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 Canadian Distributed Antenna Systems Coalition ("CANDAS") for certain orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for an Order requiring further and better answers to Interrogatories delivered to Toronto Hydro-Electric System Limited.

BOOK OF AUTHORITIES OF THE MOVING PARTY

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

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

Order accordingly.

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

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

Court File No. C29463

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Norma M. Priday, for respondent, Denis Pilotte.

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

BACKGROUND FACTS

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

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

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

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

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

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

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

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

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

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

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

Judgment of Kurisko J.

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

1. Communications between Eryou and General Accident

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

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

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

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

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

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

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

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

5. The Pilotte Statement

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

6. The Pilotte Videotape

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

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

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

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

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

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

ANALYSIS

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

Litigation privilege

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

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

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

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

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

RATIONALE FOR LITIGATION PRIVILEGE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And at p. 589:

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

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

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

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

[38] 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.

[39] 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.

[40] 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.

[41] 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

[42] 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.

[43] 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.

[44] 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 (C.A.) at pp. 483-84:

> 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.

[45] 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 Co.*, 642 F.2d 1285 (S.C.C.A. 1980) 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.]

[46] 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.) [reported 61 C.P.R. (3d) 137]; *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* (1998), 61 Alta. L.R. (3d) 38 (Q.B.); *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.); *Lehman v. Insurance Corporation of Ireland* (1983), 40 C.P.C. 285 (Man. 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 (Trial Division), released November 17, 1998 [reported [1999] 1 F.C. 507]; *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13, 138 D.L.R. 221 (Ont. C.A.).

Application of principles to the disputed categories

[47] I will depart somewhat from Kurisko J.'s categories of communication in order to relate them more directly to my legal analysis.

[48] There is no question that all communications between Eryou and General Accident are protected by solicitor-client privilege, there being no indication of waiver.

[49] The more contentious issue is whether communications between Bourret and Eryou or Bourret and General Accident are privileged.

[50] 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.

[51] 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.

[52] 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 interests of the determination of truth is served by production without effect upon the fundamental protection afforded to solicitor-client communications.

[53] 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.

[54] 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.

[55] 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.

[56] 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.

[57] 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.

[58] 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.

[59] 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.

[60] 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

[61] 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.

[62] 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

[63] 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.

[64] 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 Denis Pilotte on May 23, 1995 to the lawyer for the insurers (the "May 23rd statement") protected against production by the insurers' litigation privilege?
- Is a copy of the May 23rd 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?

[65] 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 issue. I respectfully dissent from their conclusion on the second. I would hold that the insurers are obliged to produce the statement.

[66] 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), 67 C.C.C. (3d) 289 at 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.

[67] 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

[68] 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 case of reference, I will refer only to General Accident when speaking of the respondent insurers. The respondent, Denis 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.

[69] On November 15, 1994, a fire caused extensive damage to the Chrusz hotel. Mr. M. Cook, the senior claims examiner for General Accident, immediately retained Mr. Bourret to investigate the circumstances surrounding the fire. On November 16, 1994, Mr. Bourret reported to Mr. Cook that "the fire may have been deliberately set and that arson was suspected".[1] His suspicion was based on the finding of traces of an accelerant in the bar area of the hotel. That part of the hotel had been leased by Chrusz to a tenant.

[70] 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.

[71] 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]

[72] 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 $100,000.00 in partial payment of the claim. In April 1995, General Accident agreed to advance a further $505,000.00 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.

[73] On May 23, 1995, matters took a dramatic turn. Mr. Pilotte made a lengthy statement under oath to Mr. Bourret and Mr. Eryou. Although privilege is claimed with respect to the statement, subsequent events make it clear that Mr. Pilotte made allegations that Chrusz was attempting to dishonestly inflate his insurance claim.[3] Mr. Pilotte also turned over a videotape and certain business records to Mr. Eryou. According to Mr. Pilotte, he made these disclosures on his own initiative to clear his conscience and for no other reason. Mr. Pilotte had been fired by Chrusz about four months earlier.

[74] 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.

[75] 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.

[76] On November 14, 1995, Chrusz filed a statement of defence and denied the allegations. Chrusz also counterclaimed against General Accident, Mr. Bourret and his company. In addition to claiming that General Accident had breached its obligations under the insurance contract, Chrusz alleged that General Accident had improperly relied on the "reckless, uncorroborated and malicious" statements of Mr. Pilotte. The counterclaim also made 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

[77] 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. taxes, 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.

[78] 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.

[79] A transcript of Mr. Pilotte's May 23rd 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

[80] The reasons of Kurisko J. are reported at (1997), 34 O.R. (3d) 354, 12 C.P.C. (4th) 150, 44 C.C.L.I. (2d) 122. The reasons of the Divisional Court are reported at (1998), 37 O.R. (3d) 790.

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

[82] 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.

[83] 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 $100,000.00 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.

[84] 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.

[85] 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.

[86] 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.

[87] 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

[88] 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 84, *per* Murphy J. (H.C.); N. Williams "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58 Can. Bar Rev. 1 at 37-38. In *Gruenke*, *supra*, at 304-6 Lamer C.J.C. referred to client-solicitor privilege as one of the few blanket or class privileges known to our law. The Chief Justice distinguished class or blanket privilege from other privileges which are determined on a case-by-case basis. The former operate (subject to certain exceptions) whenever the criteria for their existence are established. The operation of the latter depend on the

totality of the circumstances of each case. Obviously, the operation of class or blanket privileges can result in the exclusion of valuable evidence. No doubt this explains why there are so few class privileges recognized in our law.

[89] The criteria for the existence of client-solicitor privilege are well-established. In *Descôteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 at 398, 141 D.L.R. (3d) 590 (S.C.C.), and again very recently in *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 at 288, 171 D.L.R. (4th) 193 (S.C.C.), 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.

[90] 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 34; *Grant v. Downs* (1976), 135 C.L.R. 674 (H.C.) at 686; R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham: Butterworths, 1993) at 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.

[91] 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 649; *Smith v. Jones* (1999), 22 C.R. (5th) 203 at 217, 169 D.L.R. (4th) 385, *per* Cory J.; J.W. Strong, ed., *McCormick on Evidence*, 4th ed. (St. Paul, Minn.: West Publishing Co. 1992), vol. 1 at 353.

[92] 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: *Geffen v. Goodman* . (1991), 81 D.L.R. (4th) 211 at 231-32, *per* Wilson J. (S.C.C.); *Solosky v. The Queen* (1979), 50 C.C.C. (2d) 495 at 510, 105 D.L.R. (3d) 745 (S.C.C.); *Descôteaux v. Mierzwinski*, *supra*, at 413-14; *R. v. Beharriell* (1995), 103 C.C.C. (3d) 92 at 107-108, 130 D.L.R. (4th) 422, *per* L'Heureux-Dubé J. (concurring) (S.C.C.); *R. v. Shirose*, *supra*, at 288; *Baker v. Campbell*, *supra*, at 118-20, *per* Deane J.

[93] 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.]

[94] 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.

[95] 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 (B.C.C.A.) at 302-4 and 307-8, *per* Esson J.A.

[96] 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 preexisting 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.

[97] The confidentiality of the communications is an underlying component of each of the purposes which justify client-solicitor privilege. In *McCormick*, *supra*, at 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.

[98] 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 620-21, 72 D.L.R. (4th) 478; *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622 at 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 refer 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.

[99] Unlike some courts, (eg. *Somerville Belkin Industries Ltd. v. Brocklesby Transport*, [1985] 6 W.W.R. 85 (B.C.S.C.) at 88), 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 Ins. Co. of New York*, [1944] O.R. 328 at 334, [1944] 3 D.L.R. 147, *per* Robertson C.J.O. (C.A.); *Walters v. Toronto Transit Commission* (1985), 50 O.R. (2d) 635 (H.C.) at 637-38. 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.

[100] 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.

[101] 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 $100,000.00 on the policy shortly after January 9, 1995. To the extent that the inference of intended confidentiality turned on the existence of the suspicion of arson, the onus was on General Accident to establish that the suspicion continued over the period for which it claims privilege. I am not prepared to assume that the suspicion continued from the day after the fire until some indeterminate point in the future.

[102] 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

[103] 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.

[104] Claims for client-solicitor privilege, unlike claims for litigation privilege, are usually framed in terms of communications directly between a client and a solicitor. It is, however, well-settled that client-solicitor privilege can extend to communications between a solicitor or a client and a third party:[4] *Bunbury v. Bunbury* (1839), 48 E.R. 1146; *Russell v. Jackson* (1851), 68 E.R. 558; *Hooper v. Gumm* (1862), 70 E.R. 1199; *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675 at 682, *per* Jessel M.R.; *Jones v. Great Central Railway Co.*,

[1910] A.C. 4 (H.L.); *Susan Hosiery Ltd. v. M.N.R.*, *supra*, at 36; *Goodman & Carr v. Minister of National Revenue*, [1968] 2 O.R. 814 (H.C.) at 818; *Alcan-Colony Contracting Ltd. v. Minister of National Revenue*, [1971] 2 O.R. 365 at 368, 18 D.L.R. (3d) 32 (H.C.); *International Minerals & Chemical Corp. v. Commonwealth Insurance Co.* (1991), 89 Sask. R. 1 (Sask. Q.B.) at 7-8; *Smith v. Jones*, *supra*, at 208-210, *per* Major J. (dissenting); Attorney-Client Privilege, 139 A.L.R. 1250.

[105] 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 73-79; G. Watson and F. Au, *Solicitor-Client Privilege and Litigation Privilege in Civil Litigation* (1998), 77 Can. Bar Rev. 315 at 346-349.

[106] 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.

[107] 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.

[108] *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.]

[109] *Wheeler* has not escaped academic criticism: see J.D. Wilson, *Privilege in Experts' Working Papers* (1997), 76 Can. Bar Rev. 346 at 361-365. 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 690-91; *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.) at 762-3; *Susan Hosiery Ltd. v. M.N.R.*, *supra*, at 31-32; *R. v. Littlechild* (1979), 51 C.C.C. (2d) 406 at 411-12, 108 D.L.R. (3d) 340 (Alta. C.A.); *C-C Bottlers Ltd. v. Lion Nathan Ltd.*, [1993] 2 N.Z.L.R. 445 (H.C.) at 447-48.

[110] 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.

[111] The privilege also extends to communications and circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor. In doing so, the third party makes the information relevant to the legal issues on which the solicitor's advice is sought. For example, in *Susan Hosiery Ltd. v. M.N.R.*, *supra*, the client's financial advisers who communicated with the lawyer were intimately familiar with the client's business. At the client's instruction, they met with the solicitor to convey information concerning the business affairs of the client. They were also instructed to discuss possible arrangements of those affairs presumably to minimize tax consequences. In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer.

[112] 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.

[113] The majority of the Supreme Court of Canada (*per* Cory J. at 217) 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.

[114] 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. 210:

> 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.

[115] 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 (1951) at 31 (California Supreme Court):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Litigation Privilege Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

[166] 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.

[167] 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.

[168] 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, 55 D.L.R. (3d) 224, and *R. v. Gruenke*, [1991] 3 S.C.R. 263. I am concerned that a balancing test would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation.

[169] 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* (1998), 132 C.C.C. (3d) 225 at 239, 169 D.L.R. (4th) 385 (S.C.C.):

> 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.]

[170] 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. 242. 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 p. 240.

[171] 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 nonprivileged 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 (N.S.W.S.C.), persuasive. However, since that issue does not arise in this case, I would prefer to leave the question open.

[172] In all other respects, I agree with the reasons of Carthy J.A. and with his disposition of the appeal.

Order accordingly.

ENDNOTES

DOHERTY J.A.

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.

2 In their affidavits, both Mr. Cook and Mr. Bourret suggest that reports after December 1, 1994 were sent directly to Mr. Eryou. The documents referred to in their affidavits, however, indicate that the third report dated January 12, 1995 was the first report sent directly to Mr. Eryou.

3 The transcript of Mr. Pilotte's statement was ordered sealed by Kurisko J. A sealed copy of the transcript was filed with this court. It fills some 198 pages and is in a question and answer format. The questioning extended over two days.

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

5 See *McCormick*, *supra* at 317-18, footnote 18. This definition has been adopted in several states: eg. Arkansas, North Dakota, South Dakota and Hawaii.

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.

7 The Law Reform Commission of Canada recommended a similar qualification of the litigation privilege in its *Report on Evidence*, 1977 at p. 31. The authors described the proposed privilege in these terms:

"A person has a privilege against disclosure of information obtained or work produced in contemplation of litigation by him or his lawyer or a person employed to assist the lawyer, unless, in the case of information, it is not reasonably available from another source, and its probative value substantially outweighs the disadvantages that would be caused by its disclosure."

8 Kurisko J. provided such control in this case in reasons released on November 14, 1997, His order was affirmed by the Divisional Court on July 20, 1998.

9 Although the statement was ordered sealed by Kurisko J., his order provided for examination of the statement by the Divisional Court or this court.

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COURT OF APPEAL FOR ONTARIO

MACPHERSON and CRONK JJ.A. and WHALEN J. (*Ad Hoc*)

B E T W E E N:	)	
	)	
LIQUOR CONTROL BOARD OF ONTARIO	)	**Johanna Braden and Diana Iannetta, for the appellant**
	)	
Appellant	)	
	)	
- and -	)	
	)	
LIFFORD WINE AGENCIES LIMITED	)	**Douglas C. Hunt, Q.C. and Alistair Crawley, for the respondent**
	)	
Respondent	)	
	)	
	)	**Heard: March 16, 2005**

On appeal from the decision of Justices Jean MacFarland, John Jennings and Peter Howden of the Superior Court of Justice, sitting in the Divisional Court, dated June 7, 2004, reported at [2004] O.J. No. 2696.

CRONK J.A.:

I. Introduction

[1] This appeal arises from the refusal by an administrative tribunal to issue a witness summons requested by a liquor licensee on a motion to stay a hearing before the tribunal in which the possible revocation of the licensee's licence is at issue. The stay motion is based on the licensee's assertion that its right to a fair hearing was irreparably compromised by interference with witnesses whom it proposed to call to give evidence in support of its defence to allegations that it violated provisions of the *Liquor Licence Act*, R.S.O. 1990, c. L.19 (the "Act") and associated regulations.

[2] In preparation for the start of the hearing into the allegations made against it, the licensee summonsed approximately twelve witnesses to give evidence before the tribunal. When the witness-tampering allegation arose before the hearing commenced, the licensee

moved to stay the hearing. The tribunal heard one day of evidence on the stay motion and then adjourned the motion to permit certain of the witnesses to consult and retain legal counsel.

[3] During the adjournment, the employer of the witnesses summonsed by the licensee retained counsel who, in turn, engaged the services of a private investigator to investigate the witness-tampering allegation. The investigator interviewed most of the witnesses summonsed by the licensee, questioning them on the witness-tampering allegation and, in some instances, on issues relating to the main licence hearing. When the licensee learned of this investigation and the interviews, it sought the issuance of a summons to require the investigator to provide evidence before the tribunal on the stay motion and to produce the transcripts or other recordings of his interviews.

[4] The tribunal declined to issue the requested summons on the ground that the investigator's proposed evidence was irrelevant to the subject-matter of the stay motion. On judicial review by the licensee, the Divisional Court overturned the tribunal's ruling and directed it to issue a summons to the investigator, requiring him to attend to give evidence on the stay motion and to produce the transcripts or other recordings of the interviews of the witnesses summonsed by the licensee. The appellant employer of these witnesses now appeals the Divisional Court's decision to this court.

[5] The appellant raises four issues: (i) whether the Divisional Court erred by failing to determine and apply the appropriate standard of review in its consideration of the tribunal's decision; (ii) whether the licensee's judicial review application ought to have been denied on the ground of prematurity; (iii) whether the Divisional Court erred by concluding that the investigator's proposed evidence is relevant to the licensee's stay motion; and (iv) whether the investigator's proposed evidence is protected by solicitor-client or litigation privilege.

[6] For the reasons that follow, I would dismiss the appeal.

II. Factual Background

[7] It is important that the issues on this appeal be considered in the context of the somewhat unusual and protracted procedural history of this case. For this reason, it is necessary to set out the background facts in some detail.

[8] The respondent Lifford Wine Agencies Limited ("Lifford") holds a licence under the Act as a wine manufacturer's representative in connection with its business known as Lifford Agencies. In 2001, the Alcohol and Gaming Commission of Ontario (the "AGCO") issued two notices of proposal to revoke Lifford's licence for alleged violations of the Act and associated regulations. A hearing into these allegations was scheduled to commence before a panel of the AGCO (the "Board") in the fall of 2003. Lifford's main defence to the allegations is officially induced error. It plans to argue

before the Board that it conducted its business in accordance with the procedures and policies of the appellant, the Liquor Control Board of Ontario (the "LCBO").

[9] In anticipation of the start of the licence hearing, Lifford served summonses on approximately twelve LCBO employees, many of whom worked in the Toronto Logistics Facility of the LCBO, requiring them to attend and give evidence at the hearing. However, Lifford thereafter obtained information suggesting that David French, the General Manager of the Logistics Facility, may have sought to influence the evidence to be given by the LCBO witnesses before the Board. As a result, Lifford moved to stay the licence hearing on the basis that its right to a fair hearing before the Board had been impaired by witness-tampering.

[10] On September 22, 2003, the Board began to hear evidence on Lifford's stay motion. The Board granted a witness exclusion order and then heard testimony from three LCBO employees. The first witness was David French, who denied any improper communications with the LCBO witnesses summonsed by Lifford. He maintained that he told the LCBO witnesses "not to lie, tell the truth". He acknowledged, however, that he also told LCBO employees that, " 'I don't know' is an answer."

[11] The Board then heard from Tina Koonings, who worked for Mr. French. She testified that Mr. French threatened her job security with the LCBO if her evidence before the Board was perceived by the LCBO as aiding Lifford. She said that Mr. French told her, "If you tell the truth and if the LCBO in any way perceives that you are aiding the agent in their case, that your career at the LCBO will be history...And my time in the Private Ordering Department would be made extremely difficult." She also stated that Mr. French said, "I would make a very, very strong recommendation for you...I advise you that your idea of the truth should be the following sentences: 'I don't remember' and 'I don't recall'."

[12] Sante Filippi, who also worked in Mr. French's department at the LCBO, testified as well. He said that Mr. French suggested to him that, " 'I don't know', is an answer"; however, he denied that Mr. French suggested to him that repercussions could occur for him or for his department if his testimony was seen by the LCBO as assisting Lifford.

[13] On September 23, the Board agreed to adjourn the stay motion until early November 2003 to permit Mr. French, Ms. Koonings and Kelly McFarlane – one of the prospective LCBO witnesses who had been summonsed to testify by Lifford – to obtain legal representation and advice. In so doing, the Board varied its prior exclusion of witnesses order to exempt Mr. French and Ms. Koonings from the order, "but only in relation to their legal counsel". The Board denied any variation of the exclusion order in respect of Ms. McFarlane, directed that Ms. McFarlane be advised by Lifford's counsel "in general terms, that there is a conflict in the evidence of Mr. French and Ms. Koonings concerning the meetings Mr. French had about the summonses", and further ordered that

counsel for the AGCO and Lifford "draft an agreed summary of both Mr. French's and Ms. Koonings' evidence, which is to be provided to counsel for Mr. French and Ms. Koonings".

[14] The Board gave oral reasons on September 23 and delivered written reasons dated October 9, 2003 concerning these orders. In its reasons, the Board made no mention of the dissemination of the transcript from the September 22 proceeding.

[15] It appears that after the adjournment, copies of the transcript from the September 22 proceeding were provided by the AGCO to counsel for Ms. McFarlane and Mr. French and, Lifford contends, to counsel for the LCBO. This occurred without the consent of Lifford's counsel or the leave of the Board.

[16] As well, following the adjournment, the LCBO decided to undertake an investigation of the witness-tampering allegation. For that purpose, it retained external counsel who, on October 9, 2003, engaged a private investigator, Gordon Hobbs, to conduct the investigation. LCBO employees, including those who had been summonsed by Lifford, were informed of this investigation by letter dated October 10, 2003 from Ian Martin, Senior Vice-President, Logistics, of the LCBO. The full text of Mr. Martin's letter read as follows:

> Re: Internal Investigation Conducted on Behalf of the Liquor Control Board of Ontario
>
> As a result of evidence heard at an ongoing hearing before the Alcohol and Gaming Commission of Ontario, the LCBO is undertaking an internal investigation of certain events concerning the Toronto Logistics Division and, particularly, the consignment warehouse.
>
> The investigation will be conducted by a neutral outside investigator, with the assistance of outside counsel.
>
> It is anticipated that the investigator, Gordon Hobbs, will be contacting you in order to arrange an interview. In the event that Mr. Hobbs does contact you, you are directed to attend the interview and to answer his questions.

[17] Several significant events occurred thereafter. First, when Lifford learned of the dissemination of the September 22 transcript and the LCBO investigation, it brought a second stay motion before the Board, seeking this time to stay the licence hearing on the ground that the LCBO investigation and the distribution of the transcript gave rise to a serious risk that the application of pressure by the LCBO on prospective LCBO witnesses could influence their future testimony before the Board. The Board heard argument on

this motion, but reserved its decision until the completion of the hearing on Lifford's first stay motion. In so doing, in reasons dated November 5, 2003, the Board found that its prior order of September 23 concerning the disclosure of evidence to witnesses was not "strictly followed".

[18] Second, the LCBO moved before the Board for an order granting it intervenor status on Lifford's stay motions. This order was granted and the LCBO participated in the proceedings before the Board for three days. However, its involvement as an intervenor ended on November 17, 2003, when Cunningham A.C.J. and McRae and Epstein JJ. of the Superior Court of Justice, sitting in the Divisional Court, quashed the Board's order, holding that the LCBO had no interest in Lifford's stay motions. The Divisional Court stated, "We fail to see what positive contribution the LCBO could make to the hearing. This is a narrow dispute between Lifford and the AGCO." The LCBO does not appear to have appealed this decision.

[19] Third, at the request of the LCBO's external counsel, Mr. Hobbs interviewed several witnesses regarding the events that transpired before the Board on September 22 and, in some instances, concerning the allegations made against Lifford in the 2001 notices of proposal issued by the AGCO. The persons interviewed included LCBO employees who received summonses from Lifford to testify before the Board. Mr. Hobbs taped his interviews. In due course, he provided a report and various witness statements to the LCBO's external counsel.

[20] Fourth, throughout the months of April and May 2004, the Board heard further evidence on Lifford's first stay motion. Ms. Kooning's testimony on the motion was completed and Lifford called approximately ten additional LCBO employees as witnesses to give evidence as to the alleged witness-tampering. Several of them were questioned concerning their communications with Mr. French after they were served with Lifford's summonses to attend before the Board. In some instances, they were also questioned regarding their interviews with Mr. Hobbs.

[21] Kelly McFarlane, who also worked under Mr. French's direction, testified on April 2, 2004. She stated that, prior to her testimony before the Board, Mr. French, "would just come up to me continuously and keep reminding me that it's okay to say 'I don't know' and 'I don't remember' ". She also said that Mr. French asked her "test" questions, as if he was a lawyer, seeking to elicit responses from her that indicated a lack of recollection or knowledge on her part. She claimed that this occurred so frequently that it became a "running gag" between her and Mr. French, and among other LCBO employees who had been summonsed by Lifford. According to Ms. McFarlane, the frequency of this type of exchange with Mr. French, which increased as her scheduled date to testify approached, caused her to feel pressured to say "I don't know" during her testimony and led her to believe, "[T]his is what they want me to say."

[22] Ian Martin and Mark Latham, a Manager of Special Projects for the LCBO's Logistics Facility, gave evidence on the stay motion in early May 2004. During their testimony, among other matters, they outlined topics discussed by them with Mr. Hobbs. They indicated that Mr. Hobbs' tone and demeanour during the interviews was "fairly aggressive" (Mr. Martin) or "somewhat accusatory" and "aggressive" (Mr. Latham). According to Mr. Martin, for example, Mr. Hobbs began his interview by questioning him about "an allegation that I had met with Peter Murphy [another LCBO executive] and David French to conspire or come up with a story or a way of dealing with Lifford" for the purpose of "basically strategizing an attack or defence - - I can't remember the exact wording - - and to deal with Lifford...like a game plan and how to, you know, what to say, what to do". Mr. Martin adamantly denied this allegation but concluded, in the face of Mr. Hobbs' questions, that he was one of the subjects of Mr. Hobbs' investigation. Both Mr. Martin and Mr. Latham said that they had no discussions with Mr. French concerning the hearing before the Board.

[23] The next development concerned Mary Fitzpatrick, Senior Vice President, General Counsel and Corporate Secretary of the LCBO. On March 29, 2004, Lifford caused a summons to be issued to Ms. Fitzpatrick, requiring her to attend before the Board at the proceedings scheduled for April and May 2004, and to bring with her all documents pertaining to any investigations after August 1, 2003 in relation to or otherwise directly or indirectly involving Lifford. The LCBO responded by moving before the Board for an order quashing this summons on the basis that the information gathered in the Hobbs investigation was protected by solicitor-client or litigation privilege.

[24] On April 30, 2004, the Board granted an order quashing the Fitzpatrick summons. It made no determination on the privilege claim advanced by the LCBO, instead ruling that the evidence sought was irrelevant:

> The impact, if any, of the investigation on those summonsed has been and can be tested through examination and cross-examination.
>
> Whether or not the investigation of Mr. Hobbs is privileged, the issue as this Panel sees it is one of relevance. Section 15 of the [*Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22] requires that evidence must be relevant to the subject matter of the proceedings which, in this instance, is the motion regarding interference with witnesses.
>
> The decision as to whether this had occurred and whether such conduct, if proven, could vitiate the fairness of the hearing on the [notices of proposal] rests with this Panel. The views or conclusions of a non-party, Mr. Hobbs, whether

> retained by the LCBO or its counsel are not informative or relevant.
>
> ....
>
> The issue as the Board sees it is simply one of relevance to the subject matter of the motion...

[25] On May 3, 2004, three days after the Fitzpatrick summons was quashed by the Board, Lifford sought the issuance of a summons to compel Mr. Hobbs' testimony on the stay motion and the production of his report. The LCBO resisted the motion, relying on the Board's earlier ruling on the Fitzpatrick summons and again arguing that the fruits of the Hobbs investigation were privileged. Lifford, in contrast, maintained that Mr. Hobbs' testimony was relevant and necessary to determine whether his contact with the LCBO witnesses may have affected their evidence before the Board.

[26] On May 6, 2004, the Board denied Lifford's request, stating:

> The determination that the Board must make must be based on evidence that is relevant and necessary to the motion. On April 30th, 2004, this Panel ruled that the views [or] conclusions of Mr. Hobbs' report resulting from his investigation were neither informative nor relevant.
>
> ....
>
> Whether or not LCBO employees were affected by their contact with Mr. Hobbs is best determined by hearing from the witnesses themselves about their feelings and concerns as a result of their interviews.
>
> If there was any concern by Lifford regarding any impact Mr. Hobbs may have had on the witnesses, it had ample opportunity to raise them during its examination of those witnesses. We reiterate, the issue before this Panel is one of relevance to the subject matter of the motion.
>
> The Board believes that Mr. Hobbs' testimony would be neither relevant nor helpful.

[27] Lifford then sought judicial review of the Board's refusal to issue the requested summons to Mr. Hobbs. On June 7, 2004, MacFarland, Jennings and Howden JJ. of the Superior Court of Justice, sitting in the Divisional Court, allowed Lifford's application and ordered the AGCO to issue a summons to Mr. Hobbs requiring his attendance before

the Board and further requiring him to bring with him the "transcripts and/or recordings of interviews he made with the LBCO employees who were [summonsed] by Lifford".

[28] The LCBO now appeals to this court to set aside the decision of the Divisional Court and to restore the decision of the Board concerning the Hobbs summons.

III. Issues

[29] There are four issues:

(1) whether the Divisional Court erred by failing to determine and apply the appropriate standard of review;

(2) whether Lifford's judicial review application ought to have been denied on the ground of prematurity;

(3) whether the Divisional Court erred by concluding that Mr. Hobbs' proposed evidence is relevant to Lifford's stay motion; and

(4) whether Mr. Hobbs' proposed evidence is protected by solicitor-client or litigation privilege.

IV. Analysis

(1) Standard of Review

[30] The LCBO argues that the Divisional Court showed no deference to the Board and simply substituted its own judgment as to what is relevant to Lifford's stay motion, thereby wrongly applying a correctness standard of review, rather than a standard of reasonableness.

[31] The determination of the level of deference to be accorded by a reviewing court to the decision of an administrative tribunal is governed by a pragmatic and functional approach that involves consideration of four contextual factors: (i) the presence or absence of a privative clause or statutory right of appeal; (ii) the expertise of the tribunal relative to a court in respect of the decision in issue; (iii) the purpose of the legislation or provision in question; and (iv) the nature of the question as one of fact, law or mixed fact and law: see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

[32] I conclude that while the Divisional Court did not expressly address the applicable standard of review, it was justified in exercising its review power and ordering the

issuance of the summons to Mr. Hobbs based on either a correctness or reasonableness standard. I say this for the following reasons.

[33] There is little doubt that administrative tribunals are particularly well-positioned to assess the relevancy of evidence sought to be introduced before them. This was emphasized by the Supreme Court of Canada in *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, in which Lamer C.J., writing for the majority of the Court, stated at para. 46:

> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think that it is desirable for the courts, in the guise of protecting the rights of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator.

[34] Importantly, however, Lamer C.J. went on to say, "It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice" (at para. 46).

[35] The issue before the Board concerning the request for the issuance of the Hobbs summons was whether the evidence concerning the Hobbs investigation and its possible impact on the LCBO witnesses was relevant to the allegation of witness-tampering made by Lifford, which was the basis of its stay motion. The error of an administrative tribunal in determining the relevance of evidence is an error of law. Generally, where a tribunal enjoys the protection of a robust privative clause, its decisions are beyond judicial review for such errors: *Larocque* at para. 42. But this does not apply, even in the face of a complete privative clause, where the tribunal's decision on the relevance of evidence occasions a breach of the rules of natural justice: "A breach of the rules of natural justice is regarded in itself as an excess of jurisdiction and consequently there is no doubt that such a breach opens the way for judicial review" (*Larocque* at para. 43).

[36] The Divisional Court held in this case:

> The [AGCO]...refused to issue [a summons] for Hobbs on the basis that the evidence was irrelevant. In our view, in so doing, the Board precluded Lifford's ability to lead material evidence in support of the basis for its stay motion. This, in our view, was a breach of natural justice.

> The statements taken by Hobbs may support Lifford's position in relation to witness tampering and it should, in our view, have the ability to explore that evidence.

[37] Thus, the Divisional Court's decision was based on its conclusion that the evidence sought to be introduced by Lifford through Mr. Hobbs is "material" to the central issue on the stay motion, that is, whether improper interference with the evidence of the LCBO witnesses occurred. In the view of the Divisional Court, the effect of the Board's decision to deny Lifford the opportunity to explore this evidence impaired the fairness of the hearing on the stay motion, thereby resulting in a denial of natural justice. These findings displace curial deference and support judicial intervention on either a correctness or reasonableness standard of judicial review. I agree with Lifford's submission before this court that administrative decisions that deprive a party of natural justice do not attract curial deference.

[38] Accordingly, the Divisional Court's decision is not assailable on the ground that it failed to determine and apply the appropriate standard of review. Rather, the critical issue is whether the denial of the issuance of the Hobbs summons, in the circumstances, impaired the fairness of the hearing of Lifford's stay motion or otherwise occasioned a breach of natural justice. I address this issue next.

(2) and (3) Prematurity and Relevance

[39] The LCBO submits that the Divisional Court erred by failing to dismiss Lifford's judicial review application on the ground of prematurity. It argues that the Divisional Court failed to consider the question of prematurity and that the controlling jurisprudence required that Lifford's application be dismissed to avoid fragmentation of the Board's hearing and to permit consideration of the merits of Lifford's application on a full record. In the unusual circumstances of this case, I would not give effect to this argument.

[40] I observe at the outset that this prematurity argument is weakened by two aspects of the procedural history of this case. First, although the notices of proposal were issued in 2001, no hearing before the Board commenced until late September 2003. On the record before us, the reasons for this substantial delay are not entirely clear. Second, although the LCBO attacks Lifford's judicial review application on the basis of prematurity, in November 2003, the LCBO itself sought judicial review of certain production and disclosure orders made by the Board. Although this is not fatal to the LCBO's position on this appeal, it speaks against the force of the LCBO's assertion that prematurity alone dictated the dismissal of Lifford's judicial review application.

[41] I agree, however, with the LCBO's submission that courts in Ontario, especially the Divisional Court, have frequently stressed the need to avoid a piecemeal approach to judicial review of administrative action. The important rationales for this principle were

aptly described by the Divisional Court in *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798. In that case, Callaghan C.J.O.C. stated at p. 800:

> For some time now, the Divisional Court has...taken the position that it should not fragment proceedings before administrative tribunals. Fragmentation causes both delay and distracting interruptions in administrative proceedings. It is preferable, therefore, to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion. ...
>
> [I]t is preferable to consider issues such as those raised on this application against the backdrop of a full record, including a reasoned decision by the board or tribunal. Obviously, this is usually available to the court only after the administrative body has conducted a full hearing.

See also *McIntyre v. Kitchener-Waterloo Real Estate Board, Inc.*, [2004] O.J. No. 2214 (Div. Ct.).

[42] I endorse this principle, for the reasons articulated in *Ontario College of Art*. Neither the interests of justice nor meaningful judicial review are facilitated by the untimely challenge of administrative action during the course of a pending hearing before an administrative tribunal. Accordingly, as a general rule, such review applications should be avoided until completion of the applicable tribunal's hearing, when a full record will be available to the reviewing court. This is particularly the case where there is an adequate alternative remedy by way of appeal.

[43] This general rule, however, is not absolute and should not be applied rigidly if there is a prospect of real unfairness through, for example, the denial of natural justice. In these circumstances, which will arise infrequently, the courts will intervene before completion of an administrative hearing and prior to the exhaustion of all alternative remedies. See for example, *Gage v. Ontario (Attorney General)* (1992), 90 D.L.R. (4th) 537 (Div. Ct.) at 533.

[44] This exception is engaged here. Contrary to the appellant's submission, the Divisional Court implicitly recognized this, by finding that the denial of the Hobbs summons was a breach of natural justice. This key finding removed this case from the ambit of the general rule against review of administrative action prior to the completion of the process of the tribunal whose decision is sought to be challenged.

[45] Moreover, as I have said, although the rejection by an administrative tribunal of relevant evidence does not automatically constitute a breach of natural justice, where the

rejection of such evidence taints hearing fairness, a breach of natural justice arises. The demonstration of such a breach displaces curial deference and permits judicial intervention: *Larocque* at paras. 42, 43 and 46.

[46] The issue, therefore, is whether the Divisional Court's conclusions that Mr. Hobbs' evidence was material to Lifford's stay motion and that the denial of the Hobbs summons constituted a breach of natural justice in the circumstances, are sustainable. In my view, the answer is 'yes'.

[47] The basis for Lifford's stay motion is an allegation of witness-tampering – that is, that persons in authority within the LCBO improperly sought to influence the testimony to be given by LCBO witnesses before the Board. It need hardly be said that such an allegation, in administrative or court proceedings, is most serious. It calls into question basic principles of hearing fairness and, if substantiated, strikes at the heart of the integrity of the administration of justice and the truth-finding objective of our adversarial process. As well, if proven, such a claim could constitute the offences of counselling perjury or obstruction of justice.

[48] In this case, the Board held that Mr. Hobbs' testimony would be "neither relevant nor helpful". The Divisional Court disagreed, holding that the Board's ruling precluded "Lifford's ability to lead material evidence in support of the basis for its stay motion" and that, "The statements taken by Hobbs may support Lifford's position in relation to witness tampering." I agree.

[49] The Board based its decision on three factors: (i) its prior ruling in relation to the Fitzpatrick summons that the views or conclusions of Mr. Hobbs' report resulting from his investigation were irrelevant and not informative; (ii) hearing fairness was ensured by the fact that full examination rights in respect of the LCBO witnesses were afforded on the stay motion; and (iii) the 'best evidence' of whether or not LCBO employees were affected by their contact with Mr. Hobbs was the evidence of the employees themselves.

[50] The first of these ignored the fact that the purpose of Lifford's request to summons Mr. Hobbs was not to elicit his opinions or conclusions based on his investigation but, rather, to determine what was said to and by the LCBO witnesses during their interviews with Mr. Hobbs in order to test the veracity and reliability of their testimony before the Board.

[51] The second factor identified by the Board failed to recognize that the LCBO employees were called by Lifford as its own witnesses on the stay motion. Accordingly, the protections afforded by cross-examination were not available to Lifford, absent an adverse witness application under s. 23 of the *Evidence Act*, R.S.O. 1990, c. E. 23. There is no suggestion that the grounds for such an application existed here.

[52] Finally, and perhaps most significantly, the factors relied upon by the Board do not address the *nature* of the alleged witness interference. This concerned the suggestions that LCBO witnesses were both pressured by Mr. French concerning their future evidence and, as well, were actively encouraged by him to adopt an attitude in response to questioning that reflected a lack of recall. Such an exhortation, if proven, could constitute a direction to lie or obfuscate under oath. In these circumstances, it was especially important to allow Lifford an opportunity to determine whether the statements of the summonsed witnesses to Mr. Hobbs concerning their interactions with Mr. French constituted prior inconsistent statements, whether the witnesses revealed to Mr. Hobbs additional facts concerning their communications with Mr. French that did not emerge in their testimony before the Board, and what the witnesses were told by Mr. Hobbs.

[53] It is important to reiterate that, on the evidence heard by the Board, the assertion of attempts to influence the evidence of the LCBO witnesses was not merely speculative. There was direct evidence before the Board from at least two witnesses (Tina Koonings and Kelly McFarlane) that they experienced pressure in their communications with Mr. French regarding their testimony before the Board. Ms. Koonings also testified that she was threatened by Mr. French with future adverse career consequences if her evidence before the Board was viewed by her employer as being of assistance to Lifford. This testimony, if accepted by the Board, would cast serious doubt on the integrity of the evidence before the Board and, as I have said, could constitute the offences of counselling perjury or obstruction of justice. As well, a review of the transcripts reveals a frequent assertion by some of the LCBO witnesses that they did not recall or did not know the answer to the questions posed.

[54] The LCBO argues that it was incumbent on Lifford to demonstrate that Mr. Hobbs' evidence was material to the issue of witness-tampering. In my view, Lifford met this burden.

[55] The evidence before the Board established that Mr. Hobbs interviewed several of the LCBO witnesses prior to their testimony before the Board and that some of these interviews included questioning regarding the witnesses' communications with Mr. French, the alleged perpetrator of the witness-tampering. As well, Mr. Hobbs questioned some of the LCBO witnesses (for example, Mr. Martin) concerning Lifford and, at least inferentially, regarding the allegations made against Lifford as in issue before the Board.

[56] The investigation conducted by Mr. Hobbs, as described by Mr. Martin in his October 10, 2003 letter to LCBO employees, was triggered by the evidence before the Board on September 22, that is, by Ms. Koonings' allegations. The focus of the investigation was events "concerning the Toronto Logistics Division" of the LCBO, where many of the witnesses summonsed by Lifford worked for Mr. French or under his direction. Importantly, the recipients of Mr. Martin's letter were directed both to attend any requested interview with Mr. Hobbs and to answer his questions. Thus, the full

participation of LCBO employees in the investigation was not voluntary but, rather, compulsory at the instance of their employer.

[57] In this context, it was open to Lifford to argue that the interviews conducted by Mr. Hobbs operated to pressure LCBO employees or to heighten their apprehension concerning the reaction of the LCBO, their employer, if they testified candidly before the Board. Without access to information concerning what was actually said to and by the LCBO employees during the Hobbs interviews, the meaningful exploration of this concern by Lifford was frustrated. Contrary to the Board's conclusion that the 'best evidence' on these issues was the evidence of the LCBO witnesses themselves, the 'best evidence' upon which to test the LCBO witnesses' recollections of what was said to and by them during the Hobbs interviews regarding their communications with Mr. French, is the information contained in the contemporaneously generated tape recordings of the interviews.

[58] In these circumstances, I agree with the Divisional Court's conclusion that the evidence to be elicited from Mr. Hobbs regarding his interviews of the LCBO witnesses is material to the subject-matter of Lifford's stay motion. This evidence is separate and distinct from any evidence concerning the subjective conclusions reached by Mr. Hobbs as a result of his investigation. At the very least, the statements made by the LCBO witnesses during the Hobbs interviews relating to their communications with Mr. French as to their anticipated evidence before the Board could have a direct bearing on Lifford's efforts to establish witness-tampering and on the Board's assessment of the veracity and reliability of the testimony given by the LCBO witnesses.

[59] I therefore reject the LCBO's contention that it can safely be concluded on the existing record that the evidence now sought from Mr. Hobbs cannot be helpful in assisting the Board to determine whether any witness-tampering occurred. To the contrary, this evidence may establish its occurrence and significance or, perhaps more importantly, dispel the assertion of witness-tampering.

[60] The LCBO makes the additional submission that the evidence of the LCBO witnesses, including any testimony by them regarding the issue of witness-tampering, is irrelevant to Lifford's defence on the merits of officially induced error. It asserts that the LCBO is not a regulatory body, it does not regulate or govern Lifford's activities, and its employees are not "officials" who might be capable of inducing an error of law so as to provide Lifford with a defence to the allegations contained in the notices of proposal.

[61] But these issues are contested before the Board. Lifford plans to argue that the requisite elements of officially induced error are made out in this case, including that LCBO personnel are appropriate "officials" upon whose advice it could reasonably rely within the meaning of the legal test for officially induced error: see *R. v. Jorgensen*, [1995] 4 S.C.R. 55.

[62] While it is true that, as a matter of law, Lifford faces a high hurdle to establish officially induced error, this defence is its main response to the allegations detailed in the notices of proposal. It is for the Board to ultimately determine, upon all the admissible evidence eventually introduced before it and in accordance with the applicable legal principles, whether this defence has been made out. For the purpose of Lifford's stay motion, an affirmative showing of officially induced error is not required.

[63] Accordingly, I conclude that the refusal by the Board to issue the Hobbs summons occasioned a breach of natural justice by precluding Lifford from introducing evidence sought to be relied upon by it to establish the foundation for the requested stay of the licence hearing. This denial of natural justice is a full answer to the LCBO's claim that Lifford's judicial review application was premature and, as well, to its invocation of curial deference in relation to the Board's decision to deny the issuance of the Hobbs summons.

(4) Privilege

[64] The LCBO filed three affidavits sworn by Ephry Mudryk, a law clerk in the offices of the LCBO's external counsel, in which Ms. Mudryk provided evidence concerning the circumstances surrounding the engagement of Mr. Hobbs and his mandate. This evidence established that Mr. Hobbs was hired by the LCBO's external counsel on October 9, 2003; that at the request of the LCBO's external counsel, Mr. Hobbs "interviewed a number of witnesses in connection with this case"; that Ms. Mudryk and a secretary from her law firm were present at several of these interviews and "assisted Mr. Hobbs with his investigation"; and that Mr. Hobbs provided "a report and a number of witness statements" to the LCBO's external counsel.

[65] In her affidavit sworn on November 10, 2003, Ms. Mudryk stated that Mr. Hobbs' retainer "was necessary due to the allegations about the conduct of several LCBO employees by Lifford...". She also indicated her belief that, "Mr. Hobbs' report and the witness statements obtained by Mr. Hobbs are documents on which [the LCBO's external counsel] anticipates relying in his cross-examinations, in the event that the witnesses make inconsistent statements before the Panel in the hearing."

[66] Subsequently, in an affidavit sworn on April 20, 2004, Ms. Mudryk added: "I am advised that the purpose of retaining an investigator was to assist [the LCBO's external counsel] in providing legal advice to the LCBO in relation to the claims made by Tina Koonings and Kelly McFarlane in their testimony before the AGCO Panel." Ms. Mudryk repeated this statement, in essentially the same terms, in a third affidavit sworn by her on May 5, 2004. In that affidavit Ms. Mudryk also said, "[T]he retainer of our firm, which practises exclusively in the area of litigation, and the purpose of the investigation itself was to provide advice to the LCBO in relation to potential issues, actions or claims

arising from the testimony of Ms. Koonings, and the hearing itself." As well, Ms. Mudryk indicated:

> I am further advised by [the LCBO's external counsel] that the letters from both Ian Martin and Mary Fitzpatrick, addressed to each of the employees requiring them to attend to be interviewed by Mr. Hobbs, relate solely to that purpose and do not accurately reflect the relationship between Mr. Hobbs and...the LCBO's outside counsel.

[67] Based on this evidence, the LCBO argued before the Board and the Divisional Court that the Hobbs investigation and Mr. Hobbs' ensuing report were subject to solicitor-client or litigation privilege. As I have mentioned, the Board made no determination regarding this privilege claim. Rather, it quashed the Fitzpatrick summons and refused to issue the Hobbs summons on the basis of relevancy. However, in its reasons regarding the Hobbs summons, the Divisional Court ruled:

> In our view the Hobbs report is not subject to solicitor and client privilege for the reasons set out by the Court of Appeal in *General Accident Co. v. Chrusz* (1999), 45 O.R. (3d) at 321, where at p. 15 of the quicklaw version, the Court said:
>
> > 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.

[68] The focus of these comments by the Divisional Court was the report prepared by Mr. Hobbs, in contrast to the communications that took place during his witness interviews. However, I believe that the Divisional Court's reasons, properly read, extend to both the Hobbs report and, more generally, to the information gathered by him during his investigation, including during his witness interviews. This is consistent with the Divisional Court's ruling that Mr. Hobbs attend before the Board to give evidence and that he produce at that time the "transcripts and/or recordings" of his interviews with those of the LCBO employees who were summonsed by Lifford. Notably, the Divisional Court's decision does not require Mr. Hobbs to produce a copy of the report delivered by him to the LCBO's external counsel. In its factum filed with this court, Lifford sought production of the Hobbs report but this was not pressed in oral argument. Moreover, no cross-appeal was taken by Lifford from that aspect of the Divisional Court's ruling pertaining to Mr. Hobbs' report.

[69] I agree with the Divisional Court's conclusion that the decision of this court in *Chrusz* is dispositive of the LCBO's solicitor-client privilege claim. While it is true that solicitor-client privilege can extend to communications between a solicitor or client and a third party, this extension of the privilege is subject to important constraints. In *Chrusz*, Doherty J.A. (Carthy and Rosenberg JJ.A. concurring on this issue) stated at pp. 356-57:

> 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* [emphasis added].

[70] In this case, the investigation announced by the LCBO was characterized by Mr. Martin as an "internal" investigation to be conducted by "a neutral outside investigator" with the "assistance of outside counsel". As described by Ms. Mudryk in her affidavits, Mr. Hobbs' mandate was to assist the LCBO's external legal counsel in providing legal advice to the LCBO.

[71] Thus, in the above-quoted language of Doherty J.A. in *Chrusz*, Mr. Hobbs was authorized "only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client". This function by Mr. Hobbs was not essential to the maintenance or operation of the solicitor-client relationship between the LCBO and its external counsel. Moreover, Lifford is not seeking disclosure or production of communications between the LCBO and its external counsel. Rather, it seeks disclosure of communications between Mr. Hobbs and those of the LCBO employees interviewed by him who were summonsed by Lifford. In these circumstances, solicitor-client privilege does not apply.

[72] I reach a similar conclusion concerning the LCBO's claim of litigation privilege. With respect to it, the Divisional Court held, "Nor do we accept that litigation privilege applies. The LCBO was an intervenor in these proceedings for only a very short period of time before its involvement was terminated by earlier order of this Court."

[73] In *Chrusz* at p. 331, this court referred with approval to the following comparison of solicitor-client and litigation privilege set out by R.J. Sharpe, prior to his appointment to this court, in a lecture entitled "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence, L.S.U.C. Special Lectures* (Toronto: De Boo, 1984) 163 at 164-65:

> 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)* [emphasis added].

[74] As emphasized in this passage, litigation privilege is focused on litigation itself. A claim of litigation privilege triggers consideration of competing interests: the need for an arena of protected communications to assist the adversarial process, on the one hand, and the need for disclosure to ensure hearing fairness, on the other hand. In *Chrusz*, this court held that in order to balance these competing interests and to engage litigation privilege, the communication at issue must have been made when litigation was commenced or contemplated, where the dominant purpose for the communication was for use in, or advice concerning, the litigation. In addition, once implicated, litigation privilege is extinguished when the litigation, or the contemplation of it, comes to an end.

[75] In this case, in my view, the LCBO's claim of litigation privilege cannot succeed, for several reasons. First, the LCBO is not a party to the proceedings before the Board. It enjoyed intervenor status on Lifford's stay motions for a period of only three days. As the Divisional Court observed when it quashed the Board's decision granting intervenor status to the LCBO, "[T]the LCBO has no interest in the stay motions." I agree. The Board has no jurisdiction on Lifford's stay motions to make any determination affecting the rights, privileges or liabilities of the LBCO; nor does the Board have jurisdiction on

those motions to impose any sanction or penalty on the LCBO, or to grant relief in its favour.

[76] Second, it is telling that Ms. Mudryk's affidavits, upon which the LCBO relied to resist the Hobbs summons, contain no assertion that the dominant purpose of the LCBO investigation was actual or contemplated litigation to which the LCBO was, or anticipated that it might be, a party. The only 'litigation' referenced in those affidavits is the proceeding before the Board. The LCBO chose, as the employer of the LCBO witnesses summonsed by Lifford, to investigate the allegation of witness-tampering. Although such action may be prudent in the context of labour and employment issues within the workplace, on the facts of this case it does not attract litigation privilege.

[77] Finally, Lifford has a compelling interest in ensuring that the Board is positioned to fairly and fully evaluate the evidence given by the LCBO witnesses in relation to the witness-tampering allegation and Lifford's proposed defence to the notices of proposal, especially in light of the statements made to or by them on these issues in their interviews with Mr. Hobbs. The calling of Mr. Hobbs as a witness before the Board and the production of the transcripts or other recordings of the interviews conducted by him, as ordered by the Divisional Court, will further this important objective. In these circumstances, Lifford's interest in receiving a fair hearing before the Board on its stay motion and during the licence-hearing trumps any litigation privilege claim available to the LCBO.

V. Disposition

[78] Accordingly, for the reasons given, I would dismiss the appeal. Lifford is entitled to its costs of this appeal, the costs of the LCBO's motion for leave to appeal to this court (which were reserved to this Panel), and the costs of its judicial review application before the Divisional Court (which remain outstanding) on the partial indemnity scale, fixed in the aggregate amount of $25,000, inclusive of disbursements and Goods and Services Tax.

RELEASED:

"JCM"
"JUL 18 2005"

"E.A. Cronk J.A."
"I agree J.C. MacPherson J.A."
"I agree W.L. Whalen J. (*ad hoc*) per JCM J.A."

3

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From January 1, 2011 to the e-Laws currency date.

Last amendment: O. Reg. 436/10.

This is the English version of a bilingual regulation.

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).

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit. R.R.O. 1990, Reg. 194, r. 30.03 (3); O. Reg. 438/08, s. 27 (3).

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings. O. Reg. 653/00, s. 3; O. Reg. 438/08, s. 27 (4).

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial. R.R.O. 1990, Reg. 194, r. 30.03 (5).

Grossman et al. v. Toronto General Hospital et al.

41 O.R. (2d) 457

146 D.L.R. (3d) 280

ONTARIO
HIGH COURT OF JUSTICE

REID J.

13TH APRIL 1983.

Practice -- Discovery -- Production of documents -- Privilege -- Affidavit on production -- Appropriate description of documents and claim to privilege -- Rule 348 (Ont.).

Practice -- Costs -- Punitive order against solicitor -- Solicitor failing to produce relevant documents on discovery -- Whether punitive order appropriate.

Where a claim of privilege is made with respect to relevant documents, sufficient information must be given in the affidavit on production to enable a party opposed in interest to identify such documents. Enough detail must be given to enable a court to make a prima facie decision whether a claim for privilege has been established from what appears on the face of the affidavit, although the party resisting production is not required to give particulars which would destroy the benefit of any privilege.

It is quite inappropriate for the party required to produce to take the position that it is for his opponent to establish the existence of any documents which should be produced. The integrity of the system relating to production of documents depends upon the willingness of lawyers to require full and fair discovery of their clients. Stonewalling and improper concealment is bad practice which can work real injustice and cause delay and expense. It is a practice which must be condemned as, if widespread, it would undermine the trial system.

Where there has been a deliberate refusal to comply with the notice to produce upon advice of a solicitor, an order requiring the solicitor personally to pay the costs of the proceedings may be made. However, where the case is an example of excessive zeal, an appropriate order is that the costs of the application be paid in any event of the cause forthwith after taxation as between a solicitor and his own client.

Bow Helicopters v. Textron Canada Ltd. et al.; Rocky Mountain Helicopters Inc. et al., Third Parties (1981), 23 C.P.C. 212, aprvd
Walsh-Canadian Construction Co. Ltd. v. Churchill Falls (Labrador) Corp. Ltd. (No. 1) (1979), 9 C.P.C. 229, 23 Nfld. & P.E.I.R. 34, apld
Henderson v. Mercantile Trust Co. (1922), 52 O.L.R. 198; St. Clair v. Stair (1913), 4 O.W.N. 1437, 11 D.L.R. 862, distd
Fiege v. Cornwall General Hospital et al. (1980), 30 O.R. (2d) 691, 117 D.L.R. (3d) 152; Myers v. Elman, [1940] A.C. 282, [1939] 4 All E.R. 484, discd

Other cases referred to

Mayor and Corp. of Bristol v. Cox (1884), 26 Ch. D. 678; Budden v. Wilkinson, [1893] 2 Q.B. 432; Price v. Price (1879), 11 Ch. D. 163; Fortescue v. Fortescue (1876), 34 L.T. 847; Ledwidge v. Mayne (1877), 11 I.R. Eq. 463; Gardner et al. v. Irvin et al. (1878), 4 Ex. D. 49; Hill v. Hart-Davis (1884), 26 Ch. D. 470; Cooke v. Smith, [1891] 1 Ch. 509; Taylor v. Batten (1878), 4 Q.B.D. 85; Perini Ltd. v. Parking Authority of Toronto (1975), 6 O.R. (2d) 363, 52 D.L.R. (3d) 683

Statutes referred to

Public Hospitals Act, R.S.O. 1980, c. 410

Rules and regulations referred to

Rules of Practice (Ont.), Rules 347, 348, 352, Form 23

APPEAL from an order of Master Sandler requiring reattendance on discovery and a further affidavit on production.

Lois J. Farrer, for certain appellants, defendants.

Ian J. Tod, for respondents, plaintiffs.

REID J.:-- The action arises out of the death of Howard Grossman who is claimed to have been lost while a patient in the Toronto General Hospital ("the Hospital"). It is alleged that his body was discovered after 12 days in an air-duct shaft in the hospital.

The defence entered by the Hospital for itself and its staff amounts to a general traverse. Not even the death was directly admitted.

That document gave a hint of what was in store for plaintiffs. The Hospital's affidavit on production (the affidavit) revealed only one thing the Hospital had no objection to producing: the deceased's hospital record. That was the only entry made in the first part of the first schedule of the form (Form 23) required by the Rules of Practice.

The complete affidavit (without purely formal parts) was as follows:

> I, BLENOS A. T. PEDERSEN, of the City of Toronto, in the Municipality of Metropolitan Toronto, make oath and say as follows:
>
> 1. I am the Vice President, Medical Affairs, at Toronto General Hospital and as such have knowledge of all documents which are, or have been, in the possession, custody or power of the Defendants Toronto General Hospital, David Allen, Wilfred Alexander, Gordon Brockney, Glentis Charles, Darryl Crawford, Miguel Diaz, Phil Garment, Bernice Gerhart, Loretta Gonsales, Walter Gosley, Pauline Jackson, Margaret Keeting, Peter Lewis, Ming Cho Lai, W. L. Louth, Franco Meli, Ada McLean, Dean Nichols, Kamal Dev Persaud, Peter Sherbert, Vickery Stoughton, Debra Sutherland, Al Trupp, Gail Vander Zee, Maimo Vermai, Ishmael Wadiwalla and Linda Woods relating to the matters in question in this action.
>
> 2. I am cognizant of the matters in question in this action.
>
> 3. The said Defendants have in their possession, custody or power the documents relating to the matters in question set forth in the first and second parts of the first schedule hereto.
>
> 4. The said Defendants object to produce the said documents set forth in the second part of the first schedule thereto.
>
> 5. That the said documents set forth in the second part of the First Schedule hereto consists of a record, documents, statements, reports, memoranda, correspondence, communications and other material which came into existence for the purpose of asking for, and receiving, legal advice in relation to matters in question in this action, and in contemplation of and in preparation for and during the progress of this action, and to enable their solicitors to conduct this action on behalf of the said Defendants and were prepared or obtained for the purpose of furnishing information to their solicitors in order to obtain their advice thereon, and for their assistance in contemplated litigation, or were prepared in the course of this action, to enable their solicitors to

conduct this action.

6. The said Defendants have had, but have not now, in their possession, custody or power, the documents relating to the matters in question in this action set forth in the second schedule hereto.

7. The last-mentioned documents were last in the possession, custody or power of the said Defendants on the respective dates thereof.

8. That the said documents have been mailed or sent to the persons to whom they were respectively addressed.

9. According to the best of my knowledge, information and belief, the said Defendants have not now, and never had, in their possession, custody, or power, or in the possession, custody, or power of myself, or of any of their solicitors or agents, or of any person or persons whomsoever, on their behalf any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other documents whatsoever relating to the matters in question in this action or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto, and the pleadings and other proceedings in the action.

(Thereafter followed the jurat and the following schedules.)

THE FIRST SCHEDULE

THE FIRST PART THEREOF: Showing documents in the possession, custody or power of the said Defendants which they do not object to produce.

1. The complete hospital record of the late Howard Grossman, kept by the Defendant, Toronto General Hospital, pursuant to The Public Hospitals Act, R.S.O. 1980, c. 410, and regulations thereto.

THE SECOND PART THEREOF: showing documents in the possession of the said Defendants which they do object to produce.

Reports, statements, plans, memoranda, correspondence, photographs, sketches, communications and other documents which have been passed between their solicitors and representatives of these Defendants and between their solicitors and third parties for the purpose of obtaining or furnishing information and material to be used on their behalf in this action, or to enable such material to be obtained and to enable their solicitors to prosecute the action on their behalf, and to advise their solicitors with reference thereto.

THE SECOND SCHEDULE

SHOWING documents which the said Defendants have had but have not now in their possession or power.

NIL

The individuals named in the affidavit were hospital employees. The affidavit was filed on behalf of the Hospital and the defendants who were its employees. There are other defendants. Any reference I make to "defendants" is to the defendants referred to in the affidavit.

The affidavit was sworn on October 15, 1982. Plaintiffs moved before the master for a "further and better affidavit". The motion was returnable on October 28th. An affidavit was filed in support of the motion. The deponent was Paula Dadd, a secretary in the office of plaintiffs' counsel.

Counsel for the defendants cross-examined on the affidavit. The motion was heard by Master Sandler on November 19, 1982. At the same time he heard a cross-motion launched by defendants for an order requiring Paula Dadd's reattendance for further cross-examination.

On November 19th Master Sandler dismissed defendants' motion and allowed plaintiffs' motion. The substance of his order in respect of the latter is now set out:

1. IT IS ORDERED that the Defendant The Toronto General Hospital do deliver a further and better Affidavit on Production which should properly refer to those other documents that this Defendant has in its possession, power or custody being:

a) the documents made exhibits at the Coroner's Inquest before Dr. Loveridge on May 25, 1981 to June 8, 1982;

b) the investigator's report referred to at question 30 on the transcript of the cross-examination of Paula Debra Dadd on November 8, 1982;

Such further Affidavit on Production shall be delivered by Friday, December 10, 1982.

2. AND IT IS FURTHER ORDERED that the further and better Affidavit on Production of the Defendant Toronto General Hospital shall also set forth full particulars of all documents described in the Second Part of the First Schedule of the original Affidavit on Production of Blenos A. T. Pedersen sworn on October 15, 1982 and full particulars of the basis of the claim for priviledge for each document.
3. AND IT IS FURTHER ORDERED that the Affidavit on Production of Blenos A. T. Pedersen sworn on October 15, 1982 purporting to be an Affidavit on Production on behalf of the Defendants, the Toronto General Hospital, David Allen, Wilfred Alexander, Gordon Brockney, Joseph E. Castonguay, Glentis Charles, Darryl Crawford, Miguel Diaz, Hyla Galbraith, Phil Garment, Bernice Gerhart, Loretta Gonsales, Walter Gosley, Pauline Jackson, Margaret Keeting, Rod Lamond, Peter Lewis, Ming Cho Lai, W. L. Louth, Mary Elizabeth MacRae, Franco Meli, Thomas Morley, Ada McLean, Dean Nichols, Kamal Dev Persad, Michael Sermer, Peter Sherbert, Vickery Stoughton, Debra Sutherland, Al Trupp, Gail Vander Zee, Joy Van Loon, Maimo Vermai, Ishmael Wadiwalla and Linda Woods, be and the same is hereby struck out and it is ordered that each of the said Defendants shall deliver his or her own separate Affidavit on Production or a joint and several Affidavit on Production for some or all of the said Defendants. Such further affidavit or affidavits to be delivered by December 31, 1982 subject to further extension for any particular Defendant if, with reasonable dispatch, delivery by this date is impossible.
4. AND IT IS FURTHER ORDERED that the balance of this application be and the same is hereby dismissed but without prejudice to any further application the Plaintiffs may be advised to bring on other material.
5. AND IT IS FURTHER ORDERED that any further application for a further and better Affidavit on Production shall be heard by this Court.
6. AND IT IS FURTHER ORDERED that the costs of this application including the cross-examination of Paula Debra Dadd on November 8, 1982 but excluding the costs of the day of the contested adjournment on October 28, 1982 are to the Plaintiffs in any event of the cause as between a solicitor and his own client.

During the hearing of this appeal it became apparent that the order as issued contained an inadvertent solicitor's error. By agreement of counsel para. 3 should be amended to read:

3. AND IT IS FURTHER ORDERED that the Affidavit on Production of Blenos A. T. Pedersen sworn on October 15, 1982 purporting to be an Affidavit on Production on behalf of the Defendants, The Toronto General Hospital, David Allen, Wilfred Alexander, Gordon Brockney, Glentis Charles, Darryl Crawford, Miguel Diaz, Phil Garment, Bernice Gerhart, Loretta Gonsales, Walter Gosley, Pauline Jackson, Margaret Keeting, Peter Lewis, Ming Cho Lai, W. L. Louth, Franco Meli, Ada McLean, Dean Nichols, Kamal Dev Persad, Peter Sherbert, Vickery Stoughton, Debra Sutherland, Al

Trupp, Gail Vander Zee, Maimo Vermai, Ishmael Wadiwalla and Linda Woods ...

This appeal is from both orders of the master. I dealt with the appeal in two parts. Having dismissed defendants' appeal from the master's refusal to require a reattendance I now turn to consider the attack made on the order requiring a better affidavit on production.

Defendants' position is essentially this: plaintiffs have failed to establish that any documents exist that should be produced other than the deceased's medical record and those now described in paras. 1(a) and (b) of the master's order. When I expressed surprise that a 12-day search for a missing patient in a hospital would not have produced one scrap of paper relevant to the issues in this lawsuit Mrs. Farrer replied that any such piece of paper would be privileged, the Hospital having retained solicitors at a very early point.

That may be so. It may be a proper basis for a claim of privilege for any and all documents other than the one thing produced voluntarily and the others forced out of defendants' hands by reason of the motion before the master (in paras. 1(a) and (b) of Master Sandler's order). However, no one could have told from reading defendants' original affidavit whether or not that claim was justified. The answer made in the second part of the first schedule is a mere boiler-plate calculated to conceal all and any documents from inspection. The result was to deprive opposing counsel of any basis for challenging the privilege claimed. Equally, if a challenge had been made, no court could have decided it, without resorting to ordering production to the court of all the documents referred to in the second part of the first schedule. Since no one could have known from reading the schedule what documents are referred to, that would have been an order made in the dark.

The Rules of Practice are designed to facilitate production, not frustrate it. Rule 347 states:

> 347. Each party, after the defence is delivered or an issue has been filed, may by notice require the other within ten days to make discovery on oath of the documents that are or have been in his possession, custody or power relating to any matters in question in the action, and to produce and deposit them with the proper officer for the usual purposes and a copy of such affidavit shall be served forthwith after filing.

The response required to such a notice is an affidavit in a form set by the rules. In this case, because the Hospital is a corporation, Form 23 was used. Paragraph 4 of the form requires that documents to which objection is taken be "set forth" in the schedule. Defendants' response to that requirement sets forth nothing at all: it merely states in general terms why nothing need be set forth.

Honest differences of opinion might arise over the question whether a given document should or must be produced. If that occurs, the court has power to decide the issue. Rule 348 reads:

> 348. The court may at any time order production and inspection of documents generally or of any particular document in the possession of any party, and, if privilege is claimed for any document, may inspect the document to determine the validity of

such claim.

Notwithstanding Rule 348, it becomes quickly clear to anyone setting out to practise in the courts that "production" is open to serious abuse. The integrity of the system depends upon the willingness of lawyers to require full and fair discovery of their clients. The system is, in a sense, in the hands of the lawyers. The opportunity for stonewalling and improper concealment is there. Some solicitors grasp it. They will make only such production as can be forced from them. That is bad practice. It can work real injustice. It causes delay and expense while the other side struggles to see that which they had a right to see from the first. In such a contest the advantage is to the long purse. The worst consequence is that the strategy is sometimes successful, giving its perpetrators a disreputable advantage. The practice must be condemned. If it were widespread it would undermine the trial system.

Master Sandler has written of the susceptibility of the system to abuse. In Bow Helicopters v. Textron Canada Ltd. et al.; Rocky Mountain Helicopters Inc. et al., Third Parties (1981), 23 C.P.C. 212, he said at p. 215:

> I also observe that under our present system of documentary discovery, the choice as to what documents that are in a party's possession are relevant is, in the first instance, left up to the party itself, and my experience and observations have taught me that nowhere is the abuse of our rules of procedure greater than in this area of documentary production and in the failure of each party to fairly and reasonably disclose and produce to the opposite party all relevant documents, and to disclose the existence of all relevant but privileged documents. (This abuse has been recognized and has attempted to be remedied by the Civil Procedure Revision Committee, chaired by the late Walter B. Williston, Q.C., in draft Rules 31.03(4), 31.06(a), and 31.08 and 31.09 of their Report of June, 1980.)

The duty upon a solicitor is now, and always has been, to make full, fair and prompt discovery. Williston and Rolls, in The Law Of Civil Procedure (1970), vol. 2, put it this way, at pp. 892-4:

> A party giving discovery is under a duty to make a careful search for all relevant documents in his possession and to make diligent inquiries about other material documents which may be in the possession of others for him. A solicitor has a duty of careful investigation and supervision and of advising his client as to what documents should be included in the affidavit, because a client cannot be expected to know the whole scope of his obligation without legal assistance. In Myers v. Elman [[1940] A.C. 282] a solicitor was ordered to pay the costs of the proceedings because his managing clerk was guilty of misconduct in the preparation and filing of an incorrect and inadequate affidavit. Lord Atkin said:
>
> "What is the duty of the solicitor? He is at an early stage of the proceedings engaged

in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others he must investigate the matter; but he need not go beyond taking reasonable steps to acertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. But I may add that the duty is specially incumbent on the solicitor where there is a charge of fraud; for a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution."

Lord Wright put the matter even more bluntly:

"The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to."

In the same case, there was a discussion of the duty to make further disclosure when subsequent to filing the affidavit other relevant documents were found. Viscount Maugham said:

"A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record. The duty of the

> client is equally plain. I wish to say with emphasis that I reject the notion that it is justifiable in such a case to keep silence and to wait and wait till the plaintiff succeeds, if he can, in obtaining an order for a further and better affidavit. To do so is, in the language of Singleton J., to obstruct the interests of justice, to occasion unnecessary costs, and -- even if disclosure is ultimately obtained -- to delay the hearing of the action in a case where an early hearing may be of great importance."

Those pronouncements are clear and unequivocal. Anyone familiar with them, or with many others to the same effect, would not require a master's motion to know that the exhibits filed at the coroner's inquest would have to be produced in this case.

It has equally always been the case that sufficient information must be given of documents for which privilege is claimed to enable a party opposed in interest to be able to identify them. It is not, however, necessary to go so far as to give an indirect discovery. Williston and Rolls continue, at p. 898:

> Where privilege is claimed a description of the documents must be given sufficient to identify them and to enable an order for their production to be enforced if the claim of privilege is bad, but no details need be given which would enable the opposite party to discover indirectly the contents of the documents.

The cases cited for this proposition reveal that it is well-established and of long standing. They are Gardner et al. v. Irvin et al. (1878), 4 Ex. D. 49; Hill v. Hart-Davis (1884), 26 Ch. D. 470; Cooke v. Smith, [1891] 1 Ch. 509; Taylor v. Batten (1878), 4 Q.B.D. 85; Mayor and Corp. of Bristol v. Cox (1884), 26 Ch. D. 678 at p. 681; Budden v. Wilkinson, [1893] 2 Q.B. 432; Price v. Price (1879), 11 Ch. D. 163; Fortescue v. Fortescue (1876), 34 L.T. 847; Ledwidge v. Mayne (1877), 11 I.R. Eq. 463.

That proposition has had recent confirmation in Canada. In Walsh-Canadian Construction Co. Ltd. v. Churchill Falls (Labrador) Corp. Ltd. (No. 1) (1979), 9 C.P.C. 229, 23 Nfld. & P.E.I.R. 34, the question of the sufficiency of detail required to be given of documents for which privilege was claimed was dealt with at length in the Newfoundland Supreme Court. In that case the rule of court governing affidavits on production expressly stated that the affidavit "shall specify" which documents the party objects to produce. There is no such reference in our Rules of Practice but the forms, which have the same effect as the rules, require the documents to be "set forth". I see no difference between "set forth" and "specify".

In the course of his learned and exhaustive decision Mr. Justice Goodridge said, at p. 235:

> I do not think it necessary to deal with the matter any further. Upon my reading of these and other cases it appears to me that in discovery proceedings where a party resists the production of documents on the grounds of privilege it should set forth in its affidavit a sufficient statement of facts so that a Judge may say that if the facts are true

> then as a matter of law the documents are privileged. I would hesitate to expound on that view to any extent. Obviously the party resisting production is not required to give such particulars as will destroy the benefit of the privilege; on the other hand he ought not to be able to avoid production by his own unadorned assertion that the documents are subject to solicitor and client privilege.

The sufficiency of the description given to documents must be governed by the circumstances. The rule must be that enough must be given to enable a court to make a prima facie decision as to whether the claim for privilege has been established from what appears on the face of the affidavit. The point is well set out in a further passage from Goodridge J.'s decision, at p. 237:

> In the case of Westminster Airways Ltd. v. Kuwait Oil Co., [1951] 1 K.B. 134, [1950] 2 All E.R. 596 at 603 and 607 (C.A.), Jenkins L.J. said:
>
> "... there is nothing in the rule or in the authorities to constrain the court to hold that in every case where a claim to privilege is made and disputed the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances, but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents."

I agree with and adopt the decision in Walsh-Canadian Construction. It seems to me to express the requirements both sensibly and reasonably and in accordance with traditionally good practice. The headnote states the requirements succinctly:

> (1) A party resisting production of documents is not required to give particulars which would destroy the benefit of any privilege which might properly attach to the documents, but the description of the documents must be sufficient for a proper determination to be made.
>
> (2) Such a description should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged.

The authorities on which defendant seeks to justify the affidavit are Henderson v. Mercantile Trust Co. (1922), 52 O.L.R. 198, and St. Clair v. Stair (1913), 4 O.W.N. 1437, 11 D.L.R. 862. The effect of the decision in Stair is explained in Henderson. The affidavit in Henderson stated [at p. 198] that defendants objected to produce: "Documents numbered 3 to 55 tied up in a bundle marked A., and initialled by this deponent", relying on Stair.

In my opinion it is a misreading of the Henderson decision to suggest that a party is entitled to conceal the documents from any identification or scrutiny. The decision permitted the documents to be identified in bulk only, but required them to be identified. It does not authorize what amounts to a wave of the hand at nameless and numberless documents.

In Stair the documents could be identified for they had been segregated from others, placed in a bundle and initialled. Although it is not specifically mentioned in either Stair or Henderson, it is reasonable to suppose that they had been deposited with the "proper officer" of the court as the rule then required and as it purports to require now. I say "purports" because the practice of depositing documents referred to in the affidavit on production in court has long since, as a general practice, fallen by the wayside. Documents produced have, for at least the last 35 years, been made available at the solicitors' offices for inspection and, according to a still later practice, copying. While the rule remains, and presumably could be enforced, it does not reflect customary practice.

In Henderson the court proceeded on the basis that documents claimed to be privileged had to be identified sufficiently for a decision to be made. In the course of his decision Latchford J. said [quoting at p. 199 Lord Coleridge in Bewicke v. Graham (1881), 7 Q.B.D. 400 at p. 410]:

> "Now as I understand those cases, the principle is this, that on an application for discovery or inspection, which, I apprehend are substantially the same thing, the applicant is bound by the affidavit made in answer to the application, if the documents referred to in it are sufficiently identified to enable the Court to order their production, should the Court think right to do so."

Even the minimal identification required by Stair has not been given in this case.

In any event, this case could not fall within Stair for the documents for which privilege is claimed do not appear on the face of the affidavit to be in fact privileged. Nor was the affidavit in Henderson saved by Stair: the appeal against the local judge's order requiring a better affidavit was dismissed. Henderson is thus not a decision supporting defendants' position here: it is against it.

Even if Stair meant what defendants suggest it does not justify this affidavit. The result is that not one authority has been cited to me that permits a party to avoid revealing documents by the stratagem of simply referring to a category of documents.

The order made by Master Sandler is exactly in accord with the prevailing law as I understand it. I see no risk of an "indirect discovery" if defendants comply with reasonable common sense. It

should be possible to describe a document sufficiently without revealing its contents.

The whole course of defendants' conduct has been to refuse to disclose anything on the ground that unless plaintiffs can prove something exists they have no right to know of its existence. The unfairness of that attitude is described by Master Sandler in Bow Helicopters v. Textron Canada Ltd. et al.; Rocky Mountain Helicopters Inc. et al., Third Parties (1981), 23 C.P.C. 212 at pp. 214-5:

> I observe that in modern litigation, one of the most important tools in the pre-trial process is documentary discovery, initiated by the demand for an affidavit on production, and in no case is the proper use of this tool by the plaintiff more important than in a products liability case where the plaintiff must establish negligence in design or manufacture, or both, on the part of the defendant. In such a case, the defendant knows everything and usually has a large volume of documentary records, whereas the plaintiff has little or no information, except the product itself, and often, even that has been destroyed in the mishap. In this type of case, the plaintiff must try to penetrate the defendant's operation to see if it can discover records to indicate negligence in design or manufacture, and one tool to gain entry is the affidavit on production. The plaintiff 's difficulty is substantially increased where the product is technologically complex, such as a helicopter.

This action is in a real sense the same as the action in Bow Helicopters so far as discovery is concerned, for most, if not all, of the relevant information is within the scope of defendants' knowledge, not plaintiffs'. That is what makes fair compliance with discovery obligations so acutely necessary.

Modern courts strongly favour disclosure. Whatever the practice might have been in the dark ages of the forms of action, one has only to read Latchford J.'s decision in Henderson at p. 200 to know what the rule has been here for many years:

> It is, I think, greatly to be desired that each party to any litigation should know--so far as it may properly be known--the exact position occupied by his opponent and the precise nature of every document likely to strengthen or weaken that position. All discovery is directed to that end, and the tendency of our Courts in modern times is to widen all avenues to discovery.

The tendency to broaden disclosure, not restrict it, was emphasized in the decision of the Court of Appeal in Perini Ltd. v. Parking Authority of Toronto (1975), 6 O.R. (2d) 363 at p. 367, 52 D.L.R. (3d) 683 at p. 687, where Brooke J.A. referred to "... the modern trend to broaden discovery, whether viva voce or of documents ...".

The rule is, therefore, that a party must candidly describe in an affidavit on production not only documents for which no privilege is claimed but also those for which a privilege is claimed. It is not enough to do the one but not the other.

Litigation is, after all, a search for truth. Its processes are, we all know, imperfect. To permit advantage to be taken of its weaknesses to the point of injustice and unfairness would be wrong. Defendants' strategy in this case must not be tolerated. The appeal must be dismissed.

Plaintiffs ask for costs on a solicitor and his own client scale. That is a punitive award. Yet it was the disposition made by Master Sandler in both orders under appeal. It reveals his view of defendants' course of action.

That course of action may reflect merely excessive concern for the protection of his clients' rights or it may reveal simple stonewalling. My concern that it may be the latter is deepened by the decision of my brother Carruthers in Fiege v. Cornwall General Hospital et al. (1980), 30 O.R. (2d) 691, 117 D.L.R. (3d) 152. I am informed by counsel that the solicitor responsible for the defence in that case up to the point of trial is the solicitor responsible for the conduct of the defence herein. (That is not, I must add, Mrs. Farrer, whose lot it was to seek to justify someone else's conduct, and who did so with much skill and fortitude.) The failure in Fiege to produce an important document was strongly condemned by Carruthers J. He awarded costs on a solicitor and his own client scale against the defendant in that case because of the waste of time and money that resulted. The same may be said of this case. Time has been wasted and money thrown away. There is no merit in defendants' position.

The seriousness of a failure to make proper production is recognized in the rules. Rule 352 states:

> 352(1) If a party fails to comply with any notice or order for production or inspection of documents, he is liable to attachment and is also liable, if a plaintiff, to have his action dismissed, and, if a defendant, to have his defence, if any, struck out.

Attachment of a party is a severe sanction. Defendants' conduct in this case amounts to a deliberate refusal to comply with the notice to produce and is subject to that sanction. But in the absence of any indication that defendants' conduct was other than as advised by their solicitor, the responsibility for it must fall on the solicitor.

The consequences for a solicitor can be severe. In Myers v. Elman, [1940] A.C. 282, [1939] 4 All E.R. 484 (H.L.), the solicitor was ordered to pay the costs. If the course of action followed in this case were shown to be widespread an order to that effect would be appropriate as a general deterrent.

It could be argued that because this case is a repetition of conduct that has already been deplored that order should be made here. Although I have some doubt, I am satisfied to treat this case as an example of excessive zeal and to adopt Master Sandler's order. His order shall stand. The costs of the appeal shall be to plaintiffs in any event of the cause as between a solicitor and his own client. However, because this is a repetition of the same error found in Fiege, supra, the costs may be taxed forthwith and shall be payable forthwith thereafter.

The further affidavit, or affidavits, shall be delivered forthwith subject to any extension allowed by Master Sandler.

Appeal dismissed.

Indexed as:

Ansell Canada Inc. v. Ions World Corp.

Between
Ansell Canada Inc. c.o.b. as Pacific Brands Canada and Pacific Brands, plaintiff and defendant by counterclaim, and Ions World Corp., defendant and plaintiff by counterclaim

[1998] O.J. No. 5034

83 O.T.C. 91

28 C.P.C. (4th) 60

84 A.C.W.S. (3d) 454

Court File No. 97-CV-128727

Ontario Court of Justice (General Division)

Cullity J.

Heard: November 16, 1998.
Judgment: November 30, 1998.

(18 pp.)

Practice -- Discovery -- Production and inspection of documents -- Proper procedure where privilege claimed or relevance contested -- What documents must be produced -- Privileged documents, documents prepared in contemplation of litigation.

Appeal by the plaintiff Ansell Canada from a decision of a Master ordering production of certain documents by the plaintiff. The plaintiff objected to producing the documents on the basis that they had been prepared in contemplation of litigation and thus were protected by solicitor-client privilege. Privilege had been claimed in the affidavit of a vice-president of the plaintiff company, who was the author of three of the five documents. A schedule to the affidavit listed the five documents, their dates, nature, authors and recipients, and the nature of the privilege claimed. A legal assistant to counsel for the plaintiff also swore an affidavit in which she deposed that counsel

had examined the documents and determined that they had been created in anticipation of litigation. Counsel for the defendant cross-examined the vice-president who had prepared the affidavit, and moved for an order requiring production of the five documents. The Master found that there was no direct or other acceptable evidence of privileged communications, based on the fact that no affidavit had been provided by the author of the documents themselves. The Master also rejected the plaintiff's offer to produce the documents for inspection by the Master.

HELD: Appeal allowed. The Master erred by finding that there was no evidence from the author of the documents with respect to their purpose. The affidavit adequately addressed the purpose for which the documents had been prepared. It was not necessary that in all cases affidavit evidence must be provided by the author of a communication. The officers and senior managerial staff of a corporation, under whose general direction or authority a communication had been made, would be as well or better qualified as the immediate author or sender of the communication to testify as to its purpose. Documents need not have been written by, or to, a solicitor in order to be privileged. Since doubt had been cast upon the documents, and since the court had the power under Rule 30.06(d) to inspect them, an inspection was made. However, inspections should not be made as a matter of course.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 134(1)(a).
Ontario Rules of Civil Procedure, Rules 30.03(2)(b), 30.06, 31.06(1)(c), 39.02(1)

Counsel:

Alan J. Butcher, for the plaintiff.
Nancy Lataille, for the defendant.

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1 **CULLITY J.**:-- This is an appeal from a decision of a Master ordering production of certain documents that the Plaintiff had refused to produce on the grounds of privilege. There are five such documents. In each case privilege was claimed on the ground that the document was prepared in contemplation of litigation. As there is some urgency in the matter, I released my decision allowing the appeal in an endorsement dated November 19, 1998, and indicated that I would later provide written reasons.

2 The statement of claim in the action was issued on July 23, 1997. Privilege was claimed in an affidavit of documents sworn by Mr. Garry Poste, a Vice President of the Plaintiff. In paragraph four of his affidavit Mr. Poste states:

> "I have listed in Schedule B those documents that are or were in the possession, control or power of the [Plaintiff] that it objects to producing because it claims they are privileged, and I have stated in Schedule B the grounds of each such claim."

In Schedule B each of the five documents is identified by reference to its date, the nature of the privilege claimed - described as "In Contemplation of Litigation" - the nature of the document - described as "Facsimile Transmission" - , the name of the author of the document and the name of the recipient. Attachments are, in four of the five documents, identified as faxes of specified dates from and to named individuals. Mr. Poste is identified in the schedule as the author of three of the documents and the recipient of a fourth. The fifth document is identified as a fax from and to individuals at corporations, or groups of corporations, alleged in the Plaintiff's reply and defence to counterclaim to be associated with, or related to, it and to have been involved in the transactions from which the litigation arose. Individuals at the same entities - specifically, Shoe Talk Ltd. and Grosby Group Operations - were the recipients or the senders of the four faxes sent or received by Mr. Poste. The documents have various dates in April and May 1997.

3 In addition to the affidavit of Mr. Poste, a legal assistant to one of the counsel for the Plaintiff swore an affidavit in which she deposed, on the basis of her information and belief, that counsel had examined the documents and determined that they were created in anticipation of litigation.

4 A motion for summary judgment was brought. For this purpose Mr. Poste swore an affidavit on behalf of the Plaintiff and was cross-examined. In the course of the cross-examination counsel for the Defendant began to question him with respect to the grounds and the factual bases of the claims of privilege made in his affidavit of documents. Irrespective of the position under the previous rules governing motions for judgment, I believe that cross-examination on statements in an affidavit of documents with respect to the grounds of, and the facts supporting, a claim of privilege is permissible pursuant to rule 39.02(1) on a motion for summary judgment. Cross-examination on an affidavit of documents is now expressly permitted in examinations for discovery (rule 31.06(1)(c)) and it is, of course, permitted at trial where claims of privilege have been made. I see no reasonable basis on which it should be excluded on a motion for summary judgment. If this were not so, the ability of a party wishing to challenge a claim of privilege under rule 30.06 on such a motion would appear to be severely restricted as the power of the Court under the rule is predicated upon it being "satisfied by any evidence ... that a claim of privilege may have been improperly made ..." (emphasis added).

5 I have not been referred to any decisions that bear on this question and it is possible that counsel for the Defendant interpreted rule 39.02(1) more narrowly, or rule 30.06 more expansively, because the extent to which the cross-examination addressed the factual basis for the claim of privilege was very limited. In part, the transcript reads as follows:

> "By Ms. Tayar:

686.

Q. Now, I'm looking at Schedule "B", which is entitled "Privileged Documents".

687. Q. There are 27 documents and four of them refer to solicitor and client. Can you tell me what privilege protects these documents?

Ms. Gray:

These are solicitor/client privileged and/or a document prepared in contemplation of litigation, as is stated specifically on the ... Affidavit.

By Ms. Tayar:

688.

Q. If we can go to your transcripts on the previous examination at Page 21 to 22. I specifically asked when the claim arose?

Ms. Gray:

What do you mean, when the claim arose? ...

Ms. Gray:

Right, so this is with respect to the PVC shoes that the invoices are outstanding for, the whole leather business, and the litigation arising out of that arose much earlier than this if that's what you're ...

Ms. Tayar:

Was there litigation surrounding the leathers in March of 1997?

Ms. Gray:

Threat of litigation. Clearly that's all you need, in contemplation of litigation, Counsel.

Ms. Tayar:

And is Mr. Warwick Jennings or Garry Poste a solicitor that I'm unaware of?

Mr. Gray:

Anything that is prepared in contemplation of litigation is privileged. If you want to take this up with the master, you're welcome to do that. You have my answers.

Ms. Tayar:

Okay. So, just for the record you can restate your position, that's fine. I take the position that these documents are not privileged ...

Mr. Gray:

Were prepared ...

Ms. Tayar:

... and ...

Ms. Gray:

No, they are privileged. They were prepared.

Ms. Tayar:

I appreciate that. I just want to state my position for the record so we're clear what the refusal is. And, as you said, we can take it up with the master. I'd just like to have the question clear, that's all.

I am asking for a production of the documents listed in Schedule "B",

please?

Ms. Gray:

No.

Ms. Tayar:

> All right. It's my position that they are not privileged. They predate any action that was commenced, and save and except for four correspondence wherein there is documentation involving a solicitor, it is my position that these are inter-office or inter-company documentation, without counsel involved, and accordingly they are producible. And I've asked for production, and it's been refused and Counsel may respond if she wishes?

Ms. Gray:

> Well, it's quite clear that we're entitled to claim privilege once there's a contemplation of litigation. Legal advice had been sought by this time, and all of these documents were prepared in the context of the litigation that was threatened and ultimately occurred and, therefore, are privileged."

6 The Defendant subsequently moved under rules 34.12(3), 34.15(1) and 30.06 for an order requiring Mr. Poste to answer question 688 of his cross-examination and to produce all of the documents referred to in Schedule B other than four documents for which solicitor and client privilege had been claimed. Although the schedule refers to numerous documents, the issue has now been narrowed to the five involved in this appeal.

7 The motion for production was granted by the Master. His endorsement was as follows:

> "27/10/98 Both counsel present.
>
> The elements of "litigation privilege" are set out at p. 1183 of the All E.R. report of Waugh v. British Railways and is the law of this province. It is also well established that the person asserting privilege has the onus of establishing it.
>
> The first element in the test is the purpose of the author of the document or the person who directed that it be created. This is a question of fact and must be proved by evidence. The best evidence is that of the person I have described.

There is no such evidence before me and there is no suggestion that it was not available.

I was invited by counsel for the plaintiff to examine the documents, it being said that this would prove the point. Although this is authorized by Rule 30.04(6) it should not be done as a matter of course: see Falconbridge v. Hawker Siddley. There is an element of unfairness in having the court act upon any evidence which one party cannot see or comment upon.

Inspection should take place only when the direct evidence of intention is not available or where it leaves the issue in doubt. It is not a substitute for such evidence.

The other elements of the test will also usually require direct evidence as to the circumstances under which the documents were created.

During the course of her argument plaintiff's counsel sought an adjournment to prepare the evidence which she had come to realize was necessary. Defendant's counsel objected and I refused to grant the adjournment. A motion once commenced should be completed. The process would be greatly prolonged if it would be interrupted each time counsel realized that the motion is not working out as hoped and wishes to fall back to regroup and summon reinforcements.

In the result the plaintiff has failed to establish the onus. The order will go as asked in paragraph 2 of the notice of motion.

Costs to the defendant in any event of the cause."

8 As the learned Master indicated, there is no doubt that the Plaintiff had the legal onus of proving that the factual requirements for a claim of privilege were established. I am also in respectful agreement with the Master that the principal such requirement is that the sole or, at least, the dominant purpose of the communication in the document must have been to prepare for, or to protect the Plaintiff against, a definite prospect of litigation. It must have been made for the dominant purpose of advancing, supporting or defending the position of the Plaintiff in the anticipated litigation. It would not be enough that the purpose was to ascertain, or clarify, the facts that would be in issue in such litigation unless the litigation provided the sole, or the dominant,

reason for making the communication. This, I believe, is established by the authorities in this jurisdiction and elsewhere in Canada that have accepted the principles stated in Waugh v. British Railways Board, [1979] 2 All E.R. 1169 (H.L.) which was cited by the Master.

9 It is also, I believe, clear that it is not necessary for the communication to be made by, or to, a solicitor for the party claiming privilege: Westminster Airways, Ltd. v. Kuwait Oil Co., Ltd., [1950] 2 All E.R. 596 (C.A.). It is, however, necessary that its dominant purpose is for the use of such a solicitor or, at least, to assist in, or as part of, the preparation of the party's case to be put before a solicitor in the anticipated litigation.

10 It was established under the previous rules that, when the issue of privilege is raised in an affidavit of documents, the affidavit must provide sufficient information to permit the document to be identified. Further, the document must be described sufficiently to enable the Court to make a "proper determination" of the issue. This was emphasized by Reid, J. in Grossman et al. v. Toronto General Hospital et al. (1983), 41 O.R. (2d) 457 (H.C.) where the reasoning in Welsh-Canadian Construction Co. Ltd. v. Churchill Falls (Labrador) Corp. Ltd. (No. 1) (1979), 9 C.P.C. 229 (Nfld. S.C.) was strongly endorsed. Reid J. approved the following passage in the head note of Welsh-Canadian Construction Co. Ltd. as a succinct statement of the extent of the required description:

> "Such a description should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged."

11 Given that the deponent of the affidavit of documents in this case was the author of three of the five documents, I have had some difficulty in interpreting the Master's conclusion that there was no evidence of the author with respect to their purpose. The conclusion must, I think, have been based not on the identity of the author of the documents but on a finding that the affidavit did not directly address the dominant purpose for which the communications were made. If this is a correct interpretation of the endorsement, I am not able to agree with the finding.

12 Where the purpose for which a communication was made is in issue, the obvious and most direct method of proving it is for the person making the communication to give evidence on oath. In cases where privilege is claimed in an affidavit of documents, it has been recognized that clients will necessarily require the assistance of their solicitors in order to realize the scope and implications of their obligation with respect to production. The client's solicitor, it has been said, has "a peculiar duty in these matters as an officer of the court carefully to investigate the position and as far as possible see" that the client's obligation is performed: Myers v. Elman, [1940] A.C. 282 (H.L.) at p. 322: Grossman (supra) at p. 464.

13 Where there was legal representation it must be assumed, in the absence of evidence to the contrary, that the claim of privilege was made by the client after consultation with, and with the

approval of, the solicitor. If the solicitor does not believe that the claim is well founded, the "proper course is to withdraw from the case": Myers v. Elman, above, at p. 322. Here, in the case of the three documents of which Mr. Poste was the author, he has sworn that they were prepared in contemplation of litigation and, on that ground that they were privileged. An affidavit has been filed - albeit on information and belief - confirming that a partner of Mr. Poste's solicitors examined the documents for which privilege is claimed and determined that they were created in anticipation of litigation. The claim in Mr. Poste's affidavit that the three documents of which he was identified as the author are privileged because they were made in contemplation of litigation should, I believe, be presumed to have been made after consultation with his solicitor acting professionally and discharging her duty to the court. In these circumstances the words of Schedule B, in my judgment, indicate sufficiently that the dominant purpose of the communication in the documents was to advance, support, or defend the Plaintiff's position in the anticipated litigation. In satisfying herself that a sufficient basis existed for the claim of litigation privilege, counsel must, I believe, be presumed to be familiar with the conditions to be satisfied before such a claim will be justified. To hold that the affidavit was defective on the ground identified by the learned Master would be to insist on the addition of a few words to the statement of the nature of the privilege in Schedule "B" so that it would read: "In Contemplation, and for the Dominant Purpose, of Litigation". At least where, as here, there is evidence of the participation and concurrence of counsel with respect to the claim, the additional words would, in my view, be unnecessary and, in the future, likely to become little more than a ritual incantation.

14 I would also have difficulty in accepting an insistence that, in all cases, affidavit evidence be provided by the author of the communication if that is intended to exclude officers and senior managerial staff of a corporation at whose direction, or under whose general authority or supervision, the communication that the corporation claims to be privileged was made. Such persons would usually be as well qualified as the immediate author or sender of the communication - and in some cases they will be better qualified - to testify as to its dominant purpose. I am also of the opinion that, where such an officer or senior employee is a recipient of a communication, it cannot be assumed as a matter of course that he or she is not qualified to give evidence as to its dominant purpose. Mr. Poste was a senior officer of the Plaintiff who was chosen to give affidavit evidence on its behalf on the motion for summary judgment. Success or failure on such motions can depend upon the comprehensiveness of the affidavits and the additional facts elicited on cross-examination. I see no reason at all why it should be assumed that a person swearing such an affidavit should be assumed to be unqualified to depose as to the litigious purpose of communications to him, or between related corporations involved in the facts that gave rise to the litigation. This is also a matter at which cross-examination on an examination for discovery, at trial or, as here, on a motion for summary judgment, might properly be directed.

15 For these reasons, I believe the Master erred in finding that there was no direct, or other acceptable, evidence of the purpose of the communications in the documents for which privilege is claimed. In my view, this was an error of law that provided the basis of the decision to order production of the documents, and not a finding made in the exercise of the Master's discretion. In

consequence, the principle of non-interference expounded in Marleen Investments Limited v. McBride (1979), 33 O.R. (2d) 125 (H.C.), and frequently applied in subsequent decisions, has no application to this matter and the appeal should be allowed.

16 As the hearing of a motion for summary judgment is imminent, I did not think it was appropriate or necessary to return the case to be heard by a Master. Paragraph 134(1)(a) of the Courts of Justice Act empowers a court to which an appeal is taken to make any order or decision that ought to be, or could have been, made by the court or tribunal appealed from. That is what I decided to do.

17 If follows from my findings above that the requirements set out in the passage quoted from the headnote in Welsh-Canadian Construction Co. Ltd. have largely been satisfied. The function, role and status of the receiver and the sender of at least four of the five documents and their relationship to the Plaintiff are, I believe, sufficiently indicated in the affidavit of Mr. Poste when read in conjunction with the pleadings. Similarly, I have found that the ground on which privilege was claimed has been sufficiently stated. The only other requirement is that the affidavit should contain "a description of each document consistent with the law which renders it privileged". This requirement under the previous rules appears to be preserved by the terms of rule 30.03(2)(b) that stipulate that the affidavit "shall list and describe, in separate schedules, all documents ... for which the party claims privilege, and the grounds for the claim". I note that the instructions in forms 30A and 30B could be understood to relate the necessary description of the nature of the document merely to the need to be able to identify it. I accept, however, that the principles approved in Grossman continue to apply and that the description must be sufficient for a proper determination of the claim to privilege to be made, subject to the obvious, but important, qualification that the party claiming privilege is entitled to withhold particulars which would destroy its benefit. The description provided here was that the documents were facsimile transmissions of a certain date, between the identified recipient and sender, and that they were made in contemplation of litigation. I have found that the last statement is equivalent to an assertion that the dominant purpose or reason for making the communications in the documents was to deal with a definite prospect of litigation.

18 In Grossman, supra, Reid J. stated:

> "The sufficiency of the description given to documents must be governed by the circumstances. The rule must be that enough must be given to enable the court to make a prima facie decision as to whether the claim for privilege has been established from what appears on the face of the affidavit."

19 It follows that there is a question whether the description on the face of the affidavit of documents in this case was sufficient. In Grossman, supra, Reid J. quoted with apparent approval a passage in the judgment in Welsh-Canadian Construction Co. Ltd., supra, where it was said that a party "ought not to be able to avoid production by his own unadorned assertion that the documents are subject to solicitor and client privilege." If such a statement is not to be considered to be

sufficient, it might seem to follow that a simple statement in an affidavit that the documents were prepared in contemplation of litigation, or even for the dominant purpose of litigation, will also not be enough. I have difficulty with this conclusion because, as I have already stated, where the principal factual issue that would determine whether privilege can properly be claimed relates to the dominant purpose of the communication, the most direct method of proving this is for someone involved in the communication to take an oath with respect to its purpose. In Manes and Silver, Solicitor-Client Privilege in Canadian Law, at p. 24 it is suggested that the addition of phrases such as "substantiating a defence against liability" or "outlining a litigation strategy" or "evaluating the work of the case" would be sufficient. In Westminster Airways, Ltd., supra, the Court accepted the following more lengthy, but more general, statement in an affidavit which it described as being in a form which had frequently been before the courts:

> "The defendant company object [sic] to produce any of the documents set forth in the schedule hereto upon the ground that they came into existence and were made after litigation was in contemplation and in view of such litigation for the purpose of obtaining and furnishing to the solicitors of the defendant company evidence and information as to the evidence which could be obtained and otherwise for the use of the solicitors to enable them to conduct the defence in this action and to advise the defendants."

The Court accepted the adequacy of the statement and declined to inspect the documents. I, again, query whether, now that cross-examination on an affidavit of documents is permitted, the absence of such a verbal formula in a case where counsel has advised that privilege may properly be claimed should, by itself, require the claim to be denied. Although there will be limits to the information that can be obtained by cross-examination directed at the factual basis for a claim of privilege, it is more likely to enable the court to determine whether a prima facie case has been established than the inclusion in the affidavit of the vague and general descriptions to which I have referred. Moreover, it is, of course, one thing to say that an affidavit that satisfies the requirements discussed in Grossman will be accepted without further enquiry and quite another thing to hold that a claim of privilege will necessarily fail if one or more or those requirements is not satisfied.

20 Whether or not the inclusion of words such as those approved by the Court of Appeal, or the shorter versions suggested by Manes and Silver, should usually be regarded as essential requirements of an acceptable affidavit of documents in which privilege is claimed, I was not persuaded that it would be appropriate in the circumstances of this case to deny the claims peremptorily on this ground. The issue was raised during the cross-examination of Mr. Poste when the factual basis of the claim was challenged by counsel for the Defendant. The description of the documents in the affidavit was supplemented to some extent by Plaintiff's counsel, but the result of the cross-examination was inconclusive as Defendant's counsel did not insist that further particulars be provided. In these circumstances, I was not prepared to order production on the basis of the alleged insufficiency of the affidavit of documents. However, in view of the authorities to which I have referred, I did not believe I would be justified in upholding the claim to privilege simply on the

present state of the record. Under rule 30.06 the Court has power to order a further and better affidavit or further cross-examination, or to inspect the documents. The third of these options is available under rule 30.06(d) or, if the required evidentiary basis for the application of that rule is not present, under rule 30.04(6). Although I am in respectful agreement with the Master that inspection should not be made as a matter of course, I believe sufficient doubt has been raised with respect to the issue of privilege to justify it in this case. While, on such an inspection, the documents must speak for themselves, counsel for the Plaintiff has requested that it be made and, in view of the pending motion for summary judgment, I decided that the selection of this option would be a reasonable exercise of the discretion conferred by paragraph 134(1)(a) of the Courts of Justice Act and either of the rules I have mentioned.

21 The documents in question are those numbered 12, 13, 14, 17 and 27 in Schedule B.

22 Document 12 is a fax dated April 11, 1997, to Mr. Poste from an employee of a related company. It concerns a review of the facts that gave rise to the litigation for the purpose of ascertaining the legal position of the Plaintiff and of obtaining legal advice. In a handwritten annotation to the attachment, Mr. Poste had stated: "Giovanni is after me". Giovanni Vernich is alleged to have been the directing mind of the Defendant. While, read in isolation, there might be some doubt as to whether it is sufficiently apparent on the face of this document that it was prepared for the dominant purpose, and with a definite prospect, of litigation, I am satisfied that this is sufficiently indicated when its contents and its tone are considered together with the fact that the five documents form part of a connected series of which it is evident that the sole purpose was to determine the strength of the Plaintiff's legal position in the face of what was considered to be a serious risk of litigation. On that basis, I find that Document 12 is privileged.

23 Document 13 is a fax from Mr. Poste dated April 14, 1997, to a related company. The fax indicates that a copy was to be sent to the author of Document 12. The fax contains the review of facts referred to in Document 12 and refers expressly to Mr. Poste's belief that there will be litigation. I find that it is privileged.

24 Document 14 is a fax dated April 24, 1997, between two of the corporations related to the Plaintiff. It refers to Document 13, to advice received from Australian solicitors and to the necessity to obtain legal advice in Canada. I find that it is privileged.

25 Document 17 is dated May 2, 1997, and appears to be a fax between the corporations related to the Plaintiff which has been re-transmitted with the handwritten comments by Mr. Poste. He indicates the legal advice that has been received with respect to the dispute with the Defendant and the document with Mr. Poste's comments is, in my judgment, privileged.

26 Document 27 is a fax dated May 21, 1997, from Mr. Poste to the Grosby Group reporting, again, on the legal advice received by the Plaintiff. It is privileged.

27 It will be noted that none of the five documents was written to, or by, a solicitor. As I have

indicated, I believe that the privilege attaching to communications made in contemplation of litigation is not so restricted. As I have also indicated, the documents formed part of a connected series which involved a review and compilation of the facts provided to the Plaintiff's solicitors, and reports by Mr. Poste to other individuals involved in preparing the Plaintiff's case that described the legal advice that had been received. The documents, individually, and as a group, are, in my judgment, privileged. To the extent that the communications in the attachments to each of the privileged documents were made for the purpose of the document or contain handwritten or other annotations made for such purpose, they are incorporated into the documents and are also privileged. An attachment originally made for another purpose will not otherwise be privileged unless this is claimed and established in the required manner.

28 I have dealt with the question of costs in my endorsement.

29 Appeal Allowed.

CULLITY J.

cp/d/jjy/DRS

Case Name:

Kennedy v. McKenzie

Between
Steven Kennedy, appellant, and
Michael McKenzie and Warren Tischler, respondent

[2005] O.J. No. 2060

[2005] O.T.C. 385

17 C.P.C. (6th) 229

139 A.C.W.S. (3d) 843

2005 CarswellOnt 2109

Court File No. 03-CV-260213CM3

Ontario Superior Court of Justice

T. Ducharme J.

Heard: December 10, 2004.
Judgment: April 8, 2005.

(52 paras.)

Civil evidence -- Privilege -- Privileged relationships -- Solicitor and client -- Civil procedure -- Discovery -- Production and inspection of documents -- Privileged documents -- Where document inadvertently produced.

Appeal by Kennedy from a Master's decision that two statements he made were not protected by litigation privilege. The action arose from a fatal boat accident involving Kennedy, McKenzie and others. Kennedy was sued in three other actions relating to the accident. His insurer's counsel took two statements from Kennedy and inadvertently sent one of them to counsel for McKenzie. McKenzie's counsel would not return the statement.

HELD: Appeal allowed. The Master erred in requiring Kennedy to prove the dominant statement

was made for the purpose of instructing counsel, or that the statement disclosed his strategy. He also erred in requiring Kennedy to demonstrate a connection between the statement and the activities of defence counsel. There was no reason to set aside litigation privilege. Allowing McKenzie to use the statement because it came into his possession inadvertently would cause more harm than good. The same information could be brought before the court in other ways, as McKenzie was also a witness to the accident. The Master's order was set aside, and McKenzie's lawyer was ordered to return the statement to Kennedy and destroy any copies.

Counsel:

R. Morzaria for the Appellant

Alan Powell for the Respondent

REASONS FOR JUDGMENT

T. DUCHARME J.:--

I. NATURE OF THE APPEAL

1 This is an appeal from the decision of Master MacLeod dated September 14, 2004, in which the Master decided, among other things, that two written statements taken from the plaintiff were not protected by litigation privilege and should be produced for the purpose of this action.

II. THE FACTS

(A) Nature of the Action

2 This action arises out of a fatal boating accident that occurred at approximately 11:00 p.m. on August 16, 2002 in the Township of Georgian Bay, in which the plaintiff/appellant, Steven Kennedy, was operating a 15-foot boat on the Trent Severn Waterway of the Severn Channel between Richie Island and the Big Chute Railway. Travelling in the Kennedy boat were Pedro Barbosa, Leanne Ainsbury and Stephen Axiak. At the same time, a second boat operated by the defendant/respondent, Michael McKenzie, and owned by the defendant/respondent, Warren Tischler, was travelling on the Trent Severn Waterway of the Severn Channel. The two boats collided and, as a result, Mr. Barbosa and Ms. Ainsbury were killed and Mr. Kennedy alleges that he suffered serious personal injuries.

3 The plaintiff in the within action, Steven Kennedy, is also named as a defendant in several companion actions:

(a) Axiak et al. v. Kennedy et al., Court File No. 03-CV-245155CM1
(b) Macleod et al. v. Kennedy et al., Court File No. 03-CV-254556CM1
(c) Barbosa et al. v. Kennedy et al., Court File No. 03-CV-259224CM2

(B) Facts Relevant to the Appeal

4 The Chubb Insurance Company of Canada ("Chubb") insures Steven Kennedy. On May 7, 2003, Kirk Boggs, who at the time acted as defence counsel for Steven Kennedy in the Axiak action, delivered to Chubb a statement of claim in that action. As a result of receiving the Axiak statement of claim, Chubb appointed Crawford Adjusters Canada ("Crawford") to adjust and investigate the claim.

5 On May 20, 2003, a Crawford adjuster took a draft statement from Steven Kennedy. On May 29, 2003, Chubb retained Paul Tushinski, a partner with the law firm of Dutton Brock LLP, to defend Steven Kennedy in the Axiak action. On June 6, 2003, after Mr. Tushinski had been retained as his counsel, Steven Kennedy slightly modified and signed the statement ("the statement"). Chubb sent Mr. Tushinski a copy of the statements on June 12, 2003.

6 On September 18, 2003, the plaintiff retained McLeish Orlando LLP to commence an action on his behalf. On September 19, 2003, John McLeish, a partner with McLeish Orlando LLP, wrote to Mr. Tushinski to request copies of all documents relevant to the issue of liability as well as other information obtained by Mr. Tushinski regarding the boating collision. On October 29, 2003, Mr. Tushinski sent McLeish Orlando LLP a copy of his file, which included the two statements.

7 The plaintiff's solicitors, McLeish Orlando, inadvertently sent the second statement to Robin Cumine, counsel for the respondent, Michael McKenzie. The statement has not been provided to any other defendants. Examinations for discovery of all parties were scheduled to take place on April 28, 29, and 30, 2004 at the offices of Rosenberger & Weir. On April 28, 2004, before the examinations for discovery had begun, Mr. Brown of McLeish Orlando became aware that the second statement had been sent inadvertently to defence counsel, Mr. Cumine, and that it ought not to have been. Before the discovery began, Mr. Brown requested that Mr. Cumine immediately return the statement to him. Mr. Cumine refused to do so.

8 On April 29, 2004, Mr. Cumine wrote to Mr. Brown and confirmed that he would not return the statement until he was advised of the factual and legal basis on which the claim of privilege was being made, and the basis on which the plaintiff claimed that there was no waiver of privilege. Mr. Cumine also confirmed that following Mr. Brown's request that he return the statement, Mr. Cumine had:

(a) not reviewed the contents of the statement;
(b) not made any copies of the statement;
(c) sealed the statement in an envelope; and

(d) had not disclosed the contents of the statement or provided any information with respect to its contents to anyone.

9 Mr. Brown also wrote to Mr. Cumine on April 29, 2004, and once again requested that Mr. Cumine return the statement. Mr. Brown reiterated his position that the statement was privileged, advised that it had been taken by an insurance adjuster and that the sworn Affidavit of Documents listed the statement in Schedule "B", and finally, noted that the inadvertent disclosure of the statement did not constitute a waiver. Mr. Cumine maintained his refusal to return the statement.

10 On July 15, 2004 the plaintiff, Steven Kennedy, brought a motion for an Order requiring the solicitor for the defendant, Michael McKenzie, to:

(a) forthwith return to counsel for the plaintiff a statement of the plaintiff dated June 6, 2003 and;

(b) destroy any copies of the statement together with any written summary of the information contained within the statement that may have been in the possession or control of the solicitor of the defendant, Michael McKenzie or the defendant, Michael McKenzie.

(C) Decision of the Master

11 In reasons now reported at [2004] O.J. No. 4129, the Master noted that the defendant did not take the position that privilege was waived as a result of inadvertent disclosure. Thus, he approached the matter as if the statements had only been disclosed in schedule B of the affidavit of documents.

12 The Master recognized that in General Accident v. Chrusz (1999), 45 O.R. (3d) 321, the Court of Appeal had made it clear that litigation privilege may be asserted over a document prepared in contemplation of litigation if it meets the "dominant purpose" test. However, he rejected the claim of litigation privilege in this case, reasoning as follows:

> para. 10 There is no doubt that a report prepared by an adjuster for the purpose of instructing counsel or obtaining advice in contemplated litigation may be covered by litigation privilege. This is the case even if counsel has not yet been formally retained because investigation by an adjuster is part of the routine process by which the insurer retains counsel on behalf of its insured. See General Accident v. Chrusz, supra and Bennett Mechanical, supra. Not every investigation of facts will qualify however even if litigation was contemplated when the investigation was made and even if the document was intended to be given to counsel. There must be some connection between the creation of the document and the activities of the "adversarial advocate". (Bennett Mechanical, para. 20) That is not the character of this document.

> para. 11 The document before me is simply a record of the facts as related to the adjuster and signed by Mr. Kennedy after reviewing it. It appears the police took no statement from Mr. Kennedy at the time although a statement was taken from the defendant and that statement has been produced. I conclude that even if the reason for taking the statement was the predominantly for the use of counsel because of the litigation - and that is by no means evident from the document itself - the dominant purpose of the document was not to instruct counsel. There is nothing in the document that would in any way expose the litigation strategy of Kennedy's defence counsel in the other action. I might have reached a different conclusion had the statement consisted of questions and answers asked by the adjuster since that could have exposed the questions asked of Mr. Kennedy on behalf of his counsel. I might also have been prepared to hold that the draft statement was privileged but as there is no material difference between the documents and the corrections are evident in the signed statement, this is of no matter. In this case the adjuster appears to have acted as scribe rather than interrogator. (emphasis added)

13 Even if his conclusion about litigation privilege was incorrect, the Master indicated that he was of the view that the statements should be produced because:

> para. 12 ... the interests of justice favour disclosure over non disclosure. The statement appears to be the only record of the plaintiff's recollection reasonably contemporaneous with the events. The police took a statement from the defendant but for some reason did not obtain a statement from the plaintiff. The defendant's statement has been produced and it seems appropriate to produce the only record of what the plaintiff said took place.
> (emphasis added)

Consequently, the Master ordered that:

> (a) the statement be produced for the purpose of this action;

(b) counsel for the defendants not disclose the statement to the plaintiffs in the companion actions until privilege is waived or there is a ruling in those actions; and
(c) the statement remained sealed until the expiration of the time for appeal or until counsel for the plaintiff advised that he was instructed not to appeal.

III. THE LAW

(A) The Appropriate Standard of Review

14 In Bank of Nova Scotia v. Liberty Mutual Insurance Co. (2004), 67 O.R. (3d) 699 (Ont. Div. Ct.) at p. 702, the Divisional Court confirmed that the test to be applied on the review of a Master's decision is as follows:

(a) if the matter is one of discretion, the court should not interfere unless the Master was clearly wrong;
(b) if the matter is one of law that is not vital to the disposition of the lawsuit, the court should not interfere unless the Master was clearly wrong; and
(c) if the matter is one of law that is deemed vital to the disposition of the lawsuit, the test should be one of correctness.

15 A claim for litigation privilege requires the determination of a question of mixed law and fact, rather than the exercise of discretion: Davies v. American Home Assurance Co. (2002), 60 O.R. (3d) 512 (Ont. Div. Ct.) at para. 46. Accordingly, with respect to the status of the statements, the principle of non-interference espoused in the decision of Marleen Investments Ltd. v. McBride (1979), 23 O.R. (2d) 125 (Ont. H.C.J.) does not apply to this appeal, and the appropriate standard of review is "correctness": Romaniuk v. Prudential Insurance Co. of America, [2000] O.J. No. 1527 (Ont. S.C.J.) at para. 13; Ansell Canada Inc. v. Ions World Corp., [1998] O.J. No. 5034 (Ont. Gen. Div.) at para. 15.

(B) Are the statements Protected by Litigation Privilege?

(1) The Test For Litigation Privilege

16 Until the decision in General Accident v. Chrusz, supra, the courts in Ontario had generally applied the substantial purpose test for litigation privilege. This was based on the decision of Robertson C.J.O. in Blackstone v. Mutual Life Insurance Co. of New York, [1944] O.R. 328 (Ont. C.A.) and required only that the substantial, or one of the substantial, purposes for the creation or acquisition of the document was pending or anticipated litigation. In General Accident v. Chrusz, supra, Carthy J.A. rejected the substantial purpose test as inconsistent with contemporary trends in discovery and adopted the narrower dominant purpose test instead. The requirements of the dominant purpose test are well set out in the dissent of Kellock J.A. in Blackstone v. Mutual Life

Insurance Co. of New York, supra, at p. 334:

> In order that these documents be privileged from production, two conditions must co-exist: The documents must be (1) made in answer to inquiries made by a party as the agent for or at the request or suggestion of his solicitor, or without any such request but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice or of enabling him to prosecute or defend an action or prepare a brief; and (2) for the purposes of litigation existing, or in contemplation, or anticipated.

While Kellock J.A. was dissenting in Blackstone, neither Robertson C.J.O. nor Gillanders J.A. took issue with the first condition outlined above. Moreover, in General Accident v. Chrusz, supra, Carthy J.A. only took issue with an obiter remark of Robertson C.J.O. that had been relied upon as authority for the substantial purpose test. Carthy J.A. did not express any disagreement with the first condition outlined above by Kellock J.A. As for the second condition it was expressly adopted by Justice Carthy in General Accident v. Chrusz, supra, both in his adoption of the dominant purpose test and in his further observation at p. 334 that, "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."

17 In Bennett Mechanical Installations Ltd. v. Toronto (Metropolitan), [2001] O.J. No. 1777 (Ont. S.C.J.) at paras. 15-20 the motions judge discussed the test for establishing litigation privilege. In doing so he discussed Blackstone, supra, Waugh v. British Railway Board, [1979] 2 All E.R. 1169 (H.L.) and General Accident v. Chrusz, supra, and concluded at para. 20 that:

> These authorities clearly demonstrate that it is not sufficient to show that the documents were created for the dominant purpose of the litigation. An essential element for the establishment of litigation privilege is the connection between the creation of the document and the activities of the "adversarial advocate" in the conduct of the litigation.

The Master followed the foregoing passage in concluding at para. 10 of his reasons:

> Not every investigation of facts will qualify however even if litigation was contemplated when the investigation was made and even if the document was intended to be given to counsel. There must be some connection between the creation of the document and the activities of the "adversarial advocate".

The respondent relies heavily on Bennett Mechanical, supra, arguing that the appellant has not discharged his onus as the evidence does not identify any connection between the creation of the statements and the activities of defence counsel.

18 There is no question that litigation privilege is related to the adversarial process and the needs

of the advocates who function within that system. In General Accident v. Chrusz, supra, Carthy J.A. is explicit about this,, adopting the following passages from the lecture delivered by Professor R.J. Sharpe (now Sharpe J.A.) 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 at pp. 164-65:

> 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.

19 However, in my view, this does not mean that a party claiming litigation privilege is required to demonstrate a "connection between the creation of the document and the activities of the 'adversarial advocate' in the conduct of the litigation." In his lecture, Professor Sharpe was explicating the rationale for litigation privilege not articulating the preconditions for it. To the extent that Bennett Mechanical articulates a further freestanding pre-requisite, I must respectfully disagree with that decision. None of the authorities referred to in Bennett Mechanical support the recognition of such a further precondition. More importantly, requiring a party to demonstrate "the connection between the creation of the document and the activities of the 'adversarial advocate'" is both unhelpful and unworkable. First, it is not clear what precisely this means. This cannot mean that the document must be created at the behest of the advocate. Such a conclusion is untenable since, as Blackstone, supra, makes clear, documents prepared prior to the retention of counsel have been found to be privileged. On the other hand, if this passage means only that the document was meant to be provided to counsel with respect to the particular litigation, then it adds nothing to the law as set out in Blackstone. Second, it is difficult to imagine what this would require in practice beyond establishing that the dominant purpose for the creation of the document was to prepare for litigation. This is especially true if the onus does not rest solely with the claimant of litigation privilege. If nothing else is required, then this adds nothing to the dominant purpose test articulated in General Accident v. Chrusz, supra. Third, requiring a party to demonstrate a clearer connection between the creation of the document and the activities of the adversarial advocate runs the risk of exposing investigatory steps taken by counsel, their research strategies or their opinions, thought processes and conclusions about their strengths and weaknesses in terms of settlement discussions, negotiation tactics and litigation strategies. It is precisely these sorts of information that litigation privilege is meant to protect.

20 For all of these reasons, it is my view that the proper test for litigation privilege is that set out in Blackstone and any further gloss is both unhelpful and unnecessary. For greater convenience, I would restate the Blackstone test as requiring that a party asserting litigation 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.

(2) The Onus

21 Various decisions of this court have suggested that the onus of establishing litigation privilege rests solely on the party claiming its protection: Hannis v. Tompkins, [2001] O.J. No. 5583 (S.C.J.); Whatman v. Selley, [2000] O.J. No. 3155 (S.C.J.); Joseph v. Handscomb, [2001] O.J. No. 2754 (S.C.J.); Proctor & Redfern Ltd. v. Lakehead Region Conservation Authority, [1987] O.J. No. 1842 (S.C.J.); Varga v. Huyer, [1989] O.J. No. 2634 (S.C.J.). However, more recently, this has been questioned by both the Court of Appeal and Divisional Court. In General Accident v. Chrusz, supra, Rosenberg J.A. stated at pg. 369-370:

> 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. (emphasis added)

This passage was cited by Blair R.S.J., as he then was, in Davies v. American Home Assurance Co. (2002), 60 O.R. (3d) 512 (Ont. Div. Ct.) in overturning the finding of the motions judge that there was insufficient evidence to support the claim of litigation privilege at para. 37:

> Were there no evidence concerning the claim for privilege, this conclusion and the order made in consequence of it might have been justified. However, there was some evidence and it is not altogether clear that the entire burden in cases such as this rests upon the person asserting the privilege. (emphasis added)

22 In resolving this issue it is helpful to remember that, broadly speaking, there are two types of privilege, class privilege and case-by-case privilege. Like solicitor client privilege, litigation privilege is a class privilege. In Regina v. Gruenke, [1991] 3 S.C.R. 263 (S.C.C.) at p. 286 Lamer C.J. described this kind of privilege as:

> a privilege which was recognized at common law and one for which there is a prima facie presumption of inadmissibility (once it has been established that the

> relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). (emphasis added)

Similarly in A.(L.L.) v. B.(A.), [1995] 4 S.C.R 536 L'Heureux-Dubé J. stated at p. 562:

> The question of privilege has recently been visited by our Court in Gruenke, supra .... The majority discussed the two categories of privilege at common law: first, a "class" privilege, and second, a "case-by-case" privilege. A class privilege entails a prima facie presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure. (emphasis added)

23 As litigation privilege is a class privilege, the passages in Gruenke and L.L.A. suggest that once a party establishes that the document is prima facie entitled to the protection of litigation privilege, the onus shifts to the party seeking to set aside the privilege. Put another way, the onus of establishing the factual prerequisites of a claim of litigation privilege over a document rests on the party that seeks to claim privilege: Ansell Canada Inc. v. Ions World Corp., supra, at para. 8. In order to discharge this preliminary onus, the party resisting production is not required to give particulars that would destroy the benefit of any privilege which might properly attach to the documents. However, in order for a proper determination to be made, they must provide a sufficient description of the documents, the circumstances of their creation and the dominant purpose therefore. Once this is done, the onus shifts to the party seeking production to justify production on the basis of one of the reasons set out at paragraphs 42 to 46, infra.

(3) The Analysis of the Master With Respect to the Dominant Purpose Test

24 In applying the dominant purpose test, the Master erred in the following respects:

(a) He erred in requiring the appellant to demonstrate some connection between the creation of the document and the activities of the "adversarial advocate";
(b) He erred in interpreting the dominant purpose test as requiring the dominant purpose to be the instructing of counsel; and
(c) He erred in concluding that the document could be produced as it would not expose the appellant's litigation strategy;

I will discuss each of these in turn.

(a) The Application of the Bennett Mechanical Precondition

25 The Master erred in requiring the appellant to demonstrate some further connection between

the creation of the document and the activities of the "adversarial advocate." This led to his conclusion that:

> Not every investigation of facts will qualify however even if litigation was contemplated when the investigation was made and even if the document was intended to be given to counsel.

In my view this conclusion flies in the faces of Chrusz and demonstrates the problematic implications of the further precondition mentioned in Bennett Mechanical.

(b) Requiring the Dominant Purpose of the Document To Be The Instructing of Counsel

26 The Master erred in concluding that the statement was not privileged because its dominant purpose was not to "instruct counsel." In assessing this point, it must be kept in mind that the process of instructing counsel goes well beyond a party merely giving directions relating to the commencement and conduct of a legal proceeding. Instructing counsel also encompasses informing counsel of the relevant circumstances of the case including possible sources of evidence. When viewed in this light, the statement clearly can be used to instruct counsel as it sets out Mr. Kennedy's version of the events leading up to the collision. Moreover, for all the reasons set out in paragraph 32, infra, it is clear that this was in fact the purpose for which the statement was created.

27 More seriously, the requirement of "instructing counsel" as part of the dominant purpose test is contrary to authority. Instructions to counsel are communications that can only come from a client or her designate and go only to her counsel. However, it is clear from the test in Blackstone, set out at paragraph 20, supra, that the scope of litigation privilege is much broader. It can also protect: (a) communications between counsel and a third party; and (b) materials created or gathered at the direction of counsel or their agent. Many of these materials do not involve conventional forms of communication. As McEachern C.J.B.C. observed in Hodgkinson v. Simms (1988), 55 D.L.R. (4th) 577 (B.C.C.A.) at p. 580:

> I do not find it helpful to approach this question of privilege just from the perspective of "communications". Privilege attaches in proper cases to conventional communications where information is transferred from a client to his solicitor and vice versa by letter or conversation, but other documents such as cheques, invoices, legal bills and many other commercial or non-commercial documents may also be privileged even though they convey information or ideas indirectly. For example, a cheque may be evidence of a secret commission, or it may be completely innocent, but it is not a conventional communication. (emphasis added)

28 Moreover, if a document contains instructions from a client it would be protected by solicitor-client privilege, rendering any consideration of litigation privilege superfluous. Thus, while

the fact that a document's purpose is to instruct counsel is a sufficient basis for a claim of privilege, it is not a necessary precondition for a claim of litigation privilege.

(c) Relevance of the Fact that the Document Would Not Expose the Appellant's Litigation Strategy

29 In discussing whether litigation privilege should protect this document the Master stated:

> There is nothing in the document that would in any way expose the litigation strategy of Kennedy's defence counsel in the other action. I might have reached a different conclusion had the statement consisted of questions and answers asked by the adjuster since that could have exposed the questions asked of Mr. Kennedy on behalf of his counsel.

30 Here again the Master confuses a sufficient precondition for a claim of privilege with a necessary precondition for the claim. If the document would reveal the litigation strategy of the party then it clearly should be protected. On the other hand, even, if it does not reveal litigation strategy it nonetheless may attract the protection of litigation privilege. In this regard, it is important to keep in mind that it is not only the contents of documents that can reveal litigation strategy. The mere fact that counsel has sought to obtain a document may, without more, reveal something about how counsel views some aspect of the case or how she intends to conduct it. This is precisely why in Lyell v. Kennedy (1884), 27 Ch.D. 1 (C.A.) it was held that copies of public documents, tombstone inscriptions, gathered by a solicitor's office attained the protection of litigation privilege. As Cotton L.J. explained 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. (emphasis added)

While Carthy J.A. in Chrusz rejected the reasoning in Lyell, he was in the minority on this point as both Doherty and Rosenberg JJ.A. were prepared to acknowledge that, in certain circumstances, copies of non-privileged documents may become subject to litigation privilege.[1] The Master was wrong to focus on the fact that the statement is not in a question and answer format. In so doing he elevated form over purpose and ignored the danger identified in Lyell.

(4) Conclusion With Respect to the Dominant Purpose Test

31 Having found that the Master made the foregoing errors in his application of the dominant purpose test, it remains to be seen whether or not the second statement[2] does satisfy the Blackstone test for litigation privilege.

32 In this case, it is undisputed that the first statement was taken only after Chubb had received the statement of claim in the related Axiak action from the appellant's then counsel. Moreover, Mr. Tushinski, the appellant's defence counsel in that action deposed in his affidavit that it was "as a result of receiving that claim" that Chubb appointed Crawford Adjusters Canada to adjust and investigate the claim. It was a Crawford adjuster that took both statements. Mr. Tushinski also deposed that he believed that "the only purpose for taking [the statements] was as a result of the litigation." Moreover, the second statement was signed on June 6, 2003, one week after Mr. Tushinski had been retained by Chubb and Chubb sent a copy of it to Mr. Tushinski less than one week after Steven Kennedy had signed it.

33 The respondent submits that the foregoing is inadequate as the evidence does not identify any connection between the creation of the statements and the activities of defence counsel. I certainly agree that the evidentiary basis for the claim could have been stronger. Affidavits could have been filed by the adjuster who took the statement, by the officer at Chubb who authorized the interviews and by Mr. Kennedy explaining in greater detail why the statements were taken. Mr. Tushinski's affidavit could also have offered a more detailed explanation of the genesis of the statements rather than merely offering conclusory statements of belief. This shortcoming is unfortunate as this court has repeatedly commented on the importance of a proper evidentiary basis for a claim of litigation privilege: Garratt v. CGU Insurance Co. of Canada, [2003] O.J. No. 3441 (Div. Ct.) per Then J. at paras. 5-7; Bowes v. Peel Condominium Corp. No. 171, [2001] O.J. No. 2728 (Ont. Div. Ct.) per Gillese J., as she then was, at para. 3; Davies v. American Home Assurance Co., supra, per Blair R.S.J. at para. 36; Gabany v. Sobeys Capital Inc., [2002] O.J. No. 3151 (Ont. S.C.J.) per Hoy J. at para. 11. However, in this case, it cannot be said that there is no evidentiary basis for the claim of privilege. In this regard, I note that the respondent did not seek to cross-examine Mr. Tushinski and nothing in the respondent's motion record challenges, or in any way contradicts, the contents of the appellant's motion record. I also agree with the observation of Hoy J. in Gabany v. Sobeys Capital Inc., supra, at para. 11 that the decision in Davies v. American Home Assurance Co., supra, indicates a willingness to take a less exigent view of the evidentiary burden on the party asserting privilege where it appears that privilege has been properly asserted.

34 On the record before me I am satisfied that the statement satisfies the Blackstone test for litigation privilege. In particular, based on the history of the statement and its contents, I find that it was created for the dominant purpose of existing litigation, i.e. the Axiak action and it was created for the purpose of getting Mr. Tushinski's opinion about the action and to enable him to prepare a brief and defend the action.

35 In reaching this conclusion I take comfort from other decisions where similar documents have been held to be protected by litigation privilege. For example, in Gabany v. Sobeys Capital Inc.,

supra, where an adjuster swore an affidavit stating that the documents were made as a direct result of threatened legal action, the Court held that three witness statements and ten adjuster's reports were privileged, "having regard to the nature of each of the individual documents and the circumstances in which they were prepared." Similarly, in Green Estate v. Ontario Rugby Football Union, [2001] O.J. No. 1460 (Ont. S.C.J.) the court held that once a statement of claim has been served, the "obvious conclusion" is that the liability insurer's focus has shifted to preparation for litigation. Accordingly, a witness statement obtained after the date of service was determined to be subject to litigation privilege and was not producible.

(C) Is There Another Reason To Set Aside The Protection Of Litigation Privilege In This Case?

36 Having determined that the Master erred in not finding that the claim of litigation privilege was made out, it is necessary to consider his alternative basis for ordering production of the statement, i.e. that the interests of justice favour disclosure of the statement.

(1) The Reasons of the Master

37 As already mentioned the Master also offered another justification for ordering the production of the statement:

> para. 12 ... the interests of justice favour disclosure over non disclosure. The statement appears to be the only record of the plaintiff's recollection reasonably contemporaneous with the events. The police took a statement from the defendant but for some reason did not obtain a statement from the plaintiff. The defendant's statement has been produced and it seems appropriate to produce the only record of what the plaintiff said took place. (emphasis added)

38 At first blush, this passage seems similar to the analysis of Lord Wilberforce in Waugh v. British Railways Board, [1979] 2 All E.R. 1169 [H.L.] at p. 1173:

> 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 between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant

> purpose of it; to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available. (emphasis added)

Waugh involved a routine accident report prepared by a railway inspector. The report was prepared in part to further railway safety and in part for submission to the railway's solicitor for liability purposes. As the dominant purpose of the report was not to prepare for litigation, it was ordered produced. But Waugh does not support the approach taken by the Master. Rather the case stands for the proposition that the important interest in disclosure justifies the adoption of the dominant purpose test. However, once the privilege is established, Waugh does not approve of some further balancing of the merits of disclosure versus non-disclosure.

39 It is unclear on what basis the Master embarked upon the foregoing balancing of competing interests. His balancing approach seems similar to that suggested by Doherty J.A. in Chrusz at p. 362-364:

> 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.
>
> ...
>
> 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.

However, Doherty J.A. was writing in dissent on this point and his balancing approach was rejected expressly by Rosenberg J.A. and implicitly by Carthy J.A. Moreover, no other court has interpreted Butterfield v. Dickson as authority for the balancing of competing interests in the context of litigation privilege. While litigation privilege is qualified in the U.S. in that such material is discoverable upon a substantial showing of necessity or justification, no such qualification exists in Canadian law.[3]

40 In my view, the Master erred in engaging in exactly the type of analysis that was rejected by the majority in Chrusz. While it is true that generally "the interests of justice favour disclosure over non disclosure," this does not provide a basis to defeat litigation privilege once it has been made out. To recognize the relationship between the interests of justice and disclosure is simply to recognize the competing interests presented in cases such as this. As Professor Sharpe put it in a passage adopted by Carthy J.A. in Chrusz, supra, at p. 331:

> 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.

41 The above error in law by the Master was compounded by a factual error. The appellant's statement was not "reasonably contemporaneous with the events" as it was made more than nine months after the collision. Thus, it was incorrect to treat the statement as the equivalent of the statement taken from the respondent by the police shortly after the collision. Yet this is precisely what the Master appears to have done in concluding that, "The defendant's statement has been produced and it seems appropriate to produce the only record of what the plaintiff said took place."

(2) If Litigation Privilege Attaches Can It Properly Be Set Aside?

42 It is clear from Chrusz, supra, that litigation privilege is not absolute and can, in appropriate

circumstances, be set aside. This same conclusion necessarily follows from the shifting onus analysis outlined in paragraphs 21 to 23, supra. The question then becomes, if the onus shifts to the person challenging the privilege, what must she demonstrate in order to pierce the privilege? Answering this is complicated by the fact that this issue has not been dealt with in any cases subsequent to Chrusz.[4] However, Chrusz itself suggests a number of possible answers.

43 First, several possible bases for setting aside litigation privilege are suggested in the passage from Smith v. Jones, [1999] 1 S.C.R. 455 quoted by Rosenberg J.A. in Chrusz, at p. 369:

> 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.

This passage makes clear that any recognized exceptions to solicitor-client privilege would also apply to litigation privilege. It follows that the exceptions recognized in Smith v. Jones would also apply to claims of litigation privilege: First, where the innocence of an accused person is at stake, litigation privilege could be overridden to allow an accused to make full answer and defence to criminal charges; Second, where the materials involve communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime litigation privilege will not attach; and Third, the public safety exception could also be used to defeat litigation privilege.

44 Second, it is also clear from Chrusz, supra, that a claim of litigation privilege can be attacked on the basis of waiver.[5] However, waiver of litigation privilege involves different considerations than waiver of solicitor-client privilege. This is made clear by Justice Carthy's adoption at p. 337-338 of the following passage from United States of America v. American Telephone and Telegraph Company, 642 F.2d 1285 (1980 S.C.C.A.):

> 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.
>
> ...
>
> 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 added)

45 Third, it is clear that the scope of litigation privilege can be affected by changes in the rules of civil procedure. As Carthy J.A. observed in Chrusz, supra, at p. 331:

> ... 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.
>
> ...
>
> Our modern rules certainly have truncated what would previously have been protected from disclosure.
>
> ...
>
> 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.

Thus, future amendments to the rules may provide further exceptions to, or a narrowing of, litigation privilege.

46 Finally, it is my view that the party challenging the litigation privilege must demonstrate that the materials being sought are relevant to the proof of an issue important to the outcome of the case and that there is no reasonable alternative form of evidence that can serve the same purpose. The Manitoba Court of Appeal adopted this approach in Metcalfe v. Metcalfe, [2001] M.J. No. 115 in a civil case involving inadvertent waiver. The Supreme Court of Canada has taken a similar approach in defining the threshold test that must be satisfied in order to pierce solicitor client privilege in the criminal context: R. v. McClure, [2001] 1 S.C.R. 445; R. v. Brown, [2002] 2 S.C.R. 185.

(3) Should Litigation Privilege Be Set Aside In This Case?

47 Having rejected the Master's alternative reason for ordering production, I must still consider

whether the respondent has made out any other reason for ordering the production of the statement. I conclude that he has not for two reasons: First, none of the bases for setting aside litigation privilege outlined in paragraphs 42 to 46, supra, are applicable to this case. Second, I am not satisfied that there is no reasonable alternative form of evidence that can serve the same purpose. It must be remembered that the fact that the statement itself is protected by litigation privilege only precludes questions about the contents of the statement, it does not preclude questions about the factual circumstances discussed in the statement. As Jackett P. noted in Susan Hosiery Ltd. v. Canada (Minister of National Revenue), [1969] 2 Ex. C.R. 27 (Exch. Ct.) at p. 34:

> What is important to note about both of these rules [i.e. solicitor client privilege and litigation privilege] is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to, obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them.
>
> ...
>
> In my view, it follow that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.
> (bracketed insert and emphasis added)

Thus, the respondent will be able to obtain the appellant's own account of the events which can be elicited, under oath, at his examination for discovery. While this is not contemporaneous with the collision, neither is the statement the respondent wants produced.

(4) The Relevance of Airst v. Airst

48 In their written submissions, both the appellant and respondent argue that the proper application of the principles outlined in Airst v. Airst (1998), 37 O.R. (3d) 654 (Ont. G.D.) supports their positions of non-disclosure and disclosure respectively. I am somewhat mystified by these submissions since the Master expressly stated that the respondent was not relying on the inadvertent disclosure of the statement as a waiver of litigation privilege:

> para. 6 The defendant does not take the position that privilege was waived by inadvertent disclosure. This is appropriate. The cases are clear that inadvertent disclosure of a privileged document is not a waiver of privilege if corrected immediately. See Aviaco International Leasing Inc. v. Boeing Canada Inc. (2000), 48 C.P.C. (4th) 44 (S.C.J.), Nova Growth Corp. v. Kepinski, [2001] O.J. No. 5993 (S.C.J.), Bennett Mechanical Installations Ltd. v. Toronto, [2001] O.J. No. 1777 (S.C.J.). Privilege has therefore not been waived and the question is simply whether or not the document is privileged at all.

Thus, in my view the matter of inadvertent disclosure as a justification for production of the statements does not arise on this appeal and the principles enunciated in Airst are not relevant to its proper determination.

49 In case I am wrong in the foregoing conclusion, I will consider the approach Justice Wein took in Airst v. Airst, supra. At pp. 659-660 of the decision she stated:

> In balancing the competing interests in a case involving inadvertent disclosure, the court must exercise a discretion and determine the issue based on the particular circumstances. Factors relevant to the court's consideration will include the way in which the documents came to be released, whether there was a prompt attempt to retrieve the documents after the disclosure was discovered, the timing of the discovery of the disclosure and, sometimes, the timing of the application, the number and nature of the third parties who have become aware of the documents, whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party, and the impact on the fairness, both actual and perceived, of the processes of the court.

50 Applying the principles in Airst v. Airst, supra, to the facts of this case leads me to conclude that the statement should not be produced. In this regard I would point, in particular, to the following factors:

> (a) The disclosure was due to inadvertence and not recklessness. It occurred as part of the process of assembling and delivering productions to the respondent. Such inadvertent disclosure is likely to occur more frequently. As Farley, J. noted in Nova Growth Corp v. Kepinski, [2001] O.J. No.

5993 (Ont. S.C.J.) at paras. 21 and 22, "With rules of court now providing for liberal production of documents, the exchange of large quantities of documents between counsel is routine and accidental disclosure of privileged documents is bound to occur."

(b) Mr. Brown discovered the inadvertent disclosure of the statement to Mr. Cumine before the examinations for discovery on April 28, 2004. He promptly requested that Mr. Cumine return the statement before the discoveries commenced. Mr. Brown sent follow up correspondence requesting the return of the statements the day after the inadvertent disclosure came to his attention, and scheduled the plaintiff's motion for the return of the statements on May 18, 2004, a mere twenty days after the discovery of the inadvertent disclosure and the earliest date available to the court;

(c) The inadvertent disclosure took place only about a month before examinations for discovery and was discovered before the discoveries began. Thus, no substantive steps in the action took place before the inadvertent disclosure was discovered and an attempt was made to correct it. The timing of the discovery means that the respondent will not be prejudiced by the maintenance of the privilege as he did not engage in any steps in reliance on the statement, such as cross-examining the plaintiff on it at examinations for discovery;

(d) The statement has not been produced to any third parties or, for that matter, to any co-defendants;

(e) The maintenance of the privilege will not create any actual or perceived unfairness to the respondent. The respondent could not have had any reasonable expectation of receiving the statement, and has suffered no harm as a consequence of having received it;

(f) Ordering production of the statement would, by contrast, create actual and perceived unfairness to the appellant, for numerous reasons:

    (i) Mr. Kennedy gave the statement to an insurance adjuster under the expectation that it would not be produced;

    (ii) He made the statement in circumstances where he could be expected to divulge confidential information that might tend to demonstrate fault on his part;

    (iii) The statement was inadvertently disclosed by Mr. Kennedy's counsel, and it is clear from the evidence that Mr. Kennedy never authorized the release of the statement in this manner; and

    (iv) Ordering disclosure would leave Steven Kennedy in a position where, because of the inadvertence of his counsel, the

> opposing party will receive and make use of information that he believed he had given in confidence to assist his insurer and counsel in defending the Axiak action.

In sum, I accept the appellant's submission that allowing the respondent to make use of the statement merely because he fortuitously came into possession of it for a brief period of time would, as Justice Wilkins stated in Agrico Canada Ltd. v. Stewart, Smith (Canada) Ltd., [1994] O.J. No. 2334 (Ont. Gen. Div.) at para. 38 "cause a greater harm than whatever limited good can be derived from its use in this action."

ORDER

51 It is ordered that:

(a) the Order of Master MacLeod dated September 14, 2004, is set aside, save for that portion of the Order which convened a case conference to establish a timetable for discoveries and for the remaining steps in the action;
(b) the solicitor for the respondent, Michael McKenzie, forthwith return to counsel for the plaintiff the statement of the plaintiff dated June 6, 2003;
(c) the solicitor for the respondent, Michael McKenzie, destroy any copies of the statement of the plaintiff dated June 6, 2003 together with any summaries of the information contained within the statement, in any format, which may be in the possession, power or control of the solicitor for the respondent, Michael McKenzie, or the respondent, Michael McKenzie.

COSTS

52 The appellant is entitled to his costs. If the parties are unable to agree as to the scale and quantum of costs, the appellant shall provide brief written submissions with respect to costs within seven days of the release of this judgment and the respondent shall provide written submissions within seven days of the receipt of the appellant's written submissions.

T. DUCHARME J.

cp/e/qlsxk/qlkjg/qlrme/qlmll

1 See Doherty J.A. at p. 361 and Rosenberg J.A. at p. 370.

2 While there were two statements, only the second statement was inadvertently disclosed and the motion before the Master only sought relief with respect to the second statement although both were appended to the affidavit of Paul Tushinski. Inexplicably in paragraph 11 of his reasons the Master also makes reference to the first statement. As the first statement has not been disclosed and was not properly part of the motion being appealed from, I will not address it further.

3 Sopinka, Lederman and Bryant, The Law of Evidence in Canada, second edition, (Toronto: Butterworths, 1999) at p. 747. This qualification was first recognized by the U.S. Supreme Court in Hickman v. Taylor 329 U.S. 495 (1947) and is now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure which provides for discovery of such otherwise privileged materials "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Even when that is made out the Rule provides, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

4 One exception is the decision of Corbett J. in Guelph (City) v. Super Blue Box Recycling Corp., [2004] O.J. No. 4468 (S.C.J.).

5 There is a very helpful discussion of waiver in Guelph (City) v. Super Blue Box Recycling Corp., supra, at paras. 77-100.

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 Canadian Distributed Antenna Systems Coalition ("CANDAS") for certain orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for an Order requiring further and better answers to Interrogatories delivered to Toronto Hydro-Electric System Limited.

EB-2011-0120

ONTARIO ENERGY BOARD

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