege as against third persons having a joint interest with him or her in the subject matter of the communications passing between the client and the solicitor.[86] Thus, in *Ontario (Attorney General) v. Ballard Estate*,[87] Lederman J. held that all beneficiaries of an estate, vested or contingent, have a right to information passing between the solicitors of the estate to the executors based on

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82 (1851), 2 Gr. 442 (Ch.).

83 [1952] 2 All E.R. 462 (C.A.).

84 See also *Walton v. Bernard* (1851), 2 Gr. 344, at 363-64 (Ch.); *R. v. Prentice* (1914) 20 D.L.R. 791, at 796, 23 C.C.C. 436 (Alta. C.A.); *Doe d. Mariott v. Marquis of Hertford* (1849), 13 Jur. 632; *R. v. Bencardino* (1973), 2 O.R. (2d) 351, at 358, [1973] O.J. No. 2267 (Ont. C.A.). As for a privilege covering settlement offers, see this chapter, § 14.313 ff.

85 *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, at para. 23 (S.C.C.); *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13, at 37-38, [1982] O.J. No. 581 (Ont. C.A.); *Lawryshyn v. Aquacraft Products Ltd.* (1963), 42 W.W.R. 340, [1963] B.C.J. No. 33 (B.C.S.C.); *Horowitz v. Rothstein* (1955), 16 W.W.R. 620, [1955] B.C.J. No. 52 (B.C.C.A.); *Wilson v. McLellan Estate*, [1919] 3 W.W.R. 62, [1919] B.C.J. No. 76 (B.C.C.A.).

86 *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, [1987] 5 W.W.R. 252, at 261-62, [1987] B.C.J. No. 1134 (B.C.C.A.).

87 (1994), 119 D.L.R. (4th) 750, [1994] O.J. No. 2281 (Ont. Gen. Div.).

a commonality of or joint interest with the executors.[88] In *Platt v. Buck*,[89] correspondence between a solicitor and his client, who was the common grantor of certain land to both the plaintiff and the defendant, was held not to be privileged as against either of the client's successors in title when a dispute over the property arose between them. Similarly, no privilege exists as between partners. There is some question, however, whether there is a shared privilege between shareholders and directors where the communication was made by one of them to his or her solicitor for a reason other than contemplated litigation between them.[90]

§14.51 As Major J. pointed out in *Pritchard v. Ontario (Human Rights Commission)*:

> The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [19880] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aborignal relations and certain types of contractual or agency relations.[91]

§14.52 The solicitor-client privilege covering communications between a bankrupt and his or her solicitor continues as a personal and fundamental right after bankruptcy, and there is no identity of interest between the bankrupt and the trustee in bankruptcy and no statutory exception that would permit the trustee to waive the privilege.[92]

(d) Subject Matter

§14.53 The subject matter of all communications made by a client to his or her solicitor may not be confidential. For example, the identification or address of the client are matters which a client would rarely intend to be confidential.

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88 See also *Schmidt v. Rosewood Trust Ltd.*, [2003] J.C.J. No. 26 (P.C.); *Samson Indian Band and Nation v. Canada*, [1995] 2 F.C. 762, [1995] F.C.J. No. 734 (F.C.A.).

89 (1902), 41 D.L.R. 421, [1902] O.J. No. 167 (Ont. Master).

90 *Gourand v. Edison Gower Bell Telephone Co. of Europe* (1888), 57 L.J. Ch. 498 (Ch. Div.); *Dennis (W.) & Sons Ltd. v. West Norfolk Farmers' Manure and Chemical Co-operative Co.*, [1943] 2 All E.R. 94, [1943] 1 Ch. 220 (Ch. Div.); *Woodhouse & Co. v. Woodhouse* (1914), 30 T.L.R. 559 (C.A.). But see *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, [2009] 3 W.W.R. 135, [2008] A.J. No. 1081 (Alta. Q.B.); *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1998), 58 B.C.L.R. (3d) 105, [1998] B.C.J. No. 2674 (B.C.C.A.); *FCMI Financial Corp. v. Curtis International Ltd.*, [2003] O.T.C. 1020, [2004] O.J. No. 148 (Ont. S.C.J.).

91 [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, at para. 24 (S.C.C.).

92 *Bre-X Minerals Ltd. (Trustee of) v. Verchere* (2001), 293 A.R. 73, [2001] A.J. No. 1264 (Alta. C.A.).

Moreover, other considerations bear on the question of whether a solicitor should be compelled to disclose the identity and address of the client in an action or proceeding in which the lawyer purports to represent the client. A litigant against whom allegations are made has the right to be informed of the identity of his or her adversary. In addition, in order to determine whether a solicitor-client relationship has been entered into, so as to raise the shield of privilege, it is first necessary to disclose the identity of the client. Accordingly, one stream of Canadian cases has maintained that communications showing only the establishment of a solicitor-client relationship or the identity of the client do not constitute privileged communications.[93] Disclosure of the identity of the client takes on a different complexion, however, when the client intended that fact to remain confidential and where its revelation would have the effect of disclosing subject matter which would otherwise be privileged. Where the identification of the client is closely connected with the confidential legal business in reference to which the solicitor was retained, it should be protected.[94] As Veit J. stated in *Lavallée, Rackel and Heintz v. Canada (Attorney General)*:

> [I]n some situations, it may be critically important for a client to be confident that no one will know that she has consulted a divorce lawyer, or a lawyer who specializes in sterilization claims, or in claims for individuals who contracted AIDS through the blood supply, or in defending drunk driving charges.[95]

§14.54 The Supreme Court in *Lavallée* acknowledged that the name of the client may be protected by solicitor-client privilege — but that it is not always the case.[96]

3. Scope of the Privilege

(a) Within the Professional Relationship

§14.55 Although at one time, the communication had to be made with a view to actual or prospective litigation before the privilege could attach, that is no longer the case. The protection will be afforded so long as the communications fall

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93 *A. & D. Logging Co. v. Convair Logging Ltd.* (1967), 63 D.L.R. (2d) 618, [1967] B.C.J. No. 151 (B.C.S.C.); *Beamer v. Darling* (1847), 4 U.C.R. 249, [1847] O.J. No. 89 (U.C.Q.B.); see also *Bursil v. Tanner* (1885), 16 Q.B.D. 1 (C.A.) and *Levy v. Pope* (1829), M. & M. 410, 173 E.R. 1206 (N.P.).

94 *United States v. Mammoth Oil Co.*, [1925] 2 D.L.R. 966, [1925] O.J. No. 214 (Ont. C.A.); *Re A Solicitor* (1962), 40 W.W.R. 270, [1962] B.C.J. No. 164 (B.C.S.C.), appeal quashed (1964), 45 D.L.R. (2d) 134, [1964] B.C.J. No. 166 (B.C.C.A.), leave to appeal refused (*sub nom. Canada (Deputy Attorney General) v. Brown*), [1965] S.C.R. 84, [1965] S.C.J. No. 53 (S.C.C.); *Thorson v. Jones* (1973), 38 D.L.R. (3d) 312, [1973] B.C.J. No. 489 (B.C.S.C.).

95 (1998), 160 D.L.R. (4th) 508, at 525, [1998] A.J. No. 610 (Alta. Q.B.), affd on other grounds [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61 (S.C.C.).

96 [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61, at para. 28 (S.C.C.).

within the usual and ordinary scope of professional employment. A concise statement of the modern rule is found in Wigmore as follows:

> 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 disclosures by himself or by the legal adviser, except the protection be waived.[97]

§14.56 The privilege is of considerable breadth and encompasses all information passed within the professional lawyer and client relationship:

> . . . a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications 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.[98]

§14.57 Disclosure of a communication will not be compelled even though it was made at a time when the relationship between solicitor and client had not been formally established by either retainer or payment of fees. Preliminary communications made by a person to a solicitor, with the view to retaining him or her to act on his or her behalf, establishes a sufficient relationship to which privilege will attach. It is immaterial whether the solicitor agrees to take the brief and represent the client.[99] An individual should be encouraged to approach a solicitor of his or her choice, but in so doing, there can be no guarantee that the solicitor will accept employment. Therefore, the right to privilege turns not upon the existence of a contract, but upon the relationship or its potential existence when an individual seeks professional advice from the solicitor.

(b) For Communications Only

§14.58 The protection is for communications only and facts that exist independent of a communication may be ordered to be disclosed. In *Foster*

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97 8 Wigmore, *Evidence* (McNaughton rev., 1961), § 2292, at 554, quoted by the Supreme Court of Canada in *Solosky v. Canada*, [1980] 1 S.C.R. 821, [1979] S.C.J. No. 130 (S.C.C.), and *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at 873, [1982] S.C.J. No. 43 (S.C.C.).

98 *Descôteaux v. Mierzwinski, ibid.*, at 892-93 (S.C.R.); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, at para. 10 (S.C.C.).

99 *Shedd v. Boland*, [1942] O.W.N. 316 (Ont. H.C.J.), affd without written reasons [1942] O.W.N. 346 (Ont. C.A.); *Descôteaux v. Mierzwinski, ibid.*; *Minter v. Priest*, [1930] A.C. 558, 99 L.J.K.B. 391 (H.L.).

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2009 CarswellOnt 8860

Computershare Trust Co. of Canada v. Crystallex International Corp.

Computershare Trust Company of Canada, in its capacity as Trustee for the Holders of 9.375% Senior Unsecured Notes of Crystallex International Corporation due December 23, 2011, Applicant (Moving Party) and Crystallex International Corporation, Respondent (Responding Party)

Ontario Superior Court of Justice [Commercial List]

Campbell J.

Judgment: April 29, 2009
Docket: CV-08-7890 CL

Proceedings: refused leave to appeal *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 2009 CarswellOnt 8449 (Ont. S.C.J.)

Counsel: Derek Bell, Gavin Finlayson, for Applicant

Markus Koehnen, for Respondent

Subject: Civil Practice and Procedure

Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — Miscellaneous

Applicant, on behalf of certain noteholders of C Corp., applied for declaration that C Corp.'s business was carried out in manner oppressive to noteholders and for leave to commence derivative action against respondent's directors — Applicant brought motion for production of details as to C Corp.'s expenditures on mining project, and for order requiring C to answer questions refused on cross-examination — Motion dismissed — Information now sought had potential to postpone hearing of application — As application, full panoply of documentary and oral discovery of actions did not apply — Extent of information sought was neither necessary nor appropri-

ate at this stage — Filed material established contestable issue was to whether funds spent on project were proper and in furtherance of project — If determination of kind sought by applicant was necessary, than trial on this contested issue might become necessary with more preparation and evidence given viva voce — If further production and oral discovery continued until scheduled hearing, it was likely that adjournment would be requested — C Corp. was aware of allegation that it could not establish that expenditures were reasonable, and if issues raised could not be determined without additional information, motion could be renewed — Given time constraints, issues raised on application and potential for adjournment, requested responses were not required for purposes of hearing scheduled — Given C Corp.'s position, if details of expenditures became live issue on hearing, it might be subject to adverse inference for failure to produce requested material.

Civil practice and procedure --- Discovery — Examination for discovery — Conduct of examination — Objecting and refusing to answer

Applicant, on behalf of certain noteholders of C Corp., applied for declaration that C Corp.'s business was carried out in manner oppressive to noteholders and for leave to commence derivative action against respondent's directors — Applicant brought motion for production of details as to C Corp.'s expenditures on mining project, and for order requiring C to answer questions refused on cross-examination — Motion dismissed — Information now sought had potential to postpone hearing of application — As application, full panoply of documentary and oral discovery of actions did not apply — Extent of information sought was neither necessary nor appropriate at this stage — Filed material established contestable issue was to whether funds spent on project were proper and in furtherance of project — If determination of kind sought by applicant was necessary, than trial on this contested issue might become necessary with more preparation and evidence given viva voce — If further production and oral discovery continued until scheduled hearing, it was likely that adjournment would be requested — C Corp. was aware of allegation that it could not establish that expenditures were reasonable, and if issues raised could not be determined without additional information, motion could be renewed — Given time constraints, issues raised on application and potential for adjournment, requested responses were not required for purposes of hearing scheduled — Given C Corp.'s position, if details of expenditures became live issue on hearing, it might be subject to adverse inference for failure to produce requested material.

Rules considered:

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

Generally — referred to

MOTION by applicant for production of details as to C Corp.'s expenditures on mining project, and for order requiring C to answer questions refused on cross-examination.

***Campbell J.*:**

1 The Applicant seeks in this motion in writing an expedited determination of answers refused on the cross-examination on the affidavit of Luis Felipe Cottin held April 23, 2009. The motion arises in context of the Application which was commenced in December 2008 and has proceeded on an accelerated timetable ever since. Indeed, it was counsel for the Applicant that initially urged the need for the earliest possible return date given the urgency of the relief sought.

2 The information now sought has the potential in light of the re-attendance sought, if the motion granted, to postpone the 3 day hearing set 5 days from now. In their submissions, the Applicants characterize continued spending by the Board of Crystallex on the Las Cristinas mine project in Venezuela as "reckless and unreasonable". In the course of the examinations, counsel for the Applicants seek to obtain details of what Crystallex has and is spending to test the Crystallex assertion that: (a) spending has been appropriate; and (b) has been reduced given the current situation in which the Company finds itself without a permit but seeks to have the same reinstated or to seek other relief against the Venezuelan government for its cancellation. The Applicant seeks "evidence and documentary productions related to issues at large in this litigation including the quantum, nature, necessity and reasonableness of Crystallex's continued expenditures on the Las Cristinas gold deposit".

3 Both sides recognize and accept that in the context of what has been referred to as "real time" litigation, "proportionality" is a concept that must be taken into consideration. Indeed "proportionality" is something that will receive more prominence within the *Rules of Civil Procedure* to come into force next year even though in the context of the cases on the Commercial List it has been a feature for some time.

4 Proportionality is sometimes a concept better understood in concept than application. I can well understand why for "trial" purposes Computershare would wish all the information so it could "prove" its allegation that spending has been and continues to be as it alleges "reckless and unreasonable".

5 It should be noted that this is an Application commenced by Noteholders being one class of creditors of a public company. This is not an action in which the full panoply of documentary and oral discovery has become routine.

6 The Applicant asserts in this proceeding 3 elements of relief:

(a) A declaration that there has been a "Project Change of Control" as defined in the security agreements between the Company and Noteholders; and,

(b) That the business and affairs of Crystallex have been carried on in a manner oppressive to the Noteholders; and

(c) Leave to commence a derivative action in the name of Crystallex against its directors.

7 It seems to me at least as this stage that the threshold issue is whether or not the Board of Crystallex acted within a reasonable standard of director duty in continuing to extend funds in the face of the events surrounding the permit.

8 A subsidiary issue is whether the directors owed and discharged any duty to Noteholders to explain their actions.

9 I can well understand why Noteholders would like as much information as they can obtain to enhance their position *vis-à-vis* other Noteholders. I am not persuaded that the extent of the information sought is either necessary or appropriate at this stage.

10 The filed material establishes a contestable issue as to whether funds spent were proper and in furtherance of the mining project.

11 I can also understand that if it were necessary to make a determination of the kind that is sought by the Applicants in a 3 day hearing next week that the issue because it is contested might well give rise to the necessity of a trial on that issue. A trial of that issue would certainly require more preparation and would necessitate evidence given *viva voce*.

12 The other realistic possibility if the further production and oral discovery were to continue over the next 4 days is that one side or the other would request an adjournment of the hearing scheduled to commence next Tuesday. The Applicant alleges and presumably based on its material which I have not reviewed will be in a position to argue, that the expenditures made to date are improvident. Crystallex has put in material in response. It is aware of the allegation that the Applicant will submit that Crystallex cannot establish based on what it is refusing to produce that its expenditures and intentions are reasonable. If in the course of the proceeding I were to be satisfied that I could not decide the issues raised by the parties without additional information, the motion could be renewed.

13 For now I am not satisfied that given the time constraints, the issues raised on the application and the potential for adjournment are such that the requested responses are required.

14 The response of Crystallex focuses on the merits of its defence in the Application and submits that the information now sought is really an attempt to obtain prior to the hearing part of the relief that is sought on the Application itself. It is urged that on cross-examination on affidavits in support of an Application, it would be inappropriate to allow what is termed a "fishing expedition" into a detailed line-item fight about the reasonableness of each expenditure. I have concluded that at least at this stage and for the purpose only of the hearing of the Application next week that the further disclosures of documents and oral cross-examinations not proceed. In addition to issues of proportionality, I reach this conclusion for an additional reason. Given the position taken by the respondents in this motion, they should be under no illusion that if the spe-

cifics of expenditures made to date does become a live issue on the hearing of the Application the Respondent may be subject to an adverse inference being drawn for failure to produce the requested material.

15 For the foregoing reasons, the Applicants' motion for further production and discovery based on refusals is dismissed at this time. Should any part of this Application proceed by way of trial of issue, this ruling should not be taken as determinative in the action.

Motion dismissed.

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2009 CarswellOnt 8449,

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2009 CarswellOnt 8449

Computershare Trust Co. of Canada v. Crystallex International Corp.

COMPUTERSHARE TRUST COMPANY OF CANADA (Applicant / Moving Party) and CRYSTALLEX INTERNATIONAL CORPORATION (Responding Party)

Ontario Superior Court of Justice

Jennings J.

Judgment: October 13, 2009
Docket: CV-08-00007890-00CL

Proceedings: refusing leave to appeal *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 2009 CarswellOnt 8860 (Ont. S.C.J. [Commercial List])

Counsel: Mark Smyth for Moving Party

Markus Koehnem, Amanda Klein for Responding Party

Subject: Civil Practice and Procedure

Civil practice and procedure --- Practice on appeal — Leave to appeal — Application — Grounds

Applicant, on behalf of certain noteholders of C Corp., applied for declaration that C Corp.'s business was carried out in manner oppressive to noteholders and for leave to commence derivative action against respondent's directors — Applicant's motion for production of details as to C Corp.'s expenditures on mining project, and for order requiring C to answer questions refused on cross-examination was dismissed — Applicant applied for leave to appeal — Application dismissed — Underlying application was complex, and motions judge had case-managed proceeding since its inception — Considerable deference was due to his case-management order — Motion judge correctly identified principle of proportionality as applying here and decision he

reached was entirely within his discretion — Motion judge did not refer to Rule 34.10(4) of Rules of Civil Procedure and hence gave no reasons for ordering otherwise — C had not admitted he had possession, control or power over documents sought, although it might be inferred from his position with C Corp. — It was not incorrect of motions judge to refuse to apply R. 34.10(4) — As case management judge aware of issues in application, motion judge exercised his jurisdiction to control court's process by declaring that there had been enough production to permit application to be hear — By specifically reserving to applicant right to renew should that become necessary on hearing of application, motion judge did not finally preclude production but merely found it not to be necessary at this time — Neither branch of rule had been satisfied.

Rules considered:

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

R. 34.10(4) — considered

R. 62.02(4) — considered

APPLICATION by applicant for leave to appeal judgment reported at *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 2009 CarswellOnt 8860 (Ont. S.C.J. [Commercial List]), dismissing motion for certain discovery.

***Jennings J.*:**

1 Computershare seeks leave to appeal the order of Campbell J. of April 29/09 declining to require answers be provided to 7 questions on the cross-examination of Luis Felipe Collin, to which answers were refused. On the hearing of the motion, leave was sought only with respect to the last 4 questions, two of which required production of a document, and two of which, it was submitted, could be answered "Yes" or "No."

2 The issue raised in the application brought by Computershare relevant to this motion is its claim that the respondent's "reckless and unreasonable" expenditures in seeking to develop a gold-mine in Venezuela constitutes oppression.

3 The Application is complex. Apparently 49 affidavits have been delivered, 17 cross-examinations held, and 8 volumes of undertakings produced. Campbell J. has case-managed the proceeding since its inception. He is an experienced Commercial Court Judge intimately familiar with the issues raised in the Application because of his management of it. Considerable deference is due to his case-management order.

4 In his reasons, Campbell J. held that the material filed before him "establishes a contestable issue as to whether funds spent were proper and in furtherance of the mining report."

5 Both parties agreed before Campbell J. and on this leave motion that Campbell J. correctly identified the principle of proportionality as applying here. In his proportionality analysis, Campbell J. noted that at this stage of the proceeding, when the Application had not been heard, "the full panoply of documentary and oral discovery," which might be available on a trial of an issue, was not required "for now."

6 It may well be that had Campbell J. been asked to deal with only the last 4 questions, rather than the very onerous first 3 plus the remaining 4, he might have decided otherwise than he did. That is not a factor that I can take into account in determining whether the test in R. 62.02(4) has been met.

7 The decision of Campbell J., reached after considering proportionality, was entirely within his discretion. As such, decisions holding differently than did he are not conflicting.

8 Mr. Smyth submits that Campbell J. was incorrect in refusing or neglecting to apply the mandatory provisions of R. 34.10(4). Campbell J. did not refer to the rule, and hence gave no reasons for ordering "otherwise."

9 I was not referred to any evidence of an admission by Mr. Cottin that he had possession, control or power over the 2 documents sought, although perhaps that might be inferred because of his position with Crystallex. That point was not raised by counsel. Assuming the rule applies, I was advised by counsel that no jurisprudence exists to show when the Court will refuse to order production.

10 In my opinion, it was not incorrect of Campbell J. to refuse to apply R. 34.10(4). As the case management judge aware of the issues in the Application, he exercised his jurisdiction to control the Court's process by declaring, in effect, that there had been enough production to permit the Application to be heard. By specifically reserving to the moving party the right to renew the motion to compel answers should that become necessary on the hearing of the Application, he did not finally preclude production, but rather found it not to be necessary at this time. Deference is due that decision.

11 I cannot find that either branch of the rule has been satisfied. The application for leave to appeal is dismissed.

12 Costs of this motion fixed at $5000 inclusive as agreed by counsel, payable to the responding party forthwith.

Application dismissed.

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

45 O.R. (3d) 321

[1999] O.J. No. 3291

Docket No. C29463

Court of Appeal for Ontario

Carthy, Doherty and Rosenberg JJ.A.

September 14, 1999

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 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.

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 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.

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.

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 videotape was not privileged.

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 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.

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.

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 dee med 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.

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.

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 privilege. 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.

Cases referred to

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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 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.

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.

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.

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

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

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

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

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

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

6. The Pilotte videotape

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.)

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.

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.

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 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 interes t 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.
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> 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).
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> Rationale for Litigation Privilege
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> 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.

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).

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

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 liti-

> gation? 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 . . .
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> . . . It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose, would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly . . .

This dominant purpose test has contended in Canada with the substantial purpose test. Appellate courts in Nova Scotia, New Brunswick, British Columbia and Alberta have adopted the dominant purpose standard: see Davies v. Harrington (1980), 115 D.L.R. (3d) 347, 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.).

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:

> 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.

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.

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

> I fail to comprehend how original documents which are not privileged (because they are not prepared with the dominant purpose of actual or anticipated litigation) can become privileged simply because counsel makes photostatic copies of the documents and puts them in his "brief". This is contrary to the intent of the rules and to the modern

> approach to this problem. If a document relates to a matter in question, it should be produced for inspection.

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.

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 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 revealed in oral discovery under rule 31.06(1) which provides that questions must be answered even though the information sought is evidence.

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.

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 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.
>
> 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.

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:

> 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.

> 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: "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.
>
> 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.

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.

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.

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.

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.

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.

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.

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): --

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:

-- Are communications between an appraiser and the insurers' solicitor protected from

disclosure to the appellants by either client-solicitor privilege or litigation privilege?

-- 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?

-- 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] at end of document] 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 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.

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] at end of document]

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.

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] at end of doucment] 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.

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 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.

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.

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 claim-

ing 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 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

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.

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. 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.

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 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

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.

Mr. Justice Kurisko held that the direct communications between Mr. Eryou and Mr. Cook are protected by client-solicitor privilege.

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.

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.

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 privil eges recognized in our law.

The criteria for the existence of client-solicitor privilege are well-established. In Descteaux v. Mierzwinski, [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. Geffen, [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; Descteaux v. Mierzwinski, 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 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..

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 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.

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:

> 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.

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 the fruits of its investigation

of an incident giving rise to a possible claim under a policy of insurance. I stress that I refe r only to the fruits of the insurer's investigation and not to other topics 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 J anuary 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 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

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.

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] at end of document] 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.); Internat ional 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.

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 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.

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

-- 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.

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.

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:

> . . . 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 "representatives." 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.

(Emphasis added)

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.).

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.

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 law yer to the client and as a conduit of instructions from the client to the lawyer.

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, 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 comm unications between the client and the lawyer.

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.

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.

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.

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

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

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.

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

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 mat erial 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 conduct the same investigation, but he was to deliver his reports to Mr. Eryou instead of General Accident.[6] at end of document] 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 gi ve 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.

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

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.

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.

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.

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]);

-- 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]);

-- 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]);

-- 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]);

-- 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

-- 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]).

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:

> 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 . . .

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:

> 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."

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:

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

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.

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.

There is no doubt that the statement meets the conditions precedent to the operation of litigation privilege in that it was prepared by counsel in contemplation of litigation and for the purpose of assisting him in that litigation. The dominant purpose test is clearly met. From General Accident's perspective, the statement is the equivalent of a witness statement provided by a non-party. Such statements have been held to be protected by litigation privilege: Yri-York Ltd. v. Commercial Un-

ion 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 statement to his spiritual adviser and an accused's attempt to introduce evidence of a complainant's previous sexual activity are all examples of situations in which one party relies on a privacy interest to deny access or admissibility and the other party counters with the claim that the just and accurate resolution of the litigation requires that the party have access to or be permitted to introduce that evidence. In resolving these difficult cases, the court has identified the competing interests and has determined questions of access or admissibility by applying a type of cost-benefit analysis to the competing interests. In the outcome of that analysis, the privacy claim may win out entirely, ma y fail entirely, or may be given limited effect: see Slavutych v. Baker, [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224; R. v. Seaboyer; 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.); 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 and Silver, Solicitor-Client Privelega 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 made by one party to a representative of the opposing party even when in contemplation of litigation are instructive. These cases recognize that withholding production of the opposing party's statement does nothing to enhance the legitimate privacy expectations inherent in the client-solicitor relationship, but may impair the full, fair and timely resolution of the litigation: see Flack v. Pacific Press Ltd. (1970), 14 D.L.R. (3d) 334 at 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.

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 sub-

stantial 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] at end of document]

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.

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.

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.

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] at end of document]

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] at end of document] 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 have on discovery or at trial some four or five years after the relevant events.

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.

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.

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.

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.

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 state-

ment 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.

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.

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.

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

Conclusion

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

-- Communications between Mr. Bourret and the insurers and/or Mr. Eryou made prior to May 23, 1995 are not protected by either client-solicitor privilege or litigation privilege. Communications between Mr. Bourret and General Accident and/or Mr. Eryou on or after May 23, 1995 are protected from disclosure by litigation privilege unless they are required to be produced under the Rules of Civil Procedure;

-- The transcript of Mr. Pilotte's May 23 statement in the possession of the insurers is not protected against production by litigation privilege; and

-- The copy of the transcript of Mr. Pilotte's May 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.

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 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 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.

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:

> 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 distinctions that may exist between a solicitor-client privilege and a litigation privilege.

(Emphasis added)

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.

Notes

Note 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.

Note 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.

Note 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.

Note 4: These reasons do not address communications involving employees of the client and/or the lawyer.

Note 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.

Note 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.

Note 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 in 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.

The Law of Privilege in Canada

Volume 1

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alone, no matter how earnestly desired and clearly expressed, does not make a communication privileged from disclosure".

11.65 INTENTION TO MAINTAIN CONFIDENTIALITY

It is necessary to demonstrate an intention to maintain confidentiality in order for solicitor-client privilege to be maintained. For example, the court in *Zesta Engineering Ltd. v. Cloutier.*[47a] held that no privilege attached to notes taken by a solicitor at a meeting in which legal advice was sought and obtained because there were a group of people present at the meeting who were strangers to the action and their presence was unexplained.

Notes prepared by an accused while hiding out in an apartment, to preserve and refresh his memory about the circumstances surrounding an alleged murder, were found not to be subject to solicitor-client privilege, even though they were used in a telephone conversation with the accused's lawyer, in the case of *R. v. Abeyewardene.*[47b] There were other people in the room who overheard the accused talking to his lawyer and referring to the notes, and he had left the notes on top of his duffle bag in the apartment, showing that he did not try to keep them confidential and so they were not solicitor-client privileged.

11.70 CLASS PRIVILEGE

Courts have consistently recognized solicitor-client privilege as a class privilege, also called blanket privilege, *prima facie* privilege, or common law privilege. This is in contrast to litigation privilege, which most courts recognize as a case-by-case privilege.

Communications protected by a class privilege have a *prima facie* presumption of inadmissibility, unless the party seeking disclosure can show why the communications should not be privileged. There must be compelling policy reasons to exclude what may be relevant evidence based on the solicitor-client relationship. The relationship on which the exclusion is based must be inextricably linked with the justice system. Protection is accorded to all who fall within the class. The privilege is as close to absolute as possible and will only yield to production in clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis.[47c]

In contrast to communications covered by class privilege, there is a *prima*

47a [2008] O.J. No. 304 (QL), 164 A.C.W.S. (3d) 59, (S.C.J.).

47b [2008] O. J. No. 5749 (QL), 84 W.C.B. (2d) 177 (S.C.J.).

47c See for example the case of *Swant v. Knapp* (2008), 78 R.F.L. (6th) 437, [2008] O.J. No. 5922 (S.C.J.), in which the court held that "solicitor-client privilege should not be breached unless it is 'absolutely necessary to achieve the ends sought by the enabling legislation'" and any interpretation must be done so "restrictively" (at para. 11). The section at issue in the *Family Responsibility and Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31, which states that enforcement-related information can be demanded from anyone, and that it applies despite any common law rule of confidentiality or any other Act or regulation, does not override solicitor-client privilege.

facie presumption of admissibility in relation to communications encompassed by a case-by-case privilege. As set out in Chapter 1, in order to establish inadmissibility, each case is analysed individually, and the communication must meet the Wigmore test or some similar test. The policy reasons for excluding otherwise relevant evidence must be weighed in each particular case. The desire for confidentiality must be balanced against the desire for production, such as the right of an accused to make full answer and defence, on a case-by-case basis.[48]

Even though communications covered by a class privilege like solicitor-client have a greater immunity to attack than those subject to a case-by-case privilege, solicitor-client privilege is not absolute. It is subject to clearly defined exceptions. In some circumstances, other societal values must prevail. Those exceptions are set out below in Sections 11.190, 11.200 and 11.210.

11.80 PRIVILEGE OUTSIDE LITIGATION PROCESS

Although solicitor-client privilege is most commonly asserted in the context of the civil or criminal litigation process, its rationale is based on the relationship between a solicitor and client and not only on the adversarial litigation process. As a result, privilege applies to legal opinions exchanged among different parties in commercial transactions when the opinions are not waived beyond those parties. The reason is that courts have recognized that parties negotiating a commercial transaction have a common interest in successfully completing the transaction.

See also the case of *Currie v. Symcor*[48a] in which the court wrote that solicitor-client privilege applies when a lawyer negotiates a commercial transaction (such as a share structuring agreement), draws up contracts or communicates with a client in the course of a transaction.

In *Fraser Milner Casgrain LLP v. M.N.R.*, the court wrote:[49]

> . . . economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.

In that case, legal opinions exchanged by the parties during the course of a transaction to create certain business partnerships were still considered to be privileged with respect to the Ministry of National Revenue.

Following this decision, in *Pitney Bowes of Canada Ltd. v. Canada*,[50] the

48 *R. v. Card* (2002), 3 Alta. L.R. (4th) 92, 307 A.R. 277 (Q.B.); *R. v. Trang* (2002), 168 C.C.C. (3d) 145, [2002] 6 W.W.R. 524 (Alta. Q.B.).

48a (2007), 168 A.C.W.S. (3d) 280, [2008] O.J. No. 2987 (QL) (S.C.J. (Div. Ct.).

49 [2002] 11 W.W.R. 682, 6 B.C.L.R. (4th) 135 (S.C.), at para. 14.

50 (2003), 225 D.L.R. (4th) 747, [2003] 3 C.T.C. 98 (T.D.).

11.220.50 Implied Waiver — State of Mind

Waiver can occur through the legal position taken by a party. Where a party voluntarily injects into the proceeding the question of its state of mind and in so doing uses the legal advice it has received as a reason for its conduct, it waives the protection of solicitor-client privilege. To displace solicitor-client privilege there must be an affirmative allegation that puts the party's state of mind at issue.[169] See also *Procon Mining and Tunnelling Ltd. v. McNeil*,[169a] in which the court affirmed the lower court decision and

168b *Supra*, at para. 96.

168c (2005), 195 Man. R. (2d) 224, 351 W.A.C. 224 (C.A.), affd 201 Man. R. (2d) 91, 366 W.A.C. 91 (C.A.).

169 *Fraser v. Houston* (2002), 116 A.C.W.S. (3d) 646, [2002] B.C.J. No. 2204 (QL) (S.C.), affd 122 A.C.W.S. (3d) 652, 2003 BCSC 853 (S.C.); *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508, 62 B.C.L.R. 387 (C.A.); *Bank Leu AG v. Gaming Lottery Corp.* (1999), 43 C.P.C. (4th) 73, 92 A.C.W.S. (3d) 270 (Ont. S.C.J.), affd 132 O.A.C. 127, 95 A.C.W.S. (3d) 826 (Div. Ct.); *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 32 O.R. (3d) 575, 69 A.C.W.S. (3d) 1023 (Gen. Div.); *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, [1987] 5 W.W.R. 252, 14 B.C.L.R. (2d) 257 (C.A.).

169a [2008] B.C.J. No. 2496 (QL), 173 A.C.W.S. (3d) 746 (S.C.), affd 94 B.C.L.R. (4th) 243, [2009] B.C.J. No. 1429 (QL) (C.A.).

followed the decision in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*,[169b] that "a mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege". The Court of Appeal also noted that the privileged documents were not vital or necessary to the defendant's ability to answer any allegation by the plaintiff.

As a further example, in *Del Grande(Litigation Guardian of) v. Sebastian*,[170] the litigation was over three gifts of property and money made by Del Grande to her daughter. The lawyer for Del Grande was called as a witness to show that she had independent legal advice when she made the conveyance of property. The trial judge's decision to exclude the solicitor-client privileged communication in the lawyer's testimony was overturned on appeal because the sufficiency of the lawyer's advice had been put directly in issue in the proceeding by the Public Guardian and Trustee and the other daughter. The Court of Appeal held that, by limiting the area of examination of the lawyer, the court was deprived of evidence that may have affected the ultimate conclusion that the independent legal advice was insufficient to rebut the presumption of undue influence.

In the case of *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*,[171] the plaintiff bank put its state of mind at issue in its pleading by saying it was induced to make the loan at issue by the defendant's representations and conduct. It then led evidence that it consulted its legal department and believed the comfort letter to be strong. The legal advice it received thus became relevant.[171a]

In order for privilege to be waived on this basis, some courts have required a definitive link between the privileged communication and the state of mind at issue. For example, in *Mamaca v. Coseco Insurance Co.*,[172] the plaintiff was injured in a motor vehicle collision and commenced two actions in tort and for accident benefits against the insurer. Over time, the plaintiff became mentally incompetent; the date and cause of the incompetence were unclear but both were critical facts for trial. The plaintiff had at certain times completed certain forms and delivered them to his former solicitor. The defendant wished to compel answers from the former solicitor about the plaintiff's mental competence at specific times. The court held that evidence about the client's characteristics, behaviour and demeanour or the solicitor's opinion on his ability to communicate and understand were all privileged information. How, when, by whom and where a form was

169b (2004), 245 D.L.R. (4th) 443, [2005] 2 W.W.R. 434 (B.C.C.A.), at para. 19.

170 (1998), 110 O.A.C. 141, 24 E.T.R. (2d) 255 (C.A.).

171 *Supra*, footnote 169.

171a See also *Henderson v. Pilot Insurance Co.* (2011), 197 A.C.W.S. (3d) 250, [2011] O.J. No. 359 (S.C.J.), in which the court held that the plaintiff had waived privilege over legal advice by arguing that her action was not statute barred. She was putting her own and her lawyer's state of mind in issue, and had to answer questions put to her on discovery about the lawyer's advice to her on this point.

172 (2004), 17 C.C.L.I. (4th) 293, 12 E.T.R. (3d) 268 (Ont. S.C.J.).

completed were also considered privileged. Although the plaintiff's state of mind and competence were put into issue in the action, there was no pleading that the plaintiff's state of mind resulted from the solicitor-client communication or advice. The solicitor's involvement was limited to being a witness with respect to his competence and this was insufficient to waive solicitor-client privilege by implication. The interest in preserving solicitor-client privilege outweighed the interest in full disclosure in this case.

A subsequent Saskatchewan Court of Queen's Bench judgment distinguished *Mamaca*. In *Lavoie v. Hulowski*,[172a] the defendant refused to execute the transfer documents for a property that the plaintiff stated it had an agreement to buy. The defendant claimed mental incompetence when she signed the agreement. Her litigation guardian authorized the defendant's two lawyers to speak about her mental state to the plaintiff and to write a letter summarizing the defendant's mental state. In so doing, the client through the litigation guardian implicitly waived solicitor-client privilege over all the documents pertaining to her state of mind within one year of entering into the agreement. Unlike *Mamaca* where the solicitor maintained his position as a witness only, the defendant's litigation guardian provided information from her solicitors to the plaintiff, both orally and by letter, and this constituted waiver of all documents pertaining to this issue.

The seriousness of the allegations requiring a waiver of privilege and the real connection between the state of mind and the issue to be decided have had a significant bearing on the interpretation of fairness in some cases. For example, in *Leadbeater v. Ontario*,[173] an action for malicious prosecution and negligent investigation arising out of a criminal prosecution, the plaintiff alleged that the defendants knowingly withheld information about the complainant's previous sexual assault committed by someone else. The plaintiff said that had he known this, he would have avoided a trial, sentencing and appeal. The defendants stated that the plaintiff put his state of mind and knowledge at issue and elected to disclose some privileged documents but not all. The court held that the pleadings of the plaintiff did put into issue his state of mind and his lawyer's knowledge of the materials. By saying the Crown knew and did not disclose, and that this was the cause of the trial, sentencing and appeal, it put into issue whether the plaintiff knew as well and chose for tactical reasons not to act on that information. If that were the case, then the Crown was not the cause of any lack of ability of the accused to make full answer and defence on this basis. The court wrote:[174]

> It would be unfair to expect the defendants to defend the allegation that they deprived Leadbeater of his ability to make full answer and defence without allowing them access to the information and advice that Leadbeater had and

172a [2006] 4 W.W.R. 359, 265 Sask. R. 181 (Sask. Q.B.).
173 (2004), 70 O.R. (3d) 224, 129 A.C.W.S. (3d) 1097 (S.C.J.).
174 *Supra*, at para. 52.

> received with respect to the matter on which he says that information was denied.

The court noted that the allegations were serious. It was unfair for the plaintiff to disclose some of the communications with his solicitor that were helpful to his case, but not all communications.

The legal advice over which privilege is claimed and said to be waived must be relevant to the particular state of mind at issue. For example, in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. — Canada*,[175] the issue for trial was whether there was a default by the plaintiff under the terms of the financing agreement. The plaintiff was claiming damages for breach of the agreement. On examination for discovery, the plaintiff had admitted that it received legal advice on whether a default had occurred and the resulting options. The defendant argued that this admission constituted waiver of privilege and requested all documents related to that legal advice.

The court held that the advice remained privileged for several reasons. First, Doman had not voluntarily injected into the lawsuit the fact that it had received legal advice as evidence of its state of mind; the information had been elicited by the defendant on discovery of the plaintiff. Secondly, Doman pleaded that the parties conducted themselves as though no default had occurred. Whether or not there had been a default did not depend on whether Doman did or did not believe that one had occurred. This pleading did not make Doman's state of mind material to its claim and therefore did not justify overriding solicitor-client privilege. Finally, the legal advice was not relevant to the determination of whether the plaintiff's delay in accepting the defendant's repudiation of the agreement was reasonable. The pleading did not claim any reliance on legal advice on this issue.

Similarly see *International Container Terminal Services Inc. v. British Columbia Railway Co.*,[175a] in which the court found that just because there was an allegation of the existence of a contract, and the party claiming privilege may or may not have taken legal advice on that contract, there is no implied waiver of any legal advice that may have been received. Further, because the claim in this case was framed in contract, and not in representation and reliance, any subjective understanding of its legal position at the time was not relevant. The importance of drafting proper pleadings was made clear in this decision, when the court held that a waiver of privilege could only occur when the party has pled its case in a way that will allow or require it to give evidence at trial of its subjective understanding, including that of its legal position, at the time of the events in question. If the subjective understanding of the parties is irrelevant, because the matter can be determined by an objective analysis, then relevance cannot be created merely because it is addressed in an affidavit. Even if the affidavit

175 (2004), 245 D.L.R. (4th) 443, [2005] 2 W.W.R. 434 (B.C.C.A.), supp. reasons 7 C.P.C. (6th) 309, 345 W.A.C. 197 (B.C.CA.).

175a (2008), 175 A.C.W.S. (3d) 692, [2009] B.C.J. No. 231 (QL) (S.C.).

reveals a state of mind, it would only affect waiver if the reference in the affidavit were relevant to the issues in the action.

The importance of drafting clear pleadings was emphasized in *Vetsho-paustralia Pty. Ltd. v. Pivotal Partners Inc.*,[175b] The plaintiff claimed against the defendant for debt resulting from a contractual arrangement for non-competition, non-disclosure that ended with a settlement and release. The defendant Pivotal counterclaimed on the basis of the contract. Pivotal pleaded that the plaintiff induced it to rely on the "validity and enforce-ability" of its post-employment contractual obligations, including the non-competition/non-disclosure contract, to its detriment. The plaintiff defended the counterclaim by seeking to have the contract declared void and unenforceable. The plaintiff sought production of the advice Pivotal received from its lawyers about the non-competition/non-disclosure contract, the settlement agreement and the release, saying that Pivotal had voluntarily put its state of mind with respect to its reliance on legal advice in issue by its pleading. In oral argument counsel for Pivotal acknowledged the pleading was ambiguous and it should more accurately say that Pivotal relied to its detriment on the defendant's assertion of the position that he was abiding by the contract, not that Pivotal relied to its detriment on the validity and enforceability of the contract as a result of the plaintiff's representation. The court adjourned the motion to provide Pivotal an opportunity to amend its pleading and stated: "Given the importance of preserving solicitor client privilege, Pivotal should not be taken to have waived it on an imperfectly drafted pleading that, according to counsel, does not reflect its true intent".[175c]

By contrast, in *Pacific Concessions, Inc. v. Weir*,[176] the court found that there was waiver of privilege over an e-mail sent by the defendant to his solicitor and any communications between the defendant and solicitor in response to issues raised in the e-mail. The issue in the litigation in which the plaintiff sought to enforce guarantees given by the defendants in their personal capacities was the parties' understanding of the effect of personal guarantees. After sending the e-mail to his solicitor, the defendant commented on the transaction, stating that some aspects of the guarantee were not clear to him, that he was not prepared to sign the guarantee in the form presented to him, but eventually did sign. The e-mail was attached as an an exhibit to an affidavit for the purpose of the summary trial in order to show that the defendant's understanding of the guarantee was different from that of the plaintiff.

The defendant, a lawyer, waived privilege over the matter in the e-mail and put in issue his understanding of the legal significance and effect of the guarantee through his statement of defence. The legal advice he said he received was relevant to the defences he raised, and the e-mail went to the

175b [2008] B.C.J. No. 2376 (QL), 173 A.C.W.S. (3d) 87 (S.C.).
175c *Supra*, at para. 22.
176 (2004), 135 A.C.W.S. (3d) 1014, [2004] B.C.J. No. 2653 (QL) (S.C.).

heart of the issues in the action. The principle of fairness and consistency required that it would be unfair to allow him to rely on his confidential communications with his solicitor for his defence, while withholding other communication which might be relevant. The court was careful to say that the waiver only applied to the e-mail and correspondence in response; otherwise it would constitute an unjustifiable intrusion on the solicitor-client privilege.[176a]

In *Order of the Oblates of Mary Immaculate v. Dohm, Jaffer & Jeraj,*[176b] a dispute between a client and law firm over accounts issued between 2000 and 2005, one of the issues was whether an alleged settlement agreement between the parties should be set aside. The plaintiffs had engaged independent legal and accounting advice to review the files and the accounts. Reports were prepared by the advisers and there was partial disclosure of their advice by the plaintiffs. In pleading that there was no settlement as claimed by the defendants, or that it was vitiated by misrepresentation by the defendants of facts unknown to the plaintiffs; or by a fundamental breach justifying repudiation by the plaintiffs; or that it was limited in scope to the accounts actually reduced, the plaintiffs put their state of mind at issue. The court held that the question of the plaintiffs' understanding of their legal position would be a central consideration in relation to the issues raised by the plaintiffs. The legal and accounting advice was relevant to the settlement and whether or not it should be set aside. Further, once the advice was put into evidence, any privilege attaching to it could no longer be maintained.

Albionex (Overseas) Ltd. v. Conagra Ltd.[176c] provides a further example of a waiver of privilege over documents relevant to the state of mind at issue. This case involved a contractual dispute for a supply of wheat dating to the early 1980s. The defendant sought to rely on newly produced (but 25-year old) documents to withdraw an admission in its amended statement of defence that it had sent a particular type of wheat sample to the plaintiff. Instead, the defendant wanted to state only that they sent an unspecified wheat sample to the plaintiff. In support of this position, the defendant affiant referred to information exchanged between himself and the defendant's present and former legal counsel with respect to this matter and referred to working copies of the solicitor's notes. The court held that as a result, the affiant had raised the issue of his state of mind and knowledge of whether the particular sample had been sent and therefore privilege could not attach to any documents relating to this issue. The plaintiffs were entitled to explore the extent to which the original admission had been made inadvertently or from erroneous instructions or from negligence. The waiver

176a See *I.C. Group, Inc. v. Yorkville Printing Inc.* (2010), 194 A.C.W.S. (3d) 405, [2010] O.J. No. 4796 (S.C.J.), in which the plaintiff, by disclosing a short summary of the conclusions reached and advice given by former counsel in prior litigation about the same issues, was held to have waived privilege over the documentary evidence of those conclusions and advice.

176b [2008] 3 W.W.R. 141, 161 A.C.W.S. (3d) 399 (B.C.S.C.).

176c (2007), 49 C.P.C. (6th) 70, 163 A.C.W.S. (3d) 410 (Man. Q.B.).

was especially clear in this case where the position of the parties had been revealed in pleadings, on discovery, in the plaintiffs' evidence at trial and their reliance on the defendant's admission in its pleadings. This demonstrates that the court took into account the fairness of the proposed withdrawal in these circumstances.

In *Lloyds Bank of Canada v. Canada Life Assurance Co.*,[177] the court stated that where a plaintiff alleges that he or she relied on the defendant's representations and the defendant denies these allegations on the basis that the plaintiff obtained legal advice and relied upon that legal advice, the plaintiff will be deemed to have waived solicitor-client privilege in respect of the legal advice received.

There is a distinction between the fact of relying on legal advice to explain certain conduct and relying on legal advice with respect to a substantive legal issue at trial (such as evidence of good faith in defence). Mere disclosure of the receipt and reliance on legal advice is not sufficient to waive privilege. For example, see *Fraser v. Holman Exhibits Ltd.*[177a] where the court held that the statement in an affidavit "after consulting with counsel, we learned that Mr. Fraser was in breach of his employment contract, he was in breach of his fiduciary duty to the company, that he has committed the torts of conspiring with others to harm Holman Exhibits, and he interfered with Holman Exhibits' contractual relationship and engaged in fraud" was insufficient to establish a waiver of solicitor-client privilege. The advice given was not referenced in any detail and so the communications were not considered to have entered the public realm. See also *1318910 Ontario Ltd. v. Montgomery*,[177b] where the fact that an insurer disclosed it had requested and received legal advice before denying the plaintiff's claim was not sufficient to constitute a waiver over the substance of the advice. However, if the substance of the legal advice is put in issue in the proceeding then privilege over that advice will be waived. See also for example *Schwartz Estate v. Kwinter*.[177c]

An example of this distinction was evident in *Guelph (City) v. Super Blue Box Recycling Corp.*[178] The issue was the date of the extension of a lease. The plaintiff said a three-year extension ended on January 28, 2003, while the defendant disagreed. The disagreement focused on the condition of the extension — that is, the ability of a demonstration plant to accept solid municipal waste for recycling. The defendant sought production of the city's in-house solicitor's files on the basis that privilege had been waived during examinations for discovery in which the city deponent made reference to legal advice received over the imposition of a deadline for compliance with

177 (1991), 47 C.P.C. (2d) 157, 25 A.C.W.S. (3d) 25 (Ont. Ct. (Gen. Div.)).

177a (2008), 68 C.C.E.L. (3d) 96, 168 A.C.W.S. (3d) 965 (S.C.J.) (Ont. S.C.J.), at para. 23.

177b [2010] O.J. No. 5858, leave to appeal to Ont. S.C.J denied [2010] O.J. No. 5857, 2010 ONSC 6476.

177c (2009), 5 Alta. L.R. (5th) 365, 69 C.P.C. (6th) 392 (Q.B.), affd 6 Alta. L.R. (5th) 26, 460 A.R. 307 (C.A.).

178 (2004), 2 C.P.C. (6th) 276, 134 A.C.W.S. (3d) 787 (Ont. S.C.J.).

the terms of the agreement, and to stay firm with respect to the end-date of the agreement.

The court held that only to the extent that the city relied on this legal advice to establish its good faith would privilege be waived. In this case, prior to trial, the city had not taken that position, but had only stated it received the legal advice and relied on it. The court left it open, therefore, for the trial judge to find that there had been a waiver and to order disclosure if, at trial, the reliance was used as a substantive defence.

The good faith defence also resulted in a waiver of privilege in *H.R. Doornekamp Construction Ltd. v. Belleville (City)*,[179] in which the plaintiff claimed the city had conducted a tendering process unfairly. In its statement of defence, the city pleaded that it had made the decision in good faith, after considering all the circumstances at a meeting where the city solicitor was present to advise on the issue. The minutes of that meeting were ordered disclosed, even though privilege was claimed as a result of the solicitor's presence and advice.

Similarly, in *R. v. Shirose*,[180] the issue was whether the RCMP's defence that it had acted in good faith in conducting the controversial reverse sting operation and that it had received legal advice from the Department of Justice was enough to create waiver of the privilege over communications between the Department of Justice and the RCMP. The Supreme Court wrote:[181]

> 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:
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> > "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*."
>
> . . . . .
>
> 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. . . . . 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

179 (1997), 98 O.A.C. 350, 69 A.C.W.S. (3d) 825 (Div. Ct.). See also *Bank of America Canada v. Mutual Trust Co.* (1995), 52 A.C.W.S. (3d) 972, [1995] O.J. No. 73 (QL) (Gen. Div.).

180 (1999), 133 C.C.C. (3d) 257, 171 D.L.R. (4th) 193 (S.C.C.).

181 *Supra*, at pp. 286-87 (emphasis in original).

> response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated.
>
> 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.

Thus the good faith defence, based as it was in large part on the legal advice obtained, was sufficient to require disclosure of that advice (or a stay of the proceedings).

Unless a defendant relies on the content of legal advice specifically to refute the plaintiff's allegation of improper conduct and bad faith, privilege will not be found to have been waived, even implicitly. Mere denials of allegations of unlawful conduct and bad faith in a pleading, even when those allegations put knowledge that is the subject of a solicitor's advice in issue, are not sufficient to constitute waiver of privilege.[181a]

For example, in *Dexter Estate v. Economical Mutual Insurance Co.*,[181b] the two legal opinions sought and obtained by the defendant just before the commencement of litigation and during the course of litigation were protected from disclosure because the defendant did not put its state of mind at issue by asserting that the denial of coverage was a result of detrimental reliance on legal opinions. The court held that a party cannot be forced to waive privilege as a result of another party's pleadings or by the type of questions asked.

See for example the case of *Rushen v. Kosub*,[181c] in which the issue was the desired disclosure of documents between the plaintiff and his solicitor that may have related to the timing of their knowledge of the damage claimed and legal advice surrounding notice of same. The plaintiff claimed damages against the City of Chilliwack for faulty construction resulting in water damage in a newly built home. The defendant city raised a limitation defence in its pleadings, alleging notice to them (the City) within two months of the damage being sustained had not been provided. The City alleged waiver over the documents it sought on the basis that the plaintiff's state of mind was at issue. The court disagreed, holding there was no waiver because 1) there was no reference to legal advice by the plaintiff, but merely a setting out of the chronology of events and fairness did not require disclosure; 2) the fact of the defendant raising a limitations defence was insufficient to put the plaintiff's state of mind at issue; and there was no reply filed by the plaintiff that put the state of mind at issue; and 3) there was no voluntary intention to disclose the information.

The defence of voluntariness raised by a bank in a class action against

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181a *Reid v. British Columbia (Egg Marketing Board)* (2006), 148 A.C.W.S. (3d) 878, 2006 B.C.J. No. 464 (QL) (S.C.); *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority* (2011), 197 A.C.W.S. (3d) 369, [2011] B.C.J. No. 104 (S.C.).

181b [2007] I.L.R. ¶1-4623, [2007] N.B.J. No. 133 (QL) *sub nom. Dexter Estate v. Murphy* (Q.B.).

181c [2007] B.C.J. No. 3030 (QL), 2007 BCSC 2010.

them for breach of *Criminal Code* provisions by charging interest on cash advances in excess of an effective annual rate of 60%, was not considered by the court to require an inquiry into the defendant's state of mind. The position taken by the bank in its pleadings was that the payment of interest at a rate greater than 60% arose from the voluntary actions of the cardholder and was not compelled by the bank or anything in the cardholder agreement. This defence was not sufficient to require production of privileged documents.[181d]

And in *Simcoff v. Simcoff*,[181e] the Manitoba Court of Appeal held that implied waiver required more than reference to legal advice; instead it required the pleading or evidence of reliance on specific legal advice for the resolution of an issue. In that case, there was no evidence led by the mother

(*The next page is* 11-70.7)

181d *Markson v. MBNA Canada Bank* (2011), 197 A.C.W.S. (3d) 1037, [2011] O.J. No. 533 (S.C.J.).

181e [2009] M.J. No. 265 (QL), 179 A.C.W.S. (3d) 218 (C.A.).

of her reliance on legal advice. The fact that the legal advice was raised by questions from opposing counsel was not sufficient to constitute waiver.

In *Begetikong Anishnabe v. Canada (Minister of Indian Affairs and Northern Development)*,[182] a native band made a claim under the Comprehensive Land Claims policy. The band applied for release of a copy of a legal opinion prepared by the Department of Justice for the Minister providing a review of the comprehensive claims submitted by the band, summary of the band's arguments, legal analysis and concluding that there was no basis in law for accepting the band's claim. The court held that there was no waiver over the opinion because the Minister acted in accordance with the policy that stated that upon receipt of a claim by the band, the Minister would seek the advice of the Minister of Justice on its acceptability according to legal criteria. The Minister's reference to seeking and receiving a legal opinion to which he is entitled and on which he relied was not considered to be a waiver of the substance of that opinion, even though the action taken in reliance on that opinion was at issue in the legal proceeding.

Mere reliance on a statutory provision as a basis for an application is insufficient to require disclosure of privileged communications related to that statutory provision. The plaintiff in *Mid-West Quilting Co. v. Canada*[182a] brought an application for leave to commence an action for abuse of public authority and negligence, relating to actions that occurred prior to the six-year limitation period. This reliance on Part II, s. 14(1) of Manitoba's *Limitation of Actions Act*,[182b] for leave was insufficient to waive privilege. The facts known to the plaintiff and advice it received were relevant to its application. It had the burden of proof and the choice to rely or not on those facts to support its application. It was not required to disclose privileged communications by its reliance on the statute.

In *Rogers v. Bank of Montreal*,[183] the court dismissed an appeal from an order that the bank produce documents disclosing advice received from solicitors about the appointment of a receiver, which the plaintiff shareholders alleged had been wrongly done. The bank pleaded in its statement of defence that it received advice from the receiver. The court characterized the issue as one in which the bank was induced to take certain steps in reliance on the advice from the receiver on legal matters. By putting advice on legal matters in issue, it waived privilege over advice from its solicitors because, in its defence, it stated it relied on advice and took certain steps as a result. This inducement and decision to act involved an enquiry into the corporate state of mind of the bank. According to the Court of Appeal, following the case of *United States v. Exxon Corp.*,[184] there was no way other than

182 (1997), 138 F.T.R. 109, 75 A.C.W.S. (3d) 487 (T.D.), affd 158 F.T.R. 319*n*, 234 N.R. 24 (C.A.), leave to appeal to S.C.C. refused 239 N.R. 195*n*.

182a [2007] F.C.J. No. 1000 (QL), 159 A.C.W.S. (3d) 55 (F.C.).

182b C.C.S.M., c. L150.

183 [1985] 4 W.W.R. 508, 62 B.C.L.R. 387 (C.A.).

184 [1981] 94 F.R.D. 246.

destroying solicitor-client privilege to determine that corporate state of mind. It was interesting that solicitor-client privilege was waived in this case even though the bank made no reference in its defence to advice from its solicitors, only from the receiver.

The Ontario Superior Court of Justice provided a good summary of the concept of "waiver by reliance", which the court described as evidence that the party relied on legal advice to follow a certain course of conduct or behaviour that is at issue in the litigation, in the case of *Augustine v. Inco Ltd.*[184a] The court wrote there were four elements to the concept of waiver by reliance:[184b]

1. the party in question receives certain legal advice
2. that party discloses the substance of the legal advice in the course of the legal action
3. that legal advice relates to an outstanding issue between the parties to the action
4. the party receiving the legal advice relies in the action on that legal advice to justify that party's course of conduct.

The Alberta Court of Queen's Bench held in *Rahall v. Tait*,[184c] where a party based its case on not waiving a condition precedent in a contract after receiving advice from his lawyer, that a party must either waive privilege or provide an explanation of its reasons for not having waived the condition precedent. Failure to do either would result in a presumption that there was no valid reason behind the refusal to remove the condition precedent.

Waiver by reliance on legal advice was exemplified in *Zesta Engineering Ltd. v. Cloutier*.[184d] There, a solicitor advised his client who was plotting to leave his employer to set up a competitor business and who, while still employed, diverted business from his then employer's suppliers and customers, not to report the facts of those sales to his employer. In the affidavit provided by the client, he advised that he had provided his lawyer with full details of his funds and transactions. The court found that because he had relied on the legal advice to form a state of mind, privilege no longer attached.

Solicitor-client privilege was also waived in the case of *Teltscher v. PTC Accounting and Finance*[184e] because the plaintiff accountant pleaded in reply that he did not co-operate with the Institute of Chartered Accountant investigation on the advice of counsel and knew that failure to co-operate would likely result in his expulsion from the Institute. The counsel who advised the plaintiff was now acting as his counsel in the suit for damages for termination of employment as CEO of PTC Accounting and Finance, for failure to disclose the fact that he had received correspondence from the

184a (2006), 149 A.C.W.S. (3d) 825, [2006] O.J. No. 3070 (QL) (S.C.J.).
184b *Supra*, at para. 31.
184c [2006] 11 W.W.R. 361, 62 Alta. L.R. (4th) 19 (Q.B.), appeal allowed in part 2007 ABCA 221.
184d (2008), 164 A.C.W.S. (3d) 59, [2008] O.J. No. 304 (QL) (S.C.J.).
184e (2006), 150 A.C.W.S. (3d) 718, [2006] O.J. No. 3415 (QL) (S.C.J.).

Securities Exchange Commission requesting certain information and that the Institute of Chartered Accountants had commenced an investigation. The court held that a pleading that set out that the plaintiff had taken action on the advice of counsel, puts that advice in issue and any solicitor-client privilege that attaches is waived. The court in that case also held that counsel was in a conflict of interest as there was a strong likelihood that he would be called as a witness at trial.

Before allowing evidence otherwise subject to solicitor-client privilege to be introduced, a court must be satisfied that what is sought to be proved by the evidence is important to the outcome of the case and there is no reasonable alternative evidence that could be used for that purpose.[185]

11.220.52 Waiver Implied by Conduct of Defence

The conduct of defence counsel in failing to object to evidence to which solicitor-client privilege applies and allowing it to be heard in court resulted in the court finding privilege waived in the criminal case of *R. v. B. (I.B.)*.[185a] This was an application to expunge guilty pleas of I.B.B. After evidence was heard at the expungement hearing from I.B.B. and his criminal counsel (who testified under subpoena) of the discussions between them that led to the guilty pleas, the court requested a formal waiver of solicitor-client privilege. Defence counsel at the hearing asked the court to disregard evidence of those discussions as privilege had not been formally waived in advance of the testimony. The court disagreed, saying that the defence failure to object at the time and make its position known at the outset resulted in a waiver of privilege.

11.220.55 Good faith Allegations do not Constitute Waiver

There is a distinction between a party alleging it has acted in good faith and justifying its conduct on the basis that it acted in good faith because of legal advice from its lawyers. In *Bechtold v. Wendell Motor Sales Ltd.*,[185b] the court quoted from *Stuart Olson Construction Inc. v. Sawridge Plaza Corp.*:[185c]

> Solicitor-client privilege is not waived by disclosing that a solicitor's advice was obtained. It is waived when the evidence shows the client by his words or actions held a view or followed a course because of advice given to him by his counsel and that he relied on this act for resolution of an issue at trial.

The court held there was no evidence on the record before it to indicate that the client was alleging good faith based on legal advice from its lawyers.

185 *Metcalfe v. Metcalfe* (2001), 198 D.L.R. (4th) 318, [2001] 6 W.W.R. 244 (Man. C.A.).
185a [2009] S.J.No. 378 (QL), 84 W.C.B. (2d) 75 (P.C.).
185b (2007), 162 A.C.W.S. (3d) 585, [2007] O.J. No. 4886 (QL) (S.C.J.), at para. 38.
185c [1996] 2 W.W.R. 396 at p. 404, 34 Alta. L.R. (3d) 417 (Q.B.), affd 193 A.R. 173, 135 W.A.C. 173.

11.220.60 Waiver not Voluntary if Questions Raised on Cross-examination or Discovery

It is not always sufficient for an argument in waiver to succeed if the state of mind of the party claiming privilege over the information was put into issue in the proceeding through cross-examination or on discovery.[186]

The Ontario Divisional Court, in *Davies v. American Home Assurance Co.*,[187] was firm in its view that a party cannot be forced to reveal the contents of privileged communication just because the communication answers questions about the existence of a legal opinion and the opinion was considered in deciding the party's course of action. It relied on the Supreme Court in *R. v. Shirose*[188] and the Manitoba Court of Appeal in *Gower v. Tolko Manitoba Inc.*[189] The court wrote:[190]

> . . . the nature of the claim — even a bad faith claim against a "bad" insurer — should not (and in my opinion, does not) change the analysis as to what is or is not protected by solicitor-client privilege and/or litigation privilege. The principles that the courts have enunciated for determining the existence or non-existence of those privileges — and the evidentiary basis necessary to establish them — remain the same.In *J and R Livestock Consultants Ltd. v. Prychen*,[190a] the court noted the importance of advancing the reliance on legal advice as an affirmative defence in order for reference to that legal advice to be considered waiver. It followed *Gower*[190b] and *Shirose*[190c] in holding that a party responding to questions on cross-examination who refers to acting on legal advice does not constitute a voluntary waiver.

The Federal Court reinforced this interpretation of voluntariness of waiver through injecting state of mind into the proceedings in a decision on a motion where a federal government lawyer and the client representative had provided affidavits describing the process of seeking and obtaining legal advice.[190d] On cross-examination on the affidavits, the deponents were asked what the client requested from the lawyer, what the lawyer gave to the client, and what references were in the legal opinion. The Federal Court upheld the claim for solicitor-client privilege and ordered that the questions did not have to be answered.

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186 *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada* (2004), 245 D.L.R. (4th) 443, [2005] 2 W.W.R. 434 (B.C.C.A.), supp. reasons 7 C.P.C. (6th) 309, 345 W.A.C. 197 (B.C.C.A.).

187 (2002), 217 D.L.R. (4th) 157, 60 O.R. (3d) 512 (Div. Ct.) [costs endorsement 217 D.L.R. (4th) 157 at p. 176, 165 O.A.C. 111 (Div. Ct.)].

188 *Supra*, footnote 180.

189 (2001), 196 D.L.R. (4th) 716, [2001] 4 W.W.R. 622 (Man. C.A.).

190 *Supra*, footnote 187, at p. 168.

190a (2005), 194 Man. R. (2d) 95, 138 A.C.W.S. (3d) 636 (Q.B.), affd 143 A.C.W.S. (3d) 253, 2005 MBQB 188.

190b *Supra*, footnote 189.

190c *Supra*, footnote 180.

190d *Williamson v. Canada (Attorney General)*, 2004 D.T.C. 6554, 132 A.C.W.S. (3d) 72 (F.C.), affd 2005 D.T.C. 5043, 136 A.C.W.S. (3d) 298 (F.C.A.).

threatening litigation and could have decided to proceed no further with the claim once the adjusters had become involved; or, the insurers could have chosen to resolve the claim through some sort of payment before litigation was a reasonable possibility.

12.175 THE ONE OR TWO-STEP APPROACH IN DETERMINING LITIGATION PRIVILEGE

In *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*,[112f] connecting the anticipation of litigation inquiry with the dominant purpose test,[112g] the court confirmed the master's articulation of a two-step approach in determining litigation privilege. The two steps were:

(a) On what date was there a reasonable apprehension of litigation?
(b) For each document prepared after that date, was the dominant purpose in preparing the document to assist in the apprehended litigation?

The court went on to say, however, following the decision of Carthy J.A. in *General Accident Assurance Co. v. Chrusz*,[112h] that the master or judge who decides a litigation privilege claim has the discretion to follow either a one-step or two-step procedure, depending on the circumstances of the case. The one-step process may occur when there is only one issue in dispute between the parties. In such a case, once the party seeking to rely on litigation privilege has established when litigation was reasonably anticipated, it follows that all documents prepared after that in relation to that issue were subject to litigation privilege. However, in other circumstances, where there are numerous issues between the parties but not all of them are the subject of a reasonable apprehension of litigation, the two-step process articulated may be used.

12.180 DOMINANT PURPOSE TEST

Closely tied to the determination of when there was a reasonable prospect of litigation is the determination of the dominant purpose of the communication. Until relatively recently, there was some confusion in the case law in this area. At one extreme, some cases held that litigation had to be the *sole* purpose, while at the other extreme it was held that it had to be a *substantial* purpose, in order for privilege to attach. Now many jurisdictions have adopted the dominant purpose test, for example, British Columbia, Alberta, Manitoba, Ontario, New Brunswick and Nova Scotia.

The ability to meet the test for dominant purpose is difficult in some jurisdictions. For example in Manitoba, in *Cross v. Assuras*,[113] the court

112f (2007), 56 C.L.R. (4th) 103, 50 C.P.C. (6th) 194 (Ont. S.C.J.).
112g See Section 12.180.
112h (1999), 180 D.L.R. (4th) 241, 45 O.R. (3d) 321 (C.A.).

held that an inspection report prepared by a third party on a catheter that leaked was not privileged. The leaking catheter had worsened the condition of a patient who relied on the drug being provided by the catheter during chemotherapy. The decision to have the catheter inspected was made by the hospital, not the insurance adjuster. There was no evidence from the hospital of its reasons for seeking the inspection or requesting the report. The only evidence in support of the privilege was from the insurance adjuster, who stated he advised the hospital to get a third party inspection report, rather than a manufacturer's inspection report because he believed the injury to the patient would likely result in litigation. The Court of Appeal held this was not enough to satisfy the onus on the hospital to establish that litigation was the dominant purpose of the report. While this may have been a purpose, the desire to prevent similar occurences at the hospital could have been a dominant reason for the inspection.

A more restrictive approach to the dominant purpose test, bringing it closer to the sole purpose test, is evident from the case of *Butterfield v. Bayliner Marine Corp.*[114] In that case, the plaintiff sought an order to produce reports prepared by insurance adjusters and sent to the insurers after a fatal boating accident. The accident occurred on May 26, 1993, the adjusters were informed two days later, on May 28, 1993, and the three adjusters' reports were prepared on May 30, June 3 and July 27. The first two were given to the insurance company, the third was given to the defendant's solicitor. The court held that the reports had to be produced, because they were all prepared before the litigation commenced. The first two were obtained prior to the retention of counsel and their primary aim was to obtain information so that the insurers could assess their position. With respect to the third report, there was no evidence that legal counsel had any involvement or gave direction to adjusters in investigations. The report had a co-extensive purpose of gathering information; advice to counsel was not its dominant purpose. Just because counsel was contacted did not mean that all future activity was done with litigation as its dominant purpose. The court found that "[a] report cannot be shrouded in a veil of privilege merely because counsel has been put on notice or that the report is addressed to counsel and labelled (by the maker of the report) as being 'privileged'".[115] The court went on to note that adjusters' reports served many purposes, including administrative ones between the insurance company and the insured, settlement of an appropriate damage claim, review of coverage issue, witness statements, investigation, as well as litigation.

The court also referred to the definition of dominant purpose described in the leading case of *Waugh v. British Railway Board.*[116] There, a report was

113 (1995), 104 Man. R. (2d) 263, 40 C.P.C. (3d) 51 (Q.B.), affd 109 Man. R. (2d) 6, 46 C.P.C. (3d) 98 (Q.B.), revd 139 D.L.R. (4th) 473, [1996] 10 W.W.R. 367 (C.A.), leave to appeal to S.C.C. refused 142 D.L.R. (4th) vii, 159 W.A.C. 160*n*.

114 [1994] N.W.T.R. 228, 28 C.P.C. (3d) 242 *sub nom. Butterfield v. Dickson* (S.C.).

115 *Supra*, at para. 26.

116 [1979] 2 All E.R. 1169, [1980] A.C. 521.

prepared after a fatality occurred as a result of a train accident. The purpose of the report was to help establish the cause of the accident, as a submission to solicitors for the purpose of advising the board on legal liability, and to help the conduct of court proceedings arising from the accident. The headnote of *Waugh* summarized the issue it faced as follows:[117]

> "The court was faced with two competing principles, namely that all relevant evidence should be made available for the Court and that communications between lawyer and client should be allowed to remain confidential and privileged. In reconciling those two principles, the public interest was on balance best served by rigidly continuing within narrow limits the privilege of lawfully withholding material or evidence relevant to litigation. Accordingly, a document was only to be accorded privilege from production on the ground of legal professional privilege if the dominant purpose for which it was prepared was that of submitting it to a legal advisor for advice and use in litigation. Since the purpose of preparing the internal enquiry report for advice and use in anticipated litigation was merely one of the purposes and not the dominant purpose, the claim of privilege failed, and the report was disclosed."

The court in *Butterfield* further noted that litigation privilege is relative and qualified and that "[i]t arises from the need to balance the competing interests of achieving justice by liberal disclosure of relevant information and the self-interest in non-disclosure inherent in our adversarial mode of trial."

Connecting the dominant purpose test with anticipation of litigation, the court held that there was a reasonable prospect of litigation from the time the adjudicator was appointed to investigate the nature of the claims and the mysterious cause of death from the boating accident.

Doherty J.A., in his partial dissent in *General Accident Assurance Co. v. Chrusz*,[118] interpreted the *Butterfield* decision to be in support of his balancing approach to the determination of litigation privilege, asserting 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 reports over which privilege is sought. This balancing approach has not yet been accepted by the courts.

The *Waugh* decision also provided a springboard for the British Columbia Court of Appeal in its discussion of dominant purpose in *Hamalainen v. Sippola*.[119] There the court introduced the concept of a continuum. In the context of considering the preparation of adjuster's reports after a motor vehicle accident, it held:[120]

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will

117 *Supra* (headnote), as quoted in *Butterfield v. Bayliner*, *supra*, footnote 114, at para. 14.
118 (1999), 180 D.L.R. (4th) 241, 45 O.R. (3d) 321 (C.A.).
119 [1992] 2 W.W.R. 132, 19 W.A.C. 254 (B.C.C.A.).
120 *Supra*, at para. 24.

> shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

In *Hamalainen*, the accident occurred on November 30, 1986. The defendant argued that the nature of the injuries and the circumstances of the accident (the plaintiff fell out of a camper that was being carried on top of a pick-up truck) meant that litigation was immediately a reasonable prospect. After certain adjusters' reports were received, the defendant advised the claimant by letter dated February 19, 1987 that their investigation was completed, they believed there was no liability, and the case would be closed. Litigation was commenced after that date. The court upheld the Master's decision to require production of all communications prior to the February 19 letter as there was insufficient evidence that the communications had been prepared for the dominant purpose of litigation. Thus, the expectation or likelihood of litigation was not determinative of the privilege.[120a]

Adjusters' reports in *Hosanna Enterprises Ltd. v. Laser City Audio Video Ltd.*[121] were found to have been prepared when litigation was in reasonable prospect, as the day after a fire on the plaintiff's premises, the plaintiff alleged that the fire had been caused by the negligence of a tenant. The issue was whether the reports, which served the purpose of investigation as well as litigation preparation, were prepared for the dominant purpose of litigation. The court stated:[122]

> In my respectful opinion these decisions [*Brayley*, *supra* and *Kaiser*, *supra*] reinforce and restate the principle that the party asserting the litigation privilege must establish on all of the evidence that the dominant purpose for which the document was created was litigation. Merely saying the dominant purpose was litigation may not satisfy the test if there are other possible purposes which are equally likely. If those other purposes are not dealt in one way or another, then it may not be possible to accept the bald statement of the deponent. On the other hand, just as the recantation of the words is not a magic charm neither is the failure to utter the precise words necessarily fatal.

In other words, assertion of dominant purpose is not enough; all the evidence must be examined to determine if the dominant purpose, not the sole purpose, of the creation of the document was to aid in the conduct of the litigation. In the *Hosanna* case, the court looked at each document in question and made a determination of whether anticipated litigation was the dominant purpose for each.[122a]

120a See also *Stevanovic v. Petrovic* (2007), 54 C.C.L.I. (4th) 58, 46 C.P.C. (6th) 109 (B.C.S.C.), where the court held, following *Hamalainen v. Sippola*, *supra*, footnote 119, that the bare assertion without explanation that the documents in question were created for the purpose of litigation was not enough to satisfy the onus.

121 (1999), 85 A.C.W.S. (3d) 359, [1999] B.C.J. No. 57 (QL) (S.C.).

122 *Supra*, at para. 11.

122a A further example from the British Columbia Supreme Court is the case of *Rees v. Dhesi*

An analysis of how the party claiming privilege treats the impugned document prior to a demand for production can be as good an indicator of privilege as anything a party may assert after demand for the document is made. In *Semkiw v. Wilkosz*,[122b] the plaintiff was the widow of Mr. Semkiw, who was allegedly struck by a vehicle owned by the defendant U-Haul, rented by the defendant Lisa Hrymak, and driven by the defendant Alicia Wilkosz. The defendant insurance company claimed litigation privilege over seven documents prepared by the insurance adjuster on the same basis set out in the affidavit — that is, the purpose in preparing them was to instruct counsel and prepare for the litigation the adjuster assumed would flow from the accident. Therefore all the documents were created for the dominant purpose of litigation. However a statement taken by the adjuster from the driver about the accident was given to the driver without any restrictions on

(2007), 161 A.C.W.S. (3d) 709, [2007] B.C.J. No. 2068 (QL), in which documents gathered and created after January, 2005, after counsel had been retained for a month and had contacted ICBC, were protected by litigation privilege because they were for the dominant purpose of litigation. The fact that such material could be used for negotiation or mediation at some point did not change its dominant purpose. See also *McComb v. Jones*, [2008] B.C.J. No. 205 (QL), 2008 BCSC 157, in which the court held that an adjuster's report was sought and created for the purpose of investigation of liability and was thus not subject to litigation privilege. Similarly, see *Mathew v. Delta School District No. 37* (2010) 190 A.C.W.S. (3d) 727, [2010] B.C.J. No. 1087 (C.A.), where the Court of Appeal agreed with the Master's order that notes at issue, made by two employees of the District, after a slip and fall at a school, were prepared for the investigatory stage of the proceeding and therefore not covered by litigation privilege. All notes were prepared at the request of the school principal, within several days of the accident, and were placed in a file referred to as an incident report, until almost two years later, when they were provided by the principal to counsel for the District. See also *Azuma Foods (Canada) Ltd. v. Versacold Canada Corp.*, [2008] 11 W.W.R. 275, 64 C.C.L.I. (4th) 246 (S.C.), in which the adjusters in their affidavits asserted their reports were to pinpoint the exact cause and origin of the fire, and the court concluded in all the circumstances that litigation was a reasonable prospect at the time the preliminary opinion of the cause of the fire was provided and the dominant purpose of the adjusters' investigation was litigation as it was determined very quickly that coverage was not an issue. See also *Leslie v. S & B Apartment Holdings Ltd.* (2009), 877 A.P.R. 333, 275 N.S.R. (2d) 333 (S.C.), in which litigation privilege was claimed over a portion of an electrical investigation report prepared after a fire occurred at an apartment building and tenants reported that the fire alarm had malfunctioned. The portion of the report relating to the failure of the fire alarm system did not meet the dominant purpose test so it was ordered to be disclosed. See also *Siegel v. Mulvihill Capital*, [2009] O.J. No. 2697 (QL), 178 A.C.W.S. (3d) 566 (S.C.J.), in which a report prepared by an investigator to determine where investment monies had gone was found not to be litigation privileged, because there was no evidence that the report was created for the dominant purpose of litigation, nor for the purpose of obtaining litigation advice. In *Saturley v. CIBC World Markets Inc.* (2010), 85 C.C.E.L. (3d) 269, 193 A.C.W.S. (3d) 410 (N.S.S.C.), a group of CIBC senior managers, including legal counsel, were created to work on the problem of a calculation error that caused significant losses to the clients of the plaintiff, Saturley. Two months later, the group recommended the termination of Saturley's employment and he commenced a lawsuit for wrongful dismissal. The majority of emails, minutes of meetings, and other records arising from the work of the group were not considered to be covered by litigation privilege because litigation was not the prominent or dominant purpose of the work of the management group. Even when the group considered Saturley's employment, it was to determine whether to continue the employment with conditions, terminate the employment with severance, or dismiss for cause, and not to obtain legal advice about an anticipated wrongful dismissal suit.

122b [2009] B.C.J. No. 791 (QL), 178 A.C.W.S. (3d) 333 (S.C.).

its use. The driver in fact gave a copy of her statement to the police. The court reasoned that the adjuster's failure to restrict use of the statement demonstrated that the dominant purpose in obtaining it was not to instruct the insurance company's own counsel about the accident. If that had been the case, the defendant insurance company would have kept the statement to itself or let the driver have it only on very strict conditions and instructions.

(*The next page is* 12-47)

The continuum concept, in the context of discussing adjusters' files, was also applied in the case of *MacDonald v. Acadia University.*[123] The plaintiff became a quadriplegic as a result of an accident on September 1, 1996 during football practice. The head athletic therapist requested written statements about the accident prepared by student therapists, the equipment manager, the assistant coach and two players. These were sent to the adjuster who was appointed on September 4, during the time that he had started investigating the accident. Legal counsel was retained on September 19, 1996. The plaintiff claimed privilege over the statements because he said they were prepared for the purpose of obtaining legal advice. The court held that the statements must be produced as the plaintiff had not demonstrated that they had been obtained only for the purpose of seeking advice from counsel. At the time the statements were prepared, there was only a vague anticipation of litigation, and there must be a definite prospect of litigation contemplated in order to claim privilege. However, the balance of the adjuster's file after counsel was retained (after September 19, 1996) was privileged because it was prepared under counsel's direction. It dealt with coverage issues, the cause of loss, size of loss, and who was at fault, in the context of litigation becoming a real prospect.

Some courts have held that the usual practice or policy of the party claiming the privilege is determinative. In *Fred v. Westfair Foods Ltd.*,[124] the preparation of incident reports, photographs and witness statements were not privileged, as Westfair always prepared these documents after an incident, such as a slip and fall, as a matter of policy. If there had been discussions with the plaintiff, investigations of his injuries and the specific facts of his case, then the court may have been persuaded that the documents were prepared for the dominant purpose of litigation. The fact that all the documents prepared by Westfair were in reasonable prospect of litigation was not sufficient to protect them in this case, as Westfair expected legal action as a matter of policy every time there was an incident such as this anywhere across the country.

In the very similar case of *Cochrane v. Loblaw Properties West Inc.*,[124a] a completed customer form and statement of a store manager about a slip and fall at a Westfair Foods store were considered to be not subject to privilege, because they fell within the initial investigating/adjusting stage of the incident, prepared for the purpose of deciding whether or not an insurance settlement was warranted, rather than for the purposes of litigation.

Poss v. Save-On-Foods Ltd.[124b] is another slip and fall in a grocery store. The plaintiff required hip surgery the day after the fall. Her counsel advised the store by letter the day of the surgery. The following day, two days after

123 (2001), 196 N.S.R. (2d) 182, 10 C.P.C. (5th) 59 (S.C.).

124 [2003] Y.J. No. 102 (QL), 2003 YKSC 39. See also *Ghebremeskel v. Westfair Foods Ltd.* (2006), 276 Sask. R. 154, 147 A.C.W.S. (3d) 773 (Q.B.).

124a (2006), 274 Sask. R. 110, 25 C.P.C. (6th) 387 (Q.B.).

124b [2008] B.C.J. No. 321 (QL), 165 A.C.W.S. (3d) 805 (S.C.).

the fall, the claims examiner received a copy of the personal injury and equipment form that had been completed by the store employee the day of the fall. That same day, the claims examiner instructed the adjuster to conduct an investigation. The statements and photos taken and report written by the adjuster were found to be privileged as their dominant purpose was for instructing counsel for the purpose of litigation. However, the form completed by the store employee was not privileged because it had multiple purposes other than potential claims. It referred to damage to equipment and staff property and was for the purpose of management recording management and safety issues involving their staff.

The confirmation of the court's need to make a factual determination in each case was made clear by the Alberta Court of Appeal in *Moseley v. Spray Lakes Sawmills (1980) Ltd.*[125] That case also dealt with the investigation report of an insurance adjuster after a serious accident. The question was whether the report had been prepared for the purpose of providing information to the solicitor for use in litigation (that is, the results of an adjuster's investigation will always be privileged, since litigation is always contemplated and the assessment of liability is virtually always the first step in the preparation of contemplated litigation) or whether the statement was obtained as part of the ordinary investigative steps of the accident for the purpose of the insurer forming its own view of liability. After confirming the dominant purpose test, the court resisted the temptation to articulate a clear rule about insurance adjuster investigation reports — that is, that they always, or never, give rise to litigation privilege. Instead, the court held that each case turns on its own facts. There can be assessment of liability separate and apart from litigation preparation and there can be preparation for litigation and no assessment of liability. An investigation can be done to avoid litigation, to determine if litigation is likely, or because of an obligation under a contract of insurance. In this case, the adjuster was instructed to investigate the possibility of liability, there was nothing unusual about the instructions, there was no evidence he was making a statement to a solicitor, there was no affidavit that the purpose was for use by a solicitor to prepare for litigation, no claim had been made, the file was closed before litigation commenced, and the adjuster's report was not forwarded to a lawyer for advice. On these facts, the court held that the report was not privileged.

The court in *Bartucci v. Lindsay*,[125a] also reiterated the importance of looking at underlying facts behind each claim of litigation privilege. Another case of whether or not litigation privilege attached to a witness statement taken by the insurer of its insured after a serious motor vehicle collision, the court relied on the defendant's counsel's sworn statement that the witness statement was prepared for the dominant purpose of litigation and in anticipation of litigation. Noting that it would have been preferable

125 (1996), 135 D.L.R. (4th) 69, 122 W.A.C. 101 (Alta. C.A.).

125a (2010), 192 A.C.W.S. (3d) 76, [2010] O.J. No. 3533 (S.C.J.).

to have obtained more evidence than this, the court held that the facts made the assertion probable. Specifically, the facts that the accident was very serious, resulting in life-threatening injuries, and that a claim for statutory accident benefits was not made by the insured resulted in this probability.

The Alberta Court of Appeal confirmed its acceptance of the dominant purpose test in the case of *Nova, an Alberta Corp. v. Guelph Engineering Co.*,[126] in which the court referred to *Waugh v. British Railways Board*:

> Under that authority a party need not produce a document otherwise subject to production if the dominant purpose for which the document was prepared was submission to a legal advisor for advice and use in litigation (whether in progress or contemplated).

(*The next page is* 12-49)

126 (1984), 5 D.L.R. (4th) 755, at p. 757, [1984] 3 W.W.R. 314 (C.A.).

In the case of *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, the Alberta Court of Appeal confirmed this approach:[127]

> The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created particularly to prepare one's case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation. As a rule, this preparation will be orchestrated by a lawyer, though in some cases parties themselves will initiate certain investigations with a view to providing information for the "lawyer's brief". The litigation may already be pending or simply contemplated. There may even be relatively rare situations where a party intends to represent himself or herself throughout litigation proceedings, and gathers statements and documents specifically for the contemplated litigation. Privilege may well attach to such material, even where no lawyer is to be "briefed". That question, however, is not at issue in this case, and need not be decided now. Thus *at the time of creation*, preparation for litigation must be the dominant purpose.

Conrad J.A. refined the test in *Nova* in two key passages of her judgment, firstly:[128]

> The key is, and has been since this court adopted the dominant purpose test in *Nova*, that statements and documents will only fall within the protection of the litigation privilege where the *dominant purpose for their creation* was, at the time they were made, for use in contemplated or pending litigation. While a lawsuit need not have been initiated, and while a lawyer need not have been retained at the time the statement or document was made, the party claiming privilege must establish that at the time of creation, the dominant purpose was use in litigation. The words "by reason of an intention to provide information to solicitors" are not superfluous. The test is a strict one. As has often been stated, it is not enough that contemplated litigation is one of the purposes. So litigation privilege will not automatically apply to statements taken or reports made by insurance adjusters investigating serious personal injury accidents. The converse, however, is also true. It will not automatically fail to apply in such circumstances, as suggested by the appellant.

and secondly:[129]

> These Saskatchewan cases seem to suggest that there is no distinction between assessing liability and preparation for litigation. In my view there can be one without the other. Each case will turn on its own facts. I do accept that an investigation can occur for reasons other than preparation for litigation. It can be done to avoid litigation, or determine whether litigation will be a likelihood, or it can be done simply because there is an obligation under a contract of insurance that requires it. It depends on the facts. The litigation privilege has been carefully confined to narrow limits in order to preserve the public interest in full disclosure. The onus of proving that the privilege applies should rest squarely on the person claiming the privilege.

Another example from Alberta is the case of *Whitehead v. Braidnor*

127 *Supra*, footnote 125, at pp. 75-6 (emphasis in original).
128 *Supra*, at p. 77 (emphasis in original).
129 *Supra*, at p. 79.

Construction Ltd.[130] The defendant, Braidnor Construction, instructed its solicitor to investigate an accident in which a Greyhound bus collided with a vehicle and several people were killed and others injured. The solicitor retained an investigator who prepared written reports on the accident. Litigation privilege was claimed over the reports when they were requested. On discovery, the deponent testified that the purpose of the reports was to validate or disprove injury or other claims for the purpose of third party or potential third party claims as well as Workers' Compensation Board claims. This admission of a dual purpose for the preparation of the reports did not qualify them as privileged, as they were not prepared for the dominant purpose of litigation. The Workers' Compensation Board process was found not to be litigation. The fact that a solicitor of the defendant had requested the reports be prepared was also not determinative of the privilege issue. Even the fact that the investigation was requested after a serious accident from which litigation may have been contemplated, was not sufficient to establish that the dominant purpose was to gather information to provide to counsel in anticipation of litigation.

See also *Turnbull v. Alberta (Securities Commission)*,[131] in which an affidavit and cross-examination on it failed to meet the onus of establishing that any documents in possession of KPMG were created for the dominant purpose of use in contemplated or pending litigation. KPMG provided tax advice to the company that was under investigation by the Alberta Securities Commission. The court found that the company had retained KPMG for the dominant purpose of obtaining advice on how to structure transactions, not for the purpose of assistance in preparation for a legal or administrative hearing.

In *Turnbull-Burnight v. CIBC World Markets Inc.*,[131a] the same court reiterated the importance of affidavit evidence in establishing dominant purpose. The court found that the motions judge erred in ignoring affidavit evidence of the plaintiff and her brother, in which they set out the background and context for the plaintiff's preparation of 45 pages of handwritten notes at the request of her brother, an investment manager. He was investigating on her behalf an 80 per cent decrease in value of her investment portfolio and had requested her comments on the response to the investigation by the Head of Compliance at CIBC World Markets. The notes were a chronological outline of the plaintiff's dealings with CIBC World Markets. Her brother stated that this information was necessary in order for her to obtain and instruct counsel so she could pursue her claim against CIBC. Ultimately, this is precisely the use to which the notes were put. The motions judge erred in making no reference to either affidavit in his decision to order production. He also confused solicitor-client privilege with litigation privilege in holding that he was not persuaded that the notes

130 (2001), 304 A.R. 72, 19 M.V.R. (4th) 44 (Q.B.).
131 [2009] A.J. No. 487 (QL), 177 A.C.W.S. (3d) 1117 (Q.B.).
131a [2007] N.B.J. No 220 (QL), 158 A.C.W.S. (3d) 902 (C.A.).

were prepared for the dominant purpose of "seeking legal advice" The question instead should have been whether the notes were prepared for the dominant purpose of use in litigation. The Court of Appeal held that they were and denied production.

The New Brunswick Court of Appeal confirmed its acceptance of the dominant purpose test in *McCaig v. Trentowsky*.[131a.1] Reports of an insurance adjuster prepared as a result of a motor vehicle accident in which the plaintiffs were injured were considered privileged, because the dominant purpose of their creation was for counsel for advice and use in litigation. The affidavit evidence set out proof of this.

In *1278481 Ontario Ltd. v. Canada*,[131a.2] the Newfoundland court also adopted the dominant purpose test. The defendant retained an expert days before a lawsuit commenced to do an updated report on remediation of contaminated soil. On the basis of an earlier report, the defendant contracted with the plaintiff to perform the soil remediation. The plaintiff terminated the job and sued for breach of contract. The Terms of Reference for the second report were 'to review current information, analytical results, project history and PWGSC experience, with a view to updating the earlier report and providing recommendations for a preferred option.' In the end of the history section, termination of the contract between the plaintiff and the defendant was referenced but there was no mention of the existence of litigation, the pleadings, or mitigation of damages allegedly flowing from the breach of contract. The court found that while litigation was an additional factor supporting the need for an updated report, it was not the dominant purpose for requesting further advice.

An interesting discussion and articulation of the dominant purpose test appeared in *Kennedy v. McKenzie*[131b] Two boats collided in Georgian Bay, killing two people in one boat and injuring others. Kennedy was the driver of one of the boats and commenced an action against the driver of the other boat, McKenzie. Kennedy was also named as a defendant in three other actions, brought by the passengers in his boat. At issue was whether a statement of Kennedy, taken in his position as a defendant, by an insurance adjuster, that was modified after the insurer's counsel was retained was subject to litigation privilege. The statement was disclosed to Kennedy's solicitors who represented him in the action in which he was a plaintiff. They inadvertently sent the modified statement to counsel for McKenzie, the defendant driver of the second boat. The Master rejected the claim of litigation privilege on that basis that it did not meet the dominant purpose test.

The court adopted the requirements of the dominant purpose test set out in the dissent of Kellock J.A. in *Blackstone v. Mutual Life Insurance Co. of*

131a.1 (1983), 148 D.L.R. (3d) 724, 47 N.B.R. (2d) 71 (C.A.).
131a.2 (2007), 826 A.P.R. 1, 271 Nfld. & P.E.I.R. 1 (T.D.).
131b (2005), 17 C.P.C. (6th) 229, 139 A.C.W.S. (3d) 843 (Ont. S.C.J.).

New York,[131c] summarizing that the party asserting privilege must establish that the documents were created:

(a) for the dominant purpose of existing, contemplated or anticipated litigation; and
(b) in answer to inquiries made by an agent for the party's solicitor; or
(c) at the request or suggestion of the party's solicitor; or
(d) for the purpose of being laid before counsel for the purpose of obtaining his advice; or
(e) to enable counsel to prosecute or defend an action or prepare a brief.

The court held that the Master erred in requiring there be some connection between the creation of the document and the activities of the adversarial advocate as this was not the decision in *Chrusz*.[131d] Second, the Master erred in holding that the dominant purpose had to be "to instruct counsel" as in fact the scope of litigation privilege was much broader in that it protected communications between counsel and a third party as well as materials gathered or created at the direction of counsel or their agent. In any event, in this case, the second statement was created for the purpose of instructing counsel as it set out Kennedy's version of events leading up to the collision and was used to inform counsel of the relevant circumstances of the case. Finally, the fact that there was nothing in the document that exposed the litigation strategy of Kennedy's counsel was insufficient to justify disclosure. Litigation privilege can attach to a document even if litigation strategy is not revealed. The court concluded that the history and contents of the statement demonstrated that it was created for the dominant purpose of litigation (*i.e.* to defend one of the claims against Kennedy); and specifically for the purpose of obtaining the opinion of the insurer's lawyer about the action, and to enable him to prepare a brief and defend the action.

See also *Toronto (City) v. Grimmer*,[131d.1] where the test in *Kennedy v. McKenzie*[131d.2] was not met because there was no affidavit evidence setting out the date on which litigation was reasonably contemplated. Redacted entries in the City's childcare subsidies file for the plaintiff, dealing with steps to be taken in order to determine whether the case should be pursued criminally or civilly, were not litigation privileged in an action by the City for return of the subsidies allegedly obtained by misrepresentation. Similarly in *Gateway Industries Ltd. v. Excess Markets Corp.*,[131d.3] the defendants claimed litigation privilege over documents by virtue of having them listed in Schedule B of the affidavit of documents, without any details or other evidence on which to base a consideration of a claim of privilege. Reliance

131c [1944] O.R. 328 (C.A.).
131d *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241, 45 O.R. (3d) 321 (C.A.).
131d.1 (2008), 169 A.C.W.S. (3d) 61, [2008] O.J. No. 2535 (QL) (S.C.J.).
131d.2 *Supra*, footnote 131b.
131d.3 (2008), 234 Man. R. (2d) 56, [2008] M. J. No. 416 (QL) (Q.B.).

on this affidavit of documents was wholly inadequate to meet the onus on the defendants.

Borkowski (Litigation guardian of) v. Ontario (Minister of Health)[131e] involved an action in negligence for failure to test a newborn properly for Phenylketonuria (PKU), a metabolic disorder that left untreated results in mental retardation. The Director of the Ministry of Health laboratories commenced an investigation once the error was discovered but before the lawsuit was begun. The Director claimed litigation privilege over all the documents produced since that time. The court disagreed that they were created for the dominant purpose of litigation; instead it found that they were created primarily for the purpose of the investigation into the alleged unsatisfactory performance or error, requiring corrective action if confirmed.

The Federal Court reiterated the dominant purpose test and the importance of deciding the issue of litigation privilege on the facts of each case in *Rousseau v. Wyndowe*.[131f] The issue was whether notes from an independent medical examination (IME) done for the purpose of determining the applicant Rousseau's entitlement to long-term disability benefits covered by Maritime Life were subject to litigation privilege (interpreted to be part of the definition of the solicitor-client privilege exemption in s. 9(3) of the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*)). The Federal Court held that the dominant purpose of the IME was to gather information in order to determine if Rousseau was entitled to disability benefits, a routine part of the insurance company's business, and not litigation. The notes were made before the decision to deny benefits by the insurer had been made. Further, the assessment of an insurance claim was part of the insurance contract and not part of an ongoing dispute resolution process so the notes did not fall under the exemption in s. 9(3)(d) of *PIPEDA*, which provided that information generated for the purpose of a formal dispute resolution process was protected by privilege.

A more relaxed approach to the definition of dominant purpose was reflected in the decision of the Manitoba Court of Appeal, *Manitoba Crop Insurance Corporation v. Wiebe*.[131g] There, a report was prepared by the manager of the audit and compliance department, whose responsibilities were to do a preliminary review of the allegations of fraud or misrepresentation for the dual purpose of a) determining whether an actual compliance investigation was warranted; and b) in contemplation of litigation. The report was completed on July 4, 2002; the insurance contract was terminated on July 9, 2002; and on July 18, 2002, a statement of claim was issued. In holding that the documents were privileged, the court noted

131e (2007), 51 C.P.C. (6th) 322, 157 A.C.W.S. (3d) 505 (Ont. S.C.J.).

131f (2006), 56 Admin. L.R. (4th) 92, 153 A.C.W.S. (3d) 308 (F.C.), appeal allowed in part 71 Admin. L.R. (4th) 58, 52 C.P.C. (6th) 238 (F.C.A.).

131g [2007] 3 W.W.R. 73, 43 C.C.L.I. (4th) 190 (Man. C.A.).

that litigation was the dominant purpose, although acknowledged it was not the only purpose. The court wrote:[131h]

> If a document's dominant purpose is with a view to potential litigation, it can, in the proper circumstances, still be protected under the umbrella of litigation privilege, whether or not litigation has been initiated, or, as in this case, authorized. In *Scopis Restaurant Ltd. v. Prudential Assurance Company of England Property and Casualty (Canada)* 1999, 29 CPC (4th) 99 (Ont. Gen. Div), Sanderson, J. states (at para. 12):
>
> > "The fact that the investigation continued after that time does not detract from this conclusion. An insurer is obliged to keep an open mind and to continue to investigate even after a reasonable prospect of litigation exists. The claim for privilege is not dependent on the date of commencement of legal proceedings, or the communication of a denial of coverage to the insureds [*sic*].

See also *Cotton v. Ridley Canada Ltd.*[131h.1] where the plaintiff sued the defendant for providing contaminated feed to the plaintiff's cattle and unsuccessfully claimed litigation privilege over notes from the complaint files of the defendant's representative. The only evidence of the purpose of the notes was from examination for discovery, in which it was clear that the notes were made in the normal course of investigation of a customer complaint.

In *Bargen v. Canadian Broadcasting Corp.*,[131i] the plaintiff physician was dismissed from his position as medical health officer at the Yellowknife Health and Social Services Authority amidst allegations of paedophilia, possession of child pornography and breach of patient confidentiality. The CEO of the Authority and the representative of the Commissioner of the Northwest Territories and the Minister of Health and Social Services were compelled to answer certain questions about receiving information from the RCMP about the plaintiff. Their attempt to claim litigation privilege over the answers failed because the information from the RCMP was pre-existing and was not gathered for any reason related to the litigation.

Gordon v. Sexton[131j] presented an interesting factual twist to the dominant purpose test. Litigation privilege was found to attach to documents prepared in the context of a subrogated action commenced by the Crown pursuant to the *Government Employee's Compensation Act*. The Crown action was later discontinued when the employee elected to commence his own action instead. The employee claimed litigation (and solicitor-client) privilege over a group of documents that were created or collected in the context of his own litigation, as well as those from government agencies between the time he elected to receive compensation under the *Government Employees Compensation Act* and when he revoked

131h *Supra*, at para. 18.
131h.1 (2008), 224 Man. R. (2d) 165, 164 A.C.W.S. (3d) 768 (Q.B.).
131i [2008] 4 W.W.R. 730, 163 A.C.W.S. (3d) 38 (N.W.T.S.C.), supp. reasons [2008] 4 W.W.R. 746, 163 A.C.W.S. (3d) 540 (N.W.T.S.C.).
131j (2007), 842 A.P.R. 202, 275 Nfld. & P.E.I.R. 202 (Nfld & Lab. S.C.T.D.).

that election. The court reasoned that litigation privilege attached to the Crown documents as well because the employee's and the Crown's causes of action arose from the same delict; they had overlapping interests in each other's actions because the employee was entitled to full compensation under the *Government Employee's Compensation Act* regardless of how much the Crown collected from the defendant; the employee was entitled to any excess the Crown recovered over what he received as compensation; the employee could not settle his action without approval of the Crown; and the Crown was entitled to be reimbursed for the compensation the employee received from any moneys obtained by the employee in his action.

The cases confirm the fact-driven nature of inquiries into whether the dominant purpose test was satisfied. As courts have noted, often it is not the enunciated tests over which opposing counsel disagree, but their application to the facts of the case.

12.190 DOMINANT PURPOSE NEED NOT BE LITIGATION CONTEMPLATED BY THE PARTY SEEKING PRODUCTION

A question that arose in *Kaiser v. Bufton's Flowers Ltd.*[132] and was referred to in *Hosanna Enterprises Ltd. v. Laser City Audio Video Ltd.*[133] was whether the litigation contemplated had to involve the person seeking production. In the *Kaiser* decision, the court held that the test was met if the documents in question were created for the dominant purpose of litigation contemplated against others arising out of the same fact situation (in that case, a fire) as the litigation in question, whether or not the party seeking production was in contemplation as a defendant. Similarly, in *Azuma Foods (Canada) Ltd. v. Versacold Canada Corp.*,[133a] the court wrote that a party claiming litigation privilege is not required to establish that litigation against a particular defendant was prospect, so long as litigation to recover the losses was reasonably contemplated and the dominant purpose of the investigation report was to assist in the conduct of the litigation.

12.200 DOCUMENTS WITH DUAL PURPOSE CAN BE SEVERED

Courts have recognized and adopted the continuum test articulated in *Hamalainen v. Sippola*:[134] that the dominant purpose may change from an inquiry into a claim, to litigation. When and whether that change happens is dependent upon the particular facts and circumstances of a case. The fact that the documents in question may be used in the litigation is not sufficient

132 (1993), 41 A.C.W.S. (3d) 1120, [1993] B.C.J. No. 1695 (QL) (S.C.).
133 (1999), 85 A.C.W.S. (3d) 359, [1999] B.C.J. No. 57 (QL) (S.C.).
133a [2008] 11 W.W.R. 275, 64 C.C.L.I. (4th) 246 (B.C.S.C.), at para. 108.
134 [1992] 2 W.W.R. 132, 19 W.A.C. 254 (B.C.C.A.).

to change the documents' character. Instead, it is the dominant purpose for which the document was created that is determinative. In *Hamalainen*, the court cited with approval the decision of the House of Lords in *Waugh v. British Railways Board*,[135] which, in turn, cited with approval the following passage from the dissenting reasons of Lord Denning M.R., then at the Court of Appeal:

> "If material comes into being for a dual purpose one to find out the cause of the accident the other to furnish information to the solicitor it should be disclosed, because it is not then 'wholly or mainly' for litigation. On this basis all the reports and inquiries into accidents which are made shortly after the accident should be disclosed on discovery and made available in evidence at the trial."

The court in *Trask v. Canada Life Assurance Co.*[136] addressed the question of documents created for a dual purpose. In that case, the plaintiff sued in July, 1999, for payment of disability benefits. After the commencement of the lawsuit, the defendant continued to evaluate and assess her claim for benefits, and indeed, continued to pay her on a partially disabled basis until May, 2002. The documents in question were notes, memoranda and working papers of the defendant insurance company, the defendant's reinsurer, and the defendant's chartered accountant firm, which acted as financial consultants in the calculation of the plaintiff's benefits. The court noted that some of the documents might have come into being to process the plaintiff's claim for disability benefits as well as to furnish counsel with information. A portion of them was created for the dominant purpose of processing the claim while another portion was created for the dominant purpose of seeking or providing legal advice. The court held that if any of the documents fell within the latter category, the defendant was permitted to sever or edit out the privileged portion. The documents created for the purpose of processing claims from July 15, 1999 to May 14, 2002 were found not to be protected by litigation privilege and had to be disclosed.[137] The court referred to the continuum concept set out in *Hamalainen* and its reliance on the facts of each case. As was set out in *Kaiser v. Bufton's Flowers Ltd.*:[138]

> The law in British Columbia appears to be that privileged portions of adjuster's reports which serve a dual purpose may be severed. There is some logic to that approach. Adjusters' reports and materials are often prepared for more than one purpose and it is not always clear which is the dominant purpose. The approach taken by Mr. Justice Robinson in Grant-Howe Enterprises allows the Court to order production of important material which is not privileged, while protecting that portion that was clearly intended to assist in litigation.

135 [1979] 2 All E.R. 1169, [1980] A.C. 521, at p. 541, cited by *Hamalainen*, *supra*, at para. 23.
136 (2002), 118 A.C.W.S. (3d) 513, [2002] B.C.J. No. 2823 (QL) (S.C.).
137 See also *Daishowa Canada Co. v. Mannesmann Demag Ltd.* (1995), 58 A.C.W.S. (3d) 933, [1995] B.C.J. No. 2214 (QL) (S.C.).
138 *Supra*, footnote 132, at para. 51.

IBM Canada Limited-IBM Canada Limitée (appellant) (defendant)
v.
Xerox of Canada Limited and Xerox Corporation (respondents) (plaintiffs)

[1978] 1 F.C. 513

Action No. A-795-76

Federal Court of Canada
COURT OF APPEAL

URIE J. AND MacKAY AND KELLY D.JJ.

TORONTO, FEBRUARY 10; OTTAWA, FEBRUARY 25, 1977.

Practice -- Discovery -- Whether respondent can claim solicitor-client privilege in respect of letter written by its own salaried legal adviser -- Whether privilege waived when a document is shown to a third party -- Permissibility of questions seeking to elicit facts contained in privileged document -- Whether questions relate to facts or to evidence in support of those facts.

Appellant (defendant) is appealing from a refusal by the Trial Division to compel the respondents (plaintiffs) to produce certain documents and answer certain questions. The respondents contend that the two documents concerned are protected by solicitor-client privilege and that the two questions are either unanswerable or improper. The appellant claims that there was no solicitor-client relationship involved in the first document and that any privilege that might have attached to the second document has been waived.

Held, the appeal is allowed in part. The first document, a letter written by the respondent's in-house legal adviser to his client through its patent agents, is not privileged. Although a salaried legal adviser to a corporation is in the same position as regards privilege as a lawyer in private practice he must have been acting in that capacity when preparing the document for which privilege is claimed and this must be clear on the face of the document. In the case at bar, the corporation's lawyer was writing as a representative of the company and as manager of its patent department and therefore the document must be disclosed. The second document, however, was privileged at the outset, and once privilege has been established it cannot be defeated by a technical waiver. Consequently questions requiring disclosure of its contents are improper.

The second question need not be answered since it seeks not to elicit facts but to elicit evidence in support of those facts and is therefore an improper question in proceedings for discovery.

CASES JUDICIALLY CONSIDERED

Applied:
Alfred Crompton Amusement Machines Ltd. v. Commissioner of Customs and Excise (No. 2) [1972] 2 All E.R 353; Minet v. Morgan (1873) L.R. 8 Ch. 361; Calcraft v. Guest [1898] 1 Q.B. 759.

APPEAL on discovery.

COUNSEL:

James D. Kokonis, Q.C., for appellant.
Roger T. Hughes and Ronald E. Dimock for respondents.

SOLICITORS:

Smart & Biggar, Ottawa, for appellant.
Donald F. Sim, Q.C., for respondents.

The following are the reasons for judgment rendered in English by

1 URIE J.: This is an appeal from an order made in the Trial Division[1] refusing to direct the production of certain documents and to direct that certain questions be answered during the examination of persons produced by the respondents for examination for discovery. The appeal was disposed of in its entirety during the argument of the appeal except in respect of four questions, namely, numbers 9802, 9814, 9817 and 9819, relating to Canadian patent No. 518,430 upon which the Court reserved judgment. It is the disposition of the appeal relating to those questions which is the subject of these brief reasons.

2 Question 9802 arose in the following way. Among the documents produced by the respondents was a letter addressed to the respondent Xerox Corporation in its former name, from its New York patent agents, reading as follows:

MARKS & CLERK
220 Broadway
New York 38, N.Y.

April 7, 1955

The Haloid Company
Patent Department
Rochester 3, New York

Attention: Frank A. Steinhilper, Esq.

Re: ROLAND MICHAEL SCHAFFERT
CANADIAN PATENT APPLN. 586,750
CORRES. U.S.S.N. 21737
OUR CASE J-44471

Gentlemen:

We thank you for your letter of March 2.

We have taken up the present matter with our Ottawa Office and our Ottawa Office feel that it may possibly be of assistance if they could have a copy of the U.S. patent which you state gives you the necessary protection on the present subject matter in the U.S.

We would be glad if you would let us know the number of the U.S. patent involved, for the foregoing purpose.

Very truly yours,

"Marks & Clerk"

JB:ja
cc: William J. Mase, Esq.

3 The reply of the respondent dated April 13, 1955 enclosed a copy of U.S. patent No. 2,576,047. In relation to the April 7, 1955 letter, the respondent, Xerox Corporation was asked the following questions numbered 3817 and 3819:

3817. In the second paragraph there is a statement that Battelle (sic) Haloid stated that a United States patent gives the necessary protection on the present subject matter in the United States. Can you tell me whether such a statement was made in the written or oral form?
3819. And if it was in the form of a written statement, could you provide us with the document please? (AB/App. II/1,2)

4 The respondent's reply was embodied in questions 9802 and 9803, reading as follows:

BY MR. CAMPBELL:

9802. Q. Next is 3817, 18, 19 and 20.

"Response: The statement is set out in Mr. Steinhilper's letter to Marks and Clerk of March 2, 1955."

> Would you produce a copy of that letter from Mr. Steinhilper to Marks and Clerk of June [March] 1955, please?
>
> MR. HUGHES: Sorry. Has it already been produced?
>
> 9803. MR. CAMPBELL: No, it has not.
>
> MR. HUGHES: I don't know if that is a letter for which we have made a claim for privilege or not. Let me look into that matter and advise you. (AB/App. II/71)

5 Respondent, Xerox Corporation, refused to produce the letter of March 2, 1955 on the ground that it was a privileged communication in that it was written by a qualified lawyer, who was a house counsel for the respondent Xerox Corporation (under its former name) and manager of its patent department, to his client through its patent agents in New York, Marks & Clerk, whose services as patent agents had had to be retained under Canadian patent regulations to prosecute its application for patent in Canada.

6 The ruling of the learned Judge in the Trial Division is as follows:

> That in the rather odd circumstances of this communication between Marks & Clerk and the man who is Steinhilper, that the document is privileged and I am confining my ruling to the particular facts of this case.
>
> When we get it up in some other patent case, it is quite clear, it depends on these particular facts. After reviewing the letter, the two letters, I am convinced Mr. Steinhilper was writing in perhaps his dual capacity, but certainly not in his capacity as an employee or as Haloid Company. He was writing, I think, as primarily a solicitor and perhaps wearing part of his other hat; and secondly, the peculiar circumstance in which independent advice was referred to, I think, would raise a claim of privilege which would not be present in some other cases.

7 The basic principle upon which the respondents rely in asserting their claim of privilege is that a client cannot be compelled and a legal adviser will not be allowed, without the consent of the client, to disclose communications or to produce documents passing between them in professional confidence. Further, documents obtained by a legal adviser for the purpose of preparing for litigation, actual or anticipated, are privileged. The question here then is, was Mr. Steinhilper's letter written by him in his capacity as a lawyer to his client?

8 As did the Trial Division, we examined the letter of March 2, 1955 without disclosing the contents thereof to the appellant. Having done so, we are, with respect, unable to agree with the learned Judge that Mr. Steinhilper was writing in the dual capacity of lawyer and patent attorney but not in his capacity as an employee of The Haloid Company (now Xerox Corporation).

9 There appears to be no doubt that salaried legal advisers of a corporation are regarded in law as in every respect in the same position as those who practise on their own account. They and their clients, even though there is only the one client, have the same privileges and the same duties as their practising counterparts. (See Alfred Crompton Amusement Machines Ltd. v. Commissioner of Customs and Excise (No. 2)[2].)

10 However, there may be occasions when the legal privileges inherent in solicitor-client relationships may not be claimed. As Lord Denning M.R. said at page 376 of the Crompton case:

> 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. There are many cases in the books of actions against railway companies where privilege has been claimed in this way. The validity of it has never been doubted. I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.

11 There is nothing whatsoever in the March 2 letter which would indicate that Mr. Steinhilper was writing to Marks & Clerk in his capacity as an attorney. On the contrary, the dual capacity in which he apparently wrote was that of an authorized representative of The Haloid Company and as "Manager, Patent Department". That is how he signed the letter. There is nothing therein to indicate that he wrote as a legal adviser. If he did so, he was not scrupulous, as Lord Denning warned, to indicate to the persons to whom he wrote that it was in that capacity that he wrote. It was not Mr. Steinhilper's letter, as was alleged in the answer given by the respondents to question 9802, but clearly from the way in which it was expressed it was the letter of The Haloid Company. In our opinion, therefore, the assertion that the March 2, 1955 letter was privileged and did not have to be produced by the respondents must fail and the appeal in respect of question 9802 will thus be allowed and, the letter will be ordered to be produced.

12 In view of this disposition of the question it is unnecessary for us to decide in this case whether even if the letter was written by a lawyer acting in that capacity privilege could attach since it was written, not to the client, but to the patent agents employed by it for the prosecution of a patent application. Neither do we have to decide whether or not the letter was written in anticipation of litigation or whether the lawyer was advising in respect of laws upon which he was not qualified to advise since he was an American attorney and may have been, in part, giving his views on the prosecution of Canadian patent applications.

13 With regard to question 9814, the reasons for judgment of Collier J. dated October 25, 1976 quite concisely set forth the problem and his ruling. He said:

> By motion dated October 8, 1976 and heard October 15, 1976 at Ottawa, the defendant sought an order compelling the plaintiffs to produce certain docu-

ments and to answer certain questions objected to on examination for discovery. Other relief was, as well, asked for.

> I reserved judgment in respect of one particular matter arising out of questions 9814-9817 of the continued examination for discovery of Paul Catan. The point arose in questioning on the Schaffert patent. Haloid, the plaintiffs' predecessor, was directing the prosecution of that patent application. It was being applied for in the name of Battelle with whom Haloid had financial and research arrangements. Haloid sought and obtained a legal opinion. A copy of the opinion was given to Battelle. The plaintiffs refuse to produce the document, relying on solicitor-client privilege. The defendant contends the privilege was waived by the client when the copy of the attorney's letter was given to a third party, Battelle. The defendant relies on Electric Reduction Co. of Canada Ltd. v. Crane [(1959) 31 C.P.R. 24].
>
> There are in this case, however, further facts. Subsequently, but before this litigation, a number of patents (including Schaffert) were assigned to the American plaintiff. A term of the agreement provided that all documents and other materials in respect of the patents and research were, on the plaintiff's request, to be turned over or assigned to Haloid. In earlier motions in this litigation (arising out of the examination for discovery of the plaintiffs) it was agreed (for the purpose of those motions) that it should be deemed Haloid had in fact requested the turnover of the documents and materials described in the assignment agreement and that those materials had in fact gone back to Haloid.
>
> In my view, even if solicitor-client privilege was at one time lost or waived, it has been regained by the client. I rule the document is privileged and need not be produced.

14 We have not been persuaded that the learned Judge erred in his ruling. The letter in question when originally received was clearly a privileged communication to The Haloid Company and it is doubtful that its privileged character was lost by giving a copy thereof to Battelle, if in fact that was ever done, in view of the relationship which existed between the two companies. The general rule respecting professional communications is, as we understand it, that once privilege is established in respect of a document, that privilege continues and is not to be defeated by a technical waiver, if one in fact took place, such as is claimed by the appellant here. Even if there was such a waiver, the privilege was surely regained when all patents and documents relating to them were assigned to the respondent Xerox Corporation. The judgments in Minet v. Morgan[3] and Calcraft v. Guest[4] support this view.

15 The appeal, in so far as this question is concerned, will, therefore, be dismissed.

16 Questions 9817 and 9819 read as follows:

> 9817. In relation to what facts was that interpretation of U.S. law made by Fish, Richardson and Neave?

9819. For what reason did Haloid instruct Marks & Clerk that the interpretation of U.S. patent 2576047 was not to be brought to the attention of the Canadian Patent Office?

17 It appears that question 9817 as framed is incapable of being answered. It appears to require the disclosure of facts referred to in the letter of opinion for the purpose of laying the factual basis for the opinion. If that is so, it is clearly improper since the letter has been held to have been privileged. If it is not so, then the question is so imprecise in form as to render it unanswerable without preparing a foundation for it. The appeal in so far as it is concerned will be dismissed.

18 In so far as question 9819 is concerned, it is not a question attempting to elicit facts as is permissible on examinations for discovery but one that may require, for a proper answer, the disclosure of evidence necessary to establish facts. Therefore, in our opinion, it is not a proper question for discovery and the appeal from its rejection will be dismissed.

19 Since the appellant was successful only on half of the questions at issue in this appeal, as well as half of the questions at issue in appeal A-681-76 and since counsel for the appellant conceded that he would be seeking only one set of costs for both appeals due to the fact that they were argued together, the successful party or parties in the cause will be entitled to one half of its or their taxed costs.

* * *

20 MacKAY D.J.: I have read the reasons for judgment of Urie J., with which I agree.

* * *

21 KELLY D.J.: I have read the reasons for judgment of Urie J., with which I agree.

qp/s/mwk

1 Court No. T-730-72, not reported.

2 [1972] 2 All E.R. 353 at p. 376.

3 (1873) L.R. 8 Ch. 361.

4 [1898] 1 Q.B. 759.

Case Name:

Intel Corp. v. 3395383 Canada Inc.

Between
Intel Corporation, plaintiff, and
3395383 Canada Inc. and 9047-9320 Québec Inc., defendants

[2004] F.C.J. No. 251

[2004] A.C.F. no 251

2004 FC 218

2004 CF 218

30 C.P.R. (4th) 469

129 A.C.W.S. (3d) 55

Docket T-1993-01

Federal Court
Toronto, Ontario

Heneghan J.

Heard: August 11, 2003.
Judgment: February 11, 2004.

(34 paras.)

Counsel:

Brian Isaac and Mark Biernacki, for the plaintiff.
Alexandra Steele, for the defendants.

REASONS FOR ORDER AND ORDER

HENEGHAN J.:--

INTRODUCTION

1 Intel Corporation (the "Plaintiff") appeals from the order of Prothonotary Morneau dated July 18, 2003, relating to the refusal by the Prothonotary to order the Defendant 3395383 Canada Inc. ("Canada Inc.") to answer certain questions set out in categories (a) and (b), except question 242, as set out in Appendix "A" to the Plaintiff's original notice of motion dated July 8, 2003.

FACTS

2 The Plaintiff commenced this action on November 7, 2001, alleging unlawful use by Canada Inc. and 9047-9320 Quebec Inc. ("Quebec Inc.") of certain trademarks owned by the Plaintiff, thereby causing damage to the Plaintiff. The Plaintiff raised issues of infringement and confusion in its statement of claim; these allegations were denied by Canada Inc. and accordingly, remain unadmitted allegations of fact.

3 The Plaintiff commenced its action against both Canada Inc. and Quebec Inc., but Quebec Inc. has since been dissolved pursuant to the applicable provisions of the laws of the Province of Quebec. For practical purposes, Canada Inc. is the only Defendant in this action.

4 The Plaintiff undertook discovery examination of Mr. Michael Cuplowsky, as the representative of Canada Inc., on October 2, 2002. In the course of that examination, refusals were entered to certain questions asked on behalf of the Plaintiff. The original notice of motion before the Prothonotary, that is the notice of motion dated July 8, 2003, classified the outstanding refusals under three headings. The first, category "a", related to questions about the identification of Canada Inc.'s suppliers and customers. Questions 242, 245, 526 and 810 were in this group.

5 Category "b" dealt with questions about email communications to Canada Inc. at the pentium-construction.com website which was in operation from October 1999. Category "c" covered one question which is not the subject of this appeal.

6 The Prothonotary determined that questions 242 and 245 need not be answered since they showed an attempt by the Plaintiff to obtain information from the Defendant Canada Inc. about persons who might have been involved with the Defendant Quebec Inc. and who might have knowledge of the activities of that now dissolved corporate entity. He also found that question 245 was improper as being in the nature of a "fishing expedition". Questions 242 and 245 are as follows:

> 242 Make inquiries of Mr. Kotler to see if he can provide documents pertaining to suppliers of materials of the model home built by Quebec Inc.
>
> 245 Identify all of the subcontractors that were utilized in respect of the model home built by Quebec Inc.

7 The Prothonotary upheld the refusal of Mr. Cuplowsky to answer the remaining questions in category (a) and (b), on the basis that these remaining questions were not relevant and were in the nature of a "fishing expedition", for the purpose of assisting the Plaintiff to establish its allegations of confusion or damage to its reputation. These questions are as follows

> 526 Produce a copy of each offer for purchase and sale in respect of each house sold by Canada Inc.

526 Produce a list of names and, to the best of the Defendant's knowledge, current location of each of the customers whom the Canada Inc. company has sold a house to.

810 Produce a list of suppliers and subcontractors to Canada Inc. with contact information

812 Produce a copy of every e-mail received at the e-mail address sales

sales@pentiumconstruction.com

813 Search the archived files and deleted directory and produce any additional e-mails that have been received at sales@pentiumconstruction.com

814 Agree to an undertaking to produce all e-mails received in the future at sales@pentiumconstruction.com.

SUBMISSIONS

8 The Plaintiff argues that the Prothonotary was clearly wrong and that he erred in fact and in principle in making his decision. The Plaintiff says that the Prothonotary misapprehended the facts with respect to question 245, concerning the identity of all subcontractors that were engaged to build a model home for Quebec Inc., and consequently, erred in upholding the refusal.

9 As well, the Plaintiff argues that the Prothonotary erred in principle relative to question 245, by improperly finding it irrelevant and in the nature of a "fishing expedition". The Plaintiff says that the question arises from unadmitted allegations of facts in the pleadings and as such, it is relevant. It submits that it is a proper question and does not amount to an attempt to advance a cause of action that is not raised in the pleadings. The Plaintiff here relies on paragraphs 21 to 24 of its statement of claim, paragraph 12 of the amended defence and paragraph 6 of its amended reply.

10 The Plaintiff also argues that the Prothonotary erred in principle in upholding the Defendant's refusal to answer the remaining questions in category (a) and the refusal to answer all of the questions in category (b). Again, the Plaintiff says that these questions are relevant to the allegations made in the statement of claim that are denied by the Defendant and the Prothonotary erred in finding otherwise.

11 The Plaintiff argues that the Prothonotary erred in his application of the principle against using the discovery process as a "fishing expedition" and submits that it is entitled to ask questions of the Defendant's representative in order to elicit information that is relevant to its statement of claim. Specifically, the Plaintiff says that it has raised the issues of confusion and depreciation of goodwill in its statement of claim. Relying on Wonder Bakeries Ltd. v. Max Furman et al. (1958), 29 C.P.R. 154 (Ex. Ct.) and Superseal Corp. v. Glaverbel-Mecaniva Canada Limited (1975), 20 C.P.R. (2d) 77 (F.C.T.D.), rev'd (1975), 26 C.P.R. (2d) 140 (F.C.A.), the Plaintiff says it is entitled to rely on facts not within its knowledge to support a cause of action. It submits that its questions about the awareness of actual confusion or injury to its reputation depend upon knowing the identities of the persons who were exposed to the Defendant's trade-mark or trade name. It says that it has asked proper questions which should be answered.

12 The Plaintiff argues that its request for access to emails sent to the Defendant is proper because it is relevant. It says that there is no evidence of difficulty or impossibility on the part of the Defendant in providing this information. The Plaintiff argues that there is no evidence to support the Prothonotary's finding that contact by the Plaintiff with suppliers, customers and subcontractors "might lead to strain, and even disruption" of the Defendant's business, and says this statement is based on speculation. In making this finding, the Prothonotary has interfered with the Plaintiff's right to pursue relevant inquiries in an expeditious manner.

13 The Defendant argues, in reply, that the Plaintiff has no right to ask questions of its representatives about Quebec Inc. That corporate entity no longer exists and the Defendant is under no obligation to pursue lines of inquiry relative to it.

14 The Defendant further submits that the Plaintiff has failed to show that the Prothonotary erred in fact or in law in his decision. Rather, the Plaintiff is expressing a difference of opinion and that is insufficient to meet the test for reversing the Prothonotary's decision. The Defendant here relies on Anchor Brewing Co. v. Sleeman Brewing and Malting Co. (2001), 15 C.P.R. (4th) 63 (F.C.T.D.) and Hayden Manufacturing Co. v. Canplas Industries Ltd. (1998), 86 C.P.R. (3d) 17 (F.C.T.D.).

15 The Defendant says that the questions in issue were properly characterized by the Prothonotary as being in the nature of a "fishing expedition". These questions are not relevant to the action and in any event, are too broad.

16 Further, the Prothonotary did have evidence before him to support his finding about the potential negative impact on the Defendant's business activities, if the Plaintiff were allowed to question the Defendant's customers and suppliers about confusion resulting from exposure to the Defendant's trade-names. The Defendant here refers to the affidavit of Mr. Cuplowsky that was before the Prothonotary. The Plaintiff did not cross-examine Mr. Cuplowsky.

17 The Defendant argues that the Plaintiff has failed to show that the decision of the Prothonotary is "clearly wrong" and that this appeal should be dismissed.

ANALYSIS

18 This is an appeal from the Order of Prothonotary Morneau upon the Plaintiff's motion arising from the refusal of the Defendant representative to answer certain questions during his discovery examination. Generally an order involving the responses to questions at discovery is considered to be a discretionary order: see James River Corp. of Virginia v. Hallmark Cards Inc. (1997), 72 C.P.R. (3d) 157 (F.C.T.D.). According to Canada v. Aqua-Gem Investments Ltd., [1993] 2 F.C. 425 (C.A.), a decision of a prothonotary will remain undisturbed on appeal unless it is clearly wrong in the sense that the exercise of discretion was based on a wrong principle of law or misapprehension of the facts or where the order raises a question vital to the final disposition of the case. The latter does not apply here, so the question is whether the Prothonotary clearly erred in fact or in principle in upholding the refusals.

19 The discovery examination process is governed by the Federal Court Rules, 1998, SOR/98-106, (the "Rules") Rules 237 to 248. Rule 240 sets forth the general principle that questions on discovery can be directed to matters that are relevant to any unadmitted allegation or fact raised in a pleading. Rule 240 provides as follows:

240. Scope of examination - A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or
(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

* * *

Étendue de l'interrogatoire - La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui:

a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;
b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, don't il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.

20 In his reasons, the Prothonotary reviewed the meaning of relevance in the context of discovery and its application to the issues in this action, that is the alleged infringement of the Plaintiff's trademark, together with allegations of confusion and depreciation of goodwill. He considered relevance, in terms of the breadth of the questions other than question 245 and concluded that those remaining questions were not relevant to the matters in issue and in any event, were too broad. In making his order, the Prothonotary considered and applied the principle against using the discovery process as a "fishing expedition".

21 The Prothonotary upheld the refusal to answer question 245 on the basis that this related to a corporate entity that is independent of the Defendant Canada Inc. Relying on Rule 241, he found that Canada Inc. was not obliged to make inquiries of another party who might have knowledge of the matters in issue in the action. I see no error of fact or in principle with this conclusion.

22 The Prothonotary maintained the Defendant's refusal to answer the remaining questions on the grounds that they represented an improper attempt by the Plaintiff to use the discovery process as a "fishing expedition" to obtain information to bolster its case.

23 The prohibition against using the discovery process in this way has been discussed in a number of cases including Burnaby Machine & Mill Equipment Ltd. v. Berglund Industrial Supply Co. Ltd. et al. (1984), 81 C.P.R. (2d) 251 (F.C.T.D.) and Crestbrook Forest Industries Ltd. v. Canada, [1993] 3 F.C. 251 (C.A.). In Burnaby, supra, the Court said as follows at pages 254-255:

> In argument reference was made to the general tendency of the courts to grant broad discovery. ...
>
> ...

This must be balanced against the tendency, particularly in industrial property cases, of parties to attempt to engage in fishing expeditions which should not be encouraged. A recent example of this principle is found in the case of Monarch Marking Systems, Inc. et al. v. Esselte Meto Ltd. et al. (1983), 75 C.P.R. (2d) 130 at p. 133, in which Mahoney J. stated:

> I accept the definition of a "fishing expedition", in the context of discovery, as given by Lord Esher M.R. in Hennessy v. Wright (No. 2) (1980), 24 Q.B.D. 445 at p. 448, a libel action:
>
> > "... the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present".
>
> I agree with the defendants. Notwithstanding the present state of the pleadings and that Rule 465(15), taken literally, is broad enough to encompass the questions of category 1, those questions are, in substance, a fishing expedition. They need not be answered.

24 Are the remaining questions relevant to the issues raised in this proceeding? The Plaintiff says they are, in light of the pleadings. Paragraphs 21 to 24 of the Statement of Claim, paragraph 12 of the Amended Defence, paragraph 22 of the Counterclaim and paragraph 6 of the Amended Reply provide as follows:

> Statement of Claim
>
> 21. The Defendants' unauthorized use of the trade-mark PENTIUM as aforesaid has caused and is likely to cause confusion with the Plaintiff's registered PENTIUM trade-mark, in that such use has led and is likely to lead to the inference that the Defendants [sic] services are provided, offered, advertised, or approved by the Plaintiff
> 22. By their conduct and actions as aforesaid, the Defendants have infringed, and are deemed to have infringed the rights of the Plaintiff in trade-mark registration nos. TMA428,593 and TMA534,128, contrary to section 20 of the Trade-marks Act.
> 23. By their conduct and actions as aforesaid, the Defendants have used the trade-mark that is the subject of registration nos. TMA428,593 and TMA534,128 in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto, contrary to section 22 of the Trade-marks Act.
> 24. By their conduct and actions as aforesaid, the Defendants have directed public attention to their services and business in such a way as to cause or to be likely to cause confusion in Canada, at the time they commenced to do so, and thereafter, between their services and business and the wares, services and business of the Plaintiff, contrary to section 7(b) of the Trade-marks Act.
>
> Amended Defence and Counterclaim

12. The Defendant denies paragraphs 21, 22, 23 and 24 of the Statement of Claim.

22. The PENTIUM trade-mark registration No TMA534128 is invalid, void and of no effect for the following reasons:

a) The Plaintiff has abandoned the use of the PENTIUM trade-mark in Canada (section 18(1)(a) of the Trade-Marks Act) in association with precious metals and their alloys; jewellery, precious stones; clocks, bracelets, jewellrey, [sic] necklace charms, bracelet charms, and earring charms, cuff links, earrings, key chains, necklaces, necktie fasteners, lapel pins, money clips, necklace pendants, bracelet pendants, and earring pendants, piggy banks, tie pins, tie slides, trophies and watches; cardboard; photographs, adhesives for stationery or household purposes; playing cards, printers' type; binders; bookends, bookmarkers, boxes for pens, calendars, tablets, cards, pads, pens, pencils, folders, paperweights, pen and pencil holders, photograph stands, rulers, erasers, markers, desk sets, and bumper stickers, leather and imitations of leather; animal skins, hides; trunks and travelling bags, umbrellas, travel bags, luggage, school bags, back packs, beach bags, duffel bags, fanny packs, and umbrellas; steelwool; unworked or semi-worked glass (except glass used in building); earthenware (not included in other classes); mugs and sports bottles; t-shirts, shirts, tank tops, boxer shorts, leather jackets, sweaters, sweatshirts, sweat suits, coveralls, jackets, pants, shorts, ties, bandannas, headwear, namely baseball caps and night caps, bow ties, cardigans, gloves, gym suits, hats, jackets, jogging suits, neckties, polo shirts, scarves, infant rompers, smocks, socks and visors; sporting goods, namely footballs; decorations for Christmas trees; objects for children to play with, namely stuffed toys, plush toys, puppets, dolls, bean bags, board games, video games; and seasonal ornamentation, namely Christmas tree ornaments. The Plaintiff's use of the trade-mark in association with the above wares (if any) was only a token use to allow the filing of a declaration of use, and the plaintiff [sic] has since then, not used the trade-mark in association with all of the said wares in the normal course of trade. From such non use in the normal course of trade for a long period can be inferred the intention to abandon the trade-mark.

b) The Plaintiff was not the person entitled to secure the registration (section 18(1) in fine, section 16(3) and section 40(2) of the Trade-mars [sic] Act) since it never used the trade-mark in Canada in association with the wares specified in the application, the whole contrary to what was stated in the declaration of use which was filed by the Plaintiff. If any use was ever made, it was not as a trade-mark (section 4 of the Trade-Marks Act) but as publicity devices for the promotion of its own microprocessors.

c) The trade-mark is not distinctive at the time the proceedings bringing the validity of the registration into question are commenced (section 18(1)(b) of the Trade-Marks Act) since the Plaintiff has not exercised under licence, direct or indirect control (section 50(1) of the Trade-Marks Act) over the character or quality of the wares in association with which the PENTIUM trade-mark was allegedly used, namely: precious metals and their alloys;

jewellery, precious stones; clocks, bracelets, jewellrey, [sic] necklace charms, bracelet charms, and earring charms, cuff links, earrings, key chains, necklaces, necktie fasteners, lapel pins, money clips, necklace pendants, bracelet pendants, and earring pendants, piggy banks, tie pins, tie slides, trophies and watches; cardboard; photographs, adhesives for stationery or household purposes; playing cards, printers' type; binders; bookends, bookmarkers, boxes for pens, calendars, tablets, cards, pads, pens, pencils, folders, paperweights, pen and pencil holders, photograph stands, rulers, erasers, markers, desk sets, and bumper stickers, leather and imitations of leather; animal skins, hides; trunks and travelling bags, umbrellas, travel bags, luggage, school bags, back packs, beach bags, duffel bags, fanny packs, and umbrellas; steelwool; unworked or semi-worked glass (except glass used in building); earthenware (not included in other classes); mugs and sports bottles; t-shirts, shirts, tank tops, boxer shorts, leather jackets, sweaters, sweatshirts, sweat suits, coveralls, jackets, pants, shorts, ties, bandannas, headwear, namely baseball caps and night caps, bow ties, cardigans, gloves, gym suits, hats, jackets, jogging suits, neckties, polo shirts, scarves, infant rompers, smocks, socks and visors; sporting goods, namely footballs; decorations for Christmas trees; objects for children to play with, namely stuffed toys, plush toys, puppets, dolls, bean bags, board games, video games; and seasonal ornamentation, namely Christmas tree ornaments.

Amended Reply

6. The Plaintiff specifically denies the allegations in paragraph 22 of the Amended Statement of Defence and Counterclaim. The Plaintiff further states that the PENTIUM trade-mark has been and is used in association with the wares listed in trade-mark registration no. TMA534,128 in the normal course of the Plaintiff's trade. Such wares are manufactured for the Plaintiff under license and the Plaintiff maintains control over the character or quality of the wares.

25 The above-cited paragraphs from the pleadings show there are unadmitted allegations concerning the issues of confusion, infringement and depreciation. Accordingly, it may well be that the disputed questions could be relevant to the action and the general rule concerning the scope of discovery examination is that questions about those issues should, in the usual course, be answered. However, the matter does not end there.

26 In Reading & Bates Construction Co. v. Baker Energy Resources Corp. (1988), 24 C.P.R. (3d) 66 (F.C.T.D.), the Court reviewed the general principles applicable to the discovery examination process. While acknowledging the primacy of relevancy and that relevancy is a matter of law, not discretion, the Court has also recognized that there are limits to the discovery process and set forth a list of general principles. The following apply to the present situation and were set out in Reading & Bates, supra, by Justice McNair at pages 71-72:

...

3. The propriety of any question on discovery must be determined on the basis of its relevance to the facts pleaded in the statement of claim as constituting the cause of action rather than on its relevance to facts which the plaintiff proposes to prove to establish the facts constituting the cause of action. ...
4. The court should not compel answers to questions which, although they might be considered relevant, are not at all likely to advance in any way the questioning party's legal position: Canex Placer Ltd. v. A.-G. B.C., supra; and Smith, Kline & French Laboratories Ltd. v. A.- G. Can. (1982), 67 C.P.R. (2d) 103 at p. 108, 29 C.P.C. 117 (F.C.T.D.).
5. Before compelling an answer to any question on an examination for discovery, the court must weigh the probability of the usefulness of the answer to the party seeking the information, with the time, trouble, expense and difficulty involved in obtaining it. Where on the one hand both the probative value and the usefulness of the answer to the examining party would appear to be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer. One must look at what is reasonable and fair under the circumstances: Smith, Kline & French Ltd. v. A.-G. Can., per Addy J. at p. 109.
6. The ambit of questions on discovery must be restricted to unadmitted allegations of fact in the pleadings, and fishing expeditions by way of a vague, far-reaching or an irrelevant line of questioning are to be discouraged: Carnation Foods Co. Ltd. v. Amfac Foods Inc. (1982), 63 C.P.R. (2d) 203 (F.C.A.); and Beloit Canada Ltée/Ltd. v. Valmet Oy (1981), 60 C.P.R. (2d) 145 (F.C.T.D.).

27 In the present case, the Prothonotary determined that the remaining questions, that is questions 526, 810, 812, 813 and 814 were too broad. He characterized them as being in the nature of a "fishing expedition".

28 Question 526 relates to the production of each offer of purchase and sale relative to each house sold by the Defendant, as well as a list of the names and current location of each customer to whom the Defendant had sold a house. It appears that the Prothonotary found this question to be too broad, relative to unadmitted allegations in the pleadings. In my opinion, that conclusion is reasonable, particularly when that question is viewed in the context of the entire discovery examination of Mr. Cuplowsky.

29 Question 810, a request that the Defendant produce a list of suppliers and subcontractors with contact information, suffers from the same flaw, in my opinion. I see no error in principle in the Prothonotary's decision to uphold the Defendant's refusal to respond to this question.

30 Questions 812, 813 and 814 relate to a request for production of emails received at the email address "sales@pentiumconstruction.com". The Plaintiff allegedly seeks those emails in an effort to show actual confusion. However, according to the discovery examination of the Plaintiff's representative, the Plaintiff was aware that there was no evidence of such confusion. I refer to questions 30 and 57 that were posed to the Plaintiff's representative and the answers that were provided. This evidence was before the Prothonotary and formed part of the record on this appeal.

31 As well, I refer to Rule 242(1) which addresses the grounds upon which a party may object to questions during the discovery examination. Rule 242(1)(c) and (d) provides as follows:

> A person may object to a question asked in an examination for discovery on the ground that
>
> ...
>
> (c) the question is unreasonable or unnecessary; or
> (d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.
>
> * * *
>
> Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :
>
> ...
>
> c) la question est déraisonnable ou inutile;
> d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

32 I refer to the affidavit of Mr. Cuplowsky dated July 10, 2003, filed as part of the record before the Prothonotary. In his affidavit, Mr. Cuplowsky deposed that the Defendant could not access any emails that had been deleted from its files and further, that contact by the Plaintiff with the Defendant's customers, suppliers and subcontractors might be injurious to the Defendant's business. Mr. Cuplowsky was not cross-examined on this affidavit. Accordingly, I conclude that the Defendant has established a legitimate basis for objecting to the questions about the emails and contact with its customers and trades people.

33 In these circumstances, I conclude that the Prothonotary did not err in upholding the Defendant's refusal to answer these outstanding questions. The questions, as posed, are too broad and represent an improper attempt to elicit information when the Plaintiff itself is unaware of any instances of actual confusion, as alleged in the pleadings.

34 In the result, I see no basis for interfering with the Order under appeal and the appeal is dismissed with costs.

ORDER

The appeal is dismissed, with costs.

HENEGHAN J.

cp/e/qw/qlklc/qlhbb

Case Name:

More Marine Ltd. v. Shearwater Marine Ltd.

In the Supreme Court of British Columbia
Admiralty Action In Rem Against
the Ships "Arctic Kapvik" and "Pacific Lure" and In Personam
Between
More Marine Ltd. and More Management Ltd., Plaintiffs, and
Shearwater Marine Ltd., AXA Pacific Insurance Company,
Continental Casualty Company (CNA Canada), M/V Arctic Kapvik,
and the M/V Pacific Lure, Defendants

[2011] B.C.J. No. 219

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[2011] I.L.R. I-5113

18 B.C.L.R. (5th) 424

94 C.C.L.I. (4th) 247

2011 CarswellBC 246

Docket: S087492

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

N.H. Smith J.
(In Chambers)

Heard: December 16, 2010.
Judgment: February 10, 2011.

(23 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Attendance -- Order to attend or re-attend -- Range of examination -- Relevancy -- Application by plaintiff for order con-

tinuing defendant's examination for discovery and compelling answers allowed -- Plaintiff examined defendant's claims adjuster, who refused to answer several questions -- Many questions required better phrasing, but defendant's objections were overly rigid -- Questions about general insurance practices, policy interpretation, names of other individuals with knowledge and whether adjuster spoke to counsel on break, though not the details of any conversations, were appropriate -- Plaintiff used half its seven allowance hours and examination was to resume anyway since adjuster had been instructed to inform himself on several matters -- Remaining time extended to four hours.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 26(1), Rule 27(22)

Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 1-3(2), Rule 7-1(1), Rule 7-1(14), Rule 7-2(2), Rule 7-2(18), Rule 7-2(22)

Counsel:

Appearing on behalf of the Plaintiffs: K. Morris and K. Kermore.

Counsel for the Respondents AXA Pacific Insurance Company and Continental Casualty Company: K.A. Wigmore.

Counsel for Island Tug & Barge Ltd.: F.C. Gaerdes.

Reasons for Judgment

1 **N.H. SMITH J.**:-- The plaintiff seeks an order requiring the continuation of an examination for discovery and compelling answers to certain questions. This action involves alleged breaches of certain marine insurance policies. The plaintiff company does not have counsel and is represented by its president, Kerry Morris.

2 On December 7, 2010, Mr. Morris conducted an examination for discovery of William Bonar, a claims adjuster employed by the defendant Continental Casualty Company ("CNA Canada"). During that examination, counsel for the defendant objected to a number of questions that Mr. Morris asked. Some of those questions were answered or taken under advisement after Mr. Morris rephrased them. There were also a number of questions that Mr. Bonar could not immediately answer and, at the conclusion of the examination, there were 27 outstanding requests for Mr. Bonar to inform himself or to produce further documents. However, there remain a number of questions that were objected to and not answered.

3 The scope of proper questioning on an examination for discovery is set out in Rule 7-2 (18) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]:

> Unless the court otherwise orders, a person being examined for discovery

(a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and

(b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

4 The new *Rules* came into effect on July 1, 2010, but the language in rule 7-2 (18) is identical to the former rule 27 (22). As Griffin J. said in *Kendall v. Sun Life Assurance Company of Canada*, 2010 BCSC 1556 [*Kendall*] at para. 7 "the scope of examination for discovery has remained unchanged and is very broad." In *Cominco Ltd. v. Westinghouse Can Ltd.* (1979), 11 B.C.L.R. 142 (C.A.) [*Cominco*], an early and leading case under the former rule, the Court of Appeal said at 151 that "rigid limitations rigidly applied can destroy the right to a proper examination for discovery." The court in *Cominco* also adopted the following statement from *Hopper v. Dunsmuir No. 2* (1903), 10 B.C.R. 23 (C.A.) at 29:

> It is also obvious that useful or effective cross-examination would be impossible if counsel could only ask such questions as plainly revealed their purpose, and it is needless to labour the proposition that in many cases much preliminary skirmishing is necessary to make possible a successful assault upon the citadel, especially where the adversary is the chief repository of the information required.

5 In *Day v. Hume*, 2009 BCSC 587 this court said at para. 20:

> The principles emerging from the authorities are clear. An examination for discovery is in the nature of cross-examination and counsel for the party being examined should not interfere except where it is clearly necessary to resolve ambiguity in a question or to prevent injustice.

6 While Rule 7-2 (18) is the same as its predecessor, the new *Rules* create a distinction that did not previously exist between oral examination for discovery and discovery of documents. The former rule 26 (1) required a party to list all documents "relating to every matter in question in the action." Although disclosure in those terms may still be ordered by the court under *Rule* 7-1 (14), the initial disclosure obligation is set out more narrowly in *Rule* 7-1(1):

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

7 Under the former rules, the duty to disclose documents and the duty to answer questions on oral examination were therefore controlled by the same test for relevance. Under the new *Rules*, different tests apply, with the duty to answer questions on discovery being apparently broader than the duty to disclose documents.

8 Although that may appear to be an anomaly, there are at least two good reasons for the difference. One reason is that if the court is to be persuaded that the broader document discovery made possible by rule 7-1(14) is appropriate in a particular case, some evidence of the existence and potential relevance of those additional documents will be required. The examination for discovery is the most likely source of such evidence.

9 The second reason relates to the introduction of proportionality as a governing concept in the new *Rules*. *Rule* 1-3 (2) states:

> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
> (b) the importance of the issues in dispute, and
> (c) the complexity of the proceeding.

10 The former rule governing discovery of documents was interpreted according to the long-established test in *Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 at 63 (C.A.):

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* -- not which *must* -- either directly or indirectly enable the party ... either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party ... either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ...

11 The new *Rules* recognize that application of a 19th century test to the vast quantity of paper and electronic documents produced and stored by 21st century technology had made document discovery an unduly onerous and costly task in many cases. Some reasonable limitations had become necessary and Rule 7-1 (1) is intended to provide them.

12 The new *Rules* also impose limitations on oral examination for discovery, but do so through a different mechanism. Rule 7-2 (2) now limits an examination for discovery to seven hours or to any longer period to which the person being examined consents. Although the test for relevance of a particular question or group of questions remains very broad, examining parties who ask too many questions about marginally relevant matters, who spend too much time pursuing unproductive trains of inquiry or who elicit too much evidence that will not be admissible at trial risk leaving themselves with insufficient time for obtaining more important evidence and admissions.

13 As Griffin J. said in *Kendall*, the time limit imposes a "self-policing incentive" on the party conducting the examination: at para. 14. At the same time, the existence of the time limit creates a greater obligation on counsel for the party being examined to avoid unduly objecting or interfering in a way that wastes the time available. This interplay was described in *Kendall* at para. 18:

> A largely "hands off" approach to examinations for discovery, except in the clearest of circumstances, is in accord with the object of the Rules of Court, particularly the newly stated object of proportionality, effective July 1, 2010. Allowing wide-ranging cross-examination on examination for discovery is far more cost-effective than a practice that encourages objections, which will undoubtedly result in subsequent chambers applications to require judges or masters to rule on the objections. It is far more efficient for counsel for the examinee to raise objections to the admissibility of evidence at trial, rather than on examination for discovery.

14 I do not intend to individually review and rule on each question that was objected to. It is apparent on reading the transcript that many of Mr. Morris' questions could have been more appropriately phrased, but many of the objections are examples of what the court in *Cominco* called at 151 "rigid limitations rigidly applied." It is also apparent that objections often gave rise to arguments between Mr. Morris and counsel that occupied a significant portion of the time.

15 Some of the questions objected to relate to general practices in the insurance industry or within the defendant insurance company. I consider those questions to be proper and relevant for the same reason similar questions were found to be relevant in *Kendall*-they permit the plaintiff to probe into the issue of whether the defendants' handling of the plaintiff's claim was reasonable and fair.

16 There were also a number of questions objected to because they called for interpretation of the insurance policies at issue. I agree that the questions were not properly stated in that they simply asked the witness to state the meaning of certain words in the policy or other document. However, all of them can be easily restated (and may have been if a less obstructive approach had been taken) as questions asking how the provisions are normally applied in certain situations or how they were applied in relation to the plaintiff's claims.

17 There are some questions that require specific comment. Questions 62 through 70 relate to Mr. Bonar's knowledge of and communication with a former employee. At one point, counsel stated that Mr. Bonar "isn't here to help you locate another witness." In fact, that is one of the explicit purposes of the examination for discovery, as set out in *Rule* 7-2 (18) (b):

> (18) Unless the court otherwise orders, a person being examined for discovery
>
> ...
>
> (b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

18 In a similar vein, Mr. Bonar was asked for the names of individuals within the company to whom he reported or who approved claims above the amount he was authorized to approve. The

pleadings allege various failures to pay claims as required by the policies. The reasons for the defendants' decisions, the facts on which those decisions were based and the process by which the decisions were arrived at are all potentially relevant and the plaintiff is entitled to know the names of individuals who might have been involved in those decisions.

19 Following a brief recess, Mr. Moore asked if Mr. Bonar discussed his testimony with counsel during the break. That question was objected to. Clearly, Mr. Moore is not entitled to ask about the content of any conversation between the witness and counsel. But, in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* (1992), 72 B.C.L.R. (2d) 240 the court said counsel should refrain from discussion with the witness on such occasions. The question of whether any such discussion took place is therefore a proper one, although solicitor-client privilege will prevent any further exploration of the topic.

20 There are some questions that Mr. Bonar is not required to answer, at least not in the form they were asked. For example, at one point Mr. Moore summarizes what he understood the preceding evidence to be. While he can quite properly ask if the summary is accurate, the form in which he posed the question ("and you expect me to believe that, is that correct?") is clearly improper.

21 As said above, I have not attempted to list and rule on all of the questions objected to. Some of them may effectively be answered, notwithstanding the objection, in documents the defendant was asked to produce or in the context of matters on which Mr. Bonar was asked to inform himself. I have attempted to give the parties some guidance in how a resumed examination should proceed with a minimum of interference by counsel for the defendant. The plaintiff will bear the adverse consequences if the allowable time is not used efficiently to elicit evidence that will be relevant and admissible at trial. However, if further assistance is needed in regard to specific questions, the parties will be at liberty to apply.

22 The transcript indicates that the discovery of Mr. Bonar lasted approximately four and a half hours, including over an hour in breaks. Mr. Moore has therefore used half of the seven hours permitted by *Rule* 7-2 (2). Even in the absence of a dispute over questions, he would have the right to resume the examination because of the number of matters on which Mr. Bonar was asked to inform himself. *Rule* 7-2 (22) says:

> (22) In order to comply with subrule (18) or (19), a person being examined for discovery may be required to inform himself or herself and the examination may be adjourned for that purpose.

23 In view of the time that was taken by objections and arguments arising from those objections, I find that the time remaining for a continued examination should be extended to four hours and I order that the examination resume on that basis. The plaintiff will have costs of this application in any event of the cause.

N.H. SMITH J.

cp/e/qlrds/qlvxw/qlcas/qlana/qlhcs

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Attorney General of Ontario et al. v. Stavro et al. Ornest et al., Intervenors

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1995 CarswellOnt 1332

No. C22084

Court of Appeal for Ontario,

Labrosse, Doherty and Austin JJ.A.

Heard: September 28, 1995
Judgment: October 20, 1995

Counsel:

Frank J.C. Newbould, Q.C., and Benjamin T. Glustein, for appellants (plaintiffs).

Thomas R. Lederer and Melanie Sopinka, for respondents (defendants), Steve A. Stavro, John Donald Crump and Terence V. Kelly, executors of the estate of Harold Edwin Ballard.

Jeffrey S. Leon and Maureen Helt, respondent (defendant), for MLG Ventures Ltd.

Bernard McGarva, for respondent (defendant), Maple Leaf Gardens Ltd.

Brian P. Bellmore, for respondent (defendant), Knob Hill Farms Ltd.

Thomas McRae, for intervenors.

---

1 BY THE COURT:-- The appellants (plaintiffs) appeal from the order of the motion judge dismissing two motions brought pursuant to rule 30.10(1) of the Rules of Civil Procedure seeking production of documents in the possession, control or power of four non-parties to this action. Two of the non-parties did not oppose the motions.

2 Briefly stated, the action is with respect to issues dealing with the fiduciary duties of the executors in dealing with assets of the estate of Harold E. Ballard, deceased.

3 The Rule provides as follows:

> 30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
>
> (a) the document is relevant to a material issue in the action; and
> (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

4 The motion judge found that the documents were relevant to material issues in the litigation. He then proceeded to consider whether it would be unfair to require the appellants to proceed to trial without having discovery of those documents. After alluding to a number of factors relevant to that determination, the motion judge turned to the importance of the documents in the litigation. He referred to this consideration as the "most important factor" in the fairness assessment. After reviewing the authorities he said [p. 44 ante]:

> The evidence sought must be vital or crucial and such that the moving party cannot adequately prepare its case for trial without access to such documents.

5 The appellants submit that in holding that the documents must be "vital" or "crucial" to their preparation for trial, the motion judge departed from the test set out in rule 30.10(1).

6 We agree. The fairness assessment required by rule 30.10(1) (b) is made only after the documents are found to be relevant to a material issue. By requiring that the documents be "vital" or "crucial" before it could be said that it would be unfair to refuse their production, the motion judge combined the separate considerations identified in rule 30.10(1)(a) and (b) into a single test which imposed a higher standard of materiality than that contemplated by the rule. The rule envisions cases where it will be unfair to require a party to proceed to trial without the production of relevant documents even though those documents are not crucial or vital to that party's preparation for trial. By limiting the production of documents to those found to be vital or crucial, the trial judge elevated the materiality standard in rule 30.10(1)(a) and effectively neutered the fairness assessment demanded by rule 30.10(1)(b).

7 The motion judge did refer to various factors which could be relevant to the inquiry required by rule 30.10(1)(b). He then proceeded, however, to consider the significance of the documents in the litigation to the virtual exclusion of all other factors in determining whether it would be unfair to require the appellants to proceed to trial without production of the documents. In doing so, he erred.

8 In holding that the motion judge erred, we do not suggest that the importance of the documents in the litigation is not relevant to the fairness assessment required by rule 30.10(1) (b). In Metropolitan Life Insurance Co. v. Frenette, [1992] 1 S.C.R. 647, 89 D.L.R. (4th) 653, the defendant sought production of medical records referable to the plaintiff's mental condition before his death. In considering a provision of the Quebec Code of Civil Procedure, R.S.Q., c. C-25, which was said to be analogous to rule 30.10 (p. 690), L'Heureux-Dubé J. said at p. 685:

> Otherwise, judges must exercise their discretion under art. 402 C.C.P. according to the degree of relevance and importance of the information sought relative to the issue between the parties. In exercising that discretion, a court must weigh the diverse interests in conflict.

(Emphasis added)

9 Clearly, if a moving party can show that the documents requested are crucial to its preparation for trial, that party has gone a long way to demonstrating that it would be unfair to require the party to proceed to trial without production of those documents. It does not, however, follow that absent a demonstration that the documents are crucial to the litigation, the moving party cannot demonstrate that it would be unfair to require that party to proceed to trial without production of the documents. The importance of the documents requested is a factor, but only one factor to be considered in making the determination required by rule 30.10(1)(b).

10 The appellants submitted that if we concluded that the motion judge applied the wrong test in denying production that we should vacate that order and require production.

11 We do not agree. An order requiring production should be made only after a full consideration of all of the relevant factors. The motion judge, who is case managing this complex litigation, is in a much better position than this court to determine whether fairness requires production of all, some or none of the demanded documents at this stage of the litigation. In our view, the policy underlying the case management system is best served by remitting the matter to the motion judge for a determination of the merits.

12 In making the fairness assessment required by rule 30.10(1) (b), the motion judge must be guided by the policy underlying the discovery régime presently operating in Ontario. That régime provides for full discovery of, and production from parties to the litigation. It also imposes ongoing disclosure obligations on those parties. Save in the circumstances specifically addressed by the Rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production. By its terms, rule 30.10 assumes that requiring a party to go to trial without the forced production of relevant documents in the hands of non- parties is not per se unfair.

13 The discovery process must also be kept within reasonable bounds. Lengthy, some might say interminable, discoveries are far from rare in the present litigation environment. We are told that discovery of these defendants has already occupied some 18 days and is not yet complete. Unless production from and discovery of non-parties is subject to firm controls and recognized as the exception rather than the rule, the discovery process, like Topsy, will just grow and grow. The effec-

tive and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit.

14 The motion judge was properly concerned about the ramifications of a production order in this case. Many litigants, especially those involved in complex commercial cases, find themselves in the position where non-party financial institutions are in possession of documents which are relevant to material issues in the litigation, and which those institutions cannot, or will not, voluntarily produce prior to trial. If this situation alone is enough to compel production during the discovery stage of the process, then production from and discovery of non-parties would become a routine part of the discovery process in complex commercial cases. It may be that it should be part of that process, but that is not the policy reflected in the rules as presently drafted.

15 In deciding whether to order production in the circumstances of this case, the factors to be considered by the motion judge should include:

-- the importance of the documents in the litigation;

-- whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;

-- whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;

-- the position of the non-parties with respect to production;

-- the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;

-- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject-matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

16 In addressing these and any other relevant factors (some of which were identified by the motion judge in his reasons), the motion judge will bear in mind that the appellants bear the burden of showing that it would be unfair to make them proceed to trial without production of the documents.

17 In our opinion, a consideration of some of these factors will require an examination of the documents as contemplated by rule 30.10(3). That rule provides in part:

> 30.10(3) . . . where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

18 For example, in considering whether it would be unfair to require the appellants to wait until trial to obtain the documents, the number, content and authorship of the documents may be very important. Those facts could be ascertained only from an examination of the documents or perhaps from an examination of an appropriate summary prepared by those in possession of the documents. Similarly, the importance or unimportance of the documents in the litigation may best be determined by an examination of them.

19 We recognize that this process will be time consuming and will place an additional burden on the motion judge. We are satisfied, however, that in the circumstances of this case and considering the material filed on the motions, that an informed decision requires an examination of the documents. A decision made without reference to the documents runs the very real risk of being either over- or under-inclusive. No doubt, as the case management judge, the motion judge will have a familiarity with the case which will facilitate his review of the documents.

20 In the result, the appeal is allowed, the order made by the motion judge is set aside, and the matter is remitted to the motion judge for further consideration in accordance with the principles outlined above. The costs of this appeal and of the motion below are left to the motion judge.

Appeal allowed.

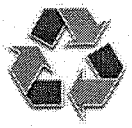
Civil Justice Reform Project

Summary of Findings & Recommendations

Honourable Coulter A. Osborne, Q.C.

November 2007

This report is available online at:
www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp



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Civil Justice Reform Project

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19. PROPORTIONALITY AND COSTS OF LITIGATION

I referred to the proportionality principle in the introduction to this Summary of Findings and Recommendations. Although this section is somewhat repetitious, the issue of proportionality is central to this undertaking. Proportionality, in the context of civil litigation, simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake. It should be expressly referenced in the Rules of Civil Procedure as an overarching, guiding principle when the court makes any order.

In my view, the civil justice system somehow has to recognize the principle of proportionality as having a broad application to all civil proceedings, so that courts and parties deal with cases in a manner that reflects what is involved in the litigation, its jurisprudential importance and the inherent complexity of the proceeding. To that end, costs rules should be amended to clearly direct courts to consider, in awarding costs at the conclusion of a proceeding, not only what time and expense may be involved in the proceeding but also what time and expense were justified, given the circumstances of the case.

In addition, counsel should as a matter of routine provide clients with a pro forma budget setting out, albeit in a somewhat imprecise way, the estimated cost (legal fees and disbursements, including expert witness fees) of commencing or defending a proceeding. Periodic updates should also be provided. There is, of course, no need for this in personal injury litigation where contingency fee arrangements are typical. Nor would this requirement be applicable to defence counsel retained by property (casualty) insurers who have developed their own methods of controlling solicitor and client cost exposure.

I stop short of specifically recommending that distributive cost orders (based on a party's relative success in the litigation) should be open to the court to a degree that does not apply now. It does, however, seem odd that a litigant who raises eight issues and loses on seven of them should receive a full set of costs if successful only on issue eight. Perhaps

the settlement offer provisions of the rules provide a good enough answer. It is my hope that the Civil Rules Committee will see fit to revisit this issue.

Recommendations (Proportionality)

- **The Rules of Civil Procedure should include, as an overarching principle of interpretation, that the court and the parties must deal with a case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding.**

- **Counsel should be required to prepare a litigation budget and review it with a client prior to commencing or defending any proceeding. This budget should be updated at least when examinations for discovery are completed. The Law Society of Upper Canada should also consider making this an express requirement for the profession under the Rules of Professional Conduct.**

- **The Civil Rules Committee should consider whether rule 57.01 should be amended to add, as a factor for the court to consider when making a cost award, the relative success of a party on one or more issues in the litigation in relation to all matters put in issue by that party. I make this recommendation not in the context of distributive cost orders (a subject on which the Court of Appeal has spoken), but rather in the context of court time which has been wasted in advancing frivolous claims or defences. It is one thing to advance claims or defences that manifestly have no merit. It is another thing to waste time doing it. Perhaps rule 57.01 (1) (e) is broad enough to capture my concern. I leave that to the Rules Committee.**

Indexed as:

Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co.

Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co., Admiral Leaseholds Ltd., Currie Products Ltd., De Leuw Cather Canada Ltd., M.M. Dillon Ltd., Golder Associates (Eastern Canada) Ltd., Algonquin College of Applied Arts and Technology, Vocisano, 170 Lees Avenue Apartments Ltd., Lee Place, Trayash Construction Ltd., Carleton Condominium Corp. No. 292 and The Queen in right of Ontario

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41 O.A.C. 65

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22 A.C.W.S. (3d) 1028

Action Nos. 15586/86 and 253/90

Ontario
High Court of Justice, Divisional Court

O'leary, Southey and Sutherland JJ.

September 17, 1990.

Counsel:

R. Bruce Smith, for plaintiff/appellant.

Douglas W.J. Smyth, for Algonquin College of Applied Arts and Technology, respondent.

The judgment of the court was delivered by

1 O'LEARY J.:-- This is an appeal from the order of Montgomery J. [reported (1989), 71 O.R. (2d) 155, 64 D.L.R. (4th) 574] requiring the plaintiff (appellant) to produce, for inspection by the defendants, photocopies of published articles and public records obtained by the plaintiff for its solicitor's trial brief, from public files or sources that are also available to defence counsel. There are two categories of documents which are the subject-matter of this appeal:

1. Copies of corporate search documents collected at the request of the plaintiff's solicitors for the purpose of this litigation from public files or from information also available to the defendants. These documents were collected amongst other reasons in order that the solicitors would know the names of those who were officers and servants of the defendants at material times in the past in order to determine who should be interviewed for information.
2. Copies of articles and papers, the result of literature searches compiled by the plaintiff's solicitors with the assistance of its environmental consultant, Conestogo-Revers and Associates.

2 The Rules of Civil Procedure, O. Reg. 560/84, read in part:

> Disclosure
>
> 30.02(1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

3 It should be pointed out that the argument proceeded before us on the basis that the documents in question are all of a nature that requires their disclosure under rule 30.02(1) even though many of them are copies of documents that could not become evidence at the trial. I have not considered, then, the question as to whether some of the documents need not have been disclosed in the affidavit of documents.

4 Montgomery J. said [p. 156 O.R.] the question before him was, "Are photocopies obtained for a solicitor's trial brief from public files or sources otherwise available to opposing counsel privileged?". He then referred to the decision of the British Columbia Court of Appeal in Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132 (C.A.), quoting from McEachern C.J.B.C. at p. 138 W.W.R.:

> In my view it is highly desirable to maintain the sanctity of the solicitor's brief which has historically been inviolate. The cases are replete with explanations for such a privilege.

And quoting also from the dissenting reasons of Craig J.A. at p. 150 W.W.R.:

> The headnote in the report of Waugh (Waugh v. British Railways Board, [1980] A.C. 521, [1979] 3 W.L.R. 150, [1979] 2 All E.R. 1169 (H.L.)) to which I have referred above, accurately sets out what I think is the ratio of the case:

> "The court was faced with two competing principles, namely that all relevant evidence should be made available for the court and that communications between lawyer and client should be allowed to remain confidential and privileged. In reconciling those two principles the public interest was, on balance, best served by rigidly confining within narrow limits the privilege of lawfully withholding material or evidence relevant to litigation. Accordingly, a document was only to be accorded privilege from production on the ground of legal professional privilege if the dominant purpose for which it was prepared was that of submitting it to a legal advisor for advice and use in litigation."

[Emphasis original]
And at p. 151 W.W.R.:

> 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".

5 Montgomery J. stated he preferred to follow the opinion expressed by Craig J.A. and held that the documents in question were not privileged from production.

6 The starting point in any discussion of the extent of solicitor's privilege as applied to copies of documents in his possession is generally considered to be Lyell v. Kennedy (No. 3) (1884), 27 Ch. D. 1, [1881-5] All E.R. Rep. 814, 53 L.J. Ch. 937 (C.A.). Speaking for the Court of Appeal, Cotton L.J. stated at p. 26 Ch. D.:

> 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.

7 Bowen L.J. stated at p. 31 Ch. D.:

> A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of

them without asking for the key to the labour which the solicitor has bestowed in obtaining them.

8 In Watson v. Cammell Laird & Co. (Shipbuilders & Engineers) Ltd., [1959] 1 W.L.R. 702, [1959] 2 All E.R. 757, [1959] 2 Lloyd's Rep. 175 (C.A.), where the solicitors for the plaintiff had prepared a copy of hospital records regarding the plaintiff's treatment but the defendant had been denied access to the records and the defendant sought production of the copy Lord Evershed M.R. stated at pp. 703-05 W.L.R., p. 758 All E.R.:

> ... the facts are clear. This document, this copy of the case notes, was, admittedly, prepared by the solicitors for the plaintiff after the litigation had either commenced or was clearly contemplated. Also it is not in doubt that the document was prepared by the solicitors for the purpose of assisting and advising the plaintiff in connexion with his claim.
>
> Prima facie, therefore, it would appear clear that the document is privileged, being of the class which is described in the ANNUAL PRACTICE, 1959, in the notes at p. 691, that is, copies which have come into existence or have been made
>
> "for the purpose of obtaining for or furnishing to the solicitor evidence to be used in the litigation, or information which might lead to the obtaining of such evidence ..."
>
> It was, however, contended with vigour by counsel for the defendants that that general rule ought not to apply where the document was a mere verbatim copy of a document not itself the subject of privilege, because, he says, the making of such a copy involves in itself no exercise of skill, properly so called. He says that if the solicitor had exercised some kind of eclectic judgment in making the copy, leaving out bits that were irrelevant or unhelpful, then it would be another matter; and that, since the actual case notes would be liable to be produced at the trial, on service of a subpoena duces tecum on the appropriate hospital officer, and since, therefore, the original would never be privileged, in any proper sense, so a mere verbatim copy can be in no better position. I am unable to accept that view. The question of privilege does not really have any significance in regard to the original: that is a document which is not, and never has been, in the possession or power of the plaintiff. It is a document which is in the possession of a third party; and, undoubtedly, by the appropriate means it can be produced at the trial. But that fact seems to me to have very little to do with the question whether this copy document did or did not come into existence in the way I have indicated, namely, by being obtained by the solicitor for the purpose of advising his client in regard to the litigation.

9 The principle enunciated in England in Lyell v. Kennedy and Watson v. Cammell Laird and in like cases has been followed in Canada. In Hoyle Industries Ltd. v. Hoyle Twines Ltd., [1980] C.T.C. 501, 80 D.T.C. 6363 (F.C. T.D.), Collier J. at p. 503 C.T.C. said in regard to copies of telex

messages the clients had at the solicitor's request obtained from third parties and had given to the solicitor:

> This was, it appears to me, necessary for the solicitor to advise the clients as to their position. It was contended by the Crown that no privilege attached to the originals in the first instance; therefore no privilege could attach to the copies obtained at a later date. I agree, speaking generally, that copies of non-privileged documents are themselves not privileged.
>
> But there are situations where the copies may, and in particular circumstances, acquire the category of privilege. See Lyell v. Kennedy, (1884) 27 Ch D 1. I quote from the head note:
>
> "Held (affirming Bacon, VC), that although mere copies of unprivileged documents were themselves unprivileged, the whole collection, being the result of the professional knowledge, skill, and research of his solicitors, must be privileged -- any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case."
>
> That principle, in my view, applies in this case. The whole file, including the copies of the telexes, is privileged, and will be returned to the solicitors.

10 In Hodgkinson v. Simms, supra, McEachern C.J.B.C. said at p. 145-46 W.W.R.:

> Considering the purpose for privilege, I see no reason why a collection of copy documents which satisfy all the requirements of Voth (Voth Brothers Construction (1974) Ltd. v. North Vancouver School District 44 (1981), 29 B.C.L.R. 114, 23 C.P.C. 276, [1989] 5 W.W.R. 91 (C.A.)), including literal creation, should not be privileged even though the uncollected originals are not privileged because they do not satisfy the same test.
>
> 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.
>
> I reach this conclusion because of the authorities cited which state the law accurately and authoritatively and because this does no violence to the dominant purpose rule established by Waugh and Voth, both supra. This conclusion merely extends the application of that rule to copies made for the dominant purpose of litigation. It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test (Voth) as would be applied to the

> original documents of which they are copies. In some cases the copies may be privileged even though the originals are not.
>
> . . . . .
>
> Mr. Walsh adds a further argument with which I respectfully agree. He says that what the defendants seek is not just to look at these copy documents but also to look into counsel's mind to learn what he knows, and what he does not know, and the direction in which he is proceeding in the preparation of his client's case. That, in my view, would be a mischief that should be avoided.

11 The reference by McEachern C.J.B.C., in the passages just quoted, to Waugh v. British Railway Board, [1980] A.C. 521, [1979] 2 All E.R. 1169, [1979] 3 W.L.R. 150 (H.L.) and Voth Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44 (1981), 29 B.C.L.R. 114, 23 C.P.C. 276, [1981] 5 W.W.R. 91 (C.A.), relate to the rule that has been applied in England and in Canada that for any document, be it an original document or a copy thereof to be privileged, the dominant purpose for which it was prepared must have been that of submitting it to a solicitor for advice and use in litigation.

12 It follows that neither an original document nor a copy thereof becomes privileged simply because it gets into the hands of a solicitor. It is only where the original itself was prepared with the necessary dominant purpose or the copy thereof was prepared with the requisite purpose that the original or copy respectively are privileged.

13 There is no suggestion in any of the cases that an original document not prepared with the relevant dominant purpose and so not privileged can become privileged because a copy of such document is prepared and given to a solicitor. In my view, the concern of Craig J.A. in Hodgkinson and expressed in his words already quoted [p. 151 W.W.R.], "I fail to comprehend how original documents which are not privileged ... can become privileged simply because counsel makes photostatic copies of the documents and puts them in his 'brief' " is without foundation.

14 It was not suggested in Hodgkinson nor is it suggested in the case before us that the making of a copy and the giving of it to a solicitor clothes the original document with privilege. What the cases have held is that if the copy has been prepared with the requisite dominant purpose then the copy, but not the original, is privileged.

15 The task that Montgomery J. was faced with and is now mine is often described as the drawing of the proper line between privilege and full disclosure. It might be better described as the duty of the court to ensure, not just in a particular case, but in the long term and for cases generally, that there be the maximum disclosure that our adversarial system of litigation allows.

16 I have little doubt if one looks no further than this immediate case, that production of the documents in question would save the defendants enormous expense in preparing their cases, would tend to focus the attention of the defendants and their solicitors on the real issues in the case, would decrease the time needed to prepare for pre-trial and trial and might even increase the chances of settlement. These prospects make it very tempting in a case of this kind to do what is expedient and order production of the documents in question.

17 In my view, however, any benefit that might flow to the parties and the court in this case by ordering such production would be gained at the expense of serious interference with our adversarial system of justice and would reduce the likelihood of full and early disclosure in future cases.

18 The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel. See Kevin M. Claremont, "Surveying Work Product" (1983), 68 Cornell L.R. 760, pp. 784-88.

19 I agree in particular with the author's words at p. 788:

> Serving justice by ordering discovery in one case may ultimately hinder it by discouraging attorney preparation in later cases.

20 In my view, the reasons for maintaining the privilege of a solicitor's trial brief are compelling and the documents here in question ought to be exempt from production.

21 I recognize, of course, that through amendments to the rules, some of the solicitor/client privilege that once existed (including some of the privilege that at one time attached to the solicitor's brief) has been removed. For example, names and addresses of witnesses must now be disclosed. The fact only a portion of such privilege has been taken away by the rules confirms, I believe, that the balance of the privilege is required to preserve the integrity of the adversarial system.

22 I would allow the appeal.

Appeal allowed.