EB-2011-0120

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Canadian Distributed Antenna Systems Coalition ("CANDAS") for certain orders under the Ontario Energy Board Act, 1998.

BRIEF OF AUTHORITIES
OF THE
CONSUMERS COUNCIL OF CANADA
FILED FEBRUARY 6, 2012

WeirFoulds LLP
Barristers & Solicitors
Suite 1600, The Exchange Tower
130 King Street West
Toronto, Ontario M5X 1J5
Robert B. Warren
(LSUC # 17210M)
Telephone: 416-365-1110
Fax: 416-365-1876

Lawyers for
The Consumers Council of Canada

K1.2

BRIEF OF AUTHORITIES OF THE CONSUMERS COUNCIL OF CANADA

1. *General Accident Assurance Co. v. Chrusz* (1999), 45 OR (3d) 321 (WL) (CA)
2. *Blank v. Canada (Department of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 (WL)
3. *Vancouver Community College v. Phillips, Baratt* (1987), 20 BCLR (2d) 289 (WL) (SC)
4. *Delgamuukw v. British Columbia* (1988), 32 BCLR (2d) 156 (WL) (SC)
5. *Browne (Litigation Guardian of) v. Lavery* (2002), 58 OR (3d) 86 (WL) (SCJ)
6. *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 83 OR (3d) 792 (WL) (CA).
7. *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co*, [1988] AJ No 810 (QL) (CA)
8. *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, [2002] BCJ No 2779 (QL)
9. *Order F06-16*, 2006 CanLII 25576 (BC IPC)
10. *Hamalainen (Committee of) v. Sippola* (1991), 62 BCLR (2d) 254 (WL) (CA)

1

1999 CarswellOnt 2898, 45 O.R. (3d) 321, 124 O.A.C. 356, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, [1999] O.J. No. 3291

General Accident Assurance Co. v. Chrusz

General Accident Assurance Company, the Sovereign General Insurance Company, Commercial Union Assurance, Wellington Insurance Company and the Canadian Surety Company, Plaintiffs (Respondents) and Daniel Chrusz, Daniel Chrusz in Trust, Catherine Backen, Gary Mitchell, Mike Filipetti, Jane Doe, John Doe and Poli-Fiberglass Industries (Thunder Bay) Limited, Defendants (Appellants)

Daniel Chrusz, Daniel Chrusz in Trust, Catherine Backen, Gary Mitchell, Mike Filipetti, and Poli-Fiberglass Industries (Thunder Bay) Limited, Plaintiffs by Counterclaim (Appellants) and General Accident Assurance Company, the Sovereign General Insurance Company, Commercial Union Assurance, Wellington Insurance Company, the Canadian Surety Company, Denis Pilotte and Patty Pilotte, John Bourret and C.K. Alexander Insurance Adjusters Limited, Defendants by Counterclaim (Respondents)

Ontario Court of Appeal

Carthy, Doherty, Rosenberg JJ.A.

Heard: December 10, 1998
Judgment: September 14, 1999
Docket: CA C29463

Proceedings: (1998), 37 O.R. (3d) 790 (Ont. Div. Ct.); reversing in part (1997), 44 C.C.L.I. (2d) 122 (Ont. Gen. Div.)

Counsel: *Paul J. Pape* and *J.D. Young, Q.C.* , for appellant.

Stephen J. Wojciechowski , for respondent.

Norma M. Priday , for respondent Pilotte.

Subject: Insurance; Evidence; Civil Practice and Procedure

Practice --- Discovery — Discovery of documents — Affidavit of documents — Sufficiency where production objected to — Statement of grounds of privilege

Plaintiff insurance company advanced money to owners in payment on loss on motel and bar which was severely damaged by fire — Former employee of owners of motel and bar gave statement under oath to insurer's lawyer and independent claims adjuster retained by them which stated that one of owners created fire damage

where none existed in order to inflate amount of claim — Employee and his counsel were given copies of employee's statement as promised by insurer's lawyer — Insurance company issued statement of claim against owners alleging concealment, fraud and misrepresentation during process of adjustment of loss — Owner's statement of defence included counterclaim against insurance company, employee and claims adjuster — Communications between lawyer and insurance company were protected by solicitor-client privilege — On May 23, 1995, revelations of employee brought litigation into contemplation — Any communications from insurance adjuster to insurance company's lawyer after May 23, 1995, dominant purpose of which was directed to litigation, were protected by litigation privilege.

Practice --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege

Plaintiff insurance company advanced money to owners in payment on loss on motel and bar which was severely damaged by fire — Former employee of owners of motel and bar gave statement under oath to insurer's lawyer and independent claims adjuster retained by them which stated that one of owners created fire damage where none existed in order to inflate amount of claim — Employee and his counsel were given copies of employee's statement as promised by insurer's lawyer — Insurance company issued statement of claim against owners alleging concealment, fraud and misrepresentation during process of adjustment of loss — Statement taken by insurance company's lawyer from employee was protected by litigation privilege in hands of lawyer.

Practice --- Discovery — Discovery of documents — Privileged document — Documents prepared in contemplation of litigation

Plaintiff insurance company advanced money to owners in payment on loss on motel and bar which was severely damaged by fire — Former employee of owners of motel and bar gave statement under oath to insurer's lawyer and independent claims adjuster retained by them which stated that one of owners created fire damage where none existed in order to inflate amount of claim — Employee and his counsel were given copies of employee's statement as promised by insurer's lawyer — Insurance company issued statement of claim against owners alleging concealment, fraud and misrepresentation during process of adjustment of loss — Copy of employee statement delivered by insurance company's lawyer to employee's lawyer was not privileged as statement was not created for this litigation and was simply relevant piece of factual information that came to counsel with original brief.

The plaintiff insurance company advanced money to the owners in payment on a loss on a motel and bar which was severely damaged by fire. The former employee of the owners of the motel and bar gave a statement under oath to the insurer's lawyer and independent claims adjuster retained by them which stated that one of the owners created fire damage where none existed in order to inflate the amount of the claim. The employee and his counsel were given copies of the employee's statement as promised by the insurer's lawyer. The insurance company issued a statement of claim against the owners alleging concealment, fraud and misrepresentation during the process of adjustment of the loss. The owner's statement of defence included the counterclaim against the insurance company, the employee and the claims adjuster. The owner sued the employee and his wife for defamation and slander and injurious falsehoods. The owner sued the insurance company for relying on the reckless, uncorroborated, unsubstantiated and malicious statements made by the former disgruntled employees. The trial judge found the communications by the insurance adjuster to the insurer and the insurer's lawyer and third parties prior to May 23, 1995 were derivative and not protected by litigation privilege in that there was no agency relationship between the insurance company and the adjuster. The trial judge found that communications between the insurance adjuster and the insurance company and the insurance company's lawyer after May 23,

1995 were subject to either legal professional privilege or litigation privilege. The Divisional court concluded that all reports from the insurance adjuster to the insurance company and/or the insurance company's lawyer made before and after May 23, 1995 were privileged. The defendant owners appealed.

Held: The appeal was allowed.

Per Carthy J.A. (Rosenberg J.A. concurring): Solicitor-client privilege serves the purpose of promoting frank communications between the client and solicitor where legal advice is being sought or given, facilitating access to justice. The communications between the lawyer and the insurance company were protected by solicitor-client privilege. The court would not accord communications between the insurance adjuster and the insurance company's lawyer and insurance adjuster and the insurance company with the protection of solicitor-client privilege as the adjuster was retained to perform functions of investigating and reporting. The insurance adjuster's retainer did not extend to any function which could be said to be integral to the solicitor-client relationship. On May 23, 1995, the revelations of the employee brought litigation into contemplation. The communications between the insurance adjuster and the insurance company and the insurance company's lawyer before May 23, 1995 were not protected by litigation privilege. Any communications from the insurance adjuster to the insurance company's lawyer after May 23, 1995 had a dominant purpose which was directed to litigation and were protected by litigation privilege.

The statement taken by the insurer's lawyer from the employee was protected by litigation privilege in the hands of the lawyer.

The copy of the statement delivered to the employee was not privileged as the statement was not created for this litigation and was simply a relevant piece of factual information that came to the insurance company's lawyer with the original brief. As closely as he was aligned in interest to the insurance company the employee did not acquire common interest privilege. The employee 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 vehilcle 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.

Per Doherty J.A. (dissenting in part): The insurance company claimed that it was not required to produce the transcript of the employee's statement of May 23 because it was protected by litigation privilege. The statement is not so protected. The statement meets 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 was clearly met. However every document which satisfies the condition precedent to the operation of litigation privilege should not be protected from disclosure by that privilege. 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. The statement consists of an exhaustive examination under oath of the employee by the insurance company's lawyer and the insurance adjuster over a two day period. It could not be said that the owners would have access to the same information from any other source. To the extent that the statement could be substantive evidence, the owners could not obtain that evidence without an order directing production of the statement. The goals of adjudicative fairness and adjudicative reliability could suffer significant harm if the statement was not ordered produced at the discovery stage of the proceedings.

Cases considered by *Carthy J.A.* (*Rosenberg J.A.* concurring):

Almecon Industries Ltd. v. Anchortek Ltd. (1998), [1999] 1 F.C. 507, 85 C.P.R. (3d) 30 (Fed. T.D.) — referred to

Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd., 61 Alta. L.R. (3d) 38, [1998] 10 W.W.R. 633, 229 A.R. 191 (Alta. Q.B.) — referred to

Archean Energy Ltd. v. Minister of National Revenue (1997), 202 A.R. 198, [1998] 1 C.T.C. 398, 98 D.T.C. 6456 (Alta. Q.B.) — referred to

Blackstone v. Mutual Life Insurance Co. of New York, [1944] O.R. 328, 11 I.L.R. 97, [1944] 3 D.L.R. 147 (Ont. C.A.) — considered

Buttes Gas & Oil v. Hammer (No. 3), [1980] 3 All E.R. 475, [1980] 3 W.L.R. 668, [1981] Q.B. 223 (Eng. C.A.) — considered

Canadian Pacific Ltd. v. Canada (Director of Investigation & Research) (December 31, 1995), Doc. B55/95F, B55/95H (Ont. Gen. Div. [Commercial List]) — referred to

Davies v. Harrington (1980), 39 N.S.R. (2d) 258, 71 A.P.R. 258, 115 D.L.R. (3d) 347 (N.S. C.A.) — referred to

Dionisopoulos v. Provias (1990), 71 O.R. (2d) 547, 45 C.P.C. (2d) 116 (Ont. H.C.) — considered

Hickman v. Taylor (1947), 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (U.S. S.C.) — referred to

Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132, 47 C.C.L.T. 94 (B.C. C.A.) — considered

Lehman v. Insurance Corp. of Ireland (1983), [1984] 1 W.W.R. 615, 3 C.C.L.I. 257, 40 C.P.C. 285, 25 Man. R. (2d) 198 (Man. Q.B.) — referred to

Lyell v. Kennedy (No. 3) (1884), 27 Ch. D. 1, [1881-5] All E.R. 814, 53 L.J. Ch. 937 (Eng. C.A.) — considered

Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd. (1994), 24 C.P.C. (3d) 120, 130 N.S.R. (2d) 211, 367 A.P.R. 211, 114 D.L.R. (4th) 526, 15 C.L.R. (2d) 53 (N.S. S.C.) — referred to

McCaig v. Trentowsky (1983), 47 N.B.R. (2d) 71, 148 D.L.R. (3d) 724, 124 A.P.R. 71 (N.B. C.A.) — referred to

Nova, an Alberta Corp. v. Guelph Engineering Co., (sub nom. *Nova, an Alberta Corp. v. Daniel Valve Co.*) [1984] 3 W.W.R. 314, 5 D.L.R. (4th) 755, 30 Alta. L.R. (2d) 183, 50 A.R. 199, 42 C.P.C. 194, 80 C.P.R. (2d) 93 (Alta. C.A.) — referred to

Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 O.R. (2d) 637, 74 D.L.R. (4th) 742, 41 O.A.C. 65, 45 C.P.C. (2d) 293 (Ont. Div. Ct.) — considered

R. v. Dunbar (1982), 28 C.R. (3d) 324, 68 C.C.C. (2d) 13, 138 D.L.R. (3d) 221 (Ont. C.A.) — referred to

United States v. American Telephone & Telegraph Co. (1980), 642 F.2d 1285, 206 U.S. App. D.C. 317 (U.S. D.C. Ct. App.) — considered

Voth Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44, 29 B.C.L.R. 114, 23 C.P.C. 276, [1981] 5 W.W.R. 91 (B.C. C.A.) — referred to

Waugh v. British Railways Board (1979), [1980] A.C. 521, [1979] 2 All E.R. 1169 (U.K. H.L.) — considered

Cases considered by *Doherty J.A.* (dissenting in part):

A. (L.L.) v. B. (A.), 103 C.C.C. (3d) 92, 44 C.R. (4th) 91, 130 D.L.R. (4th) 422, 190 N.R. 329, 33 C.R.R. (2d) 87, [1995] 4 S.C.R. 536, 88 O.A.C. 241 (S.C.C.) — considered

Alcan-Colony Contracting Ltd. v. Minister of National Revenue, [1971] 2 O.R. 365, 18 D.L.R. (3d) 32, 71 D.T.C. 5082 (Ont. H.C.) — referred to

Anderson v. Bank of British Columbia, 2 Ch. D. 644, [1874] All E.R. Rep. 396 (Eng. C.A.) — considered

Australian Federal Police, Commissioner v. Propend Finance Pty. Ltd. (1997), 141 A.L.R. 545, 71 A.L.J.R. 327, 35 A.T.R. 130 (Australia H.C.) — referred to

Baker v. Campbell (1983), 153 C.L.R. 52, 57 A.L.J.R. 749, 49 A.L.R. 385, 14 A.T.R. 713, 83 A.T.C. 4606 (Australia H.C.) — considered

Blackstone v. Mutual Life Insurance Co. of New York, [1944] O.R. 328, 11 I.L.R. 97, [1944] 3 D.L.R. 147 (Ont. C.A.) — applied

Bunbury v. Bunbury (1839), 48 E.R. 1146 (Eng. Rolls Ct.) — referred to

Butterfield v. Dickson, [1994] N.W.T.R. 228, 28 C.P.C. (3d) 242 (N.W.T. S.C.) — considered

C-C Bottlers Ltd. v. Lion Nathan Ltd., [1993] 2 N.Z.L.R. 445 (New Zealand H.C.) — referred to

Calcraft v. Guest, [1898] 1 Q.B. 759, 46 W.R. 420, [1895] All E.R. Rep. 346 (Eng. C.A.) — referred to

Canadian Indemnity Co. v. Canadian Johns-Manville Co., [1990] I.L.R. 1-2650, [1990] 2 S.C.R. 549, 115 N.R. 161, 72 D.L.R. (4th) 478, 33 Q.A.C. 161, 50 B.L.R. 1, 50 C.C.L.I. 95, [1990] R.R.A. 1038 (S.C.C.) — applied

Catherwood (Guardian ad litem of) v. Heinrichs (1995), 17 B.C.L.R. (3d) 326 (B.C. S.C. [In Chambers]) — referred to

Cook v. Ip (1985), 52 O.R. (2d) 289, 5 C.P.C. (2d) 81, 22 D.L.R. (4th) 1, *(*sub nom. *Cook v. Washuta)* 11 O.A.C. 171 (Ont. C.A.) — referred to

Coronation Insurance Co. v. Taku Air Transport Ltd. (1991), [1992] 1 W.W.R. 217, [1991] 3 S.C.R. 622, 61

B.C.L.R. (2d) 41, 85 D.L.R. (4th) 609, 131 N.R. 241, [1992] I.L.R. 1-2797, 4 C.C.L.I. (2d) 115, 6 B.C.A.C. 161, 13 W.A.C. 161, [1992] R.R.A. 470 (S.C.C.) — applied

Descôteaux c. Mierzwinski, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385 (S.C.C.) — considered

Flack v. Pacific Press Ltd. (1970), 74 W.W.R. 275, 14 D.L.R. (3d) 334 (B.C. C.A.) — considered

Goodman & Carr v. Minister of National Revenue, [1968] 2 O.R. 814, 70 D.L.R. (2d) 670, [1968] C.T.C. 484, 68 D.T.C. 5288 (Ont. H.C.) — referred to

Goodman Estate v. Geffen, [1991] 5 W.W.R. 389, 42 E.T.R. 97, *(*sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, *(*sub nom. *Geffen v. Goodman Estate)* 81 D.L.R. (4th) 211, 127 N.R. 241 (S.C.C.) — considered

Grant v. Downs (1976), 135 C.L.R. 674, 11 A.L.R. 577 (Australia H.C.) — considered

Hamalainen (Committee of) v. Sippola (1991), 62 B.C.L.R. (2d) 254, 3 C.P.C. (3d) 297, [1992] 2 W.W.R. 132, *(*sub nom. *Hamalainen v. Sippola)* 9 B.C.A.C. 254, *(*sub nom. *Hamalainen v. Sippola)* 19 W.A.C. 254 (B.C. C.A.) — considered

Hickman v. Taylor (1947), 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (U.S. S.C.) — considered

Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132, 47 C.C.L.T. 94 (B.C. C.A.) — considered

Hooper v. Gumm (1862), 70 E.R. 1199 (Eng. V.-C.) — referred to

International Minerals & Chemical Corp. (Canada) v. Commonwealth Insurance Co. (1990), 47 C.C.L.I. 196, 89 Sask. R. 1 (Sask. Q.B.) — referred to

Jones v. Great Central Railway, [1910] A.C. 4 (U.K. H.L.) — referred to

Learoyd v. Halifax Joint Stock Banking Co., [1893] 1 Ch. D. 686 (Eng. Ch. Div.) — referred to

Métropolitaine, cie d'assurance-vie c. Frenette, 4 C.C.L.I. (2d) 1, *(*sub nom. *Frenette v. Metropolitan Life Insurance Co.)* 89 D.L.R. (4th) 653, 134 N.R. 169, *(*sub nom. *Metropolitan Life Insurance Co. v. Frenette)* [1992] I.L.R. 1-2823, *(*sub nom. *Frenette v. Metropolitan Life Insurance Co.)* 46 Q.A.C. 161, *(*sub nom. *Frenette v. Metropolitan Life Insurance Co.)* [1992] 1 S.C.R. 647, *(*sub nom. *Frenette v. Metropolitan Life Insurance Co.)* [1992] R.R.A. 466 (S.C.C.) — referred to

Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd. (1985), 3 N.S.W.L.R. 44 (New South Wales S.C.) — considered

R. v. B. (K.G.), 19 C.R. (4th) 1, [1993] 1 S.C.R. 740, 61 O.A.C. 1, 148 N.R. 241, 79 C.C.C. (3d) 257 (S.C.C.) — considered

R. v. Fosty, [1991] 6 W.W.R. 673, *(*sub nom. *R. v. Gruenke)* 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, *(*sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108

(S.C.C.) — considered

R. v. Garofoli, 80 C.R. (3d) 317, [1990] 2 S.C.R. 1421, 116 N.R. 241, 43 O.A.C. 1, 36 Q.A.C. 161, 60 C.C.C. (3d) 161, 50 C.R.R. 206 (S.C.C.) — referred to

R. v. Littlechild (1979), [1980] 1 W.W.R. 742, 11 C.R. (3d) 390, 19 A.R. 395, 51 C.C.C. (2d) 406, 108 D.L.R. (3d) 340 (Alta. C.A.) — referred to

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — referred to

R. c. Perron, 54 C.C.C. (3d) 108, [1990] R.J.Q. 752, 75 C.R. (3d) 382 (Que. C.A.) — considered

R. v. S. (R.J.) (1985), 45 C.R. (3d) 161, 8 O.A.C. 241, 19 C.C.C. (3d) 115 (Ont. C.A.) — referred to

R. v. Seaboyer, 7 C.R. (4th) 117, 4 O.R. (3d) 383, 48 O.A.C. 81, 128 N.R. 81, 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193 (S.C.C.) — referred to

R. v. Shirose, *(*sub nom. *R. v. Campbell)* 237 N.R. 86, 133 C.C.C. (3d) 257, *(*sub nom. *R. v. Campbell)* 42 O.R. (3d) 800 (note), 171 D.L.R. (4th) 193, *(*sub nom. *R. v. Campbell)* 119 O.A.C. 201, *(*sub nom. *R. v. Campbell)* 43 O.R. (3d) 256 (headnote only), 24 C.R. (5th) 365, *(*sub nom. *R. v. Campbell)* [1999] 1 S.C.R. 565 (S.C.C.) — considered

R. v. Stinchcombe (1991), [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277, 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 8 W.A.C. 161 (S.C.C.) — referred to

Russell v. Jackson (1851), 68 E.R. 558, 9 Hare 387 (Eng. V.-C.) — referred to

San Francisco (City) v. Superior Court (1951), 281 P.2d 26 (U.S. Cal. Sup. Ct.) — considered

Shaughnessy Golf & Country Club v. Uniguard Services Ltd., 1 B.C.L.R. (2d) 309, [1986] 3 W.W.R. 681, 18 C.C.L.I. 292, *(*sub nom. *Shaughnessy Golf & Country Club v. Drake International Inc.)* 26 D.L.R. (4th) 298 (B.C. C.A.) — considered

Slavutych v. Baker (1975), [1976] 1 S.C.R. 254, *(*sub nom. *Slavutch v. Board of Governors of University of Alberta)* 3 N.R. 587, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224 (S.C.C.) — referred to

Smith v. Jones, 169 D.L.R. (4th) 385, *(*sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, 132 C.C.C. (3d) 225, 22 C.R. (5th) 203, *(*sub nom. *Jones v. Smith)* 236 N.R. 201, *(*sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, *(*sub nom. *Jones v. Smith)* 196 W.A.C. 161, [1999] 1 S.C.R. 455, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364 (S.C.C.) — considered

Solosky v. Canada (1979), *(*sub nom. *Solosky v. R.)* [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495 (S.C.C.) — considered

Somerville Belkin Industries Ltd. v. Brocklesby Transport, 5 C.P.C. (2d) 239, 65 B.C.L.R. 260, [1985] 6 W.W.R. 85, 16 C.C.L.I. 12 (B.C. S.C.) — referred to

Strass v. Goldsack, [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. C.A.) — considered

Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353, 69 D.T.C. 5278 (Can. Ex. Ct.) — considered

Walters v. Toronto Transit Commission (1985), 50 O.R. (2d) 635, 4 C.P.C. (2d) 66 (Ont. H.C.) — applied

Wheeler v. Le Marchant (1881), 17 Ch. D. 675, 50 L.J. Ch. 793 (Eng. C.A.) — referred to

Yri-York Ltd. v. Commercial Union Assurance Co. of Canada (1987), 17 C.P.C. (2d) 181 (Ont. H.C.) — referred to

Cases considered by *Rosenberg J.A.* (concurring):

Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd. (1985), 3 N.S.W.L.R. 44 (New South Wales S.C.) — considered

R. v. Fosty, [1991] 6 W.W.R. 673, *(*sub nom. *R. v. Gruenke)* 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, *(*sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108 (S.C.C.) — considered

Slavutych v. Baker (1975), [1976] 1 S.C.R. 254, *(*sub nom. *Slavutch v. Board of Governors of University of Alberta)* 3 N.R. 587, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224 (S.C.C.) — considered

Smith v. Jones, 169 D.L.R. (4th) 385, *(*sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, 132 C.C.C. (3d) 225, 22 C.R. (5th) 203, *(*sub nom. *Jones v. Smith)* 236 N.R. 201, *(*sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, *(*sub nom. *Jones v. Smith)* 196 W.A.C. 161, [1999] 1 S.C.R. 455, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364 (S.C.C.) — considered

Rules considered by *Carthy J.A.* (*Rosenberg J.A.* concurring):

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

Generally — considered

R. 31.06(1) — considered

R. 31.06(2) — considered

R. 31.06(3) — considered

R. 33.04 — considered

R. 33.06 — considered

R. 53.03(1) — considered

Rules considered by *Doherty J.A.* (dissenting in part):

Federal Rules of Civil Procedure

R. 26(b)(3) — considered

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

Generally — considered

R. 30.04(6) — referred to

Uniform Rules of Evidence

R. 502 — considered

R. 502(2) — considered

APPEAL by defendant owners from decision of Divisional court concluding that all reports from insurance adjuster to insurance company and/or insurance company's lawyer made before and after May 23, 1995 were privileged.

***Carthy J.A.* (*Rosenberg J.A.* concurring):**

1 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, 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 (Ont. Gen. Div.) , and (1997), 12 C.P.C. (4th) 150 (Ont. Gen. Div.) , 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 (U.S. S.C. 1947).

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 r. 31.06(1) information cannot be refused on discovery on the ground that what is sought is evidence. Under r. 31.06(2) the names and addresses of witnesses must be disclosed. A judicial ruling in *Dionisopoulos v. Provias* (1990), 71 O.R. (2d) 547 (Ont. 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 r. 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 (U.K. H.L.) . That case concerned a railway inspector's routine accident report. It was prepared in part to further railway safety and in part for submission to the railway's solicitor for liability purposes. It was held that while the document was prepared in part for the purpose of obtaining legal advice in anticipated litigation, that was not its dominant purpose and thus it must be produced.

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 Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44* (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 (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. Mutual Life Insurance Co. of New York*, [1944] O.R. 328 (Ont. C.A.) 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 (B.C. C.A.) the majority of the British Columbia Court of Appeal applied the dominant purpose test but then, relying principally on *Lyell v. Kennedy (No. 3)* (1884), 27 Ch. D. 1 (Eng. C.A.) , held that copies of public documents gathered by a solicitor's office attained the protection of litigation privilege. In *Lyell v. Kennedy (No. 3)* the protected copies were of tombstone inscriptions and Cotton L.J. upheld the privilege, stat-

ing 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 (No. 3)* , 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 r. 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 (Ont. Div. Ct.) 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 (No. 3)* 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 & Oil v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (Eng. 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 v. American Telephone & Telegraph Co.* , 642 F.2d 1285 (U.S. D.C. Ct. App. 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 (Director of Investigation & Research)* (December 31, 1995), Doc. B55/95F, B55/95H (Ont. Gen. Div. [Commercial List]); *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* (1998), 61 Alta. L.R. (3d) 38 (Alta. Q.B.) ; *Archean Energy Ltd. v. Minister of National Revenue* (1997), 202 A.R. 198 (Alta. Q.B.) ; *Lehman v. Insurance Corp. 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 (N.S. S.C.) ; *Almecon Industries Ltd. v. Anchortek Ltd.* (1998), [1999] 1 F.C. 507 (Fed. T.D.) , released November 17, 1998; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (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 & Telegraph Co.* , *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 Deny 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. Fosty* (1991), 67 C.C.C. (3d) 289 (S.C.C.) 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 com-

munication. ...

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 ease of reference, I will refer only to General Accident when speaking of the respondent insurers. The respondent, Deny Pilotte, was employed by Chrusz between July 1994 and January 1995 as the manager of the hotel property. The respondent, John Bourret, is a claims adjuster in the employ of the respondent, C.K. Alexander Insurance Adjusters Ltd.

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."[FN1] 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.[FN2]

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.

[FN3] 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. faxes, handwritten notes, invoices). Mr. Cook's affidavit of documents refers to many of the same documents as are set out in Mr. Bourret's affidavit, including those which are the product of Mr. Bourret's investigation of the fire. Many of the documents set out in Schedule "B" to Mr. Cook's affidavit are also described so generically as to not allow any inference as to their content or purpose.

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 (Ont. Gen. Div.) , 17 C.P.C. (4th) 284 , (1997), 48 C.C.L.I. (2d) 207 (Ont. Gen. Div.) . The reasons of the Divisional Court are reported at ((1998), 37 O.R. (3d) 790 (Ont. Div. Ct.) .

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 (Australia H.C.) at 84, per Murphy J.;

N. Williams "Civil Litigation Trial Preparation in Canada" (1980), 58 Can. Bar Rev. 1 at 37-38. In *Fosty* , *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 c. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.) at 398, and again very recently in *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.) at 288, the Supreme Court of Canada adopted the following description of client-solicitor privilege by Wigmore (8 Wigmore, *Evidence* , § 2292, McNaughton Rev. 1961):

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

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. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 (Can. Ex. Ct.) at 34; *Grant v. Downs* (1976), 135 C.L.R. 674 (Australia 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 counterclaim, 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* (1874), 2 Ch. D. 644 (Eng. C.A.) at 649; *Smith v. Jones* (1999), 22 C.R. (5th) 203 (S.C.C.) at 217, 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: *Goodman Estate v. Geffen* (1991), 81 D.L.R. (4th) 211 (S.C.C.) at 231-32, per Wilson J.; *Solosky v. Canada* (1979), 50 C.C.C. (2d) 495 (S.C.C.) at 510; *Descôteaux c. Mierzwinski* , *supra* , at 413-14; *A. (L.L.) v. B. (A.)* (1995), 103 C.C.C. (3d) 92 (S.C.C.) at 107-8, per L'Heureux-Dubé J. (concurring); *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. Uniguard Services Ltd.* (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 (S.C.C.) at 620-21; *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622 (S.C.C.) at 636. 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 Insurance Co. of New York*, [1944] O.R. 328 (Ont. C.A.) at 334, per Robertson C.J.O.; *Walters v. Toronto Transit Commission* (1985), 50 O.R. (2d) 635 (Ont. 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 lit-

igation 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:[FN4] *Bunbury v. Bunbury* (1839), 48 E.R. 1146 (Eng. Rolls Ct.) ; *Russell v. Jackson* (1851), 68 E.R. 558 (Eng. V.-C.); *Hooper v. Gumm* (1862), 70 E.R. 1199 (Eng. V.-C.); *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675 (Eng. C.A.) at 682, per Jessel M.R.; *Jones v. Great Central Railway*, [1910] A.C. 4 (U.K. H.L.) ; *Susan Hosiery Ltd. v. Minister of National Revenue* , *supra* , at 36; *Goodman & Carr v. Minister of National Revenue*, [1968] 2 O.R. 814 (Ont. H.C.) at 818; *Alcan-Colony Contracting Ltd. v. Minister of National Revenue*, [1971] 2 O.R. 365 (Ont. H.C.) at 368; *International Minerals & Chemical Corp. (Canada) v. Commonwealth Insurance Co.* (1990), 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 unanim-

ously 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 (Eng. Ch. Div.) at 690-91; *Calcraft v. Guest*, [1898] 1 Q.B. 759 (Eng. C.A.) at 762-3; *Susan Hosiery Ltd. v. Minister of National Revenue* , *supra* , at 31-32; *R. v. Littlechild* (1979), 51 C.C.C. (2d) 406 (Alta. C.A.) at 411-12; *C-C Bottlers Ltd. v. Lion Nathan Ltd.*, [1993] 2 N.Z.L.R. 445 (New Zealand 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. Minister of National Revenue* , *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 (U.S. Cal. Sup. Ct. 1951) at 31:

> 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 Ltd.* , *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. c. 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. Le 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.[FN5]

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 (Committee of) 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.[FN6] 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 (B.C. C.A.) 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 (New South Wales 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 *Australian Federal Police, Commissioner v. Propend Finance Pty. Ltd.* (1997), 141 A.L.R. 545 (Australia 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 Canada* (1987), 17 C.P.C. (2d) 181 (Ont. H.C.) at 186; *Catherwood (Guardian ad litem of) v. Heinrichs* (1995), 17 B.C.L.R. (3d) 326 (B.C. S.C. [In Chambers]).

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* (1975), 58 D.L.R. (3d) 397 (Alta. C.A.) 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* (1975), [1976] 1 S.C.R. 254 (S.C.C.) ; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.) ; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.) ; *R. v. Fosty* , *supra* ; *Métropolitaine, cie d'assurance-vie c. Frenette*, [1992] 1 S.C.R. 647 (S.C.C.) ; *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) ; *A. (L.L.) v. B. (A.)* , *supra* ; *Smith v. Jones* , *supra* ; see also *Cook v. Ip* (1985), 52 O.R. (2d) 289 (Ont. C.A.) ; *R. v. S. (R.J.)* (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 (B.C. C.A.) 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 (U.S. S.C. 1947) at 511. The statutory manifestation of that qualification is found in Rule 26(b)(iii) of the U.S. Rules of Federal Procedure which per-

mits 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.[FN7]

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 non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production. I would put the onus on the party claiming the privilege at the first stage of this inquiry and on the party seeking production of the document at the second stage of the inquiry. I appreciate that the party seeking production will not have seen the material and will be at some disadvantage in attempting to make the case for production. The judge can, of course, inspect the material: Rule 30.04(6). She can also provide the party seeking production with a judicial summary of that material to assist in making the necessary submissions as is done where the Crown claims privilege over the contents of an affidavit used to obtain a wiretap authorization: see *R. v. Garofoli* (1990), 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 *Strass 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.[FN8]

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.[FN9] 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 (S.C.C.) . 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.

***Rosenberg J.A.* (concurring):**

167 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* (1975), [1976] 1 S.C.R. 254 (S.C.C.) and *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) . 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* (1999), 132 C.C.C. (3d) 225 (S.C.C.) at 239

> Both parties made their submissions on the basis that the psychiatrist's report was protected by solicitor-client privilege, and it should be considered on that basis. It is the highest privilege recognized by the courts. **By necessary implication, if a public safety exception applies to solicitor-client privilege, it applies to all classifications of privileges** and duties of confidentiality. It follows that, in these reasons, it is not necessary to consider any distinctions that may exist between a solicitor-client privilege and a litigation privilege. [Emphasis added.]

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 non-privileged documents, like Doherty J.A. I find the reasons of Wood J. in *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (New South Wales 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.

> 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.

Appeal allowed.

FN1 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.

FN2 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.

FN3 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.

FN4 These reasons do not address communications involving employees of the client and/or the lawyer.

FN5 See *McCormick, supra* at 317-18, footnote 18. This definition has been adopted in several states: eg. Arkansas, North Dakota, South Dakota and Hawaii.

FN6 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.

FN7 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:

FN8 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.

FN9 Although the statement was ordered sealed by Kurisko J., his order provided for examination of the statement by the Divisional Court or this court.

END OF DOCUMENT

2006 CarswellNat 2704, 2006 SCC 39, J.E. 2006-1723, 40 C.R. (6th) 1, 51 C.P.R. (4th) 1, 270 D.L.R. (4th) 257, 352 N.R. 201, 47 Admin. L.R. (4th) 84, [2006] 2 S.C.R. 319

Blank v. Canada (Department of Justice)

Minister of Justice (Appellant) and Sheldon Blank (Respondent) and Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners)

Supreme Court of Canada

McLachlin C.J.C., Bastarache, Binnie, Deschamps, Fish, Abella, Charron JJ.

Heard: December 13, 2005
Judgment: September 8, 2006
Docket: 30553

Proceedings: affirming (2004), 2004 CarswellNat 6082, 2004 CarswellNat 3101, *(*sub nom. *Blank v. Canada (Minister of Justice))* 325 N.R. 315, 21 Admin. L.R. (4th) 225, *(*sub nom. *Blank v. Canada (Minister of Justice))* [2005] 1 F.C.R. 403, 2004 FCA 287, 244 D.L.R. (4th) 80, 34 C.P.R. (4th) 385 (F.C.A.)**Proceedings: reversing in part (2003), 2003 CarswellNat 5040, 2003 FCT 462 (F.C.)**

Counsel: Graham Garton, Q.C., Christopher M. Rupar for Appellant

Sheldon Blank for himself

Luba Kowal, Malliha Wilson, Christopher P. Thompson for Intervener, Attorney General of Ontario

Wendy Matheson, David Outerbridge for Intervener, The Advocates' Society

Raynold Langlois, Q.C., Daniel Brunet for Intervener, Information Commissioner of Canada

Subject: Public; Civil Practice and Procedure; Evidence

Privacy and freedom of information --- Freedom of information — Federal legislation — Grounds for refusal — Confidential information

Litigation privilege — Supreme Court of Canada holds that litigation privilege expires with termination of underlying litigation.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Documents prepared in contemplation of litigation

Supreme Court of Canada holds that litigation privilege expires with termination of underlying litigation.

Vie privée et accès à l'information --- Accès à l'information — Législation fédérale — Motifs de refus — Information confidentielle

Privilège relatif au litige — Selon la Cour suprême du Canada, le privilège relatif au litige expire au moment où le litige sous-jacent prend fin.

Procédure civile --- Divulgation — Divulgation de documents — Documents protégés par le privilège — Documents préparés en vue d'un litige

Selon la Cour suprême du Canada, le privilège relatif au litige expire au moment où le litige sous-jacent prend fin.

The applicant and his company were charged with various regulatory offences. The charges were quashed, renewed by indictment and ultimately stayed at the behest of the respondent Crown. The applicant then commenced civil proceedings for, *inter alia*, perjury and abuse of statutory authority. During the course of the abortive criminal proceedings and again after they were stayed in furtherance of the applicant's civil proceedings, the applicant brought requests, motions and *Access to Information Act* applications for disclosure of Crown materials relating to the conduct of the criminal proceedings. The requests were denied on the ground of solicitor-client privilege, and the Information Commissioner generally upheld the respondent's right to withhold the documents from release pursuant to the exception permitted for privileged materials. The applicant the commenced judicial review proceedings.

Upon review, the applications judge held that two species of "solicitor-client privilege" existed: the "advice privilege" and the "litigation privilege". The judge further held that "litigation privilege" expires when the litigation for which the documents were obtained or created was at an end, and that accordingly the applicant was entitled to release of the documents related to criminal proceedings once those proceedings had been stayed. The Crown appealed.

By a majority, the appeal was dismissed as to the litigation privilege point. The majority in the Court of Appeal held that, subject to possible expansions of the definition of "litigation", the "litigation privilege" died with the termination of the related litigation. The Crown appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Fish J., McLachlin C.J.C. and Binnie, Deschamps and Abella JJ. concurring: As the criminal proceedings underlying the generation of the documents sought by the applicant had ended, so too did the Crown's claim of solicitor-client "litigation privilege", and the documents were properly disclosed to the applicant. The "litigation privilege" is properly seen as distinct from the traditional understanding of "solicitor-client privilege", as that term really denotes what the applications judge called "legal advice privilege". That distinction is properly made because "litigation privilege" attaches to communications broader than just those between a client and her or his lawyers: it attaches also to communications between those lawyers and non-parties or between litigants themselves and non-parties. To allow the privilege which attaches to those communications to last forever would not serve the principle of solicitor-client privilege effectively, particularly as "litigation privilege" properly attaches to communications in contemplation of litigation which has not yet occurred. Therefore, unless closely related proceedings continue, the "litigation privilege" expires with its underlying litigation. The closely-related pro-

ceedings caveat is necessary to protect communications in complex litigation environments where a multiplicity of proceedings are possible.

In any event, in the present case if evidence of abuse of process or like deliberate misconduct were contained in the materials sought by the applicant, even ongoing proceedings would not render that evidence privileged, as only good-faith, good-conduct communications are protected by litigation privilege.

Per Bastarache J., Charron J. concurring: The reasons of the majority were agreed with: the Crown's claim of privilege fails in this case because the underlying litigation has ended. As, *inter alia*, the *Access to Information Act* mandates disclosure and as all enactments are remedial, no common-law exceptions are permitted and either litigation privilege must be read in to the Act or that privilege does not exist. Litigation privilege is properly read in as an exception to the section 23 disclosure rule, as it provides salutary benefit as described by the majority.

Le requérant et sa compagnie ont été inculpés de diverses infractions réglementaires. Les chefs d'accusation ont été annulés, puis portés de nouveau; les procédures ont été finalement arrêtées à la demande du ministère public intimé. Le requérant a alorsentamé des procédures civiles contre le gouvernment, notamment pour parjure et exercice abusif de pouvoir. Pendant les procédures criminelles qui furent annulées, puis après leur arrêt ultérieur, le requérant a présenté diverses demandes et requêtes, dont des demandes en vertu de la Loi sur l'accès à l'information, afin d'obtenir la divulgation de documents du ministère public sur le déroulement des procédures criminelles. Les demandes ont été rejetées en raison du secret professionnel de l'avocat; le Commissaire à l'information a généralement confirmé le droit de l'intimé de refuser de divulger des documents conformément à l'exception pour les documents protégés par le secret professionnel. Le requérant a entamé des procédures en contrôle judiciaire.

Le juge saisi de la demande de contrôle a estimé qu'il y avait deux sortes de « privilège avocat-client »: le « privilège de la consultation » et le « privilège relatif au litige ». Il a de plus estimé que le « privilège relatif au litige » expire lorsque se termine le litige pour lequel les documents ont été obtenus ou préparés et que, par conséquent, le requérant avait le droit d'obtenir divulgation des documents reliés aux procédures criminelles à partir du moment où ces procédures ont été arrêtées. Le ministère public a interjeté appel.

Les juges majoritaires de la Cour d'appel ont rejeté l'appel en ce qui concerne la question du privilège relatif au litige. Ils ont estimé que, sous réserve de l'élargissement possible de la définition du terme « litige », le « privilège relatif au litige » a pris fin au moment où le litige en cause a été arrêté. Le ministère public a interjeté appel à la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Fish, J. (McLachlin, J.C.C., Binnie, Deschamps et Abella, JJ., souscrivant à son opinion): Étant donné que les procédures criminelles justifiant la préparation des documents demandés par le requérant étaient terminées, le « privilège relatif au litige » du ministère public avait pris fin lui aussi; les documents furent donc divulgués à bon droit au requérant. Le « privilège relatif au litige » est correctement considéré comme distinct du sens traditionnel donné au « privilège avocat-client »; cette dernière expression correspond à ce que le juge saisi de la requête a qualifié de « privilège de la consultation ». Cette distinction est faite à juste titre, car le « privilège relatif au litige » protège beaucoup plus que les seules communications entre les avocats et leurs clients; il protège également les communications entre les avocats et les tiers ou entre les parties elles-mêmes et les tiers. Autoriser le privilège qui protège ces dernières communications à exister pour toujours serait contraire à l'application ef-

ficace du secret professionnel, d'autant plus que le « privilège relatif au litige » protège à bon droit les communications faites en vue d'un litige qui n'a pas encore eu lieu. Par conséquent, le « privilège relatif au litige » prend fin en même temps que le litige sous-jacent, à moins qu'un litige ayant un lien étroit avec celui-ci ne se poursuive. Cette mise en garde relative au litige ayant un lien étroit avec le litige sous-jacent à la communication est nécessaire, et ce, afin de protéger les communications dans le cadre de litiges complexes pouvant comprendre plusieurs procédures.

Il demeure que si la preuve de l'exercice abusif de procédures ou d'inconduite délibérée ressortait des documents demandés par le requérant, cette preuve ne pourrait pas être privilégiée du fait de procédures en cours, étant donné que seules les communications faites de bonne foi et selon une bonne conduite sont protégées par le privilège relatif au litige.

Bastarache, J. (Charron, J., souscrivant à son opinion): Les motifs prononcés par les juges majoritaires étaient partagés; le privilège revendiqué par le ministère public en l'espère avait pris fin puisque le litige sous-jacent s'était terminé. Comme la Loi sur l'accès à l'information oblige à divulguer et que ses dispositions ont un objet curatif, aucune exception prévue par la common law n'est applicable; le privilège relatif au litige doit être inclus dans la Loi ou être considéré comme n'existant pas. Vu son effet salutaire énoncé par les juges majoritaires, ce privilège est considéré à bon droit comme une exception à l'art. 23 obligeant la divulgation.

Cases considered by *Fish J.*:

Alberta Treasury Branches v. Ghermezian (1999), 1999 CarswellAlta 457, 33 C.P.C. (4th) 162, 242 A.R. 326, 1999 ABQB 407 (Alta. Q.B.) — referred to

Boulianne v. Flynn (1970), [1970] 3 O.R. 84, 1970 CarswellOnt 806 (Ont. Co. Ct.) — referred to

Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co. (1995), 35 Alta. L.R. (3d) 42, 1995 CarswellAlta 745, 176 A.R. 134 (Alta. Q.B.) — referred to

College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner) (2002), 2002 BCCA 665, 2002 CarswellBC 2942, [2003] 2 W.W.R. 279, 9 B.C.L.R. (4th) 1, 23 C.P.R. (4th) 185, 176 B.C.A.C. 61, 290 W.A.C. 61 (B.C. C.A.) — referred to

Davies v. Harrington (1980), 39 N.S.R. (2d) 258, 71 A.P.R. 258, 115 D.L.R. (3d) 347, 1980 CarswellNS 136 (N.S. C.A.) — referred to

Descôteaux c. Mierzwinski (1982), [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, 1982 CarswellQue 13, 1982 CarswellQue 291 (S.C.C.) — considered

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 61 Alta. L.R. (2d) 319, 22 C.P.R. (3d) 290, 90 A.R. 323, 1988 CarswellAlta 148 (Alta. C.A.) — considered

General Accident Assurance Co. v. Chrusz (1999), 1999 CarswellOnt 2898, 45 O.R. (3d) 321, 124 O.A.C. 356, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203 (Ont. C.A.) — considered

Goodman Estate v. Geffen (1991), [1991] 5 W.W.R. 389, 42 E.T.R. 97, *(*sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, *(*sub nom. *Geffen v. Goodman Estate)* 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557 (S.C.C.) —

referred to

Gower v. Tolko Manitoba Inc. (2001), 2001 MBCA 11, 2001 CarswellMan 24, 7 C.C.E.L. (3d) 1, 196 D.L.R. (4th) 716, 153 Man. R. (2d) 20, 238 W.A.C. 20, [2001] 4 W.W.R. 622, 2 C.P.C. (5th) 197 (Man. C.A.) — referred to

Hickman v. Taylor (1947), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (U.S. Pa.) — considered

Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132, 47 C.C.L.T. 94, 1988 CarswellBC 437 (B.C. C.A.) — considered

L. (A Minor) (Police Investigation: Privilege), Re (1996), [1996] 2 All E.R. 78, [1997] A.C. 16, [1996] 2 W.L.R. 395 (U.K. H.L.) — referred to

Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission) (2005), 2005 CarswellOnt 3098, 201 O.A.C. 1, 76 O.R. (3d) 401, 36 Admin. L.R. (4th) 192 (Ont. C.A.) — referred to

Lyell v. Kennedy (No. 3) (1884), 27 Ch. D. 1, [1881-5] All E.R. 814, 53 L.J. Ch. 937 (Eng. C.A.) — considered

McCaig v. Trentowsky (1983), 47 N.B.R. (2d) 71, 148 D.L.R. (3d) 724, 124 A.P.R. 71, 1983 CarswellNB 186 (N.B. C.A.) — referred to

Meaney v. Busby (1977), 15 O.R. (2d) 71, 2 C.P.C. 340, 1977 CarswellOnt 193 (Ont. H.C.) — referred to

Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. (2000), 2000 NSCA 96, 2000 CarswellNS 234, 188 N.S.R. (2d) 173, 587 A.P.R. 173, 10 C.P.C. (5th) 28 (N.S. C.A.) — referred to

Nova, an Alberta Corp. v. Guelph Engineering Co. (1984), *(*sub nom. *Nova, an Alberta Corp. v. Daniel Valve Co.)* [1984] 3 W.W.R. 314, 5 D.L.R. (4th) 755, 30 Alta. L.R. (2d) 183, 50 A.R. 199, 42 C.P.C. 194, 80 C.P.R. (2d) 93, 1984 CarswellAlta 17 (Alta. C.A.) — referred to

Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner) (2002), 2002 CarswellOnt 4070, 220 D.L.R. (4th) 467, *(*sub nom. *Attorney General of Ontario v. Big Canoe et al)* 22 C.P.R. (4th) 169, 62 O.R. (3d) 167, *(*sub nom. *Ontario (Attorney General) v. Big Canoe)* 167 O.A.C. 125, 48 Admin. L.R. (3d) 279 (Ont. C.A.) — referred to

Ontario (Ministry of Correctional Services) v. Goodis (2006), 2006 SCC 31, 2006 CarswellOnt 4077, 2006 CarswellOnt 4078 (S.C.C.) — referred to

R. v. Lavallee, Rackel & Heintz (2002), *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* [2002] 3 S.C.R. 209, 2002 SCC 61, 2002 D.T.C. 7267 (Eng.), 2002 D.T.C. 7287 (Fr.), 3 C.R. (6th) 209, [2002] 4 C.T.C. 143, 216 D.L.R. (4th) 257, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 167 C.C.C. (3d) 1, 4 Alta. L.R. (4th) 1, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 96 C.R.R. (2d) 189, [2002] 11 W.W.R. 191, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 217 Nfld. & P.E.I.R. 183, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 651 A.P.R. 183, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 292 N.R. 296, 312 A.R. 201, 281 W.A.C. 201, 2002 CarswellAlta 1818, 2002 CarswellAlta 1819, *(*sub nom. *Lavallee,*

Rackel & Heintz v. Canada (Attorney General)) 164 O.A.C. 280 (S.C.C.) — referred to

R. v. McClure (2001), 2001 SCC 14, 2001 CarswellOnt 496, 2001 CarswellOnt 497, 151 C.C.C. (3d) 321, 195 D.L.R. (4th) 513, 40 C.R. (5th) 1, 266 N.R. 275, [2001] 1 S.C.R. 445, 142 O.A.C. 201, 80 C.R.R. (2d) 217 (S.C.C.) — considered

R. v. Stinchcombe (1991), [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277, 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 8 W.A.C. 161, 1991 CarswellAlta 192, 1991 CarswellAlta 559 (S.C.C.) — considered

Smith v. Jones (1999), 1999 SCC 16, 1999 CarswellBC 590, 1999 CarswellBC 591, 169 D.L.R. (4th) 385, *(*sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, 132 C.C.C. (3d) 225, 22 C.R. (5th) 203, *(*sub nom. *Jones v. Smith)* 236 N.R. 201, *(*sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, *(*sub nom. *Jones v. Smith)* 196 W.A.C. 161, [1999] 1 S.C.R. 455, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364 (S.C.C.) — referred to

Three Rivers District Council & Ors v. The Bank of England (2004), [2004] Q.B. 916, [2004] 3 All E.R. 168, [2004] 2 W.L.R. 1065 (Eng. C.A.) — referred to

Voth Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44 (1981), 29 B.C.L.R. 114, 23 C.P.C. 276, [1981] 5 W.W.R. 91, 1981 CarswellBC 145 (B.C. C.A.) — referred to

Waugh v. British Railways Board (1979), [1980] A.C. 521, [1979] 2 All E.R. 1169, [1979] 3 W.L.R. 150 (U.K. H.L.) — considered

Wujda v. Smith (1974), 49 D.L.R. (3d) 476 (Man. Q.B.) — referred to

Cases considered by *Bastarache J.*:

Descôteaux c. Mierzwinski (1982), [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, 1982 CarswellQue 13, 1982 CarswellQue 291 (S.C.C.) — considered

General Accident Assurance Co. v. Chrusz (1999), 1999 CarswellOnt 2898, 45 O.R. (3d) 321, 124 O.A.C. 356, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203 (Ont. C.A.) — considered

Interprovincial Pipe Line Inc. v. Minister of National Revenue (1995), 95 D.T.C. 5642, 22 B.L.R. (2d) 147, 102 F.T.R. 141, [1996] 1 F.C. 367, 1995 CarswellNat 1151, 1995 CarswellNat 1310 (Fed. T.D.) — referred to

R. v. Amato (1982), [1982] 2 S.C.R. 418, [1983] 1 W.W.R. 1, 29 C.R. (3d) 1, 69 C.C.C. (2d) 31, 140 D.L.R. (3d) 405, 42 N.R. 487, 1982 CarswellBC 661, 1982 CarswellBC 739 (S.C.C.) — considered

Statutes considered by *Fish J.*:

Access to Information Act, R.S.C. 1985, c. A-1

Generally — considered

s. 16(1)(b) — referred to

s. 16(1)(c) — referred to

s. 17 — referred to

s. 23 — considered

s. 41 — referred to

Fisheries Act, R.S.C. 1985, c. F-14

Generally — referred to

Statutes considered by *Bastarache J.*:

Access to Information Act, R.S.C. 1985, c. A-1

Generally — referred to

s. 16 — referred to

s. 17 — referred to

s. 23 — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 170 — referred to

Regulations considered by *Fish J.*:

Fisheries Act, R.S.C. 1985, c. F-14

Pulp and Paper Effluent Regulations, SOR/92-269

Generally — referred to

APPEAL by respondent Crown from judgment reported at (2004), 2004 CarswellNat 6082, 2004 CarswellNat 3101, (*sub nom. Blank v. Canada (Minister of Justice)*) 325 N.R. 315, 21 Admin. L.R. (4th) 225, (*sub nom. Blank v. Canada (Minister of Justice)*) [2005] 1 F.C.R. 403, 2004 FCA 287, 244 D.L.R. (4th) 80, 34 C.P.R. (4th) 385 (F.C.A.), allowing in part Crown's appeal from judgment allowing application for judicial review of decision of Information Commissioner refusing disclosure of certain documents alleged to be privileged.

POURVOI du ministère public intimé à l'encontre de l'arrêt publié à (2004), 2004 CarswellNat 6082, 2004 CarswellNat 3101, (*sub nom. Blank v. Canada (Minister of Justice)*) 325 N.R. 315, 21 Admin. L.R. (4th) 225, (*sub nom. Blank v. Canada (Minister of Justice)*) [2005] 1 F.C.R. 403, 2004 FCA 287, 244 D.L.R. (4th) 80, 34 C.P.R. (4th) 385 (C.A.F.), qui a accueilli en partie son appel à l'encontre du jugement qui avait accueilli une demande de contrôle judiciaire à l'égard d'une décision rendue par le Commissaire à l'information refusant la divulgation de certains documents qui étaient considérés privilégiés.

***Fish J.*:**

I

1 This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the *solicitor-client privilege* and the *litigation privilege*. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.

2 More particularly, we are concerned in this case with the litigation privilege, with how it is born and when it must be laid to rest. And we need to consider that issue in the narrow context of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), but with prudent regard for its broader implications on the conduct of legal proceedings generally.

3 This case has proceeded throughout on the basis that "solicitor-client privilege" was intended, in s. 23 of the *Access Act*, to include the litigation privilege which is not elsewhere mentioned in the Act. Both parties and the judges below have all assumed that it does.

4 As a matter of statutory interpretation, I would proceed on the same basis. The *Act* was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the *Act*. And it explains as well why, despite the *Act's* silence in this regard, I agree with the parties and the courts below that the *Access Act* has not deprived the government of the protection previously afforded to it by the legal advice privilege *and* the litigation privilege: In interpreting and applying the *Act*, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

5 In short, we are not asked in this case to decide whether the government can invoke litigation privilege. Quite properly, the parties agree that it can. Our task, rather, is to examine the defining characteristics of that privilege and, more particularly, to determine its lifespan.

6 The Minister contends that the solicitor-client privilege has two "branches", one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the "legal advice privilege"; the second, as the "litigation privilege".

7 Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases — solicitor-client privilege and legal advice privilege — synonymously and interchangeably, except where otherwise indicated.

8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

9 The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long ter-

minated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

10 I would therefore dismiss the appeal.

II

11 The respondent is a self-represented litigant who, though not trained in the law, is no stranger to the courts. He has accumulated more than ten years of legal experience first-hand, initially as a defendant and then as a petitioner and plaintiff. In his resourceful and persistent quest for information and redress, he has personally instituted and conducted a plethora of related proceedings, at first instance and on appeal, in federal and provincial courts alike.

12 This saga began in July 1995, when the Crown laid 13 charges against the respondent and Gateway Industries Ltd. ("Gateway") for regulatory offences under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Pulp and Paper Effluent Regulations*, SOR/92-269. The respondent was a director of Gateway. Five of the charges alleged pollution of the Red River and another eight alleged breaches of reporting requirements.

13 The counts relating to reporting requirements were quashed in 1997 and the pollution charges were quashed in 2001. In 2002, the Crown laid new charges by way of indictment — and stayed them prior to trial. The respondent and Gateway then sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers.

14 This appeal concerns the respondent's repeated attempts to obtain documents from the government. He succeeded only in part. His requests for information in the penal proceedings and under the *Access Act* were denied by the government on various grounds, including "solicitor-client privilege". The issue before us now relates solely to the *Access Act* proceedings. We have not been asked to decide whether the Crown properly fulfilled, in the criminal proceedings, its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). And in the record before us, we would in any event be unable to do so.

15 In October 1997, and again in May 1999, the respondent requested from the Access to Information and Privacy Office of the Department of Justice all records pertaining to his prosecution and the prosecution of Gateway. Only some of the requested documents were furnished.

16 Additional materials were released after the respondent lodged a complaint with the Information Commissioner. The Director of Investigation found that the vast majority of the remaining documents were properly exempted from disclosure under the solicitor-client privilege.

17 The respondent pursued the matter further by way of an application for review pursuant to s. 41 of the *Access Act*. Although the appellant relied on various exemptions from disclosure in the *Access Act*, proceedings before the motions judge focussed on the appellant's claims of solicitor-client privilege in reliance on s. 23 of the *Access Act*.

18 On the respondent's application, Campbell J. held that documents excluded from disclosure pursuant to litigation privilege should be released if the litigation to which the record relates has ended (*Blank v. Canada (Department of Justice)*, 2003 CarswellNat 5040, 2003 FCT 462 (F.C.)).

19 On appeal, the Federal Court of Appeal divided on the duration of the privilege. Pelletier J.A., for the

majority on this point, found that litigation privilege, unlike legal advice privilege, expires with the end of the litigation that gave rise to the privilege, "subject to the possibility of defining ... litigation ... broadly" ([2005] 1 F.C.R. 403, 2004 FCA 287 (F.C.A.), at para. 89). He therefore held that s. 23 of the *Access Act* did not apply to the documents for which a claim of litigation privilege is made in this case because the criminal prosecution had ended.

20 Létourneau J.A., dissenting on this point, found that the privilege did not necessarily end with the termination of the litigation that gave rise to it. He would have upheld the privilege in this case.

III

21 Section 23 of the *Access Act* provides:

> The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

22 The narrow issue before us is whether documents once subject to the litigation privilege remain privileged when the litigation ends.

23 According to the appellant, this Court has determined that litigation privilege is a branch of the solicitor-client privilege and benefits from the same near-absolute protection, including permanency. But none of the cases relied on by the Crown support this assertion. The Court has addressed the solicitor-client privilege on numerous occasions and repeatedly underlined its paramount significance, but never yet considered the nature, scope or duration of the litigation privilege.

24 Thus, the Court explained in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.); *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.); *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.); *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.); and *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31 (S.C.C.). In an oft-quoted passage, Major J., speaking for the Court, stated in *McClure* that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).

25 It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.

26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients'cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> 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)
>
> R.J. Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, [1984] *Special Lect. L.S.U.C.* 163, at pp. 164-65.

29 With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (B.C. C.A.), a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: *Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission)* (2005), 76 O.R. (3d) 401 (Ont. C.A.); *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)* (2002), 62 O.R. (3d) 167 (Ont. C.A.) ("*Big Canoe*"); *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665 (B.C. C.A.); *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11 (Man. C.A.); *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96 (N.S. C.A.); *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.) [hereinafter "Chrusz"].

30 American and English authorities are to the same effect: see *L. (A Minor) (Police Investigation: Privilege), Re* (1996), [1997] A.C. 16 (U.K. H.L.), and *Three Rivers District Council & Ors v. The Bank of England*, [2004] Q.B. 916, [2004] EWCA Civ 218 (Eng. C.A.), and *Hickman v. Taylor*, 329 U.S. 495 (U.S. Pa. 1947). In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics: Sharpe; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 745-46; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 197-98; J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 868-71; G.D. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 *Can. Bar Rev.* 315. For the opposing view, see J. D. Wilson, "Privilege in Experts' Working Papers" (1997), 76 *Can. Bar Rev.* 346, and "Privilege: Watson & Au (1998) 77 *Can. Bar Rev.* 346: REJOINDER: 'It's Elementary My Dear Watson'" (1998), 77 *Can. Bar Rev.* 549.

31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.

32 Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta Treasury Branches v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407 (Alta. Q.B.). A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary," to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

36 I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege: *Boulianne v. Flynn*, [1970] 3 O.R. 84 (Ont. Co. Ct.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (Ont. H.C.); *Canada South-*

ern Petroleum Ltd. v. Amoco Canada Petroleum Co. (1995), 176 A.R. 134 (Alta. Q.B.). See also Sopinka, Lederman and Bryant; Paciocco and Stuesser.

37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (at para. 89): see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (Alta. C.A.).

39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

40 As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, p. 165). This purpose, in the context of s. 23 of the *Access Act* must take into account the nature of much government litigation. In the 1980s, for example, the federal government confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.

41 In such a situation, the advocate's "protected area" would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the *Access Act*. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.

IV

42 In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the *Access Act*, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.

43 The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It

springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.

44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

46 Finally, in the Court of Appeal, Létourneau J.A., dissenting on the cross-appeal, found that the government's status as a "recurring litigant" could justify a litigation privilege that outlives its common law equivalent. In his view, the "[a]utomatic and uncontrolled access to the government lawyer's brief, once the first litigation is over, may impede the possibility of effectively adopting and implementing [general policies and strategies]" (para. 42).

47 I hesitate to characterize as "[a]utomatic and uncontrolled" access to the government lawyer's brief once the subject proceedings have ended. In my respectful view, access will in fact be neither automatic nor uncontrolled.

48 First, as mentioned earlier, it will not be automatic because all subsequent litigation will remain subject to a claim of privilege if it involves the same or related parties and the same or related source. It will fall within the protective orbit of the *same litigation defined broadly*.

49 Second, access will not be uncontrolled because many of the documents in the lawyer's brief will, in any event, remain exempt from disclosure by virtue of the legal advice privilege. In practice, a lawyer's brief normally includes materials covered by the solicitor-client privilege because of their evident connection to legal advice sought or given in the course of, or in relation to, the originating proceedings. The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context.

50 Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged.

51 I hasten to add that the *Access Act* is a statutory scheme aimed at promoting the disclosure of information in the government's possession. Nothing in the Act suggests that Parliament intended by its adoption to extend the lifespan of the litigation privilege when a member of the public seeks access to government documents.

52 The language of s. 23 is, moreover, permissive. It provides that the Minister *may* invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*.

53 The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the *Access Act*, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when the original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the *Access Act* to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended. A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice. Should that possibility materialize — should related proceedings in fact later be instituted — the government may well have been required in the interim, in virtue of the *Access Act*, to disclose information that would have otherwise been privileged under the extended definition of litigation. This is a matter of legislative choice and not judicial policy. It flows inexorably from Parliament's decision to adopt the *Access Act*. Other provisions of the *Access Act* suggest, moreover, that Parliament has in fact recognized this consequence of the Act on the government as litigator, potential litigant and guardian of personal safety and public security.

54 For example, pursuant to s. 16(1)(*b*) and (*c*), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals. The special status of the government as a "recurring litigant" is more properly addressed by these provisions and other legislated solutions. In addition, as mentioned earlier, the nature of government litigation may be relevant when determining the boundaries of related litigation where multiple proceedings involving the government relate to common issues with closely related causes of action. But a wholesale expansion of the litigation privilege is neither necessary nor desirable.

55 Finally, we should not disregard the origins of this dispute between the respondent and the Minister. It arose in the context of a criminal prosecution by the Crown against the respondent. In criminal proceedings, the accused's right to discovery is constitutionally guaranteed. The prosecution is obliged under *Stinchcombe* to make available to the accused all relevant information if there is a "reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence ..." (p. 340). This added burden of disclosure is placed on the Crown in light of its overwhelming advantage in resources and the corresponding risk that the accused might otherwise be unfairly disadvantaged.

56 I am not unmindful of the fact that *Stinchcombe* does not require the prosecution to disclose everything in its file, privileged or not. Materials that might in civil proceedings be covered by one privilege or another will nonetheless be subject, in the criminal context, to the "innocence at stake" exception — at the very least: see *McClure*. In criminal proceedings, as the Court noted in *Stinchcombe*:

> The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. [p. 340]

57 On any view of the matter, I would think it incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from the disclosure it was bound but failed to provide in criminal proceedings that have ended.

V

58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (U.K. H.L.). It has been adopted in this country as well: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S. C.A.); *Voth Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44* (1981), 29 B.C.L.R. 114 (B.C. C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B. C.A.); *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755 (Alta. C.A.); *Ed Miller Sales & Rentals; Chrusz; Lifford; Mitsui; College of Physicians; Gower*.

60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. As Royer has noted, it is hardly surprising that modern legislation and case law

> [TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend to limit the scope of this privilege [that is, the litigation privilege]. [para. 1139]

Or, as Carthy J.A. stated in *Chrusz*:

> 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. [p. 331]

61 While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

62 A related issue is whether the litigation privilege attaches to documents gathered or copied — but not *created* — for the purpose of litigation. This issue arose in *Hodgkinson*, where a majority of the British Columbia Court of Appeal, relying on *Lyell v. Kennedy (No. 3)* (1884), 27 Ch. D. 1 (Eng. C.A.), concluded that copies of public documents gathered by a solicitor were privileged. McEachern C.J.B.C. stated:

> 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. [p. 142]

63 This approach was rejected by the majority of the Ontario Court of Appeal in *Chrusz*.

64 The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting from research or the ex-

ercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

VI

65 For all of these reasons, I would dismiss the appeal. The respondent shall be awarded his disbursements in this Court.

***Bastarache J.*:**

66 I have read the reasons of Fish J. and concur in the result. I think it is necessary to provide a more definitive and comprehensive interpretation of s. 23 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), however, so as not to leave open the possibility of a parallel application of the common law rule regarding litigation privilege in cases where the *Access Act* is invoked. I therefore propose to determine the scope of s. 23 and rule out the application of the common law in this case.

67 Here, the government institution has attempted to refuse disclosure by claiming litigation privilege pursuant to s. 23 of the *Access Act*. The question of whether these documents are covered by litigation privilege only arises once it is decided that s. 23 includes litigation privilege within its scope. The question is whether Parliament intended that the expression "solicitor-client privilege" in s. 23 also be taken to include litigation privilege. Whether s. 23 is interpreted so as to include litigation privilege or notdoes not constitute a departure from litigation privilege *per se*. Either way, the privilege is left unaffected by the legislation. In my view, litigation privilege cannot be invoked at common law to refuse disclosure which is statutorily mandated. Either Parliament intended to include litigation privilege within the phrase "solicitor-client privilege" or litigation privilege cannot be invoked.

68 It is unclear, from a legal standpoint, why the government would be able to refuse a statutory duty to disclose information by claiming litigation privilege as a matter of common law. In *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at p. 875, this Court held that legislation may infringe solicitor-client privilege (let alone litigation privilege), though such legislation would be interpreted restrictively. The *Access Act* is such legislation and it is not unique in mandating disclosure of certain information. Corporations'legislation, legislation governing certain professions, securities legislation, to name but a few examples, include statutory provisions that require certain persons to disclose information/documentation to directors, tribunals or governing bodies. It has not been open to those persons to resist disclosure on the basis of solicitor-client or litigation privilege. However, where related litigation arises, those persons will often argue that the compulsory disclosure to an auditor (for example) does not amount to a waiver of the privilege (see *Interprovincial Pipe Line Inc. v. Minister of National Revenue* (1995), [1996] 1 F.C. 367 (Fed. T.D.)). In that case, the appellants had disclosed legal advice to their auditors pursuant to s. 170 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Before the Federal Court, they argued that this did not constitute a waiver of the privilege. The judge cited the following passage from this Court's decision in *Descôteaux* at p. 875:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [Emphasis added, p. 377]

69 It is my view, however, that as a matter of statutory interpretation an exemption for litigation privilege should be read into s. 23. In 1983, litigation privilege was merely viewed as a branch of solicitor-client privilege. This means that Parliament most likely intended to include litigation privilege within the ambit of "solicitor-client privilege". *R. v. Amato*, [1982] 2 S.C.R. 418 (S.C.C.) (*per* Estey J., dissenting), and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 358-60, suggest that the incorporation of the common law concept of solicitor-client privilege into the *Access Act* does not freeze the development of the common law for the purposes of s. 23 at its 1983 state.

70 Nonetheless, my view is that the two-branches approach to solicitor-client privilege should subsist, even accepting that solicitor-client privilege and litigation privilege have distinct rationales. The Advocates' Society, intervener, suggests at para. 2 of its factum that:

> At an overarching level, litigation privilege and legal advice privilege share a common purpose: they both serve the goal of the effective administration of justice. Litigation privilege does so by ensuring privacy to litigants against their opponents in preparing their cases for trial, while legal advice privilege does so by ensuring that individuals have the professional assistance required to interact effectively with the legal system.

71 Reading litigation privilege into s. 23 of the *Access Act* is the better approach because, in fact, litigation privilege has always been considered a branch of solicitor-client privilege. As the reasons of my colleague acknowledge, at para. 31, "[t]hough conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation."

72 Second, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), at p. 336, Carthy J.A. commented that "[w]hile solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation." Thus, even if litigation privilege is read into s. 23 of the *Access Act*, it is not clear that the Crown could properly invoke it as against a third party, such as the media. This is also a question to be dealt with as a matter of statutory interpretation. In my view, once the privilege is determined to exist, s. 23 grants the institution a discretion as to whether or not to disclose. Although litigation privilege is understood as existing only *vis-à-vis* the adversary in the litigation (*Chrusz*), the effect of s. 23 is to permit the government institution to refuse disclosure to any requester so long as the privilege is found to exist.

73 I would also disagree with the reasons of Fish J., at para. 5, that "we are not asked in this case to decide

whether the government can invoke litigation privilege". This appeal turns on the proper interpretation of s. 23 of the *Access Act*. Either litigation privilege must be read into s. 23 or it must be acknowledged that the Crown cannot invoke litigation privilege so as to resist disclosure under the *Access Act*. The consequences of this latter option would have to be considered in the context of the other exemptions provided for by the Act — including those contained in ss. 16-17 and outlined at para. 54 of the reasons of my colleague:

> For example, pursuant to ss. 16(1)(*b*) and (*c*), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals.

74 For the reasons expressed by Fish J., I agree that the Minister's claim of litigation privilege fails in this case because the privilege has expired.

75 I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

END OF DOCUMENT

1987 CarswellBC 400, 20 B.C.L.R. (2d) 289, 27 C.L.R. 11, 38 L.C.R. 30

Vancouver Community College v. Phillips, Barratt

VANCOUVER COMMUNITY COLLEGE v. PHILLIPS, BARRATT et al.

British Columbia Supreme Court

Finch J. [in Chambers]

Judgment: September 4, 1987
Docket: Vancouver No. C850765

Counsel: *H.C. Ladner, Q.C.*, and *S. Gill*, for plaintiff.

S.B. Hankinson and *A. Rhodes*, for defendant Phillips, Barratt.

Subject: Contracts; Property; Evidence

Evidence --- Documentary evidence — Privilege as to documents — Expert report.

Evidence (civil) — Privilege — Legal professional privilege — Loss or waiver — Party presenting written or oral evidence of expert implicitly waiving lawyer's brief privilege protecting documents in possession of expert.

When an expert witness who is not a party is called to testify, or when an expert witness's report is placed in evidence, the expert may be required to produce to cross-examining counsel all the documents that are, or may be, relevant to the substance of the evidence or to the expert's credibility, unless it would be unfair or inconsistent to require this. Fairness and consistency must be judged in the circumstances of each case. If these requirements are met, the documents are producible because the implied intention of the party presenting this evidence, written or oral, is to waive the lawyer's brief privilege, which previously protected such documents from disclosure.

Cases considered:

Kyuquot Logging Ltd. v. B.C. Forest Prod. Ltd., [1986] B.C.W.L.D. 1048 (C.A.) — *distinguished*

Long v. Milwaukee & Suburban Tpt. Corp., 67 Wisc. 2d 3884, 227 N.W. 2d 67 (1975) — *referred to*

McIlvaney v. Maguire, 13 B.C.L.R. 391, [1979] 6 W.W.R. 152, 11 C.P.C. 289 (S.C.) — *distinguished*

Payne v. Bilco Co., 54 Wisc. 2d 345, 195 N.W. 2d 641 (1972) — *referred to*

S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd., 45 B.C.L.R. 218, [1983] 4 W.W.R. 762, 35 C.P.C. 146 (S.C.) — *considered*

Shaw v. Wuttke, 28 Wisc. 2d 448, 137 N.W. 2d 649 (S.C., 1965) — *referred to*

Susan Hosiery Ltd. v. M.N.R., [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353, 69 D.T.C. 5278 — *considered*

Thunderbird Tours & Charter Ltd. v. Vancouver Axle & Frame Ltd. (1981), 28 B.C.L.R. 140 (S.C.) — *distinguished*

U.S. v. Nobles, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975) — *applied*

Statutes considered:

Evidence Act, R.S.B.C. 1979, c. 116

s. 10(5)

Rules considered:

British Columbia Supreme Court Rules, 1976

R. 40(36)

Authorities considered:

8 Wigmore on Evidence (McNaughton revision 1961), s. 2327, pp. 635-38, 1986 Supplement, p. 151.
Application for production of documents in possession of expert witness.

***Finch J.* (orally):**

1 The questions presently for decision are whether, and to what extent, documents in the possession of an expert witness are producible upon his cross-examination at trial. Counsel who called the witness say the documents are protected from production at trial by legal-professional privilege. Cross-examining counsel who seeks their production says any privilege previously protecting the documents is lost once the witness takes the stand.

2 The issue has arisen in these circumstances: In the course of his opening statement, counsel for the plaintiff filed a number of reports or opinions obtained from various experts. The documents were received in evidence without objection. One of the experts whose reports were filed in this way was Robert T. Atkins, a quantity surveyor.

3 Before these reports were placed in evidence, counsel for the defence served Mr. Atkins and others of the plaintiff's expert witnesses a subpoena under R. 40(36), the present equivalent of a subpoena duces tecum, requiring him to bring into court all documents in his possession relevant to the litigation and described more particularly in the body of the subpoena. At an early stage of the trial, counsel for the plaintiff moved to strike out the subpoena as an abuse of process and, inter alia, as an infringement upon solicitor-client or legal-professional

privilege. The question of the proper practice to be followed was argued at that time.

4 I ordered that the subpoena be stayed. I took the view that requiring a potential witness to bring his papers into court at that stage was premature. He had not yet been called to testify and there was no assurance that he would be. I declined to rule on the claim of privilege, as it was unnecessary to do so. Now, several months later, Mr. Atkins has been called to the stand. He is the first expert witness called to testify in that capacity on the plaintiff's behalf. Counsel for the defence has renewed his attempts to force production of documents in the witness's possession. He applied for an order setting aside or vacating my earlier order in which I stayed the effect of the subpoena he had served on Mr. Atkins. After hearing submissions, I acceded to that application and vacated the earlier order, only insofar as it affected Mr. Atkins. In response to the now revived subpoena, if I can call it that, Mr. Atkins has brought into court all of his documents. Counsel for the plaintiff continues to assert his claim, or his client's claim, for privilege over some of those documents. In respect of others, the claim has been abandoned and, as I understood counsel, those documents, or copies of them, have been made available to the defence.

5 The documents over which counsel for the plaintiff persists in his claim of privilege are identified in a list which has been prepared for the purposes of deciding this issue. As to some of those documents, counsel for the defence asserts no right to production or inspection. Those documents which remain in dispute have been delivered to me for inspection for the purpose only of deciding whether they are protected from disclosure to the defence by legal-professional privilege. The law as to privilege and waiver has now been argued and counsel have referred me to authorities. I have attempted to identify the principles which are applicable in the circumstances and to apply those principles to the particular documents in question.

6 Counsel do not disagree as to the law concerning privilege over documents obtained or prepared for counsel's use. Privilege over papers created for the lawyer's brief was recognized in *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353, 69 D.T.C. 5278. At p. 33 of the Exchequer Court Report, President Jackett said this:

> As it seems to me, there are really two quite different principles usually referred to as solicitor and client privilege, *viz*:
>
> (a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and
>
> (b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.

7 After elaborating on the reasons for the privilege, he said this at p. 34:

> What is important to note about both of these rules 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 dis-

covery if, otherwise, the party would be bound to give discovery of them.

8 These statements have been widely adopted by Canadian courts and, in my view, correctly state the law in British Columbia.

9 The issue before me is not whether any of the contested documents were privileged at some earlier time. Rather, the issue is whether, assuming that they were previously protected by privilege, that privilege has now been waived or otherwise lost by the witness, in whose possession they were, having been called to the stand to testify.

10 Counsel referred me to *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 45 B.C.L.R. 218, [1983] 4 W.W.R. 762, 35 C.P.C. 146, a judgment of Madam Justice McLachlin when she was a judge in this court. There, the chambers judge addressed the question of waiver on a pre-trial application for production of documents over which solicitor-client privilege was maintained. At p. 220, Madam Justice McLachlin said this:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.

11 She concluded that in the circumstances of that case, privilege had not been waived. Towards the close of her reasons for judgment, however, she said this at p. 222:

> I may add that the foregoing comments are confined to what must be disclosed upon the pre-trial production of an expert's report pursuant to s. 11 of the Evidence Act — an expert who may or may not be called as a witness. In the event that the expert takes the stand at trial, the situation respecting waiver may well be different.

12 The learned chambers judge expressed no opinion as to what effect the calling of a witness would have over documents in his possession otherwise protected by privilege. She indicates, however, that the position as to waiver may well be different once the expert moves from the role of confidential advisor to the role of a witness in court.

13 Counsel for the plaintiff also referred me to *McIlvaney v. Maguire*, [1979] 6 W.W.R. 152, 13 B.C.L.R. 391, 11 C.P.C. 289 (S.C.). This is another case where an attempt was made on a pre-trial application to compel production of an expert's report in the possession of an adverse party. The defendant who sought production argued that the then provisions, ss. 12 and 13 of the Evidence Act, had the effect of destroying or removing privilege over certain documents in the lawyer's brief. The judge dismissed the application and held that the Evidence Act did not destroy privilege. At p. 161 he said this:

> Has the privilege thus recognized at common law been changed by the provisions of the Evidence Act or the new Supreme Court Rules? Sections 12 and 13 [re-en. 1976 c. 33, s. 86(*a*)] of the Evidence Act now provide that expert evidence cannot be given in proceedings unless a statement in writing setting out the opinion is furnished to all adverse parties at least 14 days before the statement is given in evidence. There is no provision in either section requiring the disclosure of reports or documents which are not going to be

tendered as evidence. The sections are designed to prevent surprise and provide that otherwise privileged information will not be admitted unless it is disclosed at least 14 days before it is given at trial. These sections do not, however, alter the common law with respect to privilege of documents prepared in contemplation of litigation which will not be used in evidence.

14 As I apprehend the meaning of the last sentence in context, the judge is referring to the situation in which an expert's report had been obtained by one party and not yet served. At that pre-trial stage, it was not known whether the report would be served or would be placed in evidence by the plaintiff who had obtained it, or whether the expert would be called by the plaintiff to testify orally, or whether the defendant would seek to compel attendance of the witness for cross-examination. The judge's comments appear to be directed towards the lawyer's brief privilege covering the expert's report. I do not see anything in the language used to suggest that if the report were filed or the expert were called, the defence would in any way be limited in its access to other documents in the witness's possession for the purposes of cross-examination at trial.

15 Counsel for the defence referred me to *Kyuquot Logging Ltd. v. British Columbia Forest Prod. Ltd.*, [1986] B.C.W.L.D. 1048, B.C.C.A., Vancouver No. CA004519, 24th January 1986 (not yet reported). This case also deals with a pre-trial application for production of documents claimed to be the subject of privilege. In allowing an appeal from a chambers order, the Court of Appeal found privilege not to have been established. In an obiter dictum on the subject of waiver, Esson J.A., at p. 14, said this:

Privilege not having been established, it does not matter whether it was waived. On that issue I will say only that I have the greatest difficulty in understanding how the defendant, having waived privilege for the summaries and the related commercial documents, could successfully assert privilege for the working papers which form the basis of the summaries.

16 Then, after citing and quoting from *S & K Processors Ltd.*, which I referred to earlier, the judge continued at p. 15:

This seems to me to be a case where fairness and consistency would require a finding that privilege had been waived, had it existed, and also is a case where privilege, having been waived as to part of the communication, would be waived as to the entire communication.

17 To this point, all of the cases I have referred to are ones in which the claim for production of documents protected by lawyer's brief privilege was made before trial. While they afford some guidance in a a general way on the subject of privilege and the waiver thereof, they do not address directly the issue before me, namely, the extent to which such privilege may be lost by the calling of a witness to testify.

18 The only Canadian case touching on this question is *Thunderbird Tours & Charter Ltd. v. Vancouver Axle & Frame Ltd.* (1981), 28 B.C.L.R. 140, a judgment of Mr. Justice Wallace when he sat in this court. There, counsel for the plaintiff sought to place in evidence at trial the report of an expert which had been prepared for the defence and which had been served upon the plaintiff pursuant to the provisions of the Evidence Act. Counsel for the defence argued that the report was still privileged and not admissible. The trial judge held that delivery of the report destroyed the privilege which would otherwise have attached to it and that it was admissible as part of the plaintiff's case. He added some observations not essential to his ruling at p. 142, as follows:

(c) Had plaintiffs' counsel subpoenaed Mr. Baker as a witness, he would be restricted to examining him only on the written report furnished to all parties. The instructions, research performed, and opinions formulated by the expert at defence counsel's behest would remain privileged.

(d) On the other hand, had counsel for the defendants required Mr. Baker to give evidence (pursuant to s. 10(5)) and examined on an area outside the described report, he would risk opening up the area of instructions, investigation and report, which was otherwise privileged for re-examination by plaintiff's counsel.

19 Neither of the situations postulated by the judge in these two paragraphs is the one with which I am faced. Mr. Atkins' report was placed in evidence by the plaintiff, the party who retained and instructed him. The plaintiff called him to testify. Now he is to be cross-examined. Even if the second sentence in para. (c) quoted above is an accurate statement of what the law would be in the hypothetical situation postulated, as to which I am in some doubt, it does not apply to these facts and, in any event, is an obiter dictum.

20 Those are all of the Canadian cases to which I was referred on this question, I should say all of the Canadian cases touching on the question of waiver, and I have not been able to find any others on the question of waiver of privilege by the calling of a witness to testify.

21 I have found some further assistance on the subject of waiver of privilege in *Wigmore on Evidence*, McNaughton revision, vol. 8, s. 2327 at pp. 635-38, from which I will quote, in part:

What constitutes a waiver by implication? Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention but also the element of fairness and consistency. A privileged person would seldom be found to waive if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final. As a fair canon of decision, the following distinctions may be suggested ...

22 And the learned editors of Wigmore thereafter list six examples of what may or may not constitute waiver.

23 In the 1986 supplement to Wigmore, again in vol. 8, the authors add a seventh example to the earlier list of six. It is this, and it is found at p. 151 of the supplement:

[Text, page 638 after last line of section add] (7) So also the immunity of the attorney's work product in respect to a written statement ceases to exist when the person making the statement is placed on the stand as a witness at the trial.

24 The authority cited in support of that statement is *Shaw v. Wuttke*, 28 Wisc. 2d 448, 137 N.W. 2d 649 (S.C., 1965).

25 Wigmore states the test for waiver of privilege somewhat differently than did Madam Justice McLachlin in *S & K Processors*, but the sense of both, in my view, is essentially the same. The case cited by Wigmore,

Shaw v. Wuttke, has subsequently been cited in, and I have read, *Payne v. Bilco Co.*, 54 Wisc. 2d 345, 195 N.W. 2d 641 (1972), and *Long v. Milwaukee & Suburban Tpt. Corp.*, 67 Wisc. 2d 3884, 227 N.W. 2d 67 (1975). *Shaw v. Wuttke* is also cited in *U.S. v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S.Ct. 2160. I refer only to one passage in this latter case which appears in a separate concurring opinion of Mr. Justice White at p. 159 of the L. Ed. report:

> The reasons for largely confining the work-product rule to its role as a limitation on pretrial discovery are compelling. First of all, the injury to the factfinding process is far greater where a rule keeps *evidence* from the factfinder than when it simply keeps advance disclosure of evidence from a party or keeps from him *leads* to evidence developed by his adversary and which he is just as well able to find by himself. In the main, where a party seeks to discover a statement made to an opposing party in order to prepare for trial, he can obtain the "substantial equivalent ... by other means ..." [citing the Federal Civil Procedure Rule] ... by interviewing the witness himself. A prior inconsistent statement in the possession of his adversary, however, when sought for evidentiary purposes — i.e. to impeach the witness after he testifies — is for that purpose unique. By the same token, the danger perceived in Hickman, that each party to a case will decline to prepare in the hopes of eventually using his adversary's preparation, is absent when disclosure will take place only at trial. Indeed, it is very difficult to articulate a reason why statements on the same subject matter as a witness' testimony should not be turned over to an adversary after the witness has testified. The statement will either be consistent with the witness' testimony, in which case it will be useless and disclosure will be harmless; or it will be inconsistent and of unquestioned value to the jury.

26 I have found that reasoning helpful in deciding the issues in this case.

27 So long as the expert remains in the role of a confidential advisor, there are sound reasons for maintaining privilege over documents in his possession. Once he becomes a witness, however, his role is substantially changed. His opinions and their foundation are no longer private advice for the party who retained him. He offers his professional opinion for the assistance of the court in its search for the truth. The witness is no longer in the camp of a partisan. He testifies in an objective way to assist the court in understanding scien tific, technical or complex matters within the scope of his professional expertise. He is presented to the court as truthful, reliable, knowledgeable and qualified. It is as though the party calling him says: "Here is Mr. X, an expert in an area where the court needs assistance. You can rely on his opinion. It is sound. He is prepared to stand by it. My friend can cross-examine him as he will. He won't get anywhere. The witness has nothing to hide."

28 It seems to me that in holding out the witness's opinion as trustworthy, the party calling him impliedly waives any privilege that previously protected the expert's papers from production. He presents his evidence to the court and represents, at least at the outset, that the evidence will withstand even the most rigorous cross-examination. That constitutes an implied waiver over papers in a witness's possession which are relevant to the preparation or formulation of the opinions offered, as well as to his consistency, reliability, qualifications and other matters touching on his credibility.

29 It is fair that expert witnesses should be thoroughly cross-examined on all matters touching the weight of the evidence they offer. In our system, that is the accepted method of getting at the truth. It would not, however, be fair to require the witness to deliver up papers that are wholly irrelevant, either to the substance of his opinion or to his credibility. For example, papers concerning his personal affairs remain his own and are no one else's business. Similarly, the expert may be doing work for other persons not party to the litigation. He should not be

required to disclose their secrets. As well, in the litigation in which the witness is called to testify, he may remain a confidential advisor to the party who retained him in, at least, one respect. He may be asked or may have been asked to give advice on how to cross-examine the other side's witnesses. In putting forward his own opinion, he need not necessarily attack the opinions of experts opposite. Counsel may wish to save that sort of ammunition until after the adverse expert has been called. It would not be fair to require the witness to disclose documents relating only to the cross-examination of such adverse experts because it would give the other side an advantage not available to the party calling evidence on a subject matter first.

30 There are, no doubt, other examples of what may or may not be considered fair in other circumstances, but I believe those I have given will suffice for present purposes.

31 I confess that I am not entirely sure what is meant or encompassed by the test of "consistency", as referred to in both *S & K Processors* and *Kyuquot Logging* as well as in Wigmore. My present view is that consistency is met by treating all witnesses for all parties in the same way insofar as the adversary system permits. That means that all experts called to the stand must make production of documents which are relevant either as to matters of substance or credibility.

32 I do not think it matters whether the expert's opinion is adduced simply by way of filing a written report without his being called to testify in chief or, on the other hand, whether he is called to the stand by the party retaining him to elaborate on a written report or statement of his already in evidence. In either case, the opposite party has the right to cross-examine him upon his evidence, written and/or oral. In the case of written evidence only, the right to cross-examine arises under s. 10(5) of the Evidence Act, R.S.B.C. 1979, c. 116. In the case of a witness called in chief, the right to cross-examine remains as a normal incident of our adversary trial processes.

33 In reaching these conclusions, I emphasize that I am dealing only with documents in the possession of a witness, expert or otherwise. I am not dealing with documents in the possession of a party who is called as a witness, nor with the question of privilege or waiver of privilege in respect of a party. Other considerations will obtain there, and I need not discuss them further in these reasons.

34 I will attempt to summarize my view of the law. When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case. If those requirements are met, the documents are producible because there is an implied intention in the party presenting the witness's evidence, written or oral, to waive the lawyer's brief privilege which previously protected the documents from disclosure.

35 I am sorry these reasons are so long. I hope they will assist in expediting the remainder of this trial. I do not believe I have stated any proposition or principle of law or practice that is new. I have attempted to articulate what I believe to have been the accepted practice in this province for many years. That so little is to be found in the authorities on the subject suggests to me that generally the rules are well understood.

36 I will descend to the particulars of the documents listed in Ex. D for identification. When we adjourned yesterday, counsel for the plaintiff asserted a claim for privilege over the following documents: those numbered 1.1 through 1.8, those numbered 8 through 26, and those numbered 43 to 47. Counsel for the defence has since advised me through the registrar that he does not claim a right to see the documents numbered 12, 17, 19, 20, 22 or 47, nor the documents in No. 44 on the list, except for a memorandum entitled "Escalation Management".

Similarly, counsel for the plaintiff has advised that he abandons the claim for privilege over the document numbered 21 and over one letter from Mr. Gill to Mr. Atkins dated 18th July 1986 which was contained in those documents at item No. 43 on the list. I have looked at all of the remaining documents over which the claim for privilege is maintained.

37 Applying the test I have attempted to articulate, I am satisfied that counsel cross-examining is entitled to have produced to him for inspection all of the documents over which privilege is asserted. They are documents which are or may be relevant to the substance of Mr. Atkins' evidence or to his credibility. None appear to me to relate only to possible cross-examination of defence experts. The documents relating to cross-examination appear to have been excluded by the agreement of counsel.

38 Some final comments. Counsel now know the view I hold on these matters. They will also know the experts who remain to be called, either in chief to speak to their written reports already in evidence, or for the purposes of cross-examination. They will know when those witnesses are likely to be called. It would very much facilitate the expeditious progress of this trial if a witness's documents were delivered to the opposite party in advance of his actually stepping into the witness box. Much time has been lost this week because that was not done. I expect counsel to do all that can reasonably be done in that behalf to see that further long delays do not occur.

Order accordingly.

END OF DOCUMENT

1988 CarswellBC 392, 32 B.C.L.R. (2d) 156, 55 D.L.R. (4th) 73

1988 CarswellBC 392, 32 B.C.L.R. (2d) 156, 55 D.L.R. (4th) 73

Delgamuukw v. British Columbia

DELGAMUUKW (MULDOE) et al. v. R. in Right of BRITISH COLUMBIA and ATTORNEY GENERAL OF CANADA

British Columbia Supreme Court

McEachern C.J.S.C.

Heard: November 7, 1988
Judgment: November 14, 1988
Docket: Smithers No. 0843/1984

Counsel: *L. Mandell*, for plaintiffs.

C.F. Willms and *T.A. Sigurdson*, for Attorney General of British Columbia.

M. Koenigsberg and *L. Russell*, for Attorney General of Canada.

Subject: Evidence

Evidence --- Documentary evidence — Privilege as to documents — Expert report.

Evidence (civil) — Privilege — Legal professional privilege — Extent and duration of privilege — Expert having to produce documents which are or have been in his possession or control, even if coming from file of solicitor with annotations — Communications going to expert's credibility also having to be produced except where unfair to require production.

Present law requires an expert witness who is called to testify at trial to produce all documents which are or have been in his possession or control, including draft reports, even if they come from the file of the solicitor, with annotations. Other communications which are or may be relevant to matters of substance in the expert's evidence or going to his credibility must also be produced unless it would be unfair to require production. It is a presumption of law that solicitor's privilege is waived in respect of such matters of substance, etc., when the witness is called to give evidence at trial. The court must be concerned about extending the area of disclosure unnecessarily and must make every effort to protect solicitor's privilege consistent with the preservation of the integrity of the trial process. The latter has regrettably become endangered by recent experience indicating that some experts have been shown to be advocates rather than independent, impartial, objective professionals.

Regarding privileged communications, first, it is settled law that anything in the possession of the witness relating to the litigation must be produced for inspection unless a claim to continued privilege is properly made. Secondly, counsel must produce on demand, which should usually be made before the witness enters the box, any similar documents in the possession or control of the party or counsel which the witness has seen. Thirdly, regarding oral communications, the witness must first be asked whether there were any oral communications concerning his evidence without requesting disclosure of the contents. If so and there are no claims to privilege, details may be given if they appear to relate to the substance of the evidence or to the witness's credibility.

Cases considered:

S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd., 45 B.C.L.R. 218, [1983] 4 W.W.R. 762, 35 C.P.C. 146 (S.C.) — *referred to*

Thunderbird Tours & Charter Ltd. v. Vancouver Axle & Frame Ltd. (1981), 28 B.C.L.R. 140 (S.C.) — *referred to*

Delgamuukw v. B.C. (Govt.) (1988), 32 B.C.L.R. (2d) 152 (S.C.) — *referred to*

Vancouver Community College v. Phillips, Barratt (1987), 20 B.C.L.R. (2d) 289, 27 C.L.R. 11, 38 L.C.R. 30 (S.C.) — *followed*

Vancouver Community College v. Phillips, Barratt (1987), 28 C.L.R. 277 (S.C.) — *applied*

Statutes considered:

Evidence Act, R.S.B.C. 1979, c. 116

s. 11(1) [re-en. 1981, c. 10, s. 21; am. 1985, c. 51, s. 20]

Rules considered:

British Columbia Supreme Court Rules, 1976

R. 26(12)

Ruling relating to disclosure required regarding opinion evidence.

McEachern C.J.S.C.:

1 Recent developments in practice relating to the disclosure required in connection with opinion evidence have caused counsel to make helpful submissions with a view to obtaining a comprehensive ruling which will govern the future management of such questions at this trial.

2 The plaintiffs have called three expert witnesses and with respect to two of them, a paleobotanist and a morphologist, plaintiffs' counsel has disclosed all the documents contained in the files of these expert witnesses but has blacked out parts for which privilege is claimed. For the purpose of this argument, however, counsel for the plaintiffs has furnished clear copies of all such documents except Item 12 to opposing counsel, who have

been able to illustrate their arguments usefully by reference to these documents. I understand the plaintiffs propose to call about 20 more expert witnesses and the defendants several more.

3 It may be helpful to comment that this recent practice change has been made necessary largely, if not entirely, because experience has demonstrated that some experts have been shown to be advocates rather than independent, impartial, objective professionals. For this reason it has been necessary for many judges to comment unfavourably upon the use of expert evidence and for other judges to prescribe relatively new procedures which will enhance the likelihood of a successful search for truth. It is no longer possible to assume that all expert witnesses, including many professionals, are impartial and independent. Some still qualify for that description, but others are fully participating members in the litigation team of a party to litigation and still others, as I have said, are advocates for the side which employs them.

4 There is no doubt that, by statute, counsel is now required to furnish adverse parties with at least a summary of the opinion evidence which is to be adduced and the facts upon which the opinion is based: Evidence Act, R.S.B.C. 1979, c. 116, s. 11(1). The law relating to this question has been discussed in a number of recent decisions including *Thunderbird Tours & Charter Ltd. v. Vancouver Axle & Frame Ltd.* (1981), 28 B.C.L.R. 140 (S.C.); *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 45 B.C.L.R. 218, [1983] 4 W.W.R. 762, 35 C.P.C. 146 (S.C.); and my own recent decision in this case delivered 5th October 1988 [reported ante, p. 152].

5 Those cases dealt with the question of pre-trial disclosure. In the first two authorities just mentioned there are suggestions that disclosure requirements may be different at trial. This suggestion has become a reality: *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289, 27 C.L.R. 11, 38 L.C.R. 30 (S.C.).

6 The law has long recognized two distinct kinds of privilege in these matters. The first species is commonly called solicitor-and-client privilege and it usually protects confidential communications between a client and his solicitor for the purpose of giving or receiving legal advice. I am not concerned with that kind of privilege in this judgment. The second species of privilege is commonly called "solicitor's privilege" or "solicitor's brief privilege" and it protects from disclosure all documents and confidential communications where the dominant purpose for the creation of such documents was in connection with the preparation of a case for trial including minutes of evidence and briefs of law, etc., or for the conduct of the trial itself. Until recently there has been little difficulty with this kind of privilege in relation to opinion evidence and it has seldom been the subject of recent judicial attention although there are numerous references to it in older cases both in England, the United States and Canada.

7 The leading British Columbia authority on disclosure requirements at trial of documents relating to the evidence of expert witnesses is the judgment of Finch J. in *Vancouver Community College v. Phillips, Barratt*, together with the subsequent unreported judgment of that same learned judge in the same case dated 15th December 1987 (Vancouver No. C850765) [now reported 28 C.L.R. 277].

8 At p. 298 Finch J. said:

> When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining all documents in his possession which are or *may be relevant to matters of substance in his evidence or to his credibility*, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case.

If those requirements are met, the documents are producible because there is an implied intention in the party presenting the witness's evidence, written or oral, to waive the lawyer's brief privilege which previously protected the documents from disclosure. [my italics]

9 In an earlier passage Finch J., at p. 297, explained the rationale for his conclusion as follows:

It is fair that expert witnesses should be thoroughly cross-examined on all matters touching the weight of the evidence they offer. In our system, that is the accepted method of getting at the truth. It would not, however, be fair to require the witness to deliver up papers that are wholly irrelevant, either to the substance of his opinion or to his credibility. For example, papers concerning his personal affairs remain his own and are no one else's business. Similarly, the expert may be doing work for other persons not party to the litigation. He should not be required to disclose their secrets. As well, in the litigation in which the witness is called to testify, he may remain a confidential advisor to the party who retained him in, at least, one respect. He may be asked or may have been asked to give advice on how to cross-examine the other side's witnesses. In putting forward his own opinion, he need not necessarily attack the opinions of experts opposite. Counsel may wish to save that sort of ammunition until after the adverse expert has been called. It would not be fair to require the witness to disclose documents relating only to the cross-examination of such adverse experts because it would give the other side an advantage not available to the party calling evidence on a subject matter first.

10 In his subsequent judgment Finch J. went further and required production from counsel's file of the expert's draft report (which the expert no longer had) upon which counsel had made notations.

11 Thus the present law requires an expert witness who is called to testify at trial to produce all documents which are or have been in his possession, including draft reports (even if they come from the file of the solicitor with annotations) and other communications which are or may be relevant to matters of substance in his evidence or his credibility unless it would be unfair to require production. It is a presumption of law that solicitor's privilege is waived in respect to such matters of substance, etc., when the witness is called to give evidence at trial.

12 The judgments of Finch J. are judgments of this court which I am bound to follow. Ms. Mandell does not suggest I should not do so, and she has produced the complete file of the two last expert witnesses I have mentioned and some additional documents relating to other experts. She suggests, however, that the judgments of Finch J. should not be extended further than is absolutely necessary and that I should endeavour to recognize solicitor's privilege wherever it is possible so to do. She particularly points out that Finch J. at p. 296 refers to the "... opinions and their foundations" and further that oral or written communications with the solicitor should not be disclosed unless they affect the formation or terms of the opinion which is being expressed. She points out that in some of the examples disclosed in this case the solicitor has commented favourably to members of his litigation staff about reports of the expert witnesses and has made suggestions for further work by the witnesses and other proposed experts. In other words, litigation strategy and trial tactics are described. In another context, the remuneration to be paid to the experts is mentioned and in another memo, which was sent to the witness by a member of the litigation team, there are references to discussions about the use which is proposed to be made of the evidence of the witness at trial, i.e., to use the age of a landslide as determined by carbon dating, to corroborate the oral history of the plaintiffs.

13 In short, Ms. Mandell says, the strategy of the plaintiffs is or may be disclosed by documents finding

their way into the file of the witness, or which relate to the report of the witness but rest in the file of the lawyer. She says solicitor's privilege will be seriously compromised if the dicta of Finch J. are applied literally.

14 On the other hand it is not difficult to construct scenarios where a communication from a solicitor about the report and proposed evidence of the witness, or the use to be made of it, might raise a serious question about the credibility or objectivity of the witness and there is little reason in principle to differentiate between written and oral communications. Trials might be prolonged unnecessarily and counsel might be driven into the witness box to refute allegations that might be made against him in the guise of cross-examination on the credibility of the expert if these are all proper matters for investigation at trial.

15 I share Ms. Mandell's concern about extending the area of disclosure unnecessarily and I also agree that every effort should be made to protect solicitor's privilege, consistent of course with the preservation of the integrity of the trial process which has been endangered by the trend I have identified.

16 What then are the principles upon which a judge should decide whether or not the privilege should be maintained? As Finch J. has said, documents and communications which may relate to the substance of the evidence or to the credibility of the witness must be disclosed. Generally speaking, privilege which is properly claimed with a sufficient description of the document should be maintained unless the opposite party satisfies the court that fairness requires its disclosure.

17 What I am about to say is designed for this unusual case where counsel have established some lines of communications and are working together, not always in complete harmony I am sure, but with a common understanding of the nature of this massive case and of the problems each of them are enduring. Everyone understands that this litigation is being conducted on each side by multi-discipline teams of lawyers and consultants and collaboration is common within each team in the preparation of expert evidence. It is for these reasons that I have designed what may appear to be an unwieldy procedure but which may nevertheless be suitable for this case. I leave it to others to say whether this procedure will be appropriate for less unusual kinds of litigation.

18 Generally speaking, I accept that documents and communications which may relate to the substance of the evidence or to the credibility of the witness must be disclosed when he enters the witness box. In this connection credibility must be given a limited or narrow construction because almost anything *might* relate to credibility and this aspect of the matter must not be an open door to free-roaming cross-examination. What the American cases call the "work product of counsel" should be protected, even if it has been conveyed to the witness, unless it appears that it is likely to affect the evidence or the credibility of the witness.

19 Very little turns on the question of onus because responsible counsel will not claim privilege without having a reason so to do and because disputes will be resolved by the trial judge looking at the document. As I have indicted, however, privilege will be maintained whenever that may fairly be done. It follows that the onus favours upholding properly advanced claims to privilege.

20 First, it is settled law that anything in the possession of the witness relating to the litigation must be produced for inspection unless a claim to continued privilege is properly made. This would include letters of instruction, fee agreements, written communications from the party or its agents or lawyers relating to the assignment, memos and drafts, suggestions from others, and any other written material which has or might have been considered by the witness preparing his report or opinion or evidence.

21 If counsel wishes to maintain a claim to solicitor's privilege, I think it must be done by furnishing a reas-

onable description of the document or an edited copy and by making a specific oral or written claim to privilege which in rare cases might have to be supported by affidavit, but I would expect most such questions can be decided on the statements of counsel.

22 If cross-examining counsel does not accept the claim to privilege then I see no alternative to the judge examining the document pursuant to R. 26(12) and deciding the question that way. As I have said, I think the privilege should be maintained wherever possible.

23 Secondly, counsel must produce on demand, which should usually be made before the witness enters the box, any similar documents in the possession or control of the party or counsel which the witness has seen. A claim for continuing privilege may be made or determined on the same basis mentioned above. I do not think it is necessary for counsel to produce privileged writings in his possession or control concerning the evidence of the witness unless the witness has seen the document. It was under this head that Finch J. ordered the production of a draft of the report of the witness which had been in the possession of the witness but was then only in the possession of counsel.

24 Thirdly, with regard to oral communications, the witness may first be asked whether there were any oral communications concerning his evidence without requesting disclosure of the contents. If there were such communications and if there is no claim to privilege then details may be given if they appear to relate to the substance of the evidence or to the credibility of the witness. If there is a claim to continuing privilege then the judge must conduct a voir dire for the purpose of determining the substance of the communications either on the statements of counsel or on affidavits or viva voce. Again, the communications should not be given in evidence unless the tests I have stated are satisfied.

25 Perhaps it will be useful to illustrate the foregoing by discussing the specific questions which have arisen in connection with the expert evidence in this case.

26 First, I should say that the plaintiffs' lay witnesses, in giving the oral history of their people (sometimes called an Adaawk), have described an important event said to have occurred hundreds or thousands of years ago when a supernatural grizzly bear ("Mediik") emerged from Seeley Lake or its environs and crashed through the woods towards the Skeena River, along what is now the watercourse of Chicago Creek. The plaintiffs seek through scientific evidence to establish the date of a landslide in the Chicago Creek area which in general terms may be compared to the description included in the history. By scientifically fixing the date of the landslide, the plaintiffs ask the court to infer that Gitksan people with the history mentioned above were living in the area at that time. Drs. Mathewes and Gottesfeld have given evidence from which it might be inferred that this landslide occurred about 3,500 years ago.

27 For convenience, I will describe and quote from the documents which plaintiffs' counsel have produced in connection with the evidence of these two scientists and other proposed experts but edited by blacking out certain passages for which privilege is claimed. I should also say that for this purpose the Gitksan Wet'suwet'en Tribal Council and its researcher, Mr. Overstall, are being treated by all counsel and by me as agents for both the plaintiffs and for plaintiffs' counsel. The numbers I will use refer to the tabs in the collection of these documents furnished by Ms. Mandell. The lettered subparagraphs refer to different passages in such documents for which privilege has been claimed. I must, unfortunately, quote some of the passages for which privilege has been claimed but counsel agree to this for the purposes of this judgment.

28 (1)(a) In a letter from Mr. Overstall to Dr. Gottesfeld arranging for the latter to prepare a report, it was

stated:

> This letter is intended to reflect the meeting Susan Marsden and I had with you on June 28, 1985 when we discussed a short program of geological field work in the Seeley Lake area.

29 This paragraph was blacked out as counsel did not think it necessary to inform the defendants of a meeting with Susan Marsden, who is another expert the plaintiffs propose to call as a witness. The defence says meetings with other experts may colour the report of a witness.

30 The plaintiffs do not dispute that the circumstances of a retainer are a proper subject of disclosure but not the fact or any details of the meeting.

31 I think the exposure of an expert witness to the possible influence of an expert in a different discipline may be relevant to the substance of his evidence and must be disclosed.

32 (b) In the same letter it was stated:

> We agree that the work would be done during the week of July 8-12 and a draft of the report would be available by the end of the following week (July 19). The Tribal Council will pay you $1000.00 for this work including field time, expenses and report writing. Payments will be made on receipt of the draft of the report. Because the report, or the information contained in it, may be used as evidence in the title action, you should maintain strict confidentiality in its preparation.
>
> I hope this letter covers all the points we discussed and is sufficient for you to proceed with the work. We look forward to seeing what results you are able to find.

33 Ms. Mandell agreed the privilege attached to these passages must be regarded as waived when the witness went into the witness box. I agree. I wish to add that I think the terms of engagement including compensation are proper matters for disclosure and cross-examination.

34 (2) In a letter from Mr. Overstall to Dr. Gottesfeld, before any report was prepared, it was stated:

> The Agreement uses a standard format developed by Tribal Council to satisfy its funding sources and to safeguard the interests of its members, particularly with respect to the confidentiality of the work. The work described in Section 2 and the payment scheduled in Section 4 should reflect our previous correspondence and telephone conversations. This letter will also authorise the $2,900.00 in expenses you anticipate spending under Paragraph 4.4 of the Agreement.

35 Again, Ms. Mandell now agrees that this paragraph should be disclosed. I agree.

36 (3)(a) In a memo written by plaintiffs' counsel to five members of his litigation team, including co-counsel, a copy of which was sent by one of the team to Dr. Gottesfeld, counsel blacked out all the names of the recipients of the memo except for Mr. Overstall.

37 This memo was written after a draft report had been received from Dr. Gottesfeld.

38 I do not understand how the identity of the recipients of the memo affects either the substance or the credibility of the witness. This information need not be disclosed.

39 (b) After mentioning receipt of Dr. Gottesfeld's report, counsel said to his litigation team:

> To your covering letter, I agree that John Clague should review Allen's [Gottesfeld] report and give us his informal critique of it. So long as John will maintain a high level of confidentiality to this report I think his contribution would be most useful.
>
> So far as Allen's and Leslie's report goes, I have very few comments. I think it is excellent and stands as a model of the type of reports that we want prepared for use in trial. It is presented well, it makes its argument convincingly, it [sic] backed-up by supporting background references and direct physical data. There are some minor typos and at least one figure number omitted, which should be cleaned up. Also, in my copy I did not receive Figure 11.
>
> *As a minor point some of the terms should be explained when first used.* The conclusions drawn about dating on Page 14 are fantastic, but we should explain either on Page 14 or in the references who Beta Analytic Inc. is.

40 The italicized portion was not blacked out.

41 In my view, none of these instructions of counsel, or his musings about the report after a draft has been received, affect either the substance or credibility of the witness. This sort of information should remain privileged but the instruction in the last clause about Beta Analytic Inc. must be disclosed.

42 (c) Later in the same memo, counsel said:

> This report is very helpful in corroborating and authenticating the Adaawk. I trust that it is clear to Allen that we would like him to give evidence in respect of his report at the time of trial.

43 Again, I think this comment of counsel to his client's representatives and to the other members of his litigation team should remain privileged as it does not affect either the substance of the report of Dr. Gottesfeld nor does it relate to his credibility in any way.

44 (4) The tribal council gave a copy of Dr. Gottesfeld's draft report to a research scientist who wrote a brief critique. Dr. Gottesfeld saw this critique before he revised his report. Ms. Mandell agrees that this critique must be disclosed. I agree.

45 (5) Dr. Gottesfeld made a brief written report to the tribal council about some field work in the early stages of his retainer. This brief report was disclosed except for the last paragraph, which stated:

> I am enclosing an invoice for one day's field work as per your letter of 23 April.

46 As I have said, I think compensation paid or agreed to be paid to an expert is relevant and this paragraph, innocuous as it is, should not have been blacked out and must be disclosed.

47 (6)(a) In a memo from Mr. Overstall to Dr. Gottesfeld dated 11th July 1986 headed, "Re: Comments on Stekyooden Landslides Report, December 14, 1985", Mr. Overstall responded to certain comments about Dr. Gottesfeld's report. Counsel blacked out a passage which stated:

> In general, I can only echo Stuart's [Rush] remark that the report (and the extensive field work behind it) is excellent and produced exactly the evidence we hoped to find when we initiated the research.

48 As I indicated earlier, I do not think counsel's favourable comments about a report, even when communicated to the witness, relate to either the substance of the report or to his credibility and I would maintain this claim to privilege.

49 (b) In the same memo it is stated:

> There still exists a question in my mind as to whether you should be the witness who says that what the oral histories describe as a bear could, through western eyes, be a landslide. This is how the report stands now, given your statement in the second to last paragraph on page 18 of the report, which I believe is the key statement in the report.
>
> This account of the coming of the Medeek [bear] sounds remarkably like an account of a debris flow and a debris torrent that occurred on what is now known as the Chicago Creek drainage, with the damming and rise of Seeley Lake.
>
> In scientific terms, the account does *not* sound like a landslide because landslides do not have giant grizzly bears at their core. It is my belief that your evidence should deal only with the scientific aspects of the event and that others should explain how the Gitksan and western views of the same event could differ.

50 This item is a difficult one because the author of the memo is questioning the wisdom of having a scientist comment upon the connection between a landslide and a supernatural event, which might be regarded as suggesting what should be in the report. I accordingly find these passages must be disclosed because they relate to the substance of the report although certainly not to the credibility of the witness.

51 (c) Then, after suggesting that the witness expand the introduction of his report to explain that his terms of reference included furnishing scientific evidence to explain a supernatural event which was a part of an oral history, and was not blacked out, the memo continues with the following which was blacked out:

> In that case we will have to provide evidence *elsewhere* that will:
>
> a) Exhaustively review all the extant Medeek adaawk with respect to events related to landslides and lake level changes.
>
> b) Tie the place names reported in the adaawk to the places you examined on the ground.
>
> c) Explain how two cultures can see the same event and provide two different but equally valid descriptions of what took place. [emphasis mine]

52 In my view, these are clear statements of trial strategy which by its terms is not intended to relate to the

substance of the report of the witness nor does it affect his credibility. This is historically a subject which should be protected by solicitor's privilege and it need not be disclosed.

53 (d) Counsel also blacked out the identity of those to whom copies of the memo were sent. I see no reason why this should be disclosed.

54 (7) In a brief report to the tribunal council Dr. Gottesfeld enclosed his revised report. Blacked out are two passages:

55 (a)

> Sometime when the trial approaches we will have to decide about additional copies of the photographs for extra report copies.

56 (b)

> I discussed this with you and Susan recently.

57 These subparagraphs relate entirely to trial housekeeping and are innocuous and need not be disclosed.

58 (8)(a) This a letter from Mr. Overstall to Dr. Mathewes which properly discloses revisions to his report with the following passage blacked out:

> Since you submitted your report last April we have done further work on describing the biogeoclimatic zones of the region as well as some detailed examinations of the Gitksan and Wet'suwet'en oral history which we can partially date using archaeological methods as well as the geological methods that you contributed to.

59 The letter then continued with the following not blacked out:

> As a result of this work, some more precise questions can be asked of you with respect to the palaeoenvironmental data. If you have time to respond to them in the next two or three weeks, it would help strengthen the evidence in a number of areas. The questions are as follows ...

60 In my view the blacked out portion is confidential information which counsel or his agent should be able to pass to a proposed expert witness without affecting either the substance of the report or his credibility and it should be protected.

61 (b) Later in the same letter Mr. Overstall said:

> I am giving a copy of your report and this letter to Jim Pojar in the event that his knowledge of the local biogeoclimatic zones will be of assistance to us. I also enclose a copy of an additional report that Sybille Haeussler did on biogeoclimatic zones for the case. That too may help. In any event, please phone me when you receive this and we can discuss how much time you have to add to your report in the next few weeks.

62 From the above counsel blacked out the first sentence. Jim Pojar is a scientific person, not a witness, who acted as a consultant to the plaintiffs. Ms. Mandell agrees this might affect the substance of the evidence of the witness and it must be disclosed, but I would not have thought it necessary to disclose that the report of a witness has been given to a consultant.

63 (9)(a) This is a letter from Dr. Mathewes enclosing his draft report. After the first sentence, which encloses the report, Dr. Mathewes said:

> I have spent all of my recent weekends and many evenings finalizing my data, drafting figures, and writing this report so I could get it to you before I leave for England tomorrow. I hope you feel that the time and money have been worth it. I am personally quite pleased, especially about the outcomes of the Seeley Lake studies, which I think will bolster your upcoming legal case significantly.
>
> My invoice for the equivalent of 23 working days is attached. By my calculation, I have about 460 dollars left on my original contract, which I expect to use in making revisions to the report after you have had a chance to review it. Please let me know if your bookkeeping is at odds with this interpretation.

64 In my view it is not necessary for the defendants to know that Dr. Mathewes is pleased about his report or that he thinks it will bolster the plaintiffs' case. I think it is relevant for the defendants to know the financial information contained in the second paragraph.

65 (b) At the end of his letter counsel blacked out the statement:

> I will be back home on April 16, so you could write to me or call anytime after that date.

66 This is innocuous and need not be disclosed.

67 (10) This is a memo from Dr. Pojar (consultant) to Mr. Overstall. It is referenced, "Review of approach to using biophysical evidence in the aboriginal title case of the Gitksan-Wet'suwet'en". Counsel described this as the by-product of a team meeting at an early stage of trial preparation where the theory of the plaintiffs' case was discussed. Except for a passage which comments on the quality of the report of another identified expert, the entire memo is blacked out.

68 I have read the memo, which was not given to opposing counsel, and I find it contains much sensitive comment about various aspects of the plaintiffs' claim. I do not think it relates to either the substance of the evidence of any of the witnesses or to their credibility. On p. 2, Dr. Pojar comments upon the reports of some scientific witnesses which is useful information for counsel to have but, on balance, I do not think the blacked out portion should be disclosed because it does not affect the evidence or credibility of these witnesses. In fact, it tends to be flattering of their work but that is just as irrelevant as any critical comments might have been because it does not really matter what Dr. Pojar thinks of these reports.

69 (11)(a) This is a letter from Mr. Overstall to an expert witness referenced, "Comments on Food Plant Distribution Study (October, 1985)". It starts with the words, "These comments should be taken as preliminary", and there is blacked out the following, "... and will be circulated along with your report to other Tribal Council staff and lawyers".

70 I see no reason why that information should be disclosed to the defendants.

71 (b) The letter states further:

> In general, I would like to commend you on a thorough and well-written piece of work. The lay out of the report, the maps and photographs and the clear English made it a pleasure to read and easy to understand.

72 For the reasons stated above, I do not think it is necessary for the plaintiffs to disclose Mr. Overstall's compliment about the report.

73 (c) On p. 4, under a heading suggesting additional research, there is a passage which refers to an issue in the case in tentative terms which does not seem to me to relate to the substance of the expert's report or to the credibility of the witness.

74 Items 12, 13 and 14 are unedited letters for which no privilege is claimed.

75 (15) Item 15 is an unedited letter except for one brief paragraph which is said to include financial arrangements with the consultant for which no privilege is claimed.

76 I hope the foregoing will assist counsel to manage these difficulties. They may, of course, speak to any problems they may have with the above or in connection with any other claims for solicitor's privilege.

Order accordingly.

END OF DOCUMENT

2002 CarswellOnt 496, 58 O.R. (3d) 49, 37 C.C.L.I. (3d) 86, 18 C.P.C. (5th) 241, [2002] O.T.C. 109

Browne (Litigation Guardian of) v. Lavery

Laura May Browne by her Litigation Guardian Terry Browne, Terry Browne and Erin Browne, Plaintiffs and David Lavery, Primus Automotive Financial Services Canada Inc., and Ford Motor Company of Canada Limited and Ford Credit Canada Limited, Defendants

Ontario Superior Court of Justice

Ferguson J.

Heard: December 4, 2001
Judgment: February 11, 2002
Docket: 99-CV-169461

Counsel: *E. Kim*, for Plaintiffs

M. Chadwick, for Defendant, David Lavery

G. Bowden, for Defendant, Primus Automotive Financial Services Canada Inc.

Subject: Insurance; Evidence; Civil Practice and Procedure

Insurance --- Actions on policies — Practice and procedure — Discovery

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived — Since insurer did not call E as witness, insurer was not required to produce report on basis that E was expert — Once A Ltd. was called as witness, insured was entitled to production of foundation of A Ltd.'s opinion — Expert report by one expert sent to another expert who will be called on to testify fell within scope of production — E's report, as part of A Ltd.'s "findings" under R. 31.06(3) of Rules of Civil Procedure, had to be produced — A Ltd. was silent as to whether and to what extent it was influenced by E's report — Insured was entitled to disclosure of information provided to A Ltd., even if not relied on — Production required at discovery rather than at trial to avoid potential delays — Rules of Civil Procedure, R.R.O. 1990, Reg.

194, R. 31.06(3).

Evidence --- Documentary evidence — Privilege as to documents — Expert report

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived.

Evidence --- Opinion evidence — Expert evidence — Expert reports

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived — Since insurer did not call E as witness, insurer was not required to produce report on basis that E was expert — Once A Ltd. was called as witness, insured was entitled to production of foundation of A Ltd.'s opinion — Expert report by one expert sent to another expert who will be called on to testify fell within scope of production — E's report, as part of A Ltd.'s "findings" under R. 31.06(3) of Rules of Civil Procedure, had to be produced — A Ltd. was silent as to whether and to what extent it was influenced by E's report — Insured was entitled to disclosure of information provided to A Ltd., even if not relied on — Production required at discovery rather than at trial to avoid potential delays — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 31.06(3).

Practice --- Discovery — Discovery of documents — Privileged document — Expert reports

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived.

Cases considered by *Ferguson J.*:

Allen v. Oulahen, 10 O.R. (3d) 613, 1992 CarswellOnt 698 (Ont. Master) — referred to

Athabaska Airways Ltd. v. De Havilland Aircraft of Canada Ltd., 34 C.P.C. (2d) 298, 1988 CarswellOnt 534 (Ont. H.C.) — referred to

Award Developments (Ontario) Ltd. v. Novoco Enterprises Ltd., 10 O.R. (3d) 186, 1992 CarswellOnt 687

(Ont. Gen. Div.) — referred to

Bardossy v. Cameo Restaurant Ltd., 2000 CarswellOnt 2200 (Ont. S.C.J.) — referred to

Beausoleil v. Canadian General Insurance Co. (September 21, 1993), Doc. Barrie 7488/83, 1429/86 (Ont. Gen. Div.) — referred to

Beck v. La Haie, 38 C.P.C. (2d) 67, 1989 CarswellOnt 434 (Ont. Master) — referred to

Bell Canada v. Olympia & York Developments Ltd., 33 C.L.R. 258, 68 O.R. (2d) 103, 36 C.P.C. (2d) 193, 1989 CarswellOnt 402 (Ont. H.C.) — not followed

Binkle v. Lockhart, 24 C.P.C. (3d) 11, 1994 CarswellOnt 493 (Ont. Gen. Div.) — referred to

Bronstetter v. Davies, 11 C.P.C. (2d) 289, 1986 CarswellOnt 412 (Ont. H.C.) — referred to

Cacic v. O'Connor, 71 O.R. (2d) 751, 42 C.P.C. (2d) 266, 1990 CarswellOnt 358 (Ont. H.C.) — referred to

Calvaruso v. Nantais, 7 C.P.C. (3d) 254, 1992 CarswellOnt 447 (Ont. Gen. Div.) — referred to

Casey v. Orr, 1996 CarswellOnt 444 (Ont. Gen. Div.) — referred to

Cheaney v. Peel Memorial Hospital, 73 O.R. (2d) 794, 44 C.P.C. (2d) 158, 1990 CarswellOnt 380 (Ont. Master) — referred to

General Accident Assurance Co. v. Chrusz, 1997 CarswellOnt 4360, 48 C.C.L.I. (2d) 207, 17 C.P.C. (4th) 284 (Ont. Gen. Div.) — referred to

General Accident Fire & Life Assurance Co. v. Tanter, [1984] 1 All E.R. 35 (Eng. Q.B.) — referred to

George Doland Ltd. v. Blackburn Robson Coates & Co., [1972] 1 W.L.R. 1338, [1972] 3 All E.R. 959 (Eng. Q.B.) — referred to

Great Atlantic Insurance Co. v. Home Insurance Co., [1981] 2 All E.R. 485, [1981] 2 Lloyd's Rep. 138, [1981] 1 W.L.R. 529 (Eng. C.A.) — considered

Hunter v. Rogers (1981), [1982] 2 W.W.R. 189, 34 B.C.L.R. 206, 1981 CarswellBC 391 (B.C. S.C.) — referred to

Jesionowski v. Gorecki (1992), 55 F.T.R. 1, (sub nom. *Jesionowski v. Wa-Yas (The)*) [1993] 1 F.C. 36, 1992 CarswellNat 145, 1992 CarswellNat 145F (Fed. T.D.) — referred to

Kaptsis v. Macias, 74 O.R. (2d) 189, 44 C.P.C. (2d) 285, 1990 CarswellOnt 390 (Ont. H.C.) — referred to

Kelly v. Kelly, 42 C.P.C. (2d) 181, 1990 CarswellOnt 354 (Ont. U.F.C.) — referred to

Leerentveld v. McCulloch, 4 C.P.C. (2d) 26, 1985 CarswellOnt 507 (Ont. S.C.) — referred to

Lowry v. Canadian Mountain Holidays Ltd., 59 B.C.L.R. 137, 1984 CarswellBC 432 (B.C. S.C.) — referred to

Mackin v. New Brunswick (Attorney General) (1996), 141 D.L.R. (4th) 352, 183 N.B.R. (2d) 223, 465 A.P.R. 223, 1998 CarswellNB 671, 19 C.P.C. (4th) 301, 1996 CarswellNB 671 (N.B. Q.B.) — referred to

Mahon v. Standard Life Assuraance Co. (April 25, 2000), MacLeod Master (Ont. S.C.J.) — referred to

Metropolitan Toronto Condominium Corp. No. 555 v. Cadillac Fairview Corp., 29 C.P.C. (2d) 110, 1988 CarswellOnt 449 (Ont. Master) — referred to

Nea Karteria Maritime Co. v. Atlantic & Great Lakes Steamship Corp., [1981] Com. L.R. 132 (Eng. Q.B.) — referred to

Ontario (Attorney General) v. Ballard Estate, (sub nom. *Ballard Estate, Re)* 20 O.R. (3d) 189, 5 E.T.R. (2d) 212, 1994 CarswellOnt 669 (Ont. Gen. Div. [Commercial List]) — referred to

Piché v. Lecours Lumber Co., 13 O.R. (3d) 193, 19 C.P.C. (3d) 200, 1993 CarswellOnt 447 (Ont. Gen. Div.) — not followed

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 32 B.C.L.R. (2d) 320, [1989] 2 W.W.R. 679, 1988 CarswellBC 411 (B.C. C.A.) — referred to

R. v. Stone, 1999 CarswellBC 1064, 1999 CarswellBC 1065, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, [1999] 2 S.C.R. 290 (S.C.C.) — considered

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd., [1983] 4 W.W.R. 762, 35 C.P.C. 146, 45 B.C.L.R. 218, 1983 CarswellBC 147 (B.C. S.C.) — considered

Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759, (sub nom. *Stevens v. Canada (Privy Council))* 144 D.L.R. (4th) 553, 72 C.P.R. (3d) 129, (sub nom. *Stevens v. Prime Minister (Can.))* 127 F.T.R. 90, 1997 CarswellNat 355, 1997 CarswellNat 2707 (Fed. T.D.) — referred to

Supercom of California Ltd. v. Sovereign General Insurance Co., 1998 CarswellOnt 788, 37 O.R. (3d) 597, 18 C.P.C. (4th) 104, 1 C.C.L.I. (3d) 305 (Ont. Gen. Div.) — referred to

Transmetro Properties Ltd. v. Lockyer Brothers Ltd., 4 C.P.C. (2d) 273, 1985 CarswellOnt 530 (Ont. H.C.) — considered

Vancouver Community College v. Phillips, Barratt, 27 C.L.R. 11, 38 L.C.R. 30, 20 B.C.L.R. (2d) 289, 1987 CarswellBC 400 (B.C. S.C.) — referred to

Whiten v. Pilot Insurance Co., 1999 CarswellOnt 269, [1999] I.L.R. I-3659, 170 D.L.R. (4th) 280, 117 O.A.C. 201, 42 O.R. (3d) 641, 32 C.P.C. (4th) 3 (Ont. C.A.) — referred to

Rules considered:

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

Generally — referred to

R. 31.06(3) — considered

R. 36.01(3) — referred to

R. 53.03 — referred to

MOTION by insured to compel production of report by insurer's expert.

Ferguson J.:

1 The plaintiffs brought this motion to compel answers to undertakings and refusals on discovery. I ruled on most of the issues at the hearing but reserved on the issue of whether the defendants Lavery and Primus were obliged to produce a report from an expert.

Background

2 At one time Lavery and Primus were represented by the same counsel. They are now represented by separate counsel who took the same position on this motion. On this motion their previous separate representation makes no difference to the issue before me so I shall simply refer to them as Lavery.

3 Counsel for Lavery retained C. R. Eddie, an engineer, as an expert in this litigation. Mr. Eddie provided counsel with a report.

4 Counsel for Lavery subsequently retained Arcon Engineering Consultants Limited as an expert in this litigation and sent Arcon a copy of the C. R. Eddie report.

5 Counsel for Lavery produced to the plaintiff's counsel a report from Arcon which included this paragraph:

> On June 11, 1998 we were engaged to inspect the automobile, and to assess the extent to which her injuries may have been modified had she being [sic] restrained by a seat belt assembly. In order to assist us, we were provided with a variety of material, including the following:
>
> • The police motor vehicle accident report
>
> • Transcripts of telephone interviews of the other three automobile occupants
>
> • A report on this matter prepared by C. R. Eddie, P. Eng., dated October 2, 1997

6 There is no further mention of the C. R. Eddie report in the Arcon report and there is no evidence as to how, if at all, the C. R. Eddie report affected the investigation and opinion of Arcon.

7 There was no evidence before me as to the precise content of the C. R. Eddie report and the report was not filed on this motion. I inferred from the evidence that it contained an opinion on the same issue on which Arcon was retained.

8 Lavery listed the C. R. Eddie report in Schedule B of his affidavit of documents and claimed it was privileged.

9 On the discovery of Lavery, counsel for Lavery refused to produce the C. R. Eddie report. The Arcon re-

port was produced.

10 Counsel for Lavery undertook not to call Mr. Eddie as an expert at trial.

11 There is an additional unusual fact: counsel for Lavery permitted counsel for the plaintiffs to interview Mr. Eddie and he did so. From the evidence before me I infer that counsel for the plaintiffs received information from Mr. Eddie as to his opinion but obviously did not receive a copy of the report. It appears that the plaintiff's counsel understood Mr. Eddie's opinion to be the opposite of that expressed in the Arcon report.

12 On this motion the plaintiff contends that the C. R. Eddie report is no longer privileged and must be produced.

13 In my opinion the defendant is obliged to produce the C. R. Eddie report. I arrive at this conclusion on each of two analyses: by finding a waiver of litigation privilege attaching to the C. R. Eddie report as the result of permitting plaintiff's counsel access to the findings and conclusions of Mr. Eddie, and by interpreting the requirements of Subrule 36.01(3). I shall deal with each analysis separately.

The Waiver of Litigation Privilege Attaching to the Report

14 The evidence on this motion included evidence that in accordance with the defendant's counsel's permission Mr. Eddie met with the plaintiff's counsel who reported that he "did co-operate with us fully in providing information as to his findings and conclusions. There is no seatbelt issue!"

15 The report of Mr. Eddie was originally subject to litigation privilege as it was prepared at the instance of counsel for use in the litigation.

16 The disclosure of the report to a second expert does not constitute a waiver as the communications with that second expert are also originally subject to litigation privilege.

17 If the report itself had been disclosed to opposing counsel then there would be no doubt that there had been a waiver of the privilege: see the cases discussed in *Supercom of California Ltd. v. Sovereign General Insurance Co.*, [1998] O.J. No. 711 (Ont. Gen. Div.) at p. 8.

18 However, litigation privilege may be lost even where the document is not disclosed. If some of the information in the document is disclosed then the privilege in the entire document is waived. That was recently established by the decision in *R. v. Stone* (1999), 134 C.C.C. (3d) 353 (S.C.C.) which I shall discuss further below.

19 The general rule was established in earlier cases: see *George Doland Ltd. v. Blackburn Robson Coates & Co.*, [1972] 3 All E.R. 959 (Eng. Q.B.).

20 Perhaps the most cited of these is *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C. S.C.) where Madam Justice McLachlin, as she then was, said at pp. 148-49:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication.

21 McLachlin J. reiterated a principle which had been expressed in a number of earlier cases which reached the same conclusion. See *Great Atlantic Insurance Co. v. Home Insurance Co.*, [1981] 2 All E.R. 485 (Eng. C.A.), where Templeman L.J. states at p. 492, para g:

> ... it would not be satisfactory for the court to decide that part of a privileged document can be introduced without waiving privilege with regard to the other part in the absence of informed argument to the contrary, and there can be no informed argument without the disclosure which would make argument unnecessary.

22 This approach has been coined by some writers as the "fairness test." As discussed by Wigmore, (8 Wigmore (McNaughton rev., 1961) note 28, at para 2327, at 635-36, cited in *Hunter v. Rogers* (1981), 34 B.C.L.R. 206 (B.C. S.C.):

> There is always the objective consideration when [a privileged person's] conduct touches a certain point of disclosure, fairness requires that his[/her] privilege shall cease whether [s/]he intended that result or not. [S/]He cannot be allowed, after disclosing as much as [s/]he pleases, to withhold the remainder. [S/]He may elect to withhold or to disclose, but after a certain point his[/her] election must remain final.

23 Other cases have interpreted this 'fairness' principle to require the full disclosure of documents where a partial disclosure would constitute "an attempt to mislead," (*Stevens v. Canada (Prime Minister)*, [1997] F.C.J. No. 228 (Fed. T.D.) at para 35.) See also *Lowry v. Canadian Mountain Holidays Ltd.* (1984), 59 B.C.L.R. 137 (B.C. S.C.); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), [1989] 2 W.W.R. 679 (B.C. C.A.); *Mackin v. New Brunswick (Attorney General)* (1996), 141 D.L.R. (4th) 352 (N.B. Q.B.).

24 In my view Lavery's counsel's permitting the plaintiffs' counsel to interview Mr. Eddie constituted disclosure of information contained in the report to opposing counsel and therefore was a waiver of the litigation privilege in the entire report.

The Production Required by Subrule 31.06(3)

25 Although the issue of production in the case before me relates to the discovery stage, I believe we can obtain some general guidance from the recent decision in *R. v. Stone*, *supra* which dealt with a situation at trial.

26 In *Stone* the court dealt with a situation which developed in a criminal trial. At the conclusion of the Crown' case, defence counsel made an opening statement to the jury. He told the jury he would be calling an expert who would give an opinion as to the mental state of the accused and he told the jury what the opinion would be. The trial judge ordered defence counsel to produce the report of the expert before the case proceeded further.

27 The unanimous decision of the full court on this issue was briefly stated as follows. I have underlined some pertinent parts:

> **B. Forced Disclosure of Expert Report to Crown**
>
> [96] The appellant advanced a second issue on the conviction appeal, asserting that the trial judge had made a reversible error in ordering the production of Dr. Janke's report to the Crown at the outset of the defence case. McEachern C.J. agreed that a report prepared by a defence expert would normally be privileged and not properly subject to a disclosure order. However, he held that in light of comments made by defence counsel at the opening of the defence case, and the fact Dr. Janke's report would have been disclosed in any

event as soon as he took the witness stand, premature disclosure had not occasioned any miscarriage of justice.

[97] In my view, it was unnecessary to rely on the curative provision of s. 686 in this case. The appellant, through his counsel, waived the privilege in the report at the opening of the defence case. At that time defence counsel made the following references to the content of Dr. Janke's anticipated evidence:

> As I have indicated earlier, you have heard during the Crown's case what happened. You are now about to hear from Mr. Stone and from a forensic psychiatrist, Dr. Janke, why it happened. Dr. Janke will explain that Mr. Stone's state of mind at the time of the killing was known in psychiatric terms as a dissociative state.
>
> . . . . .
>
> Dr. Janke is a psychiatrist who works in private practice, on contract with the government, and he teaches at UBC. He will give evidence to explain in psychiatric terms his diagnosis of Mr. Stone's state of mind at the time of the attack. *He will say that Mr. Stone was in a dissociative state or acting as an automaton, that is, somebody who is acting unconsciously. He will say that as Mr. Stone was not acting consciously, he could not have intended to kill his wife.* [Emphasis added]

[98] By disclosing what he wanted from the report in favour of the accused, defence counsel could not then conceal the balance of the report whose contents might contradict or put in context what had been disclosed. It is true that Dr. Janke's report included not only his diagnosis, but a recital of the facts as provided by the appellant and which formed the basis of his expert opinion. It was through disclosure of the report, for example, that the Crown learned that the accused, contrary to his initial trial testimony, appeared to have some recall of the beginning of the fatal assault by way of a dream. The contents of the report, including the statements attributed to the appellant, were of course known to defence counsel at the time he chose to make the disclosure to the jury. It was not open to the appellant to pick and choose the portions of an expert report to be put before the trier of fact. Accordingly, the trial judge acted appropriately by ordering the production of Dr. Janke's report at the conclusion of the defence opening address.

[99] However, I would also, if it were necessary, give effect to the alternative ground accepted by McEachern C.J. The act of calling of Dr. Janke would certainly constitute waiver of any privilege attached to his report. As noted by McEachern C.J., once a witness takes the stand, he/she can no longer be characterized as offering private advice to a party. They are offering an opinion for the assistance of the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately. Given the fact that the report would have to have been disclosed after Dr. Janke's direct examination, the prior disclosure of the report cannot be said to have had any material impact on the outcome of the trial. Absent the earlier disclosure, the Crown would have been entitled to stand the appellant down before completing its cross-examination of him, and to recall him once they had been given an opportunity to consider the contents of the report. Accordingly, even if defence counsel's opening address had been insufficient to trigger disclosure, s.686(1)(*b*)(iii) of the *Code* would properly be applied to cure the error.

28 As there was no statute or rule regulating these issues in *Stone* the court's decision constitutes a statement of the common law which should inform my analysis concerning our civil Rules.

29 The decision indicates that the applicable common law rules are these:

(a) A report prepared by an expert at the request of counsel for litigation purposes is privileged. This would be under the category of litigation privilege.

(b) By announcing in an opening jury address the opinion of the expert contained in the report, counsel waives the privilege in the content of the entire report.

(c) The waiver extends to information in the report which would otherwise be subject to solicitor and client privilege. In *Stone* there was such information in the form of a statement by the client provided to the expert for litigation purposes.

(d) Counsel cannot waive privilege in only part of the report.

(e) Once an expert is called as a witness at trial the opposing party is entitled to production of the "foundation" of the expert's opinion.

30 While there is no mention in *Stone* of any information being disclosed in addition to the expert's report the reasoning of the court has much broader application.

31 The *Stone* decision may have overruled the Ontario decision in *Bell Canada v. Olympia & York Developments Ltd.* (1989), 68 O.R. (2d) 103 (Ont. H.C.). In *Bell Canada* one party called an expert and produced his reports. The opposing counsel demanded production of everything that the solicitor who retained the expert had sent to the expert. The position of the opposing counsel was that once the expert became a witness there was a waiver of privilege for all communications between the counsel and expert. He contended that he was entitled to anything which may have influenced the expert including information provided by counsel which the expert did not rely on. He relied on a ruling to this effect in *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289 (B.C. S.C.).

32 The trial judge in *Bell Canada* refused to order production. In his reasons he expressed concern that to establish such a broad rule would jeopardize solicitor and client privilege. *Stone* has rejected that restriction. In addition, it has since been pointed out that the court in *Bell Canada* proceeded on the erroneous assumption that solicitor and client privilege and litigation privilege were the same: *Jesionowski v. Gorecki*, [1992] F.C.J. No. 816 (Fed. T.D.), at pp. 41-45.

33 The *Stone* decision also puts in doubt the decision in *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 (Ont. Gen. Div.). In that case the court ruled that when an expert is called as a witness there is not an automatic waiver of the expert's entire file but only of the facts and assumptions provided to the expert by counsel and then only if those formed the basis of the expert's opinion. Loukidelis J laid out the following four principles in terms of waiver of privilege:

(1) Principles of waiver relating to a privilege claim for documents in an expert's file cannot be said to have been waived simply by calling that witness to give evidence.

(2) The privilege can be waived in respect of those facts or premises in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to that expert.

(3) Whether there is a privilege or not can be ascertained by one of two ways. As in Ocean Falls, supra, the judge can examine the documents or materials for which privilege is claimed. Another way is for counsel,

through cross-examination of the expert, to determine whether all or part of the file is privileged.

(4) As a general rule, if facts are supplied that are not found in other evidence or if certain assumptions are asked to be made in the instructing documents, privilege claimed for those facts or assumptions should be considered waived.

34 With great respect, I do not think it is possible to apply these principles. I am reminded of the point of Templeton L.J. in *Great Atlantic Insurance Co.* How can the judge know what was or was not relied on or was influential without simply relying on what the expert might say? How can counsel explore the issue if the answers to the questions might disclose privileged information? The application of these principles would simply delegate the task to the person whose opinion, and perhaps integrity, is under scrutiny. And it would prevent opposing counsel from making any submissions.

35 As I shall discuss later, the court in *Stone* did not read the report, did not question the expert as to what he relied on and yet clearly ruled that even information contradictory to the opinion given in testimony had to be disclosed.

36 In my view the ruling and reasoning in *Stone* should affect the interpretation of subrule 31.06(3) which states:

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose, and

(b) the party being examined undertakes not to call the expert as a witness at trial.

37 I note that the subrule does not require the production of the expert's report: *Leerentveld v. McCulloch*, [1985] O.J. No. 1695 (Ont. S.C.). That production is required by Rule 53.03 but not until a later stage in the action.

38 Subrule 31.06(3) can arguably apply to two layers of the facts before me (disregarding the evidence concerning the interview of Mr. Eddie by the plaintiffs' counsel].

39 First, we have the application of the rule to Mr. Eddie as an expert. No production is required here because the defendant's counsel undertook not to call Mr. Eddie as a witness.

40 Next we have the application of the rule to Arcon. The issue here is whether Mr. Eddie's report falls within the term "findings".

41 There are many reported cases interpreting the scope of "findings, opinions and conclusions".

42 In *Transmetro Properties Ltd. v. Lockyer Brothers Ltd.* (1985), 4 C.P.C. (2d) 273 (Ont. H.C.) the court ruled that "findings" included "the documents, the calculations and the engineering data upon which the opinion and the conclusions were drawn" (at p. 279).

43 Mr. Alan Mark wrote a critical case comment on this decision: op.cit. at p. 274. He argued that the dictionary meaning of "findings" did not justify that interpretation. He also argued that the rule did not contemplate pre-trial discovery of an expert and that this must await trial.

44 Since *Transmetro* there have been a number of conflicting decisions.

45 The line of cases giving the term "findings" broad meaning have found the following to be included:

(a) Technical calculations prepared by the party and sent to the expert: *Athabaska Airways Ltd. v. De Havilland Aircraft of Canada Ltd.* (1988), 34 C.P.C. (2d) 298 (Ont. H.C.).

(b) The raw data and test scores used: *Cacic v. O'Connor* (1990), 71 O.R. (2d) 751 (Ont. H.C.); *Beck v. La Haie* (1989), 38 C.P.C. (2d) 67 (Ont. Master).

(c) The disclosure of "findings, opinions and conclusions" of experts should not be restricted to final findings, opinions and conclusions or to written reports. Any finding, opinion or conclusion expressed in sufficiently coherent manner that it can be used by counsel ought to be disclosed on the examination for discovery: *Cheaney v. Peel Memorial Hospital* (1990), 73 O.R. (2d) 794 (Ont. Master)

(d) The field notes, raw data and records made and used by the expert in preparing her/his report: *Award Developments (Ontario) Ltd. v. Novoco Enterprises Ltd.* (1992), 10 O.R. (3d) 186 (Ont. Gen. Div.).

(e) The research, documents, calculations and factal data relied on by the expert: *Allen v. Oulahen* (1992), 10 O.R. (3d) 613 (Ont. Master).

(f) All documents, video tapes, photographs and any information which were forwarded to expert witnesses as well as full detailed disclosure of all surveillance observations conducted on the plaintiff which were disclosed in surveillance reports, (including all observations which were visible or discernible in photographs, film, or videotape): *Beausoleil v. Canadian General Insurance Co.*, [1993] O.J. No. 2200 (Ont. Gen. Div.)

(g) A surveillance video tape which was shown to the defence expert and referred to in his report: *Binkle v. Lockhart* (1994), 24 C.P.C. (3d) 11 (Ont. Gen. Div.)

(h) the information and data obtained by the expert, contained in documents or obtained through interviews, on the basis of which conclusions are drawn and an opinion formed: *Ontario (Attorney General) v. Ballard Estate* (1994), 20 O.R. (3d) 189 (Ont. Gen. Div. [Commercial List]) and unreported additional reasons of December 14, 1995.

(i) Notes of correspondence between the plaintiff's accountant and the plaintiff's prospective employer, which were used to prepare the accountant's report (including notes and correspondence between the plaintiff and his current employer and between the plaintiff and his prospective employer): *Casey v. Orr* , [1996] O.J. No. 425 (Ont. Gen. Div.)

46 The line of cases giving the term "findings" a narrower interpretation found the following were not included:

(a) The notes of interviews conducted by the expert: *Bronstetter v. Davies* (1986), 11 C.P.C. (2d) 289 (Ont. H.C.).

(b) The notes and records on which the report is based: *Metropolitan Toronto Condominium Corp. No. 555 v. Cadillac Fairview Corp.* (1988), 29 C.P.C. (2d) 110 (Ont. Master).

(c) The expert's clinical notes and records: *Kaptsis v. Macias* (1990), 74 O.R. (2d) 189 (Ont. H.C.).

(d) Preliminary drafts of the expert's report: *Kelly v. Kelly* (1990), 42 C.P.C. (2d) 181 (Ont. U.F.C.).

(e) An instructing letter from counsel to an expert witness: *Calvaruso v. Nantais* (1992), 7 C.P.C. (3d) 254 (Ont. Gen. Div.)

(f) Documents to which only "passing reference" is made: *Bardossy v. Cameo Restaurant Ltd.*, [2000] O.J. No. 2385 (Ont. S.C.J.)

47 I find that the weight of authority and the recent trend is to give a broad interpretation to the term "findings." It was noted by Carthy J.A. in the recent Ontario Court of Appeal decision, *General Accident Assurance Co. v. Chrusz* (1997), 17 C.P.C. (4th) 284 (Ont. Gen. Div.) that "our modern rules certainly have truncated what would previously have been protected from disclosure." (at p.332.)

48 As he also said:

> 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. (at p.332)

49 The narrowing of litigation privilege has been advocated by numerous Ontario writers as the best means of pursuing truth in a fair process and of facilitating early and just resolutions in litigation: Waddell, "Litigation privilege and the expert: In the aftermath of Chrusz", *The Advocates' Society Journal*, November 2001, Vol. 20., No. 2; McLeish and Smitiuch, "Expert Evidence: Setting the Stage for Expert Evidence at Trial", *Advocates' Quarterly* Vol. 22, No. 4. It should also be noted that the view is not entirely a recent one, as evidence by the comments of Professor Garry D. Watson, in his article "Solicitor-Client Privilege in Litigation: Current Developments and Future Trends", Canadian Bar Association, Ontario, Continuing Education, delivered on October 19, 1991.

50 While it may not be consistent with the dictionary meaning of the term "findings", I think the broader approach is now established and in my view is appropriate to accomplish the purpose of the subrule.

51 Subject to the issue of causation or reliance discussed below, I conclude that an expert report from one expert which is sent to another expert who is going to be called at trial falls within the scope of production established by the weight of authority.

52 I conclude that subrule 31.06(3) requires production of the C. R. Eddie report at discovery because it is part of the "findings" of the expert Arcon.

Should production be restricted to documents which formed the basis of the opinion?

53 One of the issues also dealt with in the above cases is whether the information included in the "findings" is restricted to that which the expert actually relied on. Many of the cases cited restricted the information in that way, (see *Bell Canada*, *supra*; *Beausoleil*, *supra*).

54 In my view that is no longer a proper restriction. The fundamental difficulty with that principle is that there is no practical and fair way to determine what documents (either in whole or in part) have been influential or relied upon. As stated by Mustill J. in *Nea Karteria Maritime Co. v. Atlantic & Great Lakes Steamship Corp.*, [1981] Com. L.R. 132 (Eng. Q.B.) (as cited by Hobhouse J in the case of *General Accident Fire & Life Assurance Co. v. Tanter*, [1984] 1 All E.R. 35 (Eng. Q.B.), at 43):

> where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.

55 The same point was made by Templeman J in *Great Atlantic Insurance*, *supra* at 492, para. h, where he stated:

> ... the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased.

56 What was relied on is an issue here because it appears the C.R. Eddie report came to a different conclusion than the report prepared by Arcon and therefore may not have been relied on or used in any way by Arcon. The Arcon report is silent as to whether or to what extent the C.R. Eddie report influenced the Arcon opinion.

57 The trial judge in *Stone* ordered production of the expert's report on the ground that opposing counsel "ought to be in a position of being able to explore on cross-examination with the accused whatever statements Dr. Janke may or *may not* have relied upon in his report": at para. 20. [My underlining] The fact that his ruling was upheld implies that opposing counsel is entitled to disclosure of what information was provided to the expert even if it is not relied on.

58 The Supreme Court in *Stone* said that the purpose of the production is to permit opposing counsel to test the expert's opinions. It contemplated that the content of a report might contradict the opinion given in testimony. So might other information in the expert's possession. An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel — for instance, by removing damaging content.

59 It is difficult to understand how a determination could be made as to what was influential. Would counsel decide? Would the expert decide? Why should this decision not be open to scrutiny? The expert might not realize or acknowledge the extent to which information provided has influenced his or her opinion.

60 It seems logical that if counsel sends the expert information counsel does so because he or she believes this information is relevant to the expert's task. If it is relevant to the task then it seems to me it should be available to counsel who must test the opinion.

61 If counsel for the defendant sent the C. R. Eddie report to Arcon it seems axiomatic that counsel must have considered it relevant to the task assigned to Arcon.

62 In *Stone* the court did not require the trial judge to consider the content of the report before ordering its production. In my view this indicates that the court need not conduct a voir dire in this regard. The *Stone* decision also implies that there is no need to rely on counsel's vetting the material or rely on the expert doing so because the court did not suggest that either instructing counsel or the expert should be involved in the decision. The judge simply ordered production.

63 *Stone* makes clear that production should be ordered even if it involves the disclosure of information, such as statements of the client, which would otherwise be subject to solicitor and client privilege.

64 In *Stone* the only document ordered produced was the report. However, subrule 31.06(3) requires production of "findings".

65 While the full scope of Rule 31.06(3) at the discovery stage and the scope of the common law at the trial stage are not issues before me it is important to consider the direction in which the ruling in *Stone* and my more limited ruling in this case may take us.

66 It is my tentative view that our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial.

67 I can appreciate that discussions between counsel and experts for educational purposes might generally best be ruled to be within the zone of privacy protected by litigation privilege. For instance, counsel might communicate with the expert to discuss what information the expert needed to prepare an opinion. Counsel might also want to communicate with the expert to discuss questions which might be put to the expert or to the opposing expert at trial.

68 If the communications took place before the preparation of the report then I am inclined to think it would best for our system of litigation if they were producible because they could influence the opinion and there would be no practical way of determining this without producing and examining the communications and hearing submissions on the issue.

69 Any experienced counsel who has dealt with experts would appreciate how important it would be to know what the expert was instructed to do, what the expert was instructed not to do, what information was sent to the expert and the extent to which counsel instructed the expert as to what to say, include or omit in the report. McLeish and Smitiuch discuss in their article numerous cases which struggled with these issues. I would guess that every experienced litigation counsel knows such influential factors are not rare but commonplace. A recent and alarming example was discussed in the recent case of *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (Ont. C.A.).

70 In my view the disclosure of this information would best enable an opposing counsel and the court to as-

sess whether the instructions and information provided affected the objectivity and reliability of the expert's opinion. I also note there is much contrary opinion on this subject: eg. *Mahon v. Standard Life Assuraance Co.*, [2000] O.J. No. 2042 (Ont. S.C.J.)

71 This area of the case law cries out for appellate review.

72 There is much cynicism among the bench and bar concerning the objectivity and reliability of experts' opinions in to-day's litigation. I believe requiring full production concerning the origins of the opinion would deter inappropriate influence on an expert and help restore confidence in the process.

73 I should add that there is no suggestion in this case of any inappropriate influence on the expert.

Should the production take place at discovery or trial?

74 It might be argued that subrule 31.06(3) should not be interpreted to require production at discovery because such production should be dealt with at trial. I don't agree.

75 As noted in *Stone*, if the issue is not dealt with until trial, the opposing counsel will then be entitled to an adjournment in order to review the material then produced. That could cause significant delay. In some cases it might take days for counsel to review the material. Counsel might also need time to review the material with its own expert. As noted in *Binkle v. Lockhart, supra*, the experts of the various parties should all be on the same footing at trial by having access to the same background information: at para. 14.

76 When the information is disclosed it might well affect counsel's assessment of the merits of the case and of the value of proceeding with the trial. Earlier production might have made a trial unnecessary. If the production only takes place at trial the cross-examining counsel will not be in a position to succinctly use it in cross-examination unless the material is minimal. It takes preparation to cull information and consider whether or how to use it to test an expert's opinion. The trial is a time for examination and cross-examination not for production and preparation.

Conclusion

77 I conclude that the C. R. Eddie report must be produced for two reasons. First, the litigation privilege attaching to the document was waived when the instructing counsel permitted the author to disclose information it contained to opposing counsel. Second, unless the defendant's counsel undertakes not to call a member of Arcon as an expert at trial, subrule 31.06(3) requires that it be produced as part of the findings of Arcon.

78 In view of the divided success on the motion I am inclined to think this is not a situation where any costs should be awarded.

79 If any counsel seeks costs he should send me written submissions by February 22. Any responding submissions should be sent by March 9.

Motion granted.

END OF DOCUMENT

6

2006 CarswellOnt 5672, 215 O.A.C. 233, 32 C.P.C. (6th) 201, 272 D.L.R. (4th) 545, 83 O.R. (3d) 792

Conceicao Farms Inc. v. Zeneca Corp.

CONCEICAO FARMS INC., HORODYNSKY FARMS INC., PAUL HORODYNSKY, W.J. SMITHGARDENS LIMITED, ROMAN DYRIW, MICHAEL DYRIW and 466203 ONTARIO LIMITED (Plaintiffs / Appellants) and ZENECA CORP. cob as ZENECA ARGO, and ZENECA INC. and BRADFORD CO-OPERATIVE STORAGE LIMITED (Defendants / Respondents)

Ontario Court of Appeal

S.T. Goudge, R.A. Blair, R. Juriansz JJ.A.

Heard: September 5, 2006
Judgment: September 20, 2006
Docket: CA M34061, C42088

Proceedings: reversing *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 2006 CarswellOnt 4558, 214 O.A.C. 161 (Ont. C.A. [In Chambers])

Counsel: Brian Gover, Lawrence Theall for Appellants, Responding Parties, Conceicao Farms Inc.

Gavin MacKenzie for Respondents, Moving Parties, Zeneca Corp. cob as Zeneca Argo, Zeneca Inc.

Subject: Civil Practice and Procedure

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Expert reports

Farmers brought action against manufacturer for supplying allegedly defective pesticide — Manufacturer's original counsel retained expert to assist with litigation — Original counsel transcribed telephone conversation with expert, and kept resulting memorandum in her file — Memorandum was not produced to farmers as affidavit of documents asserted litigation privilege — Manufacturer retained new counsel who contacted expert to prepare report, and report was served on farmers before trial — Farmers' action was dismissed at trial, in part due to trial judge's reliance on expert's report — Farmers learned of existence of memorandum, and moved unsuccessfully before trial judge for production — Farmers appealed trial decision, and brought successful motion before appeal court for production of memorandum — Manufacturer brought motion to set aside order for production — Motion granted — Rule 31.06(3), under which farmers moved for production of memorandum, entitled farmers to obtain foundational information contained in memorandum on discovery — Farmers knew, prior to trial, that manufacturer had retained original counsel, and that expert had prepared report for original counsel — Farmers were entitled to seek discovery of foundational information for opinion in report prior to trial —

Rule did not give farmers right to obtain disclosure after trial — Farmers were not entitled to production of memorandum, but merely discovery of foundational information for findings, opinions and conclusions of expert contained in memorandum; however, this right expired at commencement of trial.

Cases considered:

Blank v. Canada (Department of Justice) (2006), 2006 CarswellNat 2704, 2006 CarswellNat 2705, 2006 SCC 39 (S.C.C.) — followed

Browne (Litigation Guardian of) v. Lavery (2002), 37 C.C.L.I. (3d) 86, 2002 CarswellOnt 496, 18 C.P.C. (5th) 241, 58 O.R. (3d) 49 (Ont. S.C.J.) — followed

Rules considered:

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

R. 31.06(3) — considered

R. 61.16(6) — pursuant to

MOTION to set aside judgment reported at *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 2006 CarswellOnt 4558, 214 O.A.C. 161 (Ont. C.A. [In Chambers]), ordering production of memorandum containing foundational information for expert witness' final opinion.

***Per curiam*:**

1 The respondents in this appeal move pursuant to rule 61.16(6) to set aside the order of Gillese J.A. dated July 26, 2006.

2 The circumstances leading to the order are as follows. The appellants sued the respondents for supplying defective pesticide. In August 1999, the respondents' original counsel retained an expert, Dr. Grafius, to assist with the litigation. On March 14, 2000, that counsel had a lengthy telephone conversation with Dr. Grafius which counsel transcribed. Counsel kept the resulting memorandum in her file. The respondents' affidavit of documents asserted privilege over all documents and memoranda prepared for the purposes of the litigation and the March 14 memorandum was therefore not produced to the appellants.

3 In December 2000, the respondents retained new counsel who did not establish contact with Dr. Grafius until April 2003. Dr. Grafius then prepared an expert's report for the respondents which was served on the appellants eight months before trial. He was then called as a witness at trial.

4 The appellants' action was dismissed with costs at trial, with the trial judge relying in part on the expert evidence of Dr. Grafius.

5 When the respondents provided material to the appellants in support of their costs claim, the existence of the March 14 memorandum came to light through the dockets of the respondents' original counsel.

6 The appellants then moved before the trial judge to request production of that memorandum. The trial judge dismissed their request, saying among other things, that even if he had ignored the evidence of Dr. Grafius he would have come to the same conclusion and dismissed the appellants' action.

7 The appellants have appealed and now seek to obtain the March 14 memorandum to tender as fresh evidence on the appeal, in order to argue that a decision based in part on the expert evidence of Dr. Grafius cannot stand, since the memorandum was wrongly withheld from them and could not therefore be used to cross-examine the expert.

8 The memorandum was not produced to the trial judge, Gillese J.A. or this court. However, the appellants put circumstantial evidence before Gillese J.A. by way of affidavit from which they asked her to conclude that the memorandum contained either a preliminary opinion of Dr. Grafius or "foundational information" for his final opinion and was therefore producible to them pursuant to rule 31.06(3).

9 Gillese J.A. was unable to conclude that the memorandum contained a preliminary opinion by Dr. Grafius and we would not interfere with that finding. She did find that the memorandum contained foundational information for his final opinion. She held that, as such, the memorandum should not be seen as part of counsel's work product protected by litigation privilege, but should be producible pursuant to rule 31.06(3). She therefore ordered it produced to the appellants.

Analysis

10 The appellants seek to make their case under rule 31.06(3). It reads as follows:

> (3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
>
> > (a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
> >
> > (b) the party being examined undertakes not to call the expert as a witness at the trial.

11 The rule is about the information that a party may obtain on discovery concerning the findings, opinions and conclusions of another party's expert. It speaks to the right to obtain disclosure, whether the information to be disclosed is contained in a document or not. It does not speak to the production of documents. The privilege attaching to a document is not erased simply because some or all of the information in the document must be disclosed if asked for on discovery.

12 It is true that, as a practical matter, the obligation to disclose the information in a document is often discharged by simply producing the document. Indeed, probably because of this, much of the case law concerning rule 31.06(3) refers to the rule requiring "production."

13 In *Holmested and Watson* at p. 31-106, the learned authors clearly and concisely summarize these aspects of the rule:

> Rule 31.06(3) is concerned with fact disclosure, not with documentary production. If prepared in contemplation of litigation an expert's report is privileged and the report itself (*i.e.*, the document) remains technically privileged, notwithstanding rule 31.06(3). However, in practice the parties often waive this privilege and de-

liver or exchange expert's reports in lieu of, or in fulfillment of their obligations under rule 31.06(3).

14 There is an area of debate concerning the scope of information that may be obtained pursuant to this rule. It clearly encompasses not only the expert's opinion but the facts on which the opinion is based, the instructions upon which the expert proceeded, and the expert's name and address. How far beyond this the right to obtain foundational information (as our colleague called it) extends, need not be determined here. Suffice it to say that we are of the view that it does not yet extend as far as is tentatively suggested in *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49 (Ont. S.C.J.). We simply proceed on the basis that the rule entitles the appellant to obtain on discovery the foundational information for Dr. Grafius' final opinion. As will become clear, we need not decide in this case the precise extent of the information that is discoverable.

15 In ordering that memo to be produced, Gillese J.A. found that the March 14, 2000 memorandum contains foundational information for Dr. Grafius' final opinion and that the appellants have the right to obtain that information under rule 31.06(3).

16 Accepting her finding about the contents of the memorandum, we agree that the rule entitles the appellant to obtain on discovery the foundational information contained in the memorandum. However we would part company with our colleague on whether the appellants are entitled to obtain that information at this stage, after trial. We think not.

17 As Mr. Gover candidly acknowledged, the record makes clear that the appellants knew, prior to trial, that the respondents had obtained original counsel and as well, counsel's identity. He also acknowledged that the appellants had information suggesting that Dr. Grafius had prepared a report for original counsel. Most importantly, the appellants knew of Dr. Grafius' final opinion months before trial. They had been served with a copy. They were entitled then to seek discovery of the foundational information for that opinion pursuant to rule 31.06(3). It appears that they did not do so.

18 In our view, there is no basis for them to do so now. Rule 31.06(3) applies to the discovery stage of litigation, which is closed. It gives the appellants no right to obtain disclosure after trial. Nor should they be otherwise entitled to disclosure at this late stage to cure their own failure to properly exercise their right to obtain this foundational information on discovery.

19 We do not think it is an answer to say that the appellants did not know of the memorandum until after trial. The rule does not give them the right to production of the memorandum but rather to obtain discovery of the foundational information for the findings, opinions and conclusions of Dr. Grafius contained in the memorandum. That it is a right they had right up to trial. There is no basis in the rule or in fairness to give them the same right, by means of the production of the memorandum, now that the trial has been concluded. For the trial process to function fairly and properly, parties must exercise their right to obtain discovery at the discovery stage not seek to do so after trial.

20 That is enough to dispose of the respondents' request for review. However, because counsel addressed it in argument, we offer this on one other issue: in our view, this case does not suggest a need to modify the rule of litigation privilege where experts are concerned. There is no doubt that litigation privilege attached to the March 14, 2000 memorandum. It was prepared by counsel as part of defending the lawsuit. That was its substantial if not its only purpose. Moreover as is made clear in the recently decided case of *Blank v. Canada (Department of Justice)*, 2006 SCC 39 (S.C.C.), which counsel forwarded to us, there can be no doubt that this privilege continues because the litigation continues.

21 Taking as a given that a document protected by litigation privilege and part of counsel's work product contains the foundation for an expert opinion, there is no need to remove the privilege for the document itself to do justice. The foundational information in the document is available under rule 31.06(3), if it is sought on discovery. Removing the privilege for the document itself is not necessary to obtain that information, but does run the risk of requiring disclosure of properly privileged information that is often intertwined with discoverable information in the lawyer's work product.

22 We would therefore set aside the order of Gillese J.A. and dismiss the appellants' motion. As agreed by counsel, costs of the motion and this review are for the panel hearing the appeal.

Motion granted.

END OF DOCUMENT

Indexed as:

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (Alta. C.A.)

Between
Caterpillar Tractor Co., Caterpillar Americas Co., and Caterpillar of Canada Ltd., Appellants (Defendants), and Ed Miller Sales & Rentals Ltd., Respondent (Plaintiff)

[1988] A.J. No. 810

61 Alta. L.R. (2d) 319

90 A.R. 323

22 C.P.R. (3d) 290

12 A.C.W.S. (3d) 107

Appeal No. 8803-0195 AC

Alberta Court of Appeal

Laycraft C.J.A., Haddad and Bracco JJ.

September 8, 1988

M.H. Dale, Q.C., and G.J. Draper, for the Appellants.
H. Rubin and J.B. Laskin, for the Respondent.

REASONS FOR JUDGMENT

LAYCRAFT C.J.A. (for the Court, allowing the appeal in part):-- On this appeal the Caterpillar companies seek to overturn an interlocutory order made in Chambers in Court of Queen's Bench by mr. Justice Wachowich. The order directed them to produce certain working papers created by their

chartered accountants and, further, to produce depositions made in another action in the United States Federal Court which are the subject of a confidentiality order made there.

I would allow the appeal with respect to the production of the working papers but would dismiss it as to the production of the depositions.

This complex litigation has a long history. The action was commenced on May 15, 1980. by Ed Miller Sales & Rentals Ltd against the three Caterpillar companies and all of the authorized Caterpillar dealers in Canada. Miller alleged that the marketing arrangement between the Caterpillar companies and their authorized dealers is an unlawful criminal conspiracy in breach of the common law and in breach of sections 32, 33, 34 and 38 of Part V of the Combines Investigation Act R.S.C 1970 c. C-23.

After the action commenced, proceedings in chambers to compel Miller to supply further and better particulars occupied more than three years. In September, 1983 this Court directed that particulars be supplied. The order was complied with and pleadings were closed. Examinations for discovery have been lengthy and are not yet completed. As the action has progressed, the plaintiff has discontinued it against all of the authorized caterpillar dealers except R. Angus Alberta Limited.

The Working Papers Dispute

The "working papers" in dispute were created by Price Waterhouse & Company, a firm of chartered accountants. Some years before this action was commenced, the Director of Investigation and Research appointed under the Combines Investigation Act initiated an inquiry into the production, supply and distribution in Canada of equipment manufactured by Caterpillar. He presumably acted under the authority of Section 8 of the Combines Investigation Act which required him to commence an inquiry, inter alia, whenever he had reason to believe that a ground existed for an order by the Restrictive Trade Practices Commission under Part IV.1 or he had reason to believe that an offence under Part V of the act had been, or was about to be, committed. The subjects of the inquiry were Caterpillar Americas Co., Caterpillar of Canada Ltd. and a number of authorized dealers in Canada including Angus.

One of the principal subjects of the inquiry, and of this litigation, relates to a charge of five per cent of the list price of equipment which is charged by Caterpillar to an authorized dealer (and presumably passed on by him to his customer) when he sells Caterpillar equipment to a customer anywhere in the world in the geographical area served by another dealer. Caterpillar says that this charge is to cover warranty service and other "no-charge" services which the other dealer is required to provide when the equipment is moved into his area. Miller alleges in this action that the charge is a sham which, in any event, is often not paid to the other dealer. The purpose of the charge, it is said, is simply to raise the cost of equipment to buyers such as the plaintiff so that they will be unable to compete with authorized Caterpillar dealers in re-selling or renting the equipment.

The companies who were the subject of the inquiry retained a Toronto law firm to represent

them. For the purpose of advising them, the law firm retained Price Waterhouse to prepare a study of costs incurred by a number of Canadian Caterpillar dealers in providing the disputed no-charge services. Price Waterhouse created a form on which they recorded raw data from the operations of each dealer. They then analyzed the data and estimated the cost of "no-charge" services. This process was more than a simple calculation since it involved the creation of a statistically valid sample and an analysis of the data obtained from the sampling unit.

The result of this work was a report issued on may 8, 1978 and addressed to the law firm. The report stated that warranty and delivery service cost 4.25% of list price, with a precision of plus or minus .6% and that there were other additional costs the amount of which they were unable to determine. The cost of these no-charge services is very much an issue in this litigation; Miller contends that the actual cost of them is less than one per cent of the list price of the equipment while the Caterpillar Companies say that the charge of five per cent is a valid charge.

The Caterpillar Companies supplied a copy of the report to the Director of Investigation and Research. They did not supply the working papers and the Director did not ask for them. Ultimately he discontinued the inquiry without prosecuting the Caterpillar companies or any of the authorized Caterpillar dealers and without taking any proceedings before the Restrictive Trade Practises Commission.

On the examination for discovery of an officer of R. Angus Alberta Limited, a copy of the Price Waterhouse report was produced by that company on request. Counsel for the Caterpillar companies was present at this discovery. He put no objection on the record but says he attempted to persuade counsel for Angus not to produce it.

On the examination of the officer produced by the Caterpillar companies, counsel for Miller produced the copy of the report which he had obtained on the examination of the Angus officer. It was marked as an exhibit and he proceeded to examine on various issues arising out of it. He requested production of the working papers from which Price Waterhouse had prepared the report. Appellants' counsel declined to produce them on the ground that they are documents which were prepared for the assistance of counsel in litigation.

In Court of Queen's Bench, Mr. Justice Wachowich ordered the production of the working papers. He cited the decision of this court in Nova v. Guelph Engineering company [1984] 3 W.W.R. 314 for the proposition that, to be protected by solicitor-client privilege, a document must have been prepared "for the dominant purpose of submission to the legal adviser with a view to litigation". He then said:

> "The facts in the present case do not satisfy me that the accounting report and the working papers were prepared for the dominant purpose of anticipated or pending litigation. When the Report was prepared, Caterpillar was merely being investigated pursuant to the Combines Investigation Act. This constitutes the evidence gathering stage of the enforcement scheme of the Combines

> Investigation Act (Roberts, Anticombines and-Antitrust (1980) at p. 489). The evidence gathered may result in charges being laid, or may in fact lead to no action at all. As the Report by Price Waterhouse was prepared during this preliminary investigative period, it can hardly be said that the dominant purpose for its submission was with a view to anticipated litigation. Though one of the objectives for its preparation may have been to provide information to solicitors, this would not be sufficient to satisfy this test and bring it within the document privilege. Any possible litigation leading from the investigation appears to have been too remote to support the view that the Report became privileged under the dominant purpose test."

I confess that, to me, to say they were "merely being investigated" seems an unduly sanguine description of the process in which the Caterpillar companies were then involved. They were "merely being investigated" but that investigation had the potential for the gravest consequences, both civil and criminal. It was the first step in a procedure which could ultimately lead to huge fines, to jail sentences for individuals, to the destruction of their marketing and warranty system, and to civil liability if the facts established showed breaches of the statute.

It is safe to say that anyone against whom has been set in motion the complex processes of the Combines Investigation Act has immediately sought, and certainly required, legal assistance. While the procedures of the statute are lengthy and cumbersome, and while the conclusion of them may be years away when the inquiry is launched, the danger is nevertheless real. I would consider that litigation was anticipated and, indeed, was then in progress.

The adversarial process has always found difficulty in reconciling the conflicting interests of disclosure and legal professional privilege. The modern trend has been toward broadening the discovery process so that the courts decide issues between parties on a full review of the facts. In this Court that trend is evident in such cases as Czuy v. Mitchell [1976] 6 W.W.R. 676 and Drake v. Overland [1980] 2 W.W.R. 193.

In Nova v. Guelph Engineering Company (supra), Stevenson J.A. reviewed the practice in Alberta in the light of cases in other jurisdictions, particularly the decision of the House of Lords in Waugh v. British Railway Board [1980] A.C. 521. He stated the test for production derived from Waugh in these terms:

> "... a party need not produce a document otherwise subject to production if the dominant purpose for which the document was prepared was submission to a legal advisor for advice and use in litigation (whether in progress or contemplated). Such documents are shielded from production by what is usually described as legal professional privilege."

The case law in Alberta had previously stated the "substantial purpose" test for the existence of legal professional privilege: Bourbonnie v. Union Insurance Society of Canton (1959) 28 W.W.R.

455 and [1959] 28 W.W.R. 455 and Gillespie Grain Co. v. Wacowich [1932] 1 W.W.R. 916. The Court nevertheless adopted the "dominant purpose" test from Waugh following three other Canadian Courts of Appeal in doing so: British Columbia in Voth Bros Const. (1974) Ltd. v. Bd. of School Trustees of School Dist. 44 (North Vancouver) [1981] 5 W.W.R. 91; Nova Scotia in Davies v. Harrington (1980) 39 N.S.R. (2d) 258; and New Brunswick in McCaig v. Trentowsky (1983) 148 D.L.R. (3d) 724. At pages 191-192 in Nova Stevenson J.A. discussed the rationale for the more restrictive rule. He said:

> "In my opinion the sole viable rationale is to be found in the demands of the adversary system. I do not see any real impeliment to the functioning of the adversary system in restricting this rule of privilege as the House of Lords has done. The only case for exclusion which can be made is for documents which were brought into existence by reason of an intention to provide information to solicitors. That this is an object is insufficient - such a test provides a cloak where other purposes predominate. Such a test would clothe material that probably would otherwise have been prepared, and otherwise not privileged, with a privilege intended to serve a narrow interest. Such a test conflicts with the object of discovery today which is to disclose material provided for other purposes. It would be possible to formulate other tests, but in the interest of uniformity as well as for the reasons expressed by the House of Lords, I would adopt the dominant purpose test."

In my view, the report and working papers in this case meet the "dominant purpose test". Indeed, they seem to have been created for the sole purpose of use by the solicitors in the litigation then in progress. I also respectfully disagree with the opinion of the Chambers Judge that, since the Companies "were merely being investigated", the purpose for which the papers were created was too remote from the ultimate conclusion of the process.

The effect of the order made is that in the early stages of a proceeding under the - - ines Investigation Act a lawyer's brief must be disclosed. At some point, presumably when the prospect of penalties or civil liability approaches ever closer, the position would reverse itself and favour protection of the brief. Effective legal representation is impossible on those terms. The bulwark of defence one seeks to erect, as the procedures under the Act commence, will be hollow, indeed, if it is only at the later stages of the procedures that a lawyer's brief is to be protected.

For Miller it is urged that an inquiry by the Director of Investigation and Research under the Combines Investigation Act is not litigation. Alternatively it is said that, if the documents were ever privileged, that privilege ended once the Director terminated his inquiry. In my view both arguments take too narrow a view of the term "litigation". Once the Director focussed on the Caterpillar Companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone in contemplation. The parties could look ahead to many Possible procedures. Some under the Act had possible penal

consequences; some were civil as this very action establishes. All involved the same issues. The inquiry seems to have resolved itself to the question of the cost of the Caterpillar "no-charge" services and the very same issue appears at the forefront of this action.

The conclusion of the Director's Inquiry did not mean that the litigation was ended. Section 39 of the Combines Investigation Act expressly provides that civil rights of action remain despite the provisions of the Act. The issues raised by the Director were still open to other litigants such as the respondent.

The respondent cited a number of authorities which hold that medical reports obtained by a plaintiff's solicitor and privileged in one action must be produced if the same plaintiff has another accident some time later and is engaged in litigation with respect to it. Typical of such cases are Griffiths v. Mohat [1981] 5 W.W.R. 477 (B.C.S.C.) and Meany v. Busby (1977) 15 O.R. (2d) 71 (Ont. H.C.J.). Whether these cases would be followed in Alberta, I do not need to decide in this case. They do not apply to this case in any event. The difference between those cases and this one is that, in the medical cases, it could hardly be said that litigation was in contemplation for a second accident which hadn't yet happened when the report was prepared. In this case the civil litigation on the issues of the inquiry must have been in contemplation from the commencement of the inquiry.

The respondent also contends that, if the privilege existed, the Caterpillar Companies waived that privilege, first by handing the report to the Director, or secondly by failing to object when the report was produced at the examination for discovery of the officer of R. Angus Alberta Limited. Again, in my view, neither argument has substance.

It must first be noted that the Director's inquiry is not a public proceeding. The Director hears witnesses in private and even in the absence of other subjects of the inquiry and their solicitors. Secondly, to hand a privileged document to one party to litigation for the purpose of settlement or any other purpose, does not, in my opinion, show any intention that the privilege is thereby to terminate as to other parties or in related litigation.

The Respondent also argued that the Caterpillar Companies waived any privilege which existed by failing to object when the officer of R. Angus Alberta Limited produced the Price Waterhouse report on his examination for discovery. The simple answer is that, even if one litigant has the status to interject on the examination for discovery of another, the objection is pointless if his co-defendant is resolved to produce the document. Waiver depends on intention. Failure to make a pointless objection does not, in my opinion, demonstrate that intention.

I would allow the appeal as to the production of the working papers and direct that they are not required to be produced.

The Production of the Depositions

In 1977 Caterpillar Tractor Co. commenced an action in Federal court in the United States

against Earthworm Tractor Co. alleging trademark infringement. Earthworm Tractor co. counterclaimed alleging breaches of United States anti-trust legislation. On September 27, 1978, the United States District Court for the Southern District of New York issued an order designating as confidential, certain proceedings, documents and testimony in the action.

The order was made by consent. It provided that within 30 days after documents or testimony was given, a party could designate the portions of it which were to be confidential, subject to the right of the court to disallow an unreasonable designation. Thereafter neither party could disclose the information, testimony, or depositions to other persons. Clause 3 of the order provided:

> "3. The restrictions and limitations set forth in the preceding paragraphs shall be observed until the parties consent in writing to their removal or, by Order of this Court, upon motion of a party to be relieved of this Acknowledgment and Consent made upon fifteen (15) days' written notice to the attorneys of record for the other party."

Some time after this order was issued, the parties to the action made a further agreement that either party could designate testimony or documents including those produced by itself or by third-party witnesses as "superconfidential". Thereafter, that material could be seen only by counsel for the opposite party and not by that party's officers or employees.

An officer of Ed Miller Sales & Rentals Ltd. was examined for discovery by both sides in the United States action. Mr. Rubin, who appeared for Miller on this appeal, also appeared for Miller in the United States action. On behalf of Miller, he joined counsel for Earthworm in claiming confidentiality for the depositions of the Miller officer. Counsel for Earthworm also objected to counsel for Caterpillar Tractor Co. in the United States consulting with that company's counsel in this action on the ground that information disclosed in one case might be used in the other. The United States District Court directed that confidential information should not be made available to Canadian counsel for the Caterpillar Companies in this action.

Although Mr. Rubin claimed the benefit of the confidentiality order for the evidence of the Miller officer, he subsequently attempted to obtain access to the transcripts and documents in the United States action. On September 30, 1982 his request was presented by counsel for Earthworm to the United States District Court. That court refused the request and affirmed the direction that Canadian counsel for the Caterpillar Companies in this action could not have access to the material either.

The United States action was settled but the confidentiality order has not been discharged or amended. The settlement agreement contained various terms to maintain the confidentiality but the precise wording of them is not before us. In an affidavit filed in Court of Queen's Bench, however, Mr. Rubin states that counsel for Earthworm in the United States advised him that Earthworm was willing to release the transcripts of Caterpillar officers, employees and dealers. But counsel for Earthworm said that the Company was unable to do so because the settlement agreement totally prohibited Earthworm or its counsel "from cooperating with the plaintiff in the prosecution of its

litigation in the Court of Queen's Bench in Alberta...".

During his examination for discovery of the officer of the Caterpillar Companies in this action, Mr. Rubin requested production of the transcripts of the Caterpillar witnesses in the United States action. Production was refused on the ground that they are subject to the confidentiality order in the United States Action.

In Court of Queen's Bench Mr. Justice Wachowich ordered that the transcripts be produced. He found that the transcripts had a possible relevance to this action, a point which was conceded by counsel on this appeal, He then said:

> "I find the case of Abernethy v. Ross (1985) 65 B.C.L.R. 142 (B.C.C.A.) applicable in these circumstances. The Court ordered the Defendants to produce transcripts of discoveries of those defendants from another action. The Court recognized that discoveries from previous actions could not be used for improper purposes but this did not make them privileged. They refused to adopt a rule that would prevent the court from learning what a party had said under oath in the past.
>
> I see no reason why the same principles should not be applied in the present circumstances. The depositions in the U.S. action may provide useful information to assist this court in determining the true facts in the present case. In my view, this would not be using the documents for an improper purpose. As far as these documents are possibly relevant to the present case, and may be of assistance in ascertaining the truth, they should be produced by the Defendant.
>
> I would follow the S.C.C. decision in Spencer v. R. (1985) 62 N.R. 81 as to the procedure to follow when foreign laws or judicial acts are contrary to our law. The Defendant (Respondent) will be given a reasonable time in which to apply to the United States District Court, Southern District of New York, to have the Confidentiality Order modified to allow production in this case. Failing this, there will be an Order that the Defendant produce the Earthworm Depositions to the Plaintiff herein."

In my view, the question of "Privilege" does not really arise with respect to these transcripts. I respectfully agree with the conclusion of the British Columbia Court of Appeal in Abernethy v. Ross (supra) that discoveries are confidential in the sense that they may not be used for an improper purpose. That caveat on their use, however, does not mean that the transcripts are privileged.

In this case the confidentiality which the Caterpillar Companies contend precludes their production of the transcripts is largely of their own creation. The order which binds them is a

consent order; the confidentiality is of their own designation. Moreover, on the material before the Court, the consent of the other party to the United States action is forthcoming. Thus it would seem simple for them to remove the restriction on production. I am unable to agree that a party can prevent production of a relevant document, otherwise subject to production, in a Canadian court by its own action (or inaction) in another Jurisdiction.

I am also of the opinion that the decision of the Supreme Court of Canada in Spencer v. R. (supra) is applicable to this situation. In that case the officer of a Canadian bank was subpoenaed to give evidence in an income tax prosecution of a customer of the bank arising from transactions in the Bahamas. He objected to testifying on the ground that he would thereby breach the secrecy provisions of, and commit an offence under, Bahamian law.

The Supreme Court of canada held that he was compelled to testify notwithstanding the Bahamian statute. The comity of nations requires that "Canadian Courts should not lightly disregard the Bahamian provisions requiring the appellant in this case to testify" (per Estey J. at page 85). It would therefore be desirable to allow the appellant time to obtain an order in the Bahamas permitting the testimony. But, in any event, the nature of the prosecution would have compelled the Canadian court to take the testimony. Estey J. concluded at page 86:

> "If an authorizing order had not been sought or obtained within a reasonable time, the Canadian courts would have had no option, having regard to the subject matter of these proceedings, but to proceed in the manner indicated by the Ontario Court of Appeal below."

I respectfully agree with the disposition of this point by Mr. Justice Wachowich. Since the success on this appeal has been divided I would direct that there be no costs of the appeal.

LAYCRAFT C.J.A.
HADDAD J.A.:-- I concur.
BRACCO J.A.:-- I concur.

Case Name:

College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)

Between
The College of Physicians and Surgeons of British Columbia, appellant (petitioner), and
The Information and Privacy Commissioner of British Columbia, respondent (respondent), and
Dr. Doe, respondent, and
The Applicant, respondent, and
The Attorney General of British Columbia, respondent

[2002] B.C.J. No. 2779

2002 BCCA 665

[2003] 2 W.W.R. 279

176 B.C.A.C. 61

9 B.C.L.R. (4th) 1

23 C.P.R. (4th) 185

118 A.C.W.S. (3d) 592

Vancouver Registry No. CA028608

British Columbia Court of Appeal
Vancouver, British Columbia

Hall, Low and Levine JJ.A.

Heard: September 24 and 25, 2002.
Judgment: December 12, 2002.

(118 paras.)

Crown -- Examination of public documents -- Disclosure by Information Commissioner -- Freedom of information, legislation -- Freedom of information, bars -- Solicitor-client privilege -- Advice, proposals, analyses or policy options developed for public bodies.

Appeal by the College of Physicians and Surgeons from the dismissal of its application for judicial review of a decision of the Information and Privacy Commissioner ordering it to disclose experts' reports obtained by its in-house lawyer in the course of the investigation of a complaint. The College had received a complaint about a physician. The College's lawyer obtained opinions of four experts to assist the College in assessing the complaint. The lawyer then prepared two memoranda summarizing the opinions of the experts. The complainant requested disclosure of the documents. The Commissioner found that the opinions were not subject to solicitor and client or **litigation** privilege on the grounds that the lawyer had not obtained them in her capacity as a lawyer, but rather as an investigator, and that the opinions were communications between the lawyer and third parties. The Commissioner also found that litigation was not a reasonable prospect at the time the opinions were obtained.

HELD: Appeal allowed. The documents were exempt from disclosure on the basis that they provided advice to the College as a public body. The documents were not privileged. The investigation was integral to the lawyer's function. She was engaged in giving legal advice to her client. However, the communications did not take place within the relationship between the lawyer and the College as client. The third parties were not performing a function on the College's behalf. The memoranda prepared by the lawyer were not privileged apart from the portions which contained the lawyer's comments on the opinions. The documents were not prepared in contemplation of litigation.

Statutes, Regulations and Rules Cited:

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, ss. 4(2), 12, 12(1), 12(2)(c), 13, 13(1), 13(2)(a), 13(2)(1), 14, 22(1).
Medical Practitioners Act, R.S.B.C. 196, c. 285, ss. 3(1), 3(2), 3(2)(a), 3(2)(d), 3(2)(g), 21(2), 28(2), 51, 53, 60.
Ontario Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

Counsel:

D. Martin, for the appellant.
P. Dickie and C. Buchanan, for the applicant.
W. Clark, for Dr. Doe.
M. Baird, for the Law Society of British Columbia.

The judgment of the Court was delivered by

LEVINE J.A.:--

Introduction

1 The appellant, the College of Physicians and Surgeons, claims that documents created in the course of its investigation of a complaint of professional misconduct are exempt from disclosure under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, as amended (the "Act"), because they are subject to solicitor client privilege or are "advice or recommendations developed...for a public body". At the heart of the appeal is the assertion that a "zone of confidentiality" is essential to the efficacy of the College's complaints review process.

2 The appeal is from the order of a Justice of the Supreme Court, who dismissed the College's application for judicial review of the order of the Commissioner of Information and Privacy (the "Commissioner"). The Commissioner ordered the College to disclose to the respondent, the Applicant, experts' reports obtained by the College's in-house lawyer in the course of investigating the Applicant's complaint (the "Documents").

Factual Background

3 In January 1997, the Applicant complained to the College, alleging misconduct by her employer, a physician (the respondent, Dr. Doe). Between July 1997 and April 1998, the lawyer for the College obtained the opinions of four experts, two in writing and two orally, to assist the College in assessing the basis for the complaint. The lawyer prepared memoranda summarizing the oral opinions. The Documents comprise the two written opinions (Documents 1 and 2), the two memoranda prepared by the College's lawyer summarizing the oral opinions (Documents 3 and 4), and a letter received by the College from one of the experts whose opinion had initially been given orally (Document 5).

4 Documents 1 through 4 were reviewed by the Sexual Conduct Review Committee ("SMRC") of the College between April and June 1998. The SMRC decided not to proceed with an inquiry to determine if any disciplinary action should be taken against the physician. The College's lawyer wrote to the Applicant summarizing the opinions contained in Documents 1 through 4, explaining that the SMRC had concluded that the evidence would not support any action against the physician.

5 Document 5 was received by the College in January 1999, after the decision of the SMRC and the summaries of the opinions were provided to the Applicant. A copy of Document 5 was sent by the writer to the Applicant's doctor and has been seen by the Applicant. The Applicant has also seen a letter written in February 1999 by the other expert whose opinion had initially been given orally.

6 In March 1999, the Applicant requested that the College disclose the Documents to her. The College refused. The Applicant applied to the Commissioner for review of the College's refusal.

The College provided copies of the Documents to the Commissioner for his review. The Commissioner received written submissions from the College, the physician and the Applicant. The College claimed the opinions were exempt from disclosure, inter alia, under s. 14 of the Act, as they were subject to solicitor client privilege, and under s. 13 of the Act, as advice or recommendations developed for a public body.

7 The Commissioner held that the opinions were not subject to solicitor client privilege, on the following grounds:

(a) the lawyer had not obtained them in her capacity as a lawyer, but as an investigator for the College, which was under a statutory requirement to investigate complaints made to it concerning physicians' conduct;
(b) the opinions were not communications between the client, the College, and the lawyer, but between third parties and the lawyer, and the third parties were not agents of the client;
(c) there was no litigation in reasonable prospect or in progress in relation to the complaint at the time the opinions were obtained, or if there was litigation, it had ended;
(d) if part of Document 3 was privileged, that part could be severed and the balance of the document disclosed.

8 The Commissioner also held that the Documents were not protected from disclosure by s. 13 of the Act.

9 The chambers judge upheld the Commissioner's decision on these grounds.

10 The Commissioner held further that, if the Documents were subject to solicitor client privilege, the College had not waived the privilege by providing summaries of the opinions to the Applicant. This part of the Commissioner's order was overturned on the judicial review. The chambers judge found that the Commissioner's finding that the privilege had not been waived was unreasonable, and held that the privilege had been impliedly waived. Relying on the two letters received by the College (including Document 5) after the date of the last summary provided by the College to the Applicant, the chambers judge found that the summaries were inaccurate and thus unfair.

11 I am of the view that the Documents are not privileged, so waiver is not an issue. In my opinion, however, in finding that the College had waived its privilege, the chambers judge misconstrued the facts and made a clear error of law. The College's lawyer prepared the summaries well before the College received the two letters which formed the basis for the chambers judge's finding that the summaries were inaccurate. In finding that the summaries were inaccurate, the chambers judge needlessly impugned the integrity of the College's lawyer.

12 The Documents were reviewed by the Commissioner and the chambers judge, and were

provided to this Court for review in a "Supplemental Appeal Book In Camera". Of the parties, only the College has seen all of the Documents, except for Document 5, which has been seen by the Applicant. The Applicant claims that the College stated in one of its submissions that one of the Documents was disclosed to Dr. Doe, which the College and counsel for Dr. Doe deny.

13 The Applicant's knowledge of the Documents (other than Document 5) is derived from the description of the Documents in the reasons for judgment of the chambers judge.

Issues on Appeal

14 The issues on the appeal are succinctly stated in the Applicant's factum, as follows:

(a) Did the Court below err in finding that the Documents were not protected by solicitor client communications privilege?
(b) Did the Court below err in finding that the Documents were not protected by litigation privilege?
(c) Did the Court below err in finding that if the Documents were originally privileged, any such privilege was waived?
(d) Did the Court below err in upholding the Commissioner's decision to order production of a severed portion of Document 3?
(e) Did the Court below err in finding that the Documents were not exempt from disclosure pursuant to s. 13 of the Act?

Fresh Evidence Motions

15 The College and the Applicant brought motions to admit fresh evidence on the appeal.

16 The College sought to have admitted into evidence two affidavits. The first affidavit concerns the date that Document 2 (one of the expert's written reports) was received by the College. The second affidavit denies that the College provided one of the expert's reports to Dr. Doe, as stated in the Applicant's factum, referring to a statement made in one of the College's written submissions to the Commissioner.

17 The Applicant sought an order of this Court requiring the College to produce to the Court for review four memoranda prepared by the College's in-house lawyer. These memoranda recently came to light after the Applicant requested that the College produce any documents not previously disclosed to the Commissioner and the chambers judge relating to the communications between the lawyer and the experts concerning the Applicant's complaint. The College refused and the Applicant wrote to the Commissioner. The Commissioner's office commenced an investigation, during which it identified the four memoranda. The investigation by the Commissioner's office was on-going at the time of the hearing of the appeal. The College deposited copies of the four memoranda with the Court, pending the decision on the Applicant's motion.

18 In my view, the fresh evidence should not be admitted. The "fresh evidence" of the College was available prior to the hearings before both the Commissioner and the chambers judge. The only explanation for not producing it is that no issue was raised to which it was relevant. In my view, it is not relevant to the issues on the appeal, and would not change the result.

19 The existence of the four memoranda that are the subject of the Applicant's fresh evidence motion was not known to her before either of the previous hearings. They are not, however, in issue on the appeal, but raise new issues. I am of the view that the Commissioner's investigation should not be short-circuited by reference to this Court, but should be allowed to continue.

20 I would dismiss both applications to admit fresh evidence.

Solicitor Client Privilege

21 Section 14 of the Act provides:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

22 In R. v. McClure, [2001] 1 S.C.R. 445 at 455, the Supreme Court of Canada confirmed that solicitor client privilege is a "fundamental civil and legal right" and (at p. 459) that while it is not absolute, it

> ...must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

23 The Supreme Court of Canada affirmed this principle in Lavallee, Rackel & Heintz v. Canada (Attorney General); White Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, 2002 SCC 61, [2002] S.C.J. No. 60 at para. 36.

24 Section 14 of the Act imports all of the principles of solicitor client privilege at common law; see Legal Services Society v. B.C. (Information and Privacy Commissioner) (1996), 140 D.L.R. (4th) 372 at paras. 25-6 (B.C.S.C.), where Lowry J. said:

> Certainly the purpose of the [Freedom of Information and Protection of Privacy] Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the

administration of justice and it must be applied accordingly.

25 Thus, the issue of solicitor client privilege raised on this appeal does not involve balancing the interests of the parties in disclosure or confidentiality. The issue is not whether the College has an obligation to disclose the Documents, either now or at some later time in another proceeding, under civil rules of procedure or on the application of the principles of R. v. Stinchcombe, [1991] 3 S.C.R. 326, (see Hammami v. College of Physicians and Surgeons of British Columbia (1997), 36 B.C.L.R. (3d) 17 at 32-9 (S.C.) and Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital) (1993), 115 D.L.R. (4th) 279 at 284-5 (Ont. Div. Ct.)). Nor, on the other hand, does this appeal raise the question whether the College may claim privilege on a "case-by-case" basis, on an application of the four "Wigmore" criteria (see McClure at pp. 456-7 and Ontario (Human Rights Commission) at pp. 282-3). The question is only whether the Documents are subject to solicitor client privilege as defined at common law.

26 Solicitor client privilege at common law, and thus for the purposes of s. 14 of the Act, includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice (see Descoteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 (S.C.C.)), and the privilege that attaches to documents gathered and prepared by a solicitor for the dominant purpose of litigation (see Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129 at 136 (C.A.)).

27 The Ontario and Manitoba Courts of Appeal have recently analyzed the two types of privilege in the context of investigations in which a lawyer was involved: see General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241 (Ont. C.A.) and Gower v. Tolko Manitoba Inc. [2001] M.J. No. 39 (Man. C.A.), 2001 MBCA 11. The explanations by those Courts of the different underlying rationales and conditions for solicitor client privilege are helpful in this case.

28 For the purposes of these reasons, I will use the phrase "legal advice privilege" (as used in Gower) to refer to the privilege that attaches to communications between solicitor and client for the purposes of obtaining legal advice, and "**litigation privilege**" (as used in Gower and Chrusz) to refer to the privilege that attaches to communications and material produced or brought into existence for the dominant purpose of being used in the conduct of litigation.

29 This case raises the issue of the scope of both types of solicitor client privilege. The question is whether either of these types of solicitor client privilege extends to communications between a solicitor and third parties made in the course of an investigation conducted by the solicitor on behalf of her client.

30 Each of the two types of privilege has a different scope because they serve different purposes. Legal advice privilege serves to promote full and frank communications between solicitor and client, thereby facilitating effective legal advice, personal autonomy (the individual's ability to control access to personal information and retain confidences), access to justice and the efficacy of the adversarial process (see Gower at para. 15; Chrusz at paras. 91-4). **Litigation privilege,** on the

other hand, is geared towards assuring counsel a "zone of privacy" and protecting the lawyer's brief from being poached by his or her adversary (see Chrusz at paras. 22-4).

31 In considering whether privilege attaches to a particular communication, the differing underlying rationales dictate the key questions to consider. Because legal advice privilege protects the relationship of confidence between solicitor and client, the key question to consider is whether the communication is made for the purpose of seeking or providing legal advice, opinion or analysis. Because **litigation privilege** facilitates the adversarial process of litigation, the key question to consider is whether the communication was created for the dominant purpose of litigation, actual or contemplated.

32 The fact that the Documents were created during the investigation of a complaint to the College is central to both analyses. Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client (see Gower at paras. 36-42). In this case, the question is whether legal advice privilege extends to communications between the lawyer and third parties. As discussed by Doherty J.A. in Chrusz, the privilege is extended to third party communications only in limited circumstances.

33 **Litigation privilege**, on the other hand, arises where litigation is in reasonable prospect or in progress. It applies to communications between the lawyer and the client, and also between the lawyer and third parties, where the dominant purpose for the communication is litigation. The question in this case is whether litigation was in reasonable prospect when the College was investigating the Applicant's complaint. Authorities relied on by the College that address this issue are Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co., [1988] A.J. No. 810 (Alta. C.A.); Bank Leu AG v. Gaming Lottery Corp., [2000] O.J. No. 1137 (Ont. Div. Ct.); and In Re Sealed Case, 856 F.2d 268 (D.C.Cir. 1988).

Legal Advice Privilege

34 There are two questions that arise in considering whether legal advice privilege applies to the Documents. The first is whether in receiving or creating the Documents the College's lawyer was acting as a lawyer and not an investigator. The second is whether the Documents, which are communications between third parties and the College's lawyer, are communications of legal advice, opinion or analysis between the lawyer and the College.

Investigator or Lawyer?

35 The Commissioner and the chambers judge concluded that, in obtaining the experts' reports, the College's lawyer was acting as an investigator, not a lawyer. They noted that the Medical Practitioners Act, R.S.B.C. 1996, C. 285 ("MPA"), requires the special deputy registrar of the

College to investigate and make recommendations to the SMRC concerning a complaint of sexual misconduct. The chambers judge stated that the College could not, "merely because its counsel conducted the investigation," claim legal advice privilege over the documents.

36 The Commissioner described the work involved as "work in relation to a statutorily mandated investigation" in contrast to "work in relation to, and integral to, a confidential solicitor client relationship". He concluded that:

> The College's solicitor client relationship with its lawyer serves to enable the College to discharge its duties and functions; the investigation process under the MPA does not exist to serve a solicitor client relationship between the College and its lawyer.

37 In my view, the Commissioner's reasons reveal a misunderstanding of the function of the lawyer in the investigative process.

38 In R. v. Campbell, [1999] 1 S.C.R. 565, the Supreme Court of Canada pointed out (at para. 50): "It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege." After describing the varying functions performed by government and in-house lawyers, the Court stated:

> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

39 In my view, the fact that an investigation is mandated by statute is irrelevant to the functional analysis of the lawyer's role. Lawyers must often undertake investigative work in order to give accurate legal advice. In this respect, investigation is integral to the lawyer's function.

40 The nature of investigative work undertaken by a lawyer was discussed in Gower (at para. 19):

> ...legal advice is not confined to merely telling the client the state of the law. It includes advice as to what should be done in the relevant legal context. It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services. As the United States Supreme Court acknowledged:
>
> > The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.

[Upjohn Co. v. United States 449 U.S. 383 1981) (S.C.) at para. 23]

41 In this case, the SMRC had to make legal decisions about how to proceed. The special deputy registrar of the College deposed in his affidavit that one of the lawyer's professional duties was to advise the SMRC on legal issues, to assess whether complaints to the College could be proved before an inquiry committee, and to gather evidence to be used as part of the College's case in the event that the charges proceeded to a hearing. Moreover, the College's lawyer explained in one of her letters to the Applicant:

> The Committee...is required to determine if, on the basis of all of the evidence, there is sufficient information to warrant the issuance of disciplinary charges. In making this decision the Committee has to weigh whether it is reasonable to conclude that a disciplinary charge could be proven to the requisite standard of proof. As we have discussed, while the College is not required to meet the criminal standard, it is required to have clear, cogent and convincing evidence in order to prove a charge of unprofessional conduct. It is the current view of the Committee, with the benefit of legal advice, that the evidence available in this case will not meet that standard. [Emphasis added.]

42 In my opinion, the Commissioner and the chambers judge erred in finding that the College's lawyer was not acting in her capacity as a lawyer when she investigated the Applicant's complaint. She was acting on her client's instructions to obtain the facts necessary to render legal advice to the SMRC concerning its legal obligations arising out of the complaint. As such, she was engaged in giving legal advice to her client.

Third Party Communications

43 Having concluded that the College's lawyer was engaged in rendering legal advice when she obtained the experts' opinions, the next question is whether those communications fall within the scope of the privilege. That is, did the communications take place within the relationship between the lawyer and her client, the College? In my view, they did not.

44 To support her allegation that Dr. Doe had hypnotized her, the Applicant provided information to the College concerning the conduct of Dr. Doe, and tapes, notes and gifts she had received from him during the course of her employment. In order to understand this information, and to determine whether it supported the Applicant's allegations, the College required experts to interpret it and assess whether there was evidence that the Applicant had in fact been hypnotized. The lawyer's role was to obtain the experts' reports and, with their assistance, advise the SMRC of the legal implications of the complaint.

45 The College claimed confidentiality for its investigative process on the grounds that experts

may refuse to participate if their reports are not kept confidential. Legal advice privilege does not, however, exist to protect a relationship of confidentiality between the College and the experts. The rationale for legal advice privilege is the protection of the confidentiality of the relationship between the College and its lawyer. Whether communications involving third parties are protected within the context of that relationship is the real issue to be considered.

46 In Chrusz, Doherty J.A. analyzed the extension of legal advice privilege to third party communications. In that case, an insurance company retained an independent claims adjuster to investigate a claim for loss of a motel damaged by fire and a lawyer to advise it concerning the claim. The adjuster provided his reports to the lawyer. Several months after the insurer had advanced partial payment of the claim, a former employee of the motel owner made a statement alleging that the owner had inflated the claim. The insurer sued the owner. The owner counterclaimed against the insurer and the adjuster, made a claim in defamation against the former employee, and sought disclosure of the adjuster's reports and the former employee's statement. The insurance company claimed privilege over the reports and the statement.

47 In his discussion of the application of legal advice privilege to third-party communications (at paras. 104-117), Doherty J.A. noted that although it is "well-settled" that legal advice privilege can extend to communications between a solicitor or a client and a third party, the case law is not extensive or well-developed. He stated (at para. 106) that the authorities 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 so long as those communications meet the criteria for the existence of the privilege.

48 For cases where the third party does not act as a conduit or channel of communication between the client and the lawyer, Doherty J.A. proposed (at paras. 120-5) a functional analysis to determine whether legal advice privilege applies to the communications between the third party and the lawyer. In principle, legal advice privilege ought to extend only to third party communications that are in furtherance of a function which is essential to the existence or operation of the relationship between the solicitor and the client. Doherty J.A. illustrated this principle (at paras. 120-22):

> . . . If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of a 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.

49 Doherty J.A. tied 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" (at para. 125). He reasoned that:

> 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.

[Emphasis added.]

50 In summary, third party communications are protected by legal advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client. I find this analysis persuasive.

51 Applying this analysis to the communications between the College's lawyer and the experts from whom opinions were obtained in this case, I conclude that the experts did not perform a function on behalf of the client which was integral to the relationship between the College and its lawyer. The experts were not authorized by the College to direct the lawyer to act or to seek legal advice from her. The experts were retained to act on the instructions of the lawyer to provide information and opinions concerning the medical basis for the Applicant's complaint. While the experts' opinions were relevant, and even essential, to the legal problem confronting the College, the experts never stood in the place of the College for the purpose of obtaining legal advice. Their services were incidental to the seeking and obtaining of legal advice.

Gower and Upjohn

52 The College argued that Gower and Upjohn are relevant and supportive of its claim that the experts' opinions are protected by legal advice privilege.

53 Neither Gower nor Upjohn, however, dealt with whether legal advice privilege would apply to communications between a lawyer and third parties.

54 In Gower, the Manitoba Court of Appeal held that an "investigative report leading to legal advice" from a lawyer to her client was the subject of legal advice privilege. The report concerned the lawyer's investigation of a complaint of sexual harassment, and contained witness statements and findings of fact, as well as legal analysis and legal advice. The question was whether the information gathered by the lawyer in the fact-finding investigation was received within the context of a solicitor-client relationship. The Court held that the lawyer's retainer included both fact-gathering and rendering legal advice. As the report to the client contained both the fruits of her investigation and her legal advice, the entire report was privileged.

55 It is not clear from the reasons for judgment of either Schulman J. of the Manitoba Court of Queen's Bench or of Steel J.A. of the Manitoba Court of Appeal whether the lawyer interviewed anyone who was not an employee of the client. From my reading of the reasons, I would infer that all of the witnesses were employees of the client.

56 In Upjohn, the company's general counsel conducted an investigation into allegations that a foreign subsidiary had made questionable payments to foreign government officials. Counsel obtained information from company employees, which was later sought by the Internal Revenue Service in the course of its investigation into the tax consequences of the payments. Counsel claimed solicitor client privilege. The United States Supreme Court upheld the claim, deciding that solicitor client privilege applied to communications between counsel and all corporate employees where counsel was conducting an investigation for the purpose of giving legal advice to the corporation.

57 The decision that solicitor client privilege applied turned on the fact that the communications in question were between the corporation's counsel and its employees.

58 In this case, the communications, both written and oral, were with third parties, not employees or agents of the client. For the reasons set out above, I am of the view that those communications are not subject to legal advice privilege.

Experts' Reports - Documents 1, 2 and 5

59 Documents 1, 2 and 5 are not similar to the lawyer's report in Gower. They are reports or letters written by the experts and do not contain legal advice.

The Memoranda - Documents 3 and 4 - Severance

60 Documents 3 and 4, on the other hand, are memoranda prepared by the College's lawyer. Document 3 has two parts: a summary of the information and opinions obtained by the lawyer in a meeting with an expert, and her comments concerning that information. Document 4 records the information obtained during a meeting with another expert. Both meetings were attended by other members of the College.

61 The Commissioner decided that the memoranda were not privileged, with the exception of the portion of Document 3 containing the lawyer's comments concerning the expert's opinion, which could be severed. The chambers judge upheld the Commissioner's decision, interpreting the severance provision in s. 4(2) of the Act in the context of "policy considerations" found in the Act and the MPA that, in his view, favoured access to the documents.

62 Section 4(2) of the Act provides:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part [in which s. 14 is found], but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

63 In British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner) (1995), 16 B.C.L.R. (3d) 64 (S.C.), Thackray J. (as he then was) held that a document that is subject to solicitor client privilege cannot be subject to severance. He overturned an order of the Commissioner that required factual information in two privileged documents be disclosed to the applicant. The College argues that this case is authority that s. 4(2) cannot apply to a document any part of which is subject to solicitor client privilege and thus exempt from disclosure under s. 14 of the Act.

64 The documents in question in British Columbia (Minister of Environment, Lands and Parks) were an opinion prepared by a lawyer and minutes of a meeting attended by the lawyer during which he provided legal advice. Both documents contained communications between the lawyer and the client. As in Gower, the entire documents were found to be privileged.

65 The application of the severance provision of the Ontario Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. c. F.31 as am., to documents subject to solicitor client privilege was considered in Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner), [1997] O.J. No. 1465 (Ont. Div. Ct.). The Court held that the Commissioner wrongly interpreted the scope of solicitor client privilege as narrowed under the Act. Sharpe J. (as he then was) said (at para. 17):

> Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.

66 He continued, however, (at para. 18):

> I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. ...documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: Ontario (Attorney General) v. Hale (1995), 85 O.A.C. 299 (Div.Ct.).

67 In my view, that part of Document 3 that records the communications of the expert to the lawyer and other representatives of the College, and Document 4, are the same as Documents 1, 2 and 5. They are communications by third parties, who were not agents or representatives of the client to obtain legal advice, but provided information used by the lawyer to render legal advice. They are not subject to legal advice privilege.

68 The two parts of Document 3 are not intertwined. The part of Document 3 that records the lawyer's comments is privileged. I am of the view that the severance provision of the Act may be applied where, as here, part of the document is not subject to legal advice privilege and a separate part is privileged. In such a case, the non-privileged part can "reasonably be severed".

69 I do not agree with the reasons of the chambers judge, however, that "policy considerations" are relevant to whether part of a document that is privileged may be severed from another part of the document that is not privileged. If a document is privileged, no part of it may be subject to disclosure under the Act.

Summary of Legal Advice Privilege

70 The Documents were obtained by the College's lawyer in her capacity as a lawyer and not as an investigator. However, they are third party communications that were not integral to the confidential solicitor client relationship. The third parties were not giving or receiving legal advice on behalf of the College, but were providing information to the lawyer to be used by her in rendering legal advice to the client.

71 The Documents, except for the part of Document 3 that contains the lawyer's comments, are not subject to legal advice privilege.

Litigation Privilege

72 **Litigation privilege** protects from disclosure materials created or gathered by a lawyer, including communications between a lawyer and third parties, where litigation was in reasonable

prospect at the time of the communication, and the dominant purpose of the communication was litigation: see Hamalainen v. Sippola (1991), 62 B.C.L.R. (2d) 254 at 260 (C.A.). This privilege does not exist to protect the confidential relationship between solicitor and client, but to facilitate the adversarial process of litigation. Thus, even non-confidential material may be protected if the dominant purpose for its existence is litigation in reasonable prospect or in progress: see Chrusz at paras. 22-4.

73 The question in this case is whether the investigation by the College's lawyer of the Applicant's complaint was litigation, either in prospect or in progress. The College, relying on Ed Miller Sales & Rentals, Bank Leu AG, and In Re Sealed Case, all supra, submits that when a **regulatory** agency undertakes an investigation that may result in the imposition of penalties or sanctions, litigation has commenced.

74 In both Ed Miller Sales & Rentals and Bank Leu AG (C) the "target" of an investigation by a **regulatory** agency claimed privilege over documents prepared by it or on its behalf in anticipation of or in response to the investigation. Disclosure of the documents was requested in later civil litigation between the target and another party. In both cases, the courts held that the investigation by the **regulatory** agency was litigation and the documents were subject to **litigation privilege.**

75 In In Re Sealed Case, one of the parties to civil litigation sought disclosure of documents from the United States Securities and Exchange Commission created during an investigation by the SEC of insider trading. The SEC disclosed about 40,000 pages of documents, but refused to answer questions or produce certain other documents, claiming law enforcement investigatory privilege (not in issue in this case) and "attorney work product immunity" (similar to **litigation privilege**). The Appellate Court held that the SEC was entitled to claim work product immunity with respect to its attorneys' recollections and impressions of witness interviews.

76 The Commissioner distinguished Ed Miller Sales & Rentals and Bank Leu AG on the grounds that, in those cases, the privilege was claimed by the target of the investigation, while in this case, the privilege was claimed by the **regulatory** body. He did not consider In Re Sealed Case (which was not cited in the College's written submissions to the Commissioner).

77 The Commissioner concluded that the investigation by the College's lawyer of the Applicant's complaint was not undertaken either in contemplation or in the course of actual litigation. The chambers judge agreed with the Commissioner that litigation was neither in reasonable prospect nor in progress, and in addition, held that the Documents were not created for the dominant purpose of litigation.

78 The College, Dr. Doe and the intervenor, The Law Society of British Columbia, all argued that from the outset of an investigation of a complaint against a member of the College, the College is in an adversarial relationship with the member, because he or she is potentially subject to a charge of professional misconduct, an inquiry or hearing to determine whether he or she is guilty of the charge, and serious sanctions and penalties if convicted. On this basis, they reasoned that all

parties to the complaint, including the College, are in an adversarial relationship, as there must be a lis between parties and mutuality in the relationship.

79 I do not disagree that the interest of the member being investigated is adversarial to that of the College and the complainant. That is the ratio of Ed Miller Sales & Rentals and Bank Leu AG, which I accept.

80 However, when the College is investigating a complaint, its interest in the outcome of the investigation is not adversarial in relation to either the complainant or the member. Its duty, mandated by statute, is "to serve and protect the public" and "to exercise its powers and discharge its responsibilities...in the public interest" (s. 3(1) of the MPA). The College's objects (set out in s. 3(2) of the MPA) include: to superintend the practice of the profession; to establish monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst members; and to establish, monitor and enforce standards of professional ethics amongst members (ss. 3(2)(a), (d) and (g)).

81 At the investigative stage, the College is not seeking to impose penalties or sanctions against the member, but (through the special deputy registrar acting under s. 21(2) of the MPA) to make findings on which to base a recommendation to the SMRC as to how it should proceed (under s. 28(2) of the MPA). The SMRC has a range of actions available to it, including: directing a further investigation; referring the complaint to the council, executive committee or a committee; directing the special deputy registrar to attempt to resolve the complaint informally; appointing an investigating committee for the purpose of investigating whether a member has adequate skill and knowledge to practise medicine (under s. 51 of the MPA); appointing an inquiry committee to inquire into a charge or complaint made against a member and take disciplinary proceedings (under ss. 53 and 60 of the MPA); or taking no further action.

82 In its submissions to the Commissioner, the College stated that it investigates and addresses an average of 1,300 complaints per year pertaining to medical treatment and physician conduct, the vast majority of which do not result in disciplinary action.

83 In Hamalainen, Wood J.A. for the Court stated the following test for determining whether litigation is "in reasonable prospect" (at para 20):

> In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet.

84 Given the range of actions available to the SMRC after a complaint has been investigated and the small number of complaints that actually proceed to disciplinary action, it would not be reasonable to conclude, at the outset of the investigation, that it was unlikely that the matter would

not be resolved without disciplinary action. It would be more reasonable to conclude that, in all likelihood, no disciplinary action would be taken, as is the case with most complaints. Thus, litigation could not be said to be "in reasonable prospect" at the time the Documents were created.

85 If litigation was not "in reasonable prospect", then the the Documents were not produced for the dominant purpose of litigation.

86 The content of the Documents supports this conclusion. The experts were asked to consider the allegations of the Applicant and advise the College whether, on her evidence, hypnosis had occurred. As Wood J.A. pointed out in Himalainen (at para. 24):

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation.

87 In my view, attempting to discover the cause of an accident is analogous to attempting to assess the evidentiary foundation of an allegation of misconduct. The College was attempting to discover whether there was a medical basis for the Applicant's complaint. It was not, however, at the point of preparing for litigation against Dr. Doe.

88 This case does not concern a claim of privilege by Dr. Doe over documents that came into the hands of his counsel in anticipation of disciplinary proceedings by the College. Assuming that he would be entitled to claim **litigation privilege** over such documents, neither law nor logic requires a finding that the College is similarly entitled.

89 The Commissioner characterized the role of the College in investigating a complaint as having "more in common with law enforcement officials and prosecutors upholding the law than it does with the role of a party to civil litigation." I agree. During an investigation of a complaint, it is neither its own advocate or anyone else's. The College is involved as a neutral body in discovering and analysing the facts and circumstances of the complaint and determining, within its statutory mandate, how to proceed.

90 I do not find In Re Sealed Case of much assistance. The case reveals little of the course of the SEC investigation and the stage it was at when the attorneys interviewed witnesses and presumably recorded their impressions. It may be that in another case, where the College has proceeded to a later stage of its investigative process, involving some action by the SMRC, **litigation privilege** would apply to the documents gathered by its lawyer. Furthermore, it may be that legal advice privilege would apply to the information that was found to be "attorneys' work product" in In Re Sealed Case, as was found to apply to the College's lawyer's comments contained in Document 3.

Summary of **Litigation Privilege**

91 **Litigation privilege** does not apply to the Documents as litigation was not "in reasonable prospect" when they were created and the dominant purpose for their creation was not litigation. The College was not engaged in an adversarial process when it investigated the Applicant's complaint.

Solicitor Client Privilege - Conclusion

92 It is worth noting again that at the heart of the College's claim for solicitor client privilege is its desire to protect the confidentiality of its peer review and investigative process. Its expressed concern is not the confidentiality of the information it disclosed to its lawyer or the advice she rendered to it; both of these were effectively disclosed to the Applicant in the summaries of the experts' opinions provided by the College's lawyer to the Applicant.

93 The College's expressed concern is the confidentiality of the experts' names and opinions. In recognition of this concern, the Commissioner ordered that the experts' names were exempt from disclosure under s. 22(1) of the Act.

94 The preservation of confidentiality of experts' names or opinions is not the purpose of solicitor client privilege. The College's perceived need for a "zone of confidentiality" around its investigative process does not come within the rationale for either legal advice or **litigation privilege**, and therefore there is no principled basis for exempting the experts' reports from disclosure under s. 14 of the Act (except for the severed portion of Document 3).

95 As I have found that solicitor client privilege does not apply to the Documents, there is no need for me to consider whether privilege had been waived or litigation had ended. As noted earlier, however, I am of the view that the chambers judge erred in finding that the College had waived privilege on the grounds of unfairness.

Advice or Recommendations

96 Section 13(1) of the Act provides the following exemption from disclosure:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

97 The Commissioner held that the experts' reports were not "advice or recommendations" for the purposes of s. 13(1). He described the experts' reports as "technical, or medical, findings, opinions or conclusions...as to whether a particular medical procedure was or was not used on the applicant."

98 The Commissioner found that the reports were not "recommendations" because the experts did not "lay out alternatives for the SMRC to consider....Nor did they recommend any courses of

action."

99 In finding that the experts' reports were not "advice", the Commissioner applied the definition of "advice" found in The Canadian Oxford Dictionary (Toronto: Oxford University Press, 1998): "words offered as an opinion or recommendation about future action; counsel." He acknowledged that the principles of statutory interpretation dictate that the word "advice" has a meaning that does not duplicate "recommendations", but nonetheless concluded that advice involves a communication "as to which courses of action are preferred or desirable". He found that "advice" meant more than "information", in light of the exclusion in s. 13(2)(1) of "factual information" from the ambit of s. 13(1), other decisions under the Act and the Ontario equivalent, and a policy manual issued by the Province's Information, Science and Technology Agency for use by public bodies.

100 The chambers judge agreed with the Commissioner's interpretation of the word "advice" and also provided the following interpretation (at para. 129):

> The term "advice", as it is used in the Freedom of Information Act, must be interpreted to mean advice given to the College by its counsel in the course of carrying out her duties as counsel on a day to day basis.

101 If the chambers judge intended that "advice" as used in s. 13(1) refers only to advice given by counsel, he is in error. Section 13(1) is clearly not so limited. If he meant, however, that counsel's advice is an example of a communication that would be considered "advice", he is correct. But that does not address the question in issue.

102 The chambers judge held that the experts' reports were not provided to the College "for the purpose of advising or recommending a specific course of action or range of actions available to the College", but for the "primary purpose of investigating the Applicant's complaint".

103 In my view, both the Commissioner and the chambers judge erred in their interpretation of the word "advice", by requiring that the information must include a communication about future action and not just an opinion about an existing set of circumstances.

104 The Commissioner acknowledged in his reasons that s. 13(1):

> ...is intended to allow for full and frank discussion within the public service, preventing the harm that would occur if the deliberative process were subject to excessive scrutiny.

105 In my view, s. 13 of the Act recognizes that some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focussed on the substantive issues, free of disruption from extensive and routine inquiries. The confidentiality claimed by the College has a similar objective: to allow it to thoroughly investigate a complaint with the open and frank assistance of those experts who have the knowledge and expertise to help in assessing a

complaint and deciding how to proceed.

106 By defining "advice" so that it effectively has the same meaning as "recommendations", the Commissioner and the chambers judge failed to recognize that the deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action. Their narrow view of the nature of the complaint investigation process was similarly reflected in their characterization of the function of the College's lawyer in the investigation and in their conclusions that she was not acting as a lawyer but as an investigator, which I have previously rejected.

107 The Commissioner acknowledged the principles of statutory interpretation, but did not apply them. Those principles not only mandate that different words contained in a statute be given different meanings, they also dictate that the same word be given the same meaning (see Ruth Sullivan, Driedger of the Construction of Statutes, 3d Edition (Toronto: Butterworth's, 1994) at pp. 163-4; Thomson v. Canada (Deputy Minister of Agriculture) (1992), 89 D.L.R. 4th 218 at 243-4 (S.C.C.)).

108 The need for deliberative secrecy, with reference to the cabinet and its committees, is dealt with in s. 12 of the Act, in which the words "advice" and "recommendations" are also found. Section 12(1) exempts from disclosure by a public body:

> ...information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[Emphasis added.]

109 Section 12(2)(c) excludes from the ambit of subsection (1), in certain circumstances:

> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision... [Emphasis added.]

110 In my view, it is clear from s. 12 that in referring to advice or recommendations, the Legislature intended that "information...the purpose of which is to present background explanations or analysis...for...consideration in making a decision..." is generally included. There is nothing in s. 13 that suggests that a narrower meaning should be given to the words "advice" and "recommendations" where the deliberative secrecy of a public body, rather than of the cabinet and its committees, is in issue.

111 The Commissioner noted that s. 13(2)(a) excludes from the ambit of s. 13(1) "any factual material". Section 13(2) also excludes many other kinds of reports and information. If the Legislature did not intend the opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice" for the purposes of s. 13, it could have explicitly excluded them.

112 In J.R. Moodie Co. Ltd. v. Minister of National Revenue, [1950] 2 D.L.R. 145 at 148 (S.C.C.), it was recognized that the word "advice" is not limited to a communication concerning future action. Rand J. said:

> The word "advice" in ordinary parlance means primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence....Now, [the matters on which the Minister was to be satisfied] are in one sense, matters of fact, but they also involve the exercise of judgment in the weight and significance to be attributed to the special circumstances and conditions of the business....The advice to be furnished by the Board would, then, ordinarily contemplate at least its opinion on the main question and the facts or reasons upon which it was based.

113 I am similarly of the view that the word "advice" in s. 13 of the Act should not be given the restricted meaning adopted by the Commissioner and the chambers judge in this case. In my view, it should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.

114 In any event, the experts' reports did provide "advice", even if that word were given the Commissioner's narrow interpretation. The experts were expressly asked by the College's lawyer for their opinions of whether hypnosis had been performed and for suggestions for further investigation of the complaint. Two of the experts expressly commented on whether the evidence was sufficient to support the Applicant's allegations, and one provided his view on whether Dr. Doe's explanation was "acceptable and reasonable". Thus, the reports contain advice on whether the College should take further action, bringing them within the meaning of "advice" as found by the Commissioner.

115 For all of the above reasons, I am of the view that the College may refuse to disclose the Documents pursuant to s. 13 of the Act.

Summary and Conclusions

116 In my view, s. 14 of the Act applies only to that part of Document 3 that contains the comments of the College's lawyer, but the balance of the Documents are not subject to solicitor client privilege.

117 The College may refuse to disclose the Documents to the Applicant pursuant to s. 13 of the Act.

118 I would allow the appeal.

LEVINE J.A
HALL J.A.:-- I agree.
LOW J.A.:-- I agree.

cp/i/qldrk/qlsng/qlrme

drs/d/qlabb/qlcem/qljal

Case Name:

Order F06-16; British Columbia (Ministry of Environment) (Re)

Re: Ministry of Environment

[2006] B.C.I.P.C.D. No. 23

Order No. F06-16

British Columbia Information and Privacy Commissioner

D. Loukidelis (Commissioner)

Order: July 18, 2006.

(68 paras.)

Commissioner Summary:

The applicant and the provincial government participated in energy regulation hearings in the United States and Canada about an energy project the applicant had proposed. The applicant made an access request to the Ministry for records about the proposed energy project when the US hearings, but not the Canadian hearings, had concluded. The Ministry was slow in responding to the access request, did not comply with conditions of a time extension this Office granted the Ministry under s. 10(1)(c), and failed to respond in time, effectively taking an unsanctioned time extension. The Ministry eventually released three disclosure packages over six months, from which it withheld some information under various of the Act's exceptions. The Ministry was authorized to refuse to give access to the information that it withheld under s. 13(1) or s. 14, but it is ordered under s. 58(3)(c) to refund 50% of the fees charged to the applicant.

Key Words:

advice or recommendations--solicitor-client privilege--fee waiver--delay.

Statutes Considered:

Freedom of Information and Protection of Privacy Act, ss. 13(1), 14 and 58(3)(c).

Authorities Considered:

B.C.:

Order 00-08, [2000] B.C.I.P.C.D. No. 8;

Order 01-10, [2001] B.C.I.P.C.D. No. 11;

Order 02-01, [2002] B.C.I.P.C.D. No. 1;

Order F05-21, [2005] B.C.I.P.C.D. No. 29;

Order F05-22, [2005] B.C.I.P.C.D. No. 30;

Order F05-23, [2005] B.C.I.P.C.D. No. 31;

Order 02-54, [2002] B.C.I.P.C.D. No. 55;

Order 03-32, [2003] B.C.I.P.C.D. No. 32.

Cases Considered:

College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner) (2002), 9 B.C.L.R. (4th) 1 (C.A.), [2002] B.C.J. No. 2779;

Blank v. Canada (Minister of Justice) (2004), 244 D.L.R. (4th) 80 (F.C.A.);

Ed Miller Sales & Rentals v. Caterpillar Tractor Co., [1988] A.J. No. 810 (C.A.);

Alberta (Treasury Branch) v. Ghermezian, [1999] A.J. No. 624 (Alta. Q.B.);

Whitehead v. Braidnor Construction Ltd. (2001), 304 A.R. 72 (Q.B.);

Three Rivers District Council and others v. Governor and Company of the Bank of England (2004), [2004] UKHL 48;

Re L. (a minor), [1997] A.C. 16 (H.L.);

Goodis v. Ontario (Ministry of Correctional Services), 2006 SCC 31, [2006] S.C.J. No. 31.

1.0 INTRODUCTION

1 This inquiry concerns an access request under the Freedom of Information and Protection of Privacy Act ("Act") that legal counsel for Sumas Energy 2 Inc. ("SE2") made to the Ministry of Environment ("Ministry") (then the Ministry of Water, Land and Air Protection) for the following:

> ... copies of all documents in the possession of the Ministry of Water, Land & Air Protection relating to a 660 MW combined cycle electric generating facility (the S2GF) proposed by SE2 for Sumas, Washington from or dated from April 23, 2001 to the present. Without limiting the generality of the above request, we particularly request that you provide us with copies of all correspondence, internal memoranda and studies, reports, health and environmental assessments, calculations, handwritten notes and all other records filed with the Washington State Energy Facility Site Evaluation Council and all other records and documents dealing in any way with any human health impact analysis of the S2GF.

2 About a month after the request, the Ministry assessed a fee of $8,618.75 for copying 22,475 pages of records (at 25[cents] per page and 100 hours of preparation time) of which $4,500.00 was payable as a deposit. SE2 promptly paid the deposit, the Ministry took a 30-day extension, under s. 10(1)(b) of the Act, of the time for responding and then requested and received from this Office a further 45-day extension under s. 10(1)(c).

3 When the extension under s. 10(1)(c) expired in November 2002, SE2 asked this Office to review the Ministry's failure to respond to the access request and to review the fees that the Ministry charged. SE2 had in the meantime promptly paid all the fees and the Ministry eventually released disclosure packages in January, May and June 2003, from which it withheld some information under various of the Act's exceptions.

4 SE2 requested a review of the Ministry's decision to withhold some information under s. 13(1) and s. 14 and of the Ministry's release of disclosure packages well outside any permitted response time in the Act, which SE2 said had frustrated its usefulness to SE2 in scheduled National Energy Board of Canada ("NEB") hearings. SE2 did not take issue with other exceptions applied by the Ministry, i.e., ss. 16, 21 and 22.

5 Because mediation by this Office was not successful--though the Ministry did disclose some further information during mediation--a written inquiry was held under Part 5 of the Act.

2.0 BACKGROUND

6 SE2 is an American company that sought to build a gas-fired electric generation facility ("S2GF") in the United States, near the Canadian border at Sumas, Washington. In 1999, it applied to the Washington State Energy Facility Site Evaluation Council ("EFSEC"), a statutory body responsible for assisting Washington's Governor in deciding the suitability of proposed locations for large new energy facilities, for certification to construct and operate the S2GF. SE2 submitted

revised applications to the EFSEC over the following two years. In 1999, 2000 and 2001, SE2 also filed applications and revised applications to the NEB for authorization to construct an international power line that would give it access to a power grid in British Columbia.

7 In November 2000, SE2 made a large access request to the Ministry for records relating to S2GF from January 1999 to November 2000. The Ministry responded in April 2001. That same month, the British Columbia government ("British Columbia") decided to aggressively oppose the S2GF in order to protect air quality in the Fraser Valley. British Columbia retained legal counsel and applied for and was granted intervener status in the EFSEC proceedings concerning the S2GF. Relying on the testimony of several witnesses, British Columbia participated in the EFSEC hearings. On May 24, 2002, EFSEC recommended approval of SE2's application and in August 2002 the Governor of Washington approved the construction of S2GF. British Columbia appealed the State of Washington air emission permit to the US Environmental Protection Agency which issued British Columbia's appeal was denied in March of 2003.

8 In January 2001, British Columbia filed a notice to participate in the NEB hearings, which were adjourned the next month pending a decision on S2GF by the State of Washington. Late in 2002 the NEB decided to consider not just the effects of construction of the international power line, but also the environmental effects of S2GF. The main NEB hearings were held from May to September 2003. British Columbia participated as an intervener--in conjunction with two local governments, the City of Abbotsford and the Fraser Valley Regional District--to oppose S2GF. British Columbia relied on the testimony of several witnesses in support of its intervention.

9 In March 2004, the NEB rejected SE2's application for authorization to construct an international power line[1] and in November of 2005 the Federal Court of Appeal denied SE2's legal challenge to the NEB's decision[2].

3.0 ISSUES

10 The issues in this inquiry are as follows:

1. Is the Ministry authorized to refuse to disclose the information it withheld under s. 13(1) or s. 14 of the Act?
2. Should fees that the Ministry charged be excused, reduced or refunded under s. 58(3)(c) because of Ministry delay in responding to the access request?

11 Under s. 57(1), the Ministry has the burden of proof regarding s. 13(1) and s. 14.

4.0 DISCUSSION

12 4.1 Procedural Objections--SE2 objected that the Ministry's reply submission included an affidavit that should have been provided with its initial submission. SE2 also said that the affidavit

repeated much of the Ministry's initial submission on why it was so long in responding to the access request. I have decided that, in view of my analysis of all the issues and evidence, the Ministry's affidavit was unacceptable, but had no real impact on the fairness of the inquiry for SE2.

13 The Ministry objected that SE2 unfairly split its argument on litigation privilege between its initial and reply submissions. SE2 responded that it would have been in a better position to more fully address litigation privilege in its initial submission had the Ministry complied with s. 8(1)(c) of the Act by providing reasons for its decisions to refuse access, which indicated that it was relying on both branches of solicitor-client privilege.

14 Section 8(1)(c) requires that, if access to all or part of a record is refused, the public body must include in its response "the provision" of the Act on which the refusal is based and also "the reasons for the refusal". The Ministry's response letters accompanying the disclosed records gave no reasons for the decision to refuse access. They simply cited the provisions of the Act on which the Ministry relied. As I have noted in previous orders, s. 8(1)(c) clearly requires more--it requires both reference to specific provisions of the Act relied upon and "reasons for the refusal", not just the former.

15 The Ministry's approach to compliance with s. 8(1)(c) put SE2 in the predicament of not knowing more about the Ministry's application of s. 14 until SE2 had received the Ministry's initial submission in the inquiry. I addressed this issue by permitting SE2's reply submission despite the Ministry's objection to it, while also permitting the Ministry to make a further reply limited to SE2's reply on privilege.

16 SE2 then objected to the Ministry's further reply on the basis that it went beyond the parameters I had set and because, SE2 said, it mis-stated legal and factual matters about document discovery for the EFSEC proceedings. I have addressed this objection by assuming, unless SE2 indicated otherwise in its submissions or correspondence for this inquiry, that all factual and legal aspects of the Ministry's further reply were contested by SE2.

17 Finally, SE2 asked me to examine the relatively small amount of in camera material found in the Ministry's submissions to ensure that it was appropriately received on that basis. I have done this and am satisfied that the Ministry's in camera material was properly received on that basis.

18 4.2 Solicitor-Client Privilege--Most of the information in dispute was withheld under s. 14, which reads as follows:

> Legal advice
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

19 As many previous orders and court decisions affirm, s. 14 incorporates solicitor-client

privilege at common law[3]. In their submissions, both parties acknowledged that solicitor-client privilege consists of two kinds of privilege--legal advice privilege[4] (which protects confidential communications between a lawyer and client related to the giving, seeking or formulating of legal advice) and litigation privilege (which protects materials created or obtained for the dominant purpose of existing or contemplated litigation). They also acknowledged that legal advice privilege lasts indefinitely, while litigation privilege lasts until the end of the litigation in question.

20 It is worthwhile in this case to summarize the parties' submissions on s. 14. The Ministry says most of the information was confidential communications between British Columbia (usually through the Ministry), as the client, and British Columbia's lawyers, for the purpose of preparing British Columbia's cases before the EFSEC and the NEB. These communications were directly related to the giving, seeking or formulating of legal advice (including the hiring of lawyers) and were protected by legal advice privilege and by litigation privilege.

21 The Ministry also says that some of the information consists of correspondence to or from experts that British Columbia retained, directly or through its lawyers, to provide evidence for the EFSEC or NEB hearings. British Columbia had directed its experts to include in their communications a statement that they were confidential and protected by solicitor-client privilege. Its lawyers collected information in the form of emails, memoranda and other correspondence from the Ministry and experts for the sole purpose of giving legal advice to British Columbia and conducting its cases before the EFSEC and the NEB. This information was protected by litigation privilege.

22 According to the Ministry, in the NEB hearings, British Columbia, the City of Abbotsford and the Fraser Valley Regional District together pursued their common opposition to the S2GF and privileged information that British Columbia shared with the City of Abbotsford or the Fraser Valley Regional District was protected by the doctrine of common interest privilege.

23 The EFSEC and NEB proceedings were, the Ministry argues, "litigation" for the purpose of litigation privilege. The EFSEC and the NEB were quasi-judicial; their processes included parties who were adverse in interest; parties had to submit evidence; and witnesses were examined, cross-examined and re-examined under oath. Litigation privilege applies, the Ministry says, not only to court proceedings, but also to administrative proceedings where a regulatory agency conducted an investigation that could result in the imposition of penalties or sanctions. The EFSEC used an adjudicative model to develop its record and inform its decision, with SE2 on one side and interveners on the other, and the discovery of documents was allowed under the Washington Administrative Code.

24 Litigation privilege is not limited to processes with discovery obligations comparable to those in traditional litigation, the Ministry argues. Even if there were no discovery obligations in the energy hearings, the Ministry could still receive an access request under the Act requiring it to disclose, subject to any of the exceptions in the Act, records related to those proceedings. The

underlying rationale for litigation privilege applied by reason of the right of access in the Act, even if the administrative process involved did not have a discovery mechanism. British Columbia and SE2 were adverse in interest and therefore were engaged in a dispute in the EFSEC proceedings.

25 The EFSEC hearings were concluded when SE2 made its access request to the Ministry, but the NEB hearings were still underway. The Ministry says, therefore, that the EFSEC and NEB hearings were related proceedings dealing with the environmental effects of the S2GF and litigation privilege continued to protect records prepared in connection with the EFSEC hearings.

26 Last, the Ministry complains that SE2 was trying, through its access request, to use the Act to get access to communications between the Ministry and its legal advisors, to records prepared for the dominant purpose of litigation (in the form of the EFSEC and MEB proceedings) and to the contents of its lawyer's brief, all of which was not permitted by the law of solicitor-client privilege.

27 For its part, SE2 says that much of the information in issue--for example, emails between British Columbia's legal counsel and its experts that were copied to Ministry staff--was not protected by solicitor-client privilege because it was not necessary to the existence or operation of the solicitor-client relationship between British Columbia and its lawyers.

28 The usual rule, SE2 points out, is that communications between a lawyer and third parties are not privileged and, in this case, British Columbia retained the outside experts to provide advice about a range of issues relating to SE2's application to the EFSEC.

29 SE2 also contended that the EFSEC and NEB hearings were not litigation, so that litigation privilege did not protect records associated with those processes. If the EFSEC proceedings were litigation, SE2 argued, any litigation privilege did not survive the conclusion of the EFSEC hearings in May of 2002. In any event, any privilege over draft expert reports, communications with experts or similar records was waived when British Columbia filed expert evidence at the EFSEC hearings.

30 SE2 argues that litigation privilege is premised on there being adversarial litigation, since its purpose is to prevent the contents of a lawyer's litigation file from being poached by the client's adversary. Litigation privilege should, SE2 argues, be interpreted narrowly. It does not apply to administrative proceedings that were not adversarial or in which, unlike traditional litigation, the parties were free to withhold relevant documents and disclose only those favourable to them. SE2 submits that the EFSEC and NEB proceedings were not adversarial in nature, and British Columbia's participation as an intervener did not necessarily mean it was an adverse party or that participants in the hearings were adverse in interest to SE2. The EFSEC and NEB allowed interested persons to participate in their hearings to provide a forum for all views and expertise and their processes are a far cry from traditional litigation.

31 Last, SE2 says that, while litigation privilege could extend to related litigation proceedings, the NEB hearings did not fit that description. There was no reasonable prospect at the time of the EFSEC hearings that the NEB would consider environmental effects of the S2GF. At least three

experts who testified at the EFSEC hearings were not involved in the NEB hearings and the EFSEC considered some issues (such as flooding) that the NEB did not.

32 Before considering the merits of the s. 14 issue, I will first address the Ministry's suggestion that SE2's use of the right to make an access request under the Act would somehow give SE2 unfair access to government information. It is not wrong or inappropriate at all for someone to use the right of access in the Act to gain access to records from a public body for the purpose of a process--adversarial or non-adversarial, public or private--in which the person and the public body are both involved. That is what happened here and, in its own good time, the Ministry released three disclosure packages to SE2.

33 I have reviewed the information which the Ministry withheld under s. 14. It fills approximately one file box. A great deal of it clearly consisted of confidential communications between British Columbia--through officials at the Ministry--and its lawyers relating to the obtaining or giving of legal advice. These communications are protected by legal advice privilege, whether they related to retaining British Columbia's lawyers for the EFSEC hearings or to legal advice, instructions and strategy concerning expert evidence or other EFSEC hearing issues, and regardless of whether the EFSEC or NEB hearings had finished.

34 I agree with the Ministry that the doctrine of common interest privilege applied to British Columbia's joint participation in the NEB hearings with the City of Abbotsford and the Fraser Valley Regional District.

35 The balance of the records withheld under s. 14 consists of communications between British Columbia's lawyers and experts retained to assist with and tender evidence at the EFSEC hearings, which British Columbia's lawyers had passed on to instructing officials at the Ministry. These communications with experts are not protected by legal advice privilege because that privilege extends only to communications with third parties who act as agents or conduits of the client, which was not the case here. Litigation privilege, on the other hand, applies to communications with third parties, such as experts, where the dominant purpose of the communication is preparing for or conducting litigation under way or in reasonable prospect at the time. As noted earlier, litigation privilege ends when the litigation ends[5].

36 The Ministry supported its position that the EFSEC and NEB hearings were litigation for the purposes of litigation privilege with information about the EFSEC certification process and excerpts from the Revised Code of Washington, the Washington Administrative Code and the National Energy Board Act. SE2 supported its position that those proceedings were not litigation with EFSEC orders and related correspondence, EFSEC environmental impact statements, excerpts from EFSEC hearing transcripts and pre-filed testimony, and information about NEB process and orders, rulings and related correspondence. Both parties also referred extensively to decisions from British Columbia, Ontario and the United States.

37 As I mentioned above, the scope and application of litigation privilege are the same as at

common law in British Columbia. Litigation privilege is an exception to rules requiring parties to litigation to disclose relevant documents to each other for the purposes of the litigation. Litigation privilege allows a party to litigation a degree of confidentiality to prepare its case without its adversaries in the litigation knowing everything about its case. The applicability of litigation privilege to non-judicial proceedings and the issue of what is considered related litigation have not been frequently considered in Canada. In Order 00-08[6], I reviewed the case law as follows:

> [paragraph]74 There are several relevant, although not conclusive, cases to consider on this issue. One is Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 61 Alta L.R. (2d) 319 (Alta. C.A.), a case relied on by the College. In that case, the Director of Investigation and Research, under what was then the Combines Investigation Act (Canada), conducted an inquiry which caused the investigation's target, through its legal counsel, to instruct an accountant to prepare certain documents for use in the target's defence. The Director ended his inquiry and did not charge the target. The documents prepared in the target's defence were sought to be produced in subsequent civil litigation which involved the same or similar issues as those investigated by the Director. The Alberta Court of Appeal held that the documents prepared by the target's accountant were protected by litigation privilege. It rejected an argument that the Director's process was not "litigation", at p. 326:
>
> > For Miller it is urged that an inquiry by the Director of Investigation and Research under the Combines Investigation Act is not litigation. Alternatively, it is said that, if the documents were ever privileged, that privilege ended once the director terminated his inquiry. In my view, both arguments take too narrow a view of the term "litigation". Once the director focused on the Caterpillar companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone in contemplation. The parties could look ahead to many possible procedures. Some under the Act have possible penal consequences; some were civil as this very action establishes. All involved the same issues. The inquiry seems to have resolved itself to the question of the costs of the Caterpillar "no-charge" services and the very same issue appears at the forefront on this action.
> >
> > The conclusion of the director's inquiry did not mean that the litigation was ended. Section 39 of the Combines Investigation Act expressly provides that civil rights of action remain despite the provisions of the Act. The issues raised by the director were still open to other litigants such as the respondent.

[paragraph]75 I make three observations about the Ed Miller case. First, the above aspect of that case has not been considered in any British Columbia judicial decision of which I am aware. Second, unlike this case, where privilege is being invoked by the College, in Ed Miller privilege was invoked by the target of the Director's inquiry. Third, in order to commence an inquiry under the applicable legislation, the Director was statutorily required to have reason to believe that a ground existed for an order against the target or that an offence had been or was about to be committed. No such threshold for the College's investigation of complaints under the MPA has been brought to my attention and I have not found any. For these reasons, I do not consider the decision in Ed Miller to be binding upon me or, in any event, to stand for the proposition that litigation privilege applies to a statutory agency when it investigates a complaint of regulatory or professional wrongdoing.

[paragraph]76 It should be noted that Ed Miller was considered in Alberta (Treasury Branch) v. Ghermezian, [1999] A.J. No. 624 (Alta. Q.B.). Applying a somewhat different approach, the court held, at paras. 18-21, that an appeal of a tax assessment to a review board was not litigation for the purposes of establishing litigation privilege:

> The purpose of granting privilege over documents made in anticipation of litigation is to allow a party to freely prepare its case. This privilege is also necessary to override the requirement in civil litigation that parties exchange all relevant documents. If a party is not afforded the protection provided by litigation privilege, it would be required to forward to its opponent unfavourable information which it has developed while preparing its case. As stated in The Law of Evidence in Canada (J. Sopinka, J. Lederman and A. Bryant, Toronto: Butterworths, 1992):
>
> > The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine its truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. ... Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigation

> and thought processes compiled in the trial brief of opposing counsel. (p. 654)

However, if there is no requirement that a party provide all documents to the other side, the need for litigation privilege disappears. The mandatory disclosure requirement is an important aspect of "traditional litigation" insofar as the entitlement to litigation privilege is concerned. Therefore, for the litigation privilege to attach to documents prepared in contemplation of a proceeding which is not traditionally classified as litigation, a party must demonstrate that his opponent has a right to access any material prepared in contemplation of that proceeding. If a certain proceeding does not have a sufficiently similar disclosure requirement to that of "traditional litigation", it follows that it should not be characterized as "litigation" for the purpose of finding litigation privilege.

There is no evidence before me that parties involved in a dispute before the Municipal Tax Assessment Board are required [to] exchange relevant documents or make any type of disclosure akin to that in a civil action. As such, the policy justifications underlying litigation privilege are not brought into play in this case. WEM was free to gather any information it required to prior to the hearing, and was able to choose which information it disclosed to the City and to the Board. There is no need for privilege because a party is not required to exchange documents with the opposing parties.

Under this test, it is possible that the material may become privileged if at some point in the regular course of the proceedings the parties become obliged to disclose all relevant documents to the other side. At that point the rationale for instigating litigation privilege would come into play. However, the proceedings in this action did not reach a point where there was any requirement of disclosure, and it is unlikely that such a requirement would ever have come into existence. As such, I find that the Appraisal is not covered by litigation privilege.

[paragraph]77 I am not, with respect, convinced that the test articulated in Ghermezian is necessarily an apt one. Because it focuses only on whether disclosure requirements apply to a proceeding, it ignores the need for an adversarial element to support the existence of litigation privilege. Further, the

> existence of discovery requirements does not create a static zone of litigation privilege; on the contrary, in a traditional civil litigation context the "modern trend is in the direction of complete discovery", with litigation privilege being "the area of privacy left to a solicitor after the current demands of discoverability have been met": General Accident, above, per Carthy J.A., at p. 256.
>
> [paragraph]78 The approach taken in Ghermezian would also assume that, if no traditional discovery requirements are attached to a proceeding, then the parties would not be required to make any type of disclosure. This assumption may be valid for private parties who are engaged in a traditionally adversarial judicial or quasi-judicial process. It lacks validity, however, where one of the parties is a disciplinary, regulatory or criminal prosecutor. This is because, as is discussed below, disclosure of relevant evidence - whether damaging or supportive - is a component of both administrative and criminal justice.

38 In College of Physicians & Surgeons, the Court of Appeal set aside Order 00-08 as it related to s. 13(1) of the Act. For litigation privilege under s. 14, the court applied the test that information gathered or obtained by a lawyer for the dominant purpose of use in litigation that is reasonably in prospect is privileged from production. In doing so, the court accepted the reasoning in Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.[7], that the interest of the target of the regulatory investigation was adversarial to that of the investigating agency. The Court of Appeal found, however, that the College of Physicians and Surgeons did not have an adversarial interest in the outcome of its investigation, litigation was not in reasonable prospect at the relevant time and the College was not gathering or creating information for the dominant purpose of litigation.

39 As for other cases, SE2 cited the case of Whitehead v. Braidnor Construction Ltd.[8], which held that accident investigation reports were not protected by litigation privilege on the basis that they had been gathered for submission to a workers' compensation board. I have also considered Re L. (a minor)[9], in which the majority of the House of Lords held that child protection proceedings did not attract litigation privilege because they were essentially non-adversarial in nature. Most recently, in Blank v. Minister of Justice[10], the majority of the Federal Court of Appeal confirmed that the solicitor-client privilege exception in s. 23 of the federal Access to Information Act, which is essentially the same as s. 14 of the Act, applied only to records which were privileged at the time the access request was made and, in contrast to legal advice privilege--which was not limited in time--litigation privilege ends when the litigation ends (subject to the possibility that the litigation may include related proceedings).

40 I have concluded that the information the Ministry refused to disclose on the basis of litigation privilege was protected by that privilege. The scope and application of litigation privilege in relation to administrative proceedings, and principles for deciding when proceedings are related to each other, are still developing. In deciding that litigation privilege applies here, I have kept in view the

underlying policy of litigation privilege, which is, again, to give parties who are adverse in interest in contested legal proceedings confidentiality protection for information that they obtain or create to prepare their cases.

41 I note that, in College of Physicians, the Court of Appeal approved of Ed Miller Sales, which held that a regulatory investigation can support a claim of litigation privilege in relation to the adversarial interest of the target of the investigation. SE2 and British Columbia were clearly opposed in interest in the EFSEC and the NEB hearings--their interests were adversarial, as was the case in Ed Miller.

42 Further, it was clear throughout, in my view, that SE2's applications to the EFSEC for approval of the S2GF in Washington were linked to its applications to the NEB for approval of the international power line to British Columbia. While identity of issues or evidence between the EFSEC and the NEB hearings was unlikely, it was easily foreseeable, I think, that there would be some overlap between the issues and evidence in the two proceedings.

43 As for waiver, when British Columbia's lawyers were consulting experts for the EFSEC hearings, it was well known that SE2's application was pending with the NEB for approval of the international power line. If SE2 maintained that principles of fairness or consistency in connection with the EFSEC or the NEB hearings necessitated waiver of litigation privilege over working communications between British Columbia's lawyers and experts consulted for the EFSEC proceedings, then it was incumbent on SE2 to pursue this position in those hearings, not through an access request under the Act.

44 The NEB proceedings (the hearings or the application for judicial review that followed) were not concluded at the time SE2 made its access request to the Ministry, so it cannot be said that litigation privilege had ended by that time.

45 I find that s. 14 authorized the Ministry to refuse disclosure of the information to which it applied that exception.

46 4.3 Advice or Recommendations--Section 13(1) of the Act reads as follows:

> Policy advice, recommendations or draft regulations
>
> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

47 Section 13(2) provides that certain types of information may not be withheld under s. 13(1), while s. 13(3) says that s. 13(1) does not apply to information in a record that has existed for more than 10 years.

48 The parties referred to previous orders that characterized the purpose of s. 13(1) as being to allow full and frank discussion of advice or recommendations on a proposed course of action within a public body, preventing the harm that would occur if the deliberative process of government decision and policy-making was subject to excessive scrutiny, particularly while a public body is considering a given issue. The Ministry also said a public body is authorized to refuse information that would allow an individual to draw accurate inferences about advice or recommendations. It said all of the information withheld under s. 13(1) constituted advice or recommendations to the Ministry concerning a course of action or the exercise of a power or function, to which s. 13(2) and (3) did not apply.

49 The Ministry withheld relatively little information under s. 13(1), in the following types of records: draft position, advisory and communications notes on the S2GF from which proposed wording and revisions to wording were withheld; several emails involving the Ministry and British Columbia's lawyers and a draft report to which s. 14 was also applied; information in a number of other emails (one of which concerned a draft editorial); and a draft letter and information in emails associated with proposed changes and revisions to that letter.

50 I do not need to deal with the information that was also withheld under s. 14 because I have already upheld the Ministry's authority to refuse access under that section. The information that the Ministry withheld in the draft notes, editorial and letter was recommended wording or suggested revisions to the wording of these records that the Ministry was, I have concluded, authorized to withhold under s. 13(1). The information withheld in the emails to which the Ministry did not apply s. 14 was advice or recommendations to Ministry staff on possible courses of action that in my view fell under s. 13(1). Sections 13(2) and (3) do not apply to any information withheld here.

51 4.4 Fees Charged by the Ministry--SE2 never objected to the amount of the fees the Ministry charged. Its complaint was always that what SE2 considered to be the excessive time the Ministry took to respond to the access request, warranted an order for the refund of fees under s. 58(3)(c).

52 Section 58(3)(c) reads as follows:

> Commissioner's orders
>
> 58(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following: ...
>
> (c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met; ...

53 In Order 02-54[11], I was critical of a six-month delay in responding to an access request when there was no apparent reason why the public body could not have released records as and when they

were processed. In Order 03-32[12], I reminded public bodies that they must not ignore the requirements of the Act when there is litigation underway.

54 In Order F05-21[13], Adjudicator Celia Francis made an order under s. 58(3)(c) requiring the refund of fees for an access request to which Land and Water British Columbia Inc. had taken nine months to respond. Related orders were also made against two ministries[14]. The basis for her decisions was that s. 58(1)(c) is worded the way it is to make it clear that, while public bodies may charge fees, they may be required to forgo those fees in certain cases, including where they fail to meet time limits.

55 SE2 submitted that fees should be refunded because what is sees as the Ministry's extraordinary delay and recalcitrance in responding had substantially defeated SE2's right of access under the Act. The Ministry accepted that there is authority in s. 58(3)(c) to order a refund or reduction of a fee where a public body has failed to meet a time limit, but said this remedy was only warranted as a punitive measure and should not be applied every time a public body is late responding to an access request. The Ministry did not elaborate on what circumstances might justify such a "punitive" measure.

56 SE2 said, and I tend to agree, that the reason for limiting and scrutinizing extensions of time under the Act is that delay can become a systemic barrier to the right of access--access delayed is often access denied. While I agree with the Ministry that there is no right to a fee refund whenever a time limit for responding to an access request is missed, s. 58(3)(c) is not focussed only on punishing a public body. That would fail to account for the effects on the applicant of the fee and the delay in getting a response to the access request, which are circumstances that are also be relevant to the appropriateness of a fee.

57 Some of the Ministry's submissions focus on the fact that SE2 did not request a fee waiver or reduction under s. 75 of the Act. It also appears there was some confusion about the relevance of s. 75 in early correspondence, found in the inquiry record, among this Office, SE2 and the Ministry. SE2 readily acknowledged throughout that it was not seeking a fee waiver or reduction under s. 75. It was, instead, seeking a refund of fees under s. 58(3)(c) based on the Ministry's delay in responding to the access request. Focus on s. 75 is not helpful on the issue at hand, which is whether an order should be made under s. 58(3)(c).

58 The time that it took for the Ministry to respond to SE2's access request breaks down as follows:

* SE2 made its access request on May 30, 2002.
* On June 25, 2002, the Ministry issued a fee estimate of $8,618.75 for 22,475 pages of records and 100 hours to prepare records for disclosure.
* On July 10, 2002, SE2 paid the fee deposit of $4,500.00.
* On July 11, 2002, the Ministry took an extension under s. 10(1)(b) of a further 30 days, of the time for its response to SE2's access request.

* On September 4, 2002, the Ministry asked this Office to allow a further extension, under s. 10(1)(c), of the time for responding to the access request.
* On September 6, 2002, this Office granted the Ministry an extension to November 15, 2002. The reasons indicated for seeking and granting the extension were to enable the Ministry to consult with other public bodies. The extension under s. 10(1)(c) was subject to the following terms:

    * The Ministry was to immediately notify the applicant of the extension, provide reasons for it, and tell the applicant when a response could be expected.
    * The Ministry was to respond to the applicant as soon as possible with the requested records. If possible, the Ministry was to release records to the applicant in stages as the review progressed. The Ministry was not to delay releasing records to permit bulk release unless it was absolutely necessary for the global consideration of the disclosure package.
    * The Ministry would not be granted an additional time extension unless exceptional circumstances arose.

* The Ministry released no records by the extended time of November 15, 2002 and it sought no further extensions of time under the Act to respond to the access request.
* On January 20, 2003, the Ministry released its first disclosure package, which, according to SE2, consisted largely of already public documents.
* On February 27, 2003, the Ministry official specifically assigned to the access request informed SE2 that he hoped to have a second disclosure package ready by the next week.
* On March 20, 2003, the Ministry manager responsible for access requests informed SE2 that the official who had been working on the matter had retired and was in the process of being replaced by the Ministry, which would disclose further records to SE2 when it had available staff.
* On March 31, 2003, the Ministry consulted with the Ministry of Finance concerning disclosure of a record originating with the Crown Corporations Secretariat.
* The Ministry took what it described as the extraordinary step (due to the volume of the records involved) of hiring a contractor (at a cost of $3,125) to review requested records to determine what could be released under the Act. The Ministry apparently also hired a secretarial service (at a cost of $1,050) to copy responsive records.

* On May 26, 2003, the Ministry released its second disclosure package. The fees were adjusted to $8,970.10 for 13,450 pages of records and 189 hours to locate, retrieve and prepare records.
* On June 4, 2003, SE2 paid $4,470.10, the balance of the fees owing.
* On June 9, 2003, the Ministry released its third disclosure package.
* The main NEB hearings--in which SE2 and British Columbia were opposed in interest--were held from May to September 2003.
* From November 2002 to June 2003, SE2 sent persistent communications to the Ministry (and to this office) concerning the Ministry's failure to respond in a timely fashion to the access request and about the appropriateness of the fees charged by the Ministry in the circumstances.

59 The Ministry said in its submissions that SE2 unnecessarily requested and pursued records that it already had through the EFSEC proceedings, which was an irresponsible exercise of access rights under the Act and a significant added burden for the Ministry in processing this access request. SE2 strongly contested these allegations and their relevance to whether a fee refund should be ordered in the circumstances.

60 There were discrepancies in the inquiry record as to the volume of records involved for the access request, but it was obviously significant--in the order of eight file boxes (some 15,000 to 17,000 pages), seven of which (some 13,000 to 15,000 pages) were disclosed to SE2.

61 The Ministry pointed to SE2's November 2000 access request, which covered some 33,000 pages of records in 15 file boxes and to which the Ministry responded in April 2001. Both requests were large, but I do not see how SE2's earlier access request is relevant to the Ministry's processing of the 2002 access request involved here. SE2 made its first access request, and the Ministry responded before British Columbia's decision to oppose the S2GF project. SE2's second access request was made after British Columbia's decision to oppose S2GF. If anything, the Ministry's response time for the first access request might suggest that the Ministry demonstrated its capability of responding to the larger access request much more quickly than it responded--during a time when British Columbia was vigorously opposing SE2's plans--to the large, but considerably smaller, access request involved in this inquiry.

62 As regards its request for a refund of fees, SE2 contends that the Ministry failed to comply with the terms of the time extension granted by this Office in September 2002; that the Ministry failed to respond to the access request at all for eight months; the records the Ministry did disclose--in the first disclosure package, at least--were public records that SE2 already had; dates on some records indicate they were assembled by the Ministry in July and August 2002 but were not disclosed until May 2003 (with no indication as to why it took so long); the Ministry disclosed the majority of the records--in May and June 2003--after the NEB hearings, in which British Columbia was participating, were underway; and the Ministry failed to provide reasons for withholding information.

63 The Ministry acknowledges that it took a long time to process the access request, but says its response was still reasonable given the volume of records involved. It argues that it went to extraordinary lengths to process the access request in as timely a fashion as possible. According to the Ministry, the process of locating, retrieving, reviewing and copying the records was incredibly time-consuming and the fees it charged did not reflect the true cost of processing.

64 The Ministry acknowledges that it should have sought a further time extension from this Office. It goes so far as to suggest, however, that a longer time extension had been warranted in September 2002, but it did not request one because the Ministry believed this Office would not grant it.

65 I have concluded that in the circumstances of this case it is appropriate to order the Ministry to refund 50% of the fees charged to SE2. The Ministry's response time for this access request was long and was well beyond time limits in the Act. A further serious consideration is the extent to which (for over six months) the Ministry processed this access request outside of the accountability framework in the Act. I am not referring to set time limits in the Act which, the reality is, have sometimes been exceeded. I am referring to the accountability mechanism for time extensions to respond to access requests in s. 10 of the Act and the terms of the extension that this Office allowed under s. 10(1)(c) in September 2002.

66 In seeking and getting the September 2002 extension, the Ministry apparently represented that it required more time in order to consult with other public bodies. The extension was granted on that basis and SE2 was told of it. I agree with SE2 that the Ministry did not comply with the terms of that extension. It is troubling, as well, that there is a lack of evidence that the Ministry spent any time at all in consulting with other public bodies (other than about one record with the Ministry of Finance, on March 31, 2003). If the Ministry was labouring under difficult circumstances that were affecting its ability to respond in a timely way, it is not at all clear why those matters were not brought forward in the form of a request for a further extension of time, particularly in the context of an access request that clearly was time sensitive in relation to the upcoming NEB hearings and was being very actively pressed by SE2.

67 Most important, it is not fair to access applicants for public bodies to take unilateral, very long, de facto time extensions that sidestep the explicit mechanism in the Act for the scrutiny of extensions of time to respond to access requests. While I acknowledge that those administering the Act--including this Office--can at times find it challenging to meet the Act's timelines, it is not open to a public body to sail ahead in disregard of an express and specifically applicable accountability provision in the legislation, in this case s. 10.

5.0 CONCLUSION

68 For the reasons given above, under s. 58 of the Act, I make the following orders:

1. At the time that the access request was made, the Ministry was authorized

to refuse to disclose the information it withheld under s. 13(1) or s. 14 of the Act and I confirm its decision; and

2. The circumstances are appropriate for a refund of fees charged in connection with the access request and I therefore order the Ministry to refund $4,486.00 to SE2.

cp/e/qlebh

1 Sumas Energy 2, Inc. (March 2004), EH-1-2000 (National Energy Board).

2 [2005] F.C.J. No. 1895 (C.A.).

3 See, for example, Order 02-01, [2002] B.C.I.P.C.D. No. 1, and College of Physicians & Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner), (2002), 9 B.C.L.R. (4th) 1 (C.A.), [2002] B.C.J. No. 2779 (C.A.). The Supreme Court of Canada recently affirmed the nature and importance of solicitor-client privilege in a case involving a claim of privilege under Ontario's Freedom of Information and Protection of Privacy Act: Goodis v. Ontario (Ministry of Correctional Services), 2006 SCC 31, [2006] S.C.J. No. 31.

4 Previous orders under the Act have referred to the first branch of solicitor-client privilege as "legal professional privilege". See, for example, Order 01-10, [2001] B.C.I.P.C.D. No. 11 and Order 02-01. The trend seems to be to use the term "legal advice privilege", as illustrated by College of Physicians & Surgeons, Blank v. Canada (Minister of Justice) (2004), 244 D.L.R. (4th) 80 (F.C.A.), and Three Rivers District Council and others v. Governor and Company of the Bank of England (2004), [2004] UKHL 48. I have therefore decided to use, from now on, the term "legal advice privilege" to refer to confidential communications between solicitor and client related to the obtaining or giving of legal advice.

5 College of Physicians & Surgeons, at paras. 32-33.

6 [2000] B.C.I.P.C.D. No. 8.

7 (1988), 61 Alta L.R. (2d) 319 (Alta. C.A.), paras. 74-78.

8 (2001), 304 A.R. 71 (Alta. Q.B.).

9 [1997] A.C. 16 (H.L.).

10 (2004), 244 D.L.R. (4th) 80 (F.C.A.), leave to appeal granted [2004] S.C.C.A. No. 513.

11 [2002] B.C.I.P.C.D. No. 55.

12 [2003] B.C.I.P.C.D. No. 32.

13 [2005] B.C.I.P.C.D. No. 29.

14 Order F05-22, [2005] B.C.I.P.C.D. No. 30 and Order F05-23, [2005] B.C.I.P.C.D. No. 31.

1991 CarswellBC 320, 62 B.C.L.R. (2d) 254, [1992] 2 W.W.R. 132, 3 C.P.C. (3d) 297, (sub nom. Hamalainen v. Sippola) 9 B.C.A.C. 254, 19 W.A.C. 254

1991 CarswellBC 320, 62 B.C.L.R. (2d) 254, [1992] 2 W.W.R. 132, 3 C.P.C. (3d) 297, (sub nom. Hamalainen v. Sippola) 9 B.C.A.C. 254, 19 W.A.C. 254

Hamalainen (Committee of) v. Sippola

PAUL ZACHARIAS HAMALAINEN, by his Committee, MARIAN LORRAINE HAMALAINEN v. ANTTI SIPPOLA

British Columbia Court of Appeal

Toy, Proudfoot and Wood JJ.A.

Heard: June 14, 1991
Judgment: December 9, 1991
Docket: Vancouver Doc. CA 012514

Counsel: *D.C. Quinlan*, for appellant.

F.M. Baily, for respondent.

Subject: Civil Practice and Procedure

Practice --- Discovery — Discovery of documents — Privileged document — Documents prepared in contemplation of litigation.

Civil procedure — Discovery of documents — Documents subject to production — Privileged documents — Adjusters preparing ten reports respecting November 1986 accident and denying claim in February 1987 — Adjusters deposing reports having been prepared for principal purpose of assisting in preparation and conduct of litigation — Master not obliged to accept adjusters' opinions on very issues to be decided, and not erring in finding on the evidence that reports made after February 1987 and not before met "dominant purpose" test.

Evidence (civil) — Privilege — Legal professional/litigation privilege — Documents prepared in contemplation of litigation — Adjusters preparing ten reports respecting November 1986 accident and denying claim in February 1987 — Adjusters deposing reports having been prepared for principal purpose of assisting in preparation and conduct of litigation — Master not obliged to accept adjusters' opinions on very issues to be decided, and not erring in finding on the evidence that reports made after February 1987 and not before met "dominant purpose" test.

The plaintiff was injured in November 1986 when he fell out of the back door of the defendant's camper truck

while the vehicle was on the highway. Immediately after the accident was reported to I.C.B.C. in early December 1986, adjuster V. instructed two independent adjusters to investigate. The adjusters prepared ten reports between December 1986 and February 1987. On February 19, 1987 adjuster N. wrote to the plaintiff's wife that I.C.B.C. was taking the position that there was no liability on the defendant. On an application by the plaintiff to the master for production of the reports, V. deposed that as soon as he received the claim he was of the opinion that litigation was a reasonable prospect, and he accordingly requested the investigation by the adjusters for the principal purpose of assisting in the preparation and conduct of the litigation. The defendant also filed an affidavit by N. to the same effect. The application was allowed with respect to reports prepared before February 19. An appeal to the chambers judge was dismissed. The defendant appealed.

Held:

Appeal dismissed.

It was for the master to determine whether litigation was a "reasonable prospect" at the time the reports were made, and if so, the dominant purpose of the reports. He was not obliged to accept the adjusters' opinions on the very issues to be decided. In the circumstances, litigation was a reasonable prospect when the claim was first reported. In every such case there is an initial stage during which the parties are attempting to ascertain the cause of the accident. At some point in this process the focus of the inquiry shifts such that the dominant purpose becomes that of preparing for litigation. There is no absolute rule that the decision to deny liability to the claimant marks the point of demarcation, and the terms "adjusting stage" and "litigation stage" found in the authorities are merely convenient labels to describe the stages before and after the relevant point. The master's decision meant no more than that on the evidence before him, reports made after February 19, 1987 were for the dominant purpose of litigation. With respect to reports before that date, the defendant had failed to meet the onus on him to establish the claim of privilege.

Cases considered:

Grant v. Downs (1976), 135 C.L.R. 674 (Aust. H.C.) — *applied*

Pound v. Drake Insurance Co. (1984), 8 C.C.L.I. 108 (B.C.C.A.) — *considered*

Shaughnessy Golf & Country Club v. Uniguard Services Ltd., 1 B.C.L.R. (2d) 309, [1986] 3 W.W.R. 681, (sub nom. *Shaughnessy Golf & Country Club v. Drake International Inc.)* 26 D.L.R. (4th) 298 (C.A.) — *considered*

Voth Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44, 29 B.C.L.R. 114, [1981] 5 W.W.R. 91, 23 C.P.C. 276 (C.A.) — *applied*

Waugh v. British Railways Board, [1980] A.C. 521, [1979] 2 All E.R. 1169 (H.L.) — *considered*

Appeal from decision of chambers judge upholding master's order requiring production of adjusters' reports.

The judgment of the court was delivered by *Wood J.A.*:

I

1 This appeal raises once again the problem of how to apply the "dominant purpose" test, adopted by this

court in *Voth Brothers Construction (1974) Ltd. v. North Vancouver School District No. 44*, 29 B.C.L.R. 114, [1981] 5 W.W.R. 91, 23 C.P.C. 276, for deciding questions of privilege associated with documents in the possession of one party and sought by another during the course of litigation.

2 In this case Master Grist ordered that the appellant deliver up to the respondent copies of certain adjuster's reports prepared for the Insurance Corporation of British Columbia ("I.C.B.C."), together with a statement taken from a potential witness to a motor vehicle accident, all of which were claimed by the appellant to be privileged. A chambers judge dismissed the appeal from the master's decision without giving reasons. This appeal is brought pursuant to leave granted by Toy J.A. on July 9, 1990.

II

3 On November 28, 1986 Paul Zacharias Hamalainen was seriously injured when he fell out of the back door of a camper mounted on the back of a pickup truck that was travelling north on Interstate 5 in the state of Washington. The camper and pickup, owned by Antti Sippola, was being driven by Mattie Louhivouri. Sippola was a front seat passenger.

4 On December 1, 1986, the accident was reported to I.C.B.C. by Hamalainen's wife. Carlo Viola, an adjuster with the corporation, immediately instructed Geoff Nuthall of General Insurance Adjusters and Richard Conklin of Custard Insurance Adjusters to investigate the circumstances of the accident and the injuries suffered by the plaintiff. Between that date and February 19, 1987, these two adjusters prepared a total of ten reports, all of which were forwarded either to Carlo Viola or to John Babcock, a senior adjuster who assumed conduct of the matter from Viola on December 23, 1986. It is these ten reports, together with a letter of instruction from I.C.B.C. to Conklin on December 23 and a statement taken from Louhivouri on December 3 by Nuthall, which are in dispute.

5 During this same period of time Nuthall was in touch with Mrs. Hamalainen both by telephone and by mail. He solicited and obtained from her various medical accounts relating to the treatment of her husband's injuries and discussed with her the various benefits which might be available to him. On February 19, 1987, he wrote a letter to her in which he advised as follows:

> This letter confirms my telephone conversation with you as of February 19, 1987, pertaining to your husband, Mr. Paul Hamalainen's claim.
>
> I.C.B.C. since the investigation has been concluded are of the opinion that there is no liability on the insured, Mr. Antti Sippola, who was driving the pickup truck when your husband fell out of the camper.

III

6 This matter came before the master on May 24, 1990, as a result of an application brought by the plaintiff for production of the documents to which I have earlier referred, together with eight other adjuster's reports which were prepared and delivered after February 19, 1987. The defendant's claim of privilege was founded on the affidavits of Viola and Nuthall. Viola deposed that:

> 4. Immediately upon receiving this claim, it was my view that there was a reasonable prospect that it would result in litigation. The significant factors which emphasized this included:
>
> (a) the Plaintiff suffered serious injuries as a result of his fall; and

(b) liability for any damages suffered by the Plaintiff clearly would be in issue since there was little indication as to how he came to fall out of a camper.

5. On December 1, 1986 immediately after receiving the file, I contacted Geoff Nuthall of Geoff Nuthall General Insurance Adjusters and Richard A Conklin of Custard Insurance Adjusters and instructed each of them to investigate the circumstances surrounding the accident and the injuries suffered by the Plaintiff.

6. Because it was my view that litigation was a reasonable prospect, I requested that the investigation be conducted by Mr. Nuthall and Mr. Conklin for the principal purpose of assisting in the preparation for and the conduct of such litigation.

7 Nuthall deposed that:

3. I was contacted by Carlo Viola on December 1, 1986 and instructed to conduct investigations with respect to the accident which is the subject of this action and the injuries suffered by the Plaintiff, Paul Hamalainen, as a result of that accident.

4. Although I do not have a specific recollection of my initial conversation with Carlo Viola, due to the unique circumstances of the accident I do have a recollection of my investigations in this matter.

5. It was clear to me from the outset that there was no indication as to how Mr. Hamalainen came to be lying on the highway. Further, because he was a passenger in an apparently moving vehicle at the time of the accident and he suffered serious injuries as a result of his fall, it was my view at the time I commenced my investigation of this accident that litigation was a probable result. *Therefore, each of the Reports was prepared for the principal purpose of assisting in the preparation for and the conduct of any such litigation.*

6. In the course of conducting my investigations, I took two statements, one from Antti Sippola dated December 3, 1986 and another from Matti Louhivouri, undated. Although the statement of Matti Louhivouri is undated, I recall that it was taken on December 3, 1986, immediately after taking the statement of Antti Sippola.

7. Each of the two statements referred to in paragraph 5 above also were prepared for the principal purpose of assisting in the preparation for and the conduct of the probable litigation and were enclosures in my report dated December 3, 1986. (emphasis added)

8 Both affidavits fail to make any reference to the February 19, 1987 letter from Nuthall to Mrs. Hamalainen. Although this letter was not part of the materials filed in support of the application, its content was apparently put before the master without objection when the application was heard.

9 However, the affidavits of both Viola and Nuthall did attach as an exhibit, a letter dated December 31, 1986, from Brian A. Mason, a lawyer, to Nuthall advising that he had been instructed to act for the respondent in connection with his personal injury claims. This letter was referred to by both as reinforcing their belief that litigation would result from the accident. But neither made mention of a letter from Mr. Mason to Nuthall, dated January 7, 1987, in which he apologized for his earlier letter and advised that he in fact had no instructions to act. He requested that Mr. Nuthall "continue to deal with Mrs. Hamalainen." This letter appeared for the first time before the chambers judge as a result of the respondent's application to adduce further evidence when the appeal from the master's order was heard.

10 The master, in written reasons delivered at the request of counsel, referred to both the *Voth* case, supra, and this court's decision in *Shaughnessy Golf & Country Club v. Unigard Services Ltd.*, 1 B.C.L.R. (2d) 309, [1986] 3 W.W.R. 681, (sub nom. *Shaughnessy Golf & Country Club v. Drake International Inc.)* 26 D.L.R. (4th) 298. He quoted specifically from the judgment of Mr. Justice Esson (as he then was) in the latter case, where at p. 319 of the report the following appears:

> In *Pound v. Drake Ins. Co.* (1984), 8 C.C.L.I. 108, this court considered a claim for privilege in respect of adjusters' reports in an action brought by the insured against the insurer. It upheld the decision of the chambers judge [5 C.C.L.I. 274] refusing the claim of privilege with respect to the reports earliest in time because the dominant purpose at that time was to consider whether or not to deny liability, but held that the chambers judge had erred in not upholding the claim for privilege in respect of reports after the denial of liability, where the evidence established that they were created solely for the purposes of the anticipated litigation. The terms "adjusting stage" and "litigation stage" were employed in the reasons for judgment in this court in *W.K. Const. Ltd. v. Maritime Ins. Co.*, [1985] B.C.W.L.D. 1428, B.C.C.A., Vancouver No. CA003295, 27th February 1985 (not yet reported). It was said by Seaton J.A. at p. 4 that *Pound v. Drake Ins. Co.* "... suggests a distinction between the adjusting stage and the litigation stage". I do not interpret that as laying down any principle other than the principle that, in respect of each document, the question as to dominant purpose must be answered. The distinction being made was between the facts in *Pound v. Drake Ins. Co.* where there was a basis for drawing a distinction between the earlier and the later adjusting reports, and those in *W.K. Const.* which concerned only one document which was held entitled to privilege because the evidence satisfied the test of dominant purpose. As between the two cases, *Pound v. Drake Ins. Co.* is closer in its facts to this case. Both cases support the view that there is no special rule applicable to adjusters' reports.

11 The master then said this at pp. 5-6 of his reasons:

> In the present case it is apparent that the initial investigation after an incident such as described by the facts of this case has more than one end. Both the plaintiff and the defendant were "insured" persons under the "plan of universal compulsory automobile association" operated by the Insurance Corporation. The corporation will in the usual course investigate such a loss and make its determination of liability. Should liability be denied, it will continue to meet the injured party's claim under Pt. 7 of the regulations.
>
> There must be to my mind, some stage at which the corporation is gathering information to determine its position in respect of an insured injured through the operation of a motor vehicle. In this case I came to the conclusion that this initial stage constituted an "adjusting stage" as opposed to a "litigation stage" and as in *Pound v. Drake*, supra, I fixed upon the denial of liability as the point in time the initial stage came to an end.
>
> Evidence of the denial of liability was contained in a letter from the adjuster, Geoff Nuthall to Mrs. Hamalainen dated February 19, 1987, in the text of which he says:
>
> > This letter confirms my telephone conversation with you as of February 19, 1987, pertaining to you[r] husband, Mr. Paul Hamalainen's claim.
> >
> > I.C.B.C. since the investigation has been concluded are of the opinion that there is no liability on the insured, Mr. Antti Sippola, who was driving the pick up truck when your husband fell out of the camper.

> He had been sleeping in the camper, as you are aware and for some reason got up and fell out the rear door for reasons unknown.
>
> This letter also confirms that I.C.B.C. will be looking after the No Fault Part Seven Benefits for you and we would ask that you please, from this date forward, contact the I.C.B.C. Rehabilitation Dept., Ms. Joan Cave, phone # 661-6502.

Accordingly, production of all reports prior to February 19, 1990 [sic] and the passenger's statement was ordered.

IV

12 The appellant argues firstly that the affidavits of Viola and Nuthall contain the only evidence before the court as to the purpose for which the various documents were prepared. Thus it is suggested that in the absence of any evidence which sheds doubt on their credibility, it was not open to the master either to disregard their evidence or to do other than give effect to it.

13 This argument cannot prevail for several reasons. First of all, it was not incumbent upon the master to accept without question the opinion of either deponent on one of the very issues he was bound to decide. Whether or not litigation was in reasonable prospect was a matter for him to decide on all the evidence before him. The opinions of Viola and Nuthall on that issue were evidence to be considered on that question, but they by no means foreclosed the issue from further consideration.

14 Secondly, and more importantly, both affidavits appear to be based on what I view as a significant error of law, namely, the assumption that because litigation seemed likely the reports must necessarily have been prepared for the "principal purpose of assisting in the preparation for and the conduct of" such litigation. This assumption is most clearly expressed in the highlighted portion of para. 5 of Nuthall's affidavit, but it underlies the often repeated conclusion to be found in both. Quite apart from the error inherent in assuming such a nexus, the proposition quoted suggests that the principal purpose of a report must necessarily be its dominant purpose. That such is clearly not the case is evident from the following passage at p. 321 [B.C.L.R.] of the report in the *Shaughnessy Golf Club* case, supra:

The fact that litigation is a reasonable prospect after a casualty, and the fact that that prospect is one of the predominant reasons for the creation of the reports is now not enough. Unless such purpose is, in respect of the particular document, the dominant purpose for creating the document, it is not privileged.

15 The final point I would not bother to mention were it not for the fact that it was raised directly in argument. Both affidavits failed to disclose pertinent facts. Those non-disclosures became apparent during the course of the proceedings before both the master and the chambers judge. In the circumstances it does not now sit well for the appellant to suggest that the weight of the affidavit material cannot be questioned.

16 The second argument advanced by the appellant is that the master erred in applying the "adjusting stage," "litigation stage" analysis, used by this court in *Pound v. Drake Insurance Co.* (1984), 8 C.C.L.I. 108, (and referred to by Esson J.A. in the *Shaughnessy Golf Club* case), to this case, in an effort to determine the point at which privilege could properly be claimed with respect to the documents before him. Such analysis is said to apply only to those cases where an insured sues an insurer for indemnification under a contract of insurance and to be inappropriate in an action where the plaintiff seeks damages for loss suffered as a result of the tortious con-

duct of another. *Pound v. Drake* was a suit for indemnification, and the appellant suggests that in such a case, where the parties do not generally start out in an adversarial position, there is a clear line between the adjusting and the litigation stage which is marked by the insurer's decision not to indemnify. Thus use of the adjusting stage analysis is appropriate in such a case. But in a case such as this, where litigation was viewed as inevitable from the outset, no "adjusting stage" could be defined as such or would be relevant to the dominant purpose test.

17 Regardless of the terminology used to apply it, the correct rule, as adopted in *Voth*, is that stated by Barwick C.J. of the Australian High Court in *Grant v. Downs* (1976), 135 C.L.R. 674 at 677:

> Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

18 Any attempt to apply the rule when determining a claim of privilege with respect to a document necessarily requires that two factual determinations be made:

19 (a) Was litigation in reasonable prospect at the time it was produced, and

20 (b) If so, what was the dominant purpose for its production?

(a) Was litigation "in reasonable prospect" at the time these documents were produced?

21 The onus is on the party claiming privilege to establish on a balance of probabilities that both tests are met in connection with each of the documents falling within the claim. As was so in the *Shaughnessy Golf Club* case, no effort was made in the material filed by the defendant in this case to distinguish one document from another in meeting that onus. The assumption seems to have been that by establishing that litigation was in reasonable prospect from the outset, the claim of privilege must necessarily prevail.

22 I am not aware of any case in which the meaning of "in reasonable prospect" has been considered by this court. Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet. I am satisfied it was met in this case in connection with all of the documents in issue. The circumstances of this accident, and the nature of Mr. Hamalainen's injuries, were such that litigation was clearly a reasonable prospect from the time the claim was first reported on December 1, 1986.

(b) What was the dominant purpose for which the documents were produced?

23 A more difficult question to resolve is whether the dominant purpose of the author, or the person under whose direction each document was prepared, was "[to use] it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation."

24 When this court adopted the dominant purpose test, it did so in response to a similar move by the House of Lords in *Waugh v. British Railways Board*, [1980] A.C. 521, [1979] 2 All E.R. 1169. In that case the majority opinion is to be found in the speech of Lord Wilberforce, who agreed "in substance" with the dissenting judgment of Lord Denning M.R. in the court below. While the Court of Appeal judgments do not appear to have been reported, some excerpts from Lord Denning's opinion are to be found in the speech of Lord Edmund-Davies, including the following at p. 541 [A.C.] of the report:

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

25 At the heart of the issue in the *British Railways Board* case was the fact that there was more than one identifiable purpose for the production of the report for which privilege was claimed. The result of the decision was to reject both the substantial purpose test previously adhered to by the English Court of Appeal and the sole purpose test which by then had been adopted by the majority of the Australian High Court in *Grant v. Downs*.

26 Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

27 In that sense there is obviously no absolute rule that the decision to deny liability in such a claim must mark the point in which the conduct of litigation becomes the dominant purpose underlying the production of each and every document of the sort for which privilege was claimed in this case. But I do not read the master's reasons as invoking any such absolute rule. He was faced with affidavit material filed by the party claiming privilege which was deficient in a number of respects. As already noted it failed to draw any distinction between the purpose under lying the production of individual documents. The risk inherent in that approach was pointed out by Mr. Justice Esson in the *Shaughnessy Golf* case at p. 319 of the report:

> Privilege was claimed for a large number of documents. The grounds for it had to be established in respect of each one. By trying to extend to the whole list the considerations which confer privilege on most of the documents, the plaintiff has confused the issue and created the risk that, because it did not make in its evidence the distinctions that could have been made, it must be held not to have established privilege for any.

28 Furthermore, the affidavit material concentrated on the repetitious assertion by each deponent of his belief that litigation in the case was inevitable, from which fact the dominant purpose underlying the production of all documents was apparently assumed. As already pointed out that approach to the onus facing the deponent on this question represented a mistaken view of the law.

29 With the limited aid of such deficient material the master was faced with the task of discerning at what point in time the dominant purpose underlying the production of each document could be demonstrated to support the claim of privilege. In my view, his decision imports no more than a conclusion that in this case, on the basis of the material put before him, it was apparent to him that the dominant purpose underlying the production

of investigative (adjusters') reports and witness statements after the date upon which liability was formally denied was probably for use in the litigation which had been in reasonable prospect since the accident of November 30. With respect to documents produced prior to that date, the defendant failed to meet the onus put upon him to establish that dominant purpose. I cannot say that the master was wrong to approach the problem the way he did, in fact, I think that he was right.

30 I attach no particular significance to the expressions "adjusting stage" and "litigation stage." In some cases those may be effective labels with which to describe the period before and after the point in which the dominant purpose for the production of a particular document can be said to be that described by Barwick C.J. in *Grant v. Downs*. It may be that such cases are more likely to be actions for indemnification under a contract of insurance, but I do not think that the process of solving the difficult problem of privilege is made any easier by taking an inflexible approach to the use of such labels.

31 Nor do I attach any significance to the master's reference to the plaintiff as an "insured injured through the operation of a motor vehicle." I do not believe that he was purporting to announce or to apply any spe cial rule of privilege relating to plaintiffs in this province who advance a claim for damages arising from a motor vehicle accident. Thus the question whether any different rules should be applicable in such cases by reason of the fact that all motorists in this province are represented by a single insurer does not arise and does not need to be decided in this case.

V

32 It follows that I would dismiss the appeal.

Appeal dismissed.

END OF DOCUMENT