CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.

Intervenors

BOOK OF AUTHORITIES
(Respondents' Refusals Motion)

ATTORNEY GENERAL OF CANADA
Department Of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

Derek Leschinsky
Tel: 613-818-1611
derek.leschinsky@cb-bc.gc.ca

Ryan Caron
Tel: 819-635-3797
jonathan.bitran@cb-bc.gc.ca

Jonathan Bitran
Tel: 416-605-1471
jonathan.bitran@cb-bc.gc.ca

Counsel to the Commissioner of Competition

INDEX

LEGISLATION **TAB**

TAB 1

2012 ONSEC 43
Ontario Securities Commission

Phillips, Re

2012 CarswellOnt 14984, 2012 ONSEC 43, 35 O.S.C.B. 10957

In the Matter of the Securities Act, R.S.O. 1990, c. S.5, as Amended

In the Matter of David Charles Phillips and John Russell Wilson

James D. Carnwath Commr.

Heard: November 26, 2012
Judgment: November 30, 2012
Docket: None given

Counsel: Bruce O'Toole, Kate McGrann, for Respondents
Yvonne Chisholm, for Ontario Securities Commission

***James D. Carnwath Commr.*:**

I. Introduction

1 In this motion, David Charles Phillips ("*Phillips*") and John Russell Wilson ("*Wilson*") (together, the "*Respondents*"), seek disclosure of certain documents in the possession of Staff of the Ontario Securities Commission (the "*Commission*" and "*Staff*"). The Respondents say that the documents they seek are relevant to Staff's allegation that they engaged in fraud. Staff submits that the documents the Respondents seek are irrelevant to the allegations and in many cases privileged.

2 For the following reasons, the motion is allowed in part, and Staff is ordered to disclose certain of the documents requested, as set out below, subject to privilege.

3 The hearing on the merits is scheduled to commence on February 11, 2013, and to continue on February 13, 14, 15, 19, 20, 21, 22, 25, 27 and 28, and March 1, 4, 5 and 6, 2013 (the "*Merits Hearing*"). At the hearing of the motion (the "*Motion Hearing*"), Staff and the Respondents (the "*Parties*") expressed their intent to comply with the disclosure timelines set out in the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "*Rules*"). They are encouraged to be mindful that any further motions in this matter will need to be disposed of quickly to ensure that the Merits Hearing goes ahead as scheduled.

II. Background

4 This proceeding commenced on June 4, 2012, when the Commission issued a Notice of Hearing in relation to a Statement of Allegations issued by Staff on the same day. Staff alleges that the Respondents engaged in fraud, contrary to section 126.1(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "*Act*"), between August 22 and October 28, 2011 (the "*Sales Period*"), by selling and overseeing the sales of securities by the First Leaside Group ("*FLG*"), raising approximately $18.9 million from investors, while withholding important information from investors, namely the August 19, 2011 report of Grant Thornton Limited ("*Grant Thornton*").

5 Four important background facts are undisputed in this motion. First, there is no dispute that in March 2011, Staff urged FLG to retain an independent accounting firm to conduct a viability study, and that FLG selected Grant Thornton from a short-list of firms provided by Staff. Second, there is no dispute that on March 18, 2011, Phillips gave Staff an undertaking that while Grant Thornton conducted its review of FLG (the "*Review*") and for one week after the delivery to Staff of the Grant Thornton

report (the "*Report*"), no sale of debt or equity in certain FLG funds would be made to any investors (the "*Undertaking*"). Third, there is no dispute that the Report was delivered to FLG on August 19, 2011, that FLG delivered it to Staff the same day, and accordingly that the Undertaking expired on August 26, 2011. Finally, there is no dispute that following the expiry of the Undertaking, FLG resumed offering all of its products to investors, including the products described in the Undertaking.

6 The Respondents advise that at the Merits Hearing, they will submit, amongst other things, that: (a) the Report was reasonably viewed by FLG as being neither a material fact nor a material change, Staff did not raise the issue of its disclosure to investors at the time it was delivered to the Respondents and Staff, notwithstanding detailed discussions between Staff and counsel for FLG, Staff was aware that the Undertaking expired one week after delivery of the Report, and Staff was aware that FLG sold its products during the Sales Period; (b) there were no conclusions or recommendations in the Report that required a reassessment of FLG's business model or that would affect the value or risk associated with the securities offered to investors; (c) the decision not to release the Report was made by the full board of directors of First Leaside Wealth Management ("*FLWM*"), who received legal advice; and (d) the decision to sell FLG's equity and debt products was discussed with the full board of directors of FLWM, with counsel present, and Staff was aware that FLG was selling its products, including those mentioned in the Undertaking, during the Sales Period.

III. Documents Disclosed by Staff

7 Staff has provided a substantial amount of disclosure. Staff provided affidavit evidence, which was not disputed by the Respondents, that between June 22 and August 27, 2012, Staff disclosed 49 volumes of material to the Respondents, including: interview transcripts, exhibits and documents of witnesses interviewed by Staff; the Report and other reports prepared by Grant Thornton after it was appointed monitor of FLG; the property valuation reports obtained by FLG in early 2011; documents from the proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA Proceeding*"); corporate documents; corporation profile reports; documents regarding the registration of the Respondents and a number of FLG companies; documents regarding the suspension of First Leaside Securities Inc. ("*FLSI*"), an investment dealer, and F.L. Securities Inc. ("*F.L. Securities*"), an exempt market dealer; correspondence; enforcement notices and replies; contact centre and investigation notes; and discs of emails of the Respondents and another individual during the Sales Period, with an explanation of the computer search terms employed.

IV. Additional Disclosure Requested by the Respondents

8 The Respondents ask for disclosure of the following additional categories of documents:

(a) Drafts of the Undertaking and correspondence, both internal and external, regarding the Undertaking;

(b) Documents evidencing receipt of the Report on August 19, 2011;

(c) Staff's commentary, in internal emails or otherwise, about the Report;

(d) Documents evidencing meetings between Staff and counsel for FLG between March and November 2011, including but not limited to notes taken during the meeting and internal emails following the meeting;

(e) Staff's commentary, in internal emails or otherwise, regarding the September 12, 2011 letter from counsel for FLG to Staff concerning the FLG response to the Report;

(f) Staff's commentary, in internal emails or otherwise, regarding FLG's retainer of Grant Thornton in late September 2011;

(g) Documents evidencing Staff's decision, more than two months after receipt of the Report, to seek a cease trade order; and

(h) the reports filed by FLG under National Instrument 45-106 — *Prospectus and Registration Exemptions* ("*NI 45-106*") and proof of payment made during the Sales Period.

V. The Law On Disclosure

9 The parties agree that in this Motion, the Commission need not determine whether the documents described in paragraph 8 above (the "*Disputed Documents*") will be admissible in the Merits Hearing.

10 The parties agree that Staff's disclosure obligations are set out in Rule 4.3(2), which says:

> In the case of a hearing under section 127 of the Act and subject to Rule 4.7, Staff shall make available for inspection by every other party all other documents and things that are in the possession or control of Staff that are relevant to the hearing. Staff shall provide copies, or permit the inspecting party to make copies, of these documents at the inspecting party's expense, as soon as is reasonably practicable after the Notice of Hearing is served, and in any case at least 20 days before the commencement of the hearing.

11 The Respondents submit that given the nature of Staff's allegations against them (fraud), their good character and the propriety of their conduct is at issue in the proceeding, and therefore section 8 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "*SPPA*") and Rule 4.4 also have application. Section 8 of the SPPA states:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

12 Rule 4.4 is as follows:

> Subject to Rule 4.7, if the good character, propriety of conduct or competence of a party is an issue in a proceeding, Staff shall provide particulars of the allegations and disclose to the party against whom the allegations are made all documents and things in Staff's possession or control relevant to the allegations, as soon as is reasonably practicable after the Notice of Hearing is served, and in any case at least 20 days before the commencement of the hearing on the merits.

13 The parties agree that Staff's duty of disclosure to the Respondents is "akin to the *Stinchcombe* standard", which requires the Crown, in criminal trials, to disclose all relevant information, whether inculpatory or exculpatory, and whether or not the Crown intends to introduce it into evidence (*R. v. Stinchcombe*, [1991] S.C.J. No. 83 (S.C.C.), at paragraph 29 ("*Stinchcombe*")). The Commission has adopted the *Stinchcombe* standard of disclosure in its enforcement proceedings. In *Biovail Corp., Re* (2008), 31 O.S.C.B. 7161 (Ont. Securities Comm.) ("*Re Biovail*"), the Commission summarized Staff's disclosure obligations as follows:

> The parties agree that Staff has a broad duty of disclosure akin to the *Stinchcombe* standard. The Stinchcombe standard requires the Crown to disclose all relevant information, whether inculpatory or exculpatory, subject to the discretion of the Crown, which discretion is reviewable by the court. While the Crown must err on the side of inclusion, clearly irrelevant documents should be excluded, and the initial obligation to separate "the wheat from the chaff" rests with the Crown. Documents should not be withheld if there is a reasonable possibility that doing so would impair the right of the accused to make full answer and defence.
>
> . . .
>
> As a matter of law, Staff has an obligation to disclose to the Respondents all documents that are relevant to this proceeding, whether inculpatory or exculpatory, in accordance with principles akin to those articulated in *Stinchcombe*. There is no dispute between Staff and the Respondents with respect to that conclusion. The obligation to disclose is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them.
>
> . . .
>
> With respect to determining relevance, we adopt the following statement from the Court of Appeal decision in *Deloitte* [*Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2002] O.J. No. 2350 (Ont. C.A.) ("*Deloitte CA*"), at paragraph 44]:

> Relevant material in the *Stinchcombe*, *supra*, sense includes material in the possession or control of Staff and intended for use by Staff in making its case against the [Philip] respondents. Relevant material also includes material in Staff's possession which has a reasonable possibility of being relevant to the ability of the [Philip] respondents to make full answer and defence to the Staff allegations. This latter category includes material that the [Philip] respondents could use to rebut the case presented by Staff; material they could use to advance a defence; and material that may assist them in making tactical decisions.

(

Biovail Corp., Re, above, at paragraphs 15, 32 and 40. See also, for example, *Market Regulation Services Inc., Re* (2008), 31 O.S.C.B. 5441 (Ont. Securities Comm.), at paragraphs 66-68.)

14 In *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 (S.C.C.) ("*Deloitte SCC*"), the Supreme Court of Canada, applying a reasonableness standard of review, accepted that the Commission's use of the *Stinchcombe* relevance standard and its application in that case were reasonable decisions (*Deloitte SCC*, at paragraph 26).

15 The parties agree that the Commission's disclosure power is subject to privilege and that any claims of solicitor-client or litigation privilege raised by Staff in relation to specific documents included in the categories of documents ordered disclosed in this Motion will need to be addressed in another motion before the start of the Merits Hearing.

VI. The Respondents' Submissions

16 The Respondents submit that they need the Disputed Documents in order to make full answer and defence to Staff's allegation that they engaged in fraud. They submit (and it is not disputed by Staff) that in order to prove fraud, Staff must establish the four elements set out by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.) ("*Théroux*"), as follows:

> ... the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> (*Théroux*, above, at paragraph 27)

17 The Supreme Court of Canada further expanded upon the act element and mental element of fraud in the following passage:

> .... To establish the *actus reus* of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act. Under the third head of the offence it will be necessary to show that the impugned act is one which a reasonable person would see as dishonest. Deprivation or the risk of deprivation must then be shown to have occurred as a matter of fact. To establish the *mens rea* of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.

> The requirement of intentional fraudulent action excludes mere negligent misrepresentation. It also excludes improvident business conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. Again, an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused would have no knowledge that the prank would put the property of those who heard it at risk. We are left then with deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk. Such conduct may be appropriately criminalized, in my view.
>
> (*Théroux*, above, at paragraphs 39-40)

18 The Supreme Court of Canada also stated, in *Théroux*, that the *mens rea* element of fraud is subjective, but a guilty mind or wrongful intentions can be inferred from the prohibited acts themselves, barring some explanation casting doubt on such an inference (*Théroux*, above, at paragraphs 20, 21 and 23). Finally, recklessness or wilful blindness as to the consequences of the prohibited acts may be sufficient evidence of wrongful intentions (*Théroux*, above, at paragraphs 26 and 28).

19 The Respondents submit that while they will deny, at the Merits Hearing, that they engaged in any prohibited acts, it will be open to them to provide an explanation that casts doubt on any inference that their actions demonstrate a wrongful intention or that they were reckless or wilfully blind in selling and causing the sales of FLG equity and debt offerings while not disclosing the Report to investors. The Respondents submit that the Disputed Documents are relevant to the "factual matrix" that informed their decisions. They submit that they will be impaired in making full answer and defence if the Disputed Documents are not disclosed.

20 The Respondents also submit that they want the Disputed Documents for tactical reasons, including deciding whether to testify and whether to waive privilege with respect to the communications between Staff and counsel for FLG.

VII. Staff's Submissions

21 Staff submits that the Respondents are attempting to convert the Merits Hearing into an enquiry into Staff's actions and state of mind. Staff submits that the Disputed Documents are not relevant to the allegations, which relate to the Respondents' actions and state of mind during the Sales Period.

22 Staff submits that internal documents evidencing Staff's views, opinions, analysis, and decisions about whether or when to commence proceedings are irrelevant and of no assistance to the Commission. Staff relies on three decisions: *Shambleau, Re* (2002), 25 O.S.C.B. 1850 (Ont. Securities Comm.) ("*Shambleau, Re*"), affirmed by *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629 (Ont. Div. Ct.) ("*Shambleau Div. Ct.*"), *Vancouver Stock Exchange, Re* (1999), 31 B.C.S.C.W.S. 20 (B.C. Securities Comm.) ("*Re VSE*"), and *Mills, Re*, [1999] I.D.A.C.D. No. 41 (Can. I.D.A.) ("*Mills, Re*").

23 In *Mills, Re*, a decision of the Ontario District Council of the (Investment Dealers Assocation ("*IDA*"), the issue was whether IDA Staff should be required to produce to the respondent the report of an investigator who was no longer employed by the IDA and would not be called as a witness for IDA Staff. The report appeared to contain conclusions or recommendations inconsistent with the evidence to be given by another IDA Staff investigator, who would be called to testify. The respondent's counsel submitted that the report might be relevant to the credibility of the witnesses called by IDA Staff, noting also that the respondent would be unable to compel the attendance of the former investigator since the IDA does not have power to power to subpoena witnesses. The disclosure motion was dismissed. The District Council held that "neither *Stinchcombe* nor the cases applying its principles in the regulatory context" go so far as to require the disclosure of documents relating to internal deliberations about whether to commence proceedings (*Mills, Re*, above, at p. 6).

24 In *Vancouver Stock Exchange, Re*, the B.C. Securities Commission overturned a decision of a hearing panel of the Vancouver Stock Exchange ("*VSE*") that ordered VSE Staff to produce internal documents, including internally-generated investigation reports, to the respondent. The B.C. Securities Commission drew a distinction between documents that were gathered by VSE Staff during the investigation (the "fruits of the investigation"), which must be disclosed, subject to privilege, in accordance with Stinchcombe, and documents that were internally generated by VSE Staff, which need not be disclosed:

> It is the responsibility of the hearing panel to determine whether the allegations ... have been met. The views of ... staff, as expressed in internally generated documents such as investigation reports, are of no relevance in this regard.

(*Vancouver Stock Exchange, Re*, above, at page 7).

25 In *Shambleau, Re*, Staff of TSE Regulation Services Inc. ("*RS*") brought an application, pursuant to section 21.7 of the Act, for hearing and review of a decision of the board of the Toronto Stock Exchange (the "*TSE Board*") that upheld a decision of a TSE hearing panel requiring RS Staff to disclose an investigation report to the respondent. The hearing panel held that the report was relevant to opinion evidence that its author, Kim Stewart ("*Stewart*") would give at the merits hearing and would help the respondent cross-examine Michael Prior ("*Prior*"), another investigator who would be called by RS Staff to give expert evidence at the hearing. The Commission overturned the decision of the TSE Board. The Commission held that Stewart was a fact witness, not an expert witness, and her opinions were irrelevant to the decision of the TSE hearing panel:

> Ms. Stewart is a fact witness and her opinions are irrelevant. ... It is ultimately up to the Hearing Panel to make the final determinations on the issues in dispute and Ms. Stewart's opinion or interpretation of the facts, as contained in the investigation report, is of no relevance for the purposes of disclosure.
>
> Unlike in *Howe* [*Howe v. Institute of Chartered Accountants (Ontario)* (1994), 19 O.R. (3d) 483 (Ont. C.A.)], investigators are generally only called as fact witnesses. They introduce the documents, outline the investigation and introduce transcripts but they do not advance opinions on the ultimate issue. It is ultimately up to the Hearing Panel to determine whether, on the facts of the case, Mr. Shambleau executed a trade that was intended to establish an artificial price. Ms. Stewart's opinions, which may or may not be contained in her report, are not relevant to the Hearing Panel's determination.
>
> (

Shambleau, Re, above, at paragraphs 27-28)

26 The Commission held that while *Stinchcombe* required disclosure of the fruits of the investigation, including all of the facts underpinning Stewart's opinion, the report she had generated setting out that opinion was not relevant to the issues before the hearing panel and therefore need not be disclosed.

27 On appeal, the Divisional Court found that the decision of the Commission was not unreasonable. After noting that Stewart had been "extensively cross-examined" by the respondent's counsel about her investigation, the Court made the following comments:

> The duty of disclosure which applies in disciplinary matters is a high one. The Commission recognized this and the standard of disclosure set out in its Reasons is entirely consistent with that set out in *Stinchcombe* (1991), 3 S.C.R. 327 and also that set out in the dissenting reasons of Mr. Justice Laskin in *Howe v. Institute of Chartered Accountants (Ontario)* (1994) 19 O.R. (3d) 483 on which counsel for the appellant relies. The Appellant submits that these cases mandate that the investigative report must in all cases be produced. In *Howe v. Institute of Chartered Accountants (Ontario)*, the report in question was that of an accountant who had examined all the books of the accountant charged with professional misconduct, formed opinions as to the propriety of the accused's conduct and was to be called as an expert witness at the hearing as to his findings. Clearly in those circumstances, the entire report was required to be produced. Mr. Justice Laskin noted that the issue was so clear that there was no need to even examine the report itself to decide that a mere summary of the report

would not suffice. The reasons of Justice Laskin were given in the context of the case before him and did not purport to establish nor does it establish any rule that in all cases all investigative reports must be released.

The basis of the disclosure requirement is found in the duty of fairness. The question is not whether a particular class of documents must be disclosed or not. Whatever disclosure is necessary to satisfy the duty of fairness must be made. The Commission recognized and accepted this and found that in the present case, the disclosure already made satisfied the duty of fairness without the actual report of Kim Stewart, the document gathering investigator, being produced. We are unable to find that the Commission was unreasonable in so finding.

(*Re Shambleau (Div. Ct.)*, above, at paragraphs 6-7)

28 Staff submits that at the Merits Hearing, it will be open to the Respondents to testify about their actions and state of mind, including what advice they received from counsel. The Commission will decide, based on the evidence before it, including Staff's evidence and any evidence that may be introduced by the Respondents, whether Staff has met its burden of proving, on a balance of probabilities, that the Respondents, amongst other things, engaged in fraud contrary to section 126.1(b) of the Act. The Disputed Documents, in Staff's submission, are irrelevant to that decision.

VIII. Analysis

29 The parties agree and the Commission has accepted that Staff's duty of disclosure to the respondents in the Commission's enforcement proceedings is "akin to the *Stinchcombe* standard", which means that Staff must disclose to the respondents all relevant information in Staff's possession or control, whether inculpatory or exculpatory, and whether or not Staff intends to introduce it into evidence at the merits hearing (the fruits of the investigation) (*Re Berry*, *Biovail Corp., Re* and *Deloitte & Touche LLP v. Ontario (Securities Commission)*). Disclosure enables the respondents to know the case they have to meet, prepare to rebut Staff's evidence, and make tactic al decisions about how to present their case. It "is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them." For that reason, "relevance" is defined broadly in the context of disclosure, and includes material that has "a reasonable possibility of being relevant to" the respondents' ability to make full answer and defence to Staff's allegations, though it may not, ultimately, be admitted at the merits hearing. On these principles, there is no dispute. The parties disagree about the application of these principles to the Disputed Documents.

30 Before considering the categories of Disputed Documents, I make the following general remarks. First, it is no answer to a request for disclosure for Staff to say that the documents are, or should be, independently obtainable by the Respondents from another source, or by waiving privilege. That is not the test. Staff is required to disclose all relevant documents in the possession or control of Staff, including documents that evidence communications between Staff and the Respondents or their counsel, subject to privilege. Amongst other things, it is helpful for the Respondents, in making full answer and defence, to "know what Staff knows".

31 It is also no answer to a request for disclosure for Staff to say, in effect, "you know what you did and what you were thinking, and it's for you to provide the evidence". That is not the test. Staff bears the onus of proving its allegations on a balance of probabilities at the Merits Hearing, and Staff is required to disclose to the Respondents all relevant documents it has gathered in the investigation, whether or not they are independently available to the Respondents, subject to privilege.

32 Finally, the parties agree that any claims of privilege in respect of the Disputed Documents will need to be addressed in another motion at a later date, based on an adequate evidentiary record. For the purposes of this Motion, I make no assumptions about whether any of the internal documents sought by the Respondents may raise issues of solicitor-client or litigation privilege.

33 I accept that documents evidencing communications between Staff and the Respondents may be relevant in considering the Respondents' actions and state of mind during the Sales Period and they must, therefore, be disclosed, subject to privilege. I do not accept that Staff's disclosure obligations are limited to the Sales Period because I find that previous events, especially communications with Staff before and during the Sales Period, may be relevant in considering the Respondents' actions and state of mind during the Sales Period.

34 The crux of the dispute between the Parties in this Motion is whether Staff must disclose internally-generated documents evidencing Staff's analysis, commentary, opinion or discussions about commencing proceedings ("*Staff work product*"). *Shambleau, Re* governs the disposition of this question. I find that Staff is not required to disclose Staff work product because it is irrelevant to the issues that will be considered by the Commission at the Merits Hearing.

35 Nothing prevents the Respondents from seeking further disclosure before or during the Merits Hearing. The Commission would then decide the relevance of any particular documents sought by the Respondents in making full answer and defence to the allegations.

IX. Conclusion

36 At the Motion Hearing, Staff provided evidence that it had disclosed "documents evidencing receipt of the Report on August 19, 2011" (item (b) at paragraph 8 above). Staff also advised that the NI 45-106 reports and proof of payment documents (item (h)) will be disclosed, once available to Staff. Staff is required to disclose these documents, if they have not already done so, subject to privilege.

37 Staff also advised, at the Motion Hearing, that it had not been aware that Grant Thornton was retained by FLG in late September 2011 (item (f) at paragraph 8 above). Any such documents in the possession or control of Staff are to be dealt with in accordance with paragraphs 38-39 below.

38 With respect to items (a), (c), (d), (e), (f) and (g) at paragraph 8 above, the Motion is allowed with respect to documents that were gathered during the investigation and documents that evidence communications between Staff and the Respondents and counsel in relation to the allegations, because such documents may be relevant at the Merits Hearing in considering the Respondents' actions and state of mind. Staff is required to disclose these documents, subject to privilege.

39 The Motion is dismissed with respect to internally-generated documents, described in items (a), (c), (d), (e), (f) and (g) at paragraph 8 above, evidencing Staff's analysis, commentary, opinion or discussions about commencing proceedings (Staff work product).

40 For clarity, this order is subject to any privilege issue that may be raised in a subsequent motion, and any further disclosure orders that may be made by the Commission before or during the Merits Hearing. The Parties are urged to attempt to resolve any such issues in a timely way, and in accordance with the Rules, to ensure that the Merits Hearing goes ahead, as scheduled, on February 11, 2013.

TAB 2

Wang v. York Regional Police Services, [2007] O.H.R.T.D. No. 11

Ontario Human Rights Tribunal Decisions

Ontario Human Rights Tribunal

Michael Gottheil (Chair)

March 20, 2007.

File Nos. HR-1192-06 and HR-1193-06

[2007] O.H.R.T.D. No. 11 | 2007 HRTO 11

Between Ontario Human Rights Commission, Commission, and Peter Wang and Rosemary Wang, Complainants, and York Regional Police Services, Bob Muir, Andrew Graham, Respondents

(15 paras.)

Appearances

No appearances mentioned.

INTERIM DECISION

INTRODUCTION

1 This is a complaint brought under the *Human Rights Code*, R.S.O. 1990, c. H.19 as amended ("the *Code*"), alleging a breach of sections 1 and 9.

2 Prior to filing their pleadings, the Respondents requested the production of certain documents from the Commission. The Commission disputed the request, and the Respondents therefore sought an order from the Tribunal compelling production of the documents. After directing the parties to provide submissions on the issue, the Tribunal set a conference call hearing for March 15, 2007.

3 At the telephone hearing on March 15, 2007, Counsel for all parties participated and made submissions and argument on the dispute. Several of the original production requests were no longer in issue as counsel for the Commission and the Complainants confirmed that they had produced all documents within certain of the classes sought by the Respondents.

4 After hearing the parties, the Tribunal issued a brief oral decision. This decision confirms the oral decision.

ISSUES AND POSITION OF THE PARTIES

5 The outstanding production requests fall into two groups of documents. First, the Respondents seek all witness statements, documents and other evidence collected by the Commission in respect of an investigation into a related complaint by these Complainants as against Newmarket Hydro. Second, the Respondents seek "all documents not previously produced by the Commission but which are in the possession of the Commission or its employees and investigators and which relate in any way to the Complaint, including the Commission's handling and processing of the file."

6 The Commission did not dispute the arguable relevance of the first group of documents, but took the position that it was prevented from releasing the documents because of its obligations under the *Freedom of Information and Personal Privacy Act* (*"FIPPA"*). The documents related to a complaint which the Commission had decided not to refer to the Tribunal. In the circumstances and following decisions of the Information and Privacy Commissioner of Ontario (for example: PO-2480), the Commission stated that it was not permitted to release the contents of its investigation file. It did however agree that *FIPPA* did not restrict the release of the documents where the Tribunal has made an order for production, and it consented to such an order being made in this case. The Complainants concurred with the position of the Commission.

7 With respect to the second group of documents, the Commission stated that it had released all documents relating to the "fruits of its investigation", but took the position that internal Commission documents were not arguably relevant and the Respondents were not entitled to an order for production. The Commission argued that internal Commission documents containing opinions of Commission staff or detailing how the Complaint was handled by the Commission were not relevant to the issues before the Tribunal.

8 The Respondents submitted that they sought these documents because they had concerns about how the Complaints were handled by the Commission and how the Commission reached the determination to refer the matters. Counsel submitted that the Commission had investigated the Complaints and had concluded that there was sufficient basis for referring them to the Tribunal. Counsel argued that in a criminal proceeding or civil action it would be able to test the basis for this conclusion, and it should be able to do so in this context.

9 The Respondents did concede that any documents containing opinions provided by Commission counsel would be protected by solicitor-client privilege.

DECISION

10 The Tribunal is satisfied that the first group of requested documents is arguably relevant and therefore should be produced. Having regard to this determination, and the agreement of the parties, the Tribunal so orders.

11 The Tribunal does not accept that there is a basis for ordering production of the second group of documents.

12 It has been consistently held by the Tribunal and the Courts that the Tribunal does not have jurisdiction to review a decision of the Commission to refer a complaint under section 36 of the *Code*. A claim by a respondent that the Commission has acted improperly, or that the investigation was faulty, or that there was insufficient basis for referral, lies to the Divisional Court. It follows then that documents sought only for the purpose to impugn the Commission's handling of a complaint and its decision-making process are not arguably relevant.

13 In addition, such documents are not relevant because the mandate of the Tribunal is to determine whether there has been a violation of the *Code*, and if so, by whom. The proceedings before the Tribunal are in the nature of a trial *de novo*. Whether and on what basis the Commission may have reached a conclusion that there has been a violation of the *Code* is irrelevant to the Tribunal's consideration at this point of the proceeding. (It may be relevant to a claim for costs pursuant to section 41(4)). Again, it follows that internal documents detailing the opinions of Commission staff are not relevant and need not be produced. The request for production of this group of documents is dismissed.

ORDER

14 The Commission is ordered to produce forthwith all witness statements, documents and other evidence collected by the Commission in respect of the investigation of the complaint by these Complainants as against Newmarket Hydro.

15 The parties also agreed to the following timelines for the exchange of pleadings: the Respondents will serve and file their pleadings and make disclosure no later than April 30, 2007. Any Reply by the Commission or the Complainants shall be served and filed no later than May 7, 2007.

TAB 3

2003 BCCA 360
British Columbia Court of Appeal

British Columbia (Securities Commission) v. Scharfe

2003 CarswellBC 1515, 2003 BCCA 360, [2003] B.C.J. No. 1437, 123 A.C.W.S. (3d) 391

British Columbia Securities Commission (Respondent) And Bradley Nixon Scharfe (Appellant)

Finch C.J.B.C., Mackenzie J.A., and Ryan J.A.

Heard: June 13, 2003
Judgment: June 13, 2003
Docket: Vancouver CA030162

Counsel: R. Kyle, R. Bandstra for Appellant
J. Bernardo, L. Herlin for Respondent
R.W. Taylor for D.L. Mason

***Finch C.J.B.C.*:**

1 Mr. Scharfe appeals, with leave, from the decision of the B.C. Securities Commission on 3 September 2002, with written reasons delivered on 16 September 2002. The Commission dismissed the appellant's application for further disclosure of documents. The appellant applies to adduce fresh evidence on this appeal.

2 The proceedings before the Commission were commenced on 27 December 2001 by a Notice of Hearing issued under s.161 of the ***Securities Act***. The substance of the allegations is that the appellant and another person contravened the ***Act*** and engaged in an illegal share trading scheme. The same conduct was the subject of proceedings before the Canadian Venture Exchange (formerly the Vancouver Stock Exchange). The Exchange issued a Citation against the appellant on 22 February 1999. On 26 March 2001, the appellant entered into a Settlement Agreement with the Exchange, and agreed to sanctions in respect of the conduct complained of.

3 In these proceedings before the Commission, the Notice of Hearing refers to the Settlement Agreement and recites the admissions the appellant made in that Agreement. It is apparent that the Commission's case against the appellant is based on essentially the same facts that the appellant admitted to in that document.

4 On the application for further disclosure, counsel for the appellant sought production of any documents that would show communications passing between investigators at the Exchange and the investigating staff at the Commission, related to the allegations in the Notice of Hearing. Counsel said such material was necessary to support Mr. Scharfe's position that the matters in issue were *res judicata*, that he was exposed to double jeopardy, or that the Commission's proceedings amounted to an abuse of process.

5 In its written reasons for dismissing the application, the Commission described the issue this way:

> ¶9 The issue before us was whether communications between Commission and Exchange staff in connection with the matters raised in the notice of hearing are "relevant material gathered in the investigation relating to the allegations in the notice of hearing".

6 The Commission concluded:

> 11 We agreed that relevance must be determined in reference to the allegations in the notice of hearing, not in reference to arguments made by the respondents that are unrelated to those allegations.
>
> 12 We also agreed that only relevant material "gathered in the investigation" should be disclosed. We were of the view that communications between Commission and Exchange staff are not themselves "fruits of the investigation". If those communications enclose or refer to relevant material gathered in the investigation, that material would have to be disclosed; the communications themselves, however, would not.
>
> 13 Therefore, we denied Scharfe's application for disclosure of those communications.

7 I respectfully agree with the Commission that communications passing between the Commission and the Exchange are not relevant to the issues raised by the Notice of Hearing. The appellant's proposed arguments on *res judicata*, double jeopardy and abuse of process are legal issues that may be argued from the record of the two proceedings. Counsel said the communications might show that the Commission and Exchange were "privies" of one another, and that the Commission was therefore estopped from re-litigating the same issues. I do not accept that argument. The mandate and functions of the Commission and Exchange are determined by statute. The conduct and communications of their employees cannot alter their statutory roles.

8 I do not consider that the fresh evidence tendered meets the test for admissibility. It could have been presented on the application before the Commission by the exercise of due diligence. It would not, in any event, have affected the disposition of the application.

9 I would dismiss the appeal.

***Ryan J.A.*:**

10 I agree.

***Mackenzie J.A.*:**

11 I agree.

***Finch C.J.B.C.*:**

12 The appeal is dismissed.

TAB 4

Mitton (Re)

British Columbia Securities Commission Decisions

British Columbia Securities Commission

A. Salvail-Lopez, J.K. Graf and R.J. Milbourne

Heard: September 3, 2002

Decision: September 16, 2002

COR No. 02/103

2002 LNBCSC 697 | [2002] B.C.S.C.D. No. 898 | 2002 BCSECCOM 793

Section 161(1) of the Securities Act, RSBC 1996, c. 418 Michael Lee Mitton and Bradley Nixon Scharfe

Appearing:

Richard N. Bandstra For Bradley Nixon Scharfe.

Lorne Herlin For Commission staff.

Introduction

1 Bradley Nixon Scharfe applied for further disclosure.

Background

2 On March 26, 2001, Scharfe entered into a settlement agreement with the Canadian Venture Exchange (now the TSX Venture Exchange) relating to his participation between December 1995 and March 1996 in a share trading scheme involving companies listed on the Exchange.

3 On December 27, 2001, the Executive Director issued a notice of hearing under section 161(1) of the Securities Act, RSBC 1996, c. 418, against Scharfe and Michael Lee Mitton. The notice alleges that Scharfe and Mitton contravened the Act and acted contrary to the public interest by participating in the share trading scheme.

4 On September 3, 2002, Scharfe applied for an order requiring Commission staff to disclose communications between Commission and Exchange staff in connection with the matters raised in the notice of hearing. We denied Scharfe's application. These are our reasons.

Analysis

The Commission established the standard of disclosure to be met by Commission staff prior to section 161(1) enforcement hearings in Re Cartaway Resources Corporation, [1999] 22 BCSC Weekly Summary 27. At page 39, the Commission said:

> The duty on Commission staff counsel requires disclosure of:
>
> 1. the particulars of the case against the respondents; and
> 2. all relevant material gathered in the investigation relating to the allegations in the notice of hearing, whether Commission staff intend to rely on the material or not, unless there is any special reason why such material should not be disclosed and in those circumstances the special reason should be brought to the attention of the respondents. Of the relevant materials disclosed, Commission

staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not.

5 Counsel for Scharfe advised that he intends to bring a preliminary application alleging abuse of process, in which he will argue res judicata, estoppel and double jeopardy. He submitted that he needs disclosure of the communications between Commission and Exchange staff to bring his application and that he is entitled to this disclosure "because otherwise I have to make it [his application] completely without a factual foundation."

6 He also submitted that this disclosure is relevant and argued as follows:

> ... I believe that Commission proceedings are no different than - in a lot of respects than civil proceedings. The issues a defendant raises in response reflect what is relevant in the proceedings. You can't look at the Notice of Hearing or a Statement of Claim in the abstract. You have to look at what arguments the defendant is going to make to determine what is relevant, and I don't believe Commission Staff has done that here.

7 Commission staff submitted that they have made disclosure to the standard established in Cartaway. This standard requires them to disclosure "all relevant material gathered in the investigation relating to the allegations in the notice of hearing". On the issue of what is "relevant", they rejected Scharfe's analogy between civil proceedings and Commission proceedings, arguing that Commission proceedings are regulatory in nature and designed to protect the public interest. Finally, Commission staff argued that the application to be made by Scharfe is a legal one and does not require a factual foundation. They suggested that Scharfe is attempting to go on a fishing expedition by gaining access to communications between Commission and Exchange staff.

8 The issue before us was whether communications between Commission and Exchange staff in connection with the matters raised in the notice of hearing are "relevant material gathered in the investigation relating to the allegations in the notice of hearing".

9 In Cartaway, the Commission provided additional direction in this regard, observing at page 39 that:

> ... In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not "fruits of the investigation" as suggested by Johnson [a respondent] and need not be disclosed.

10 We agreed that relevance must be determined in reference to the allegations in the notice of hearing, not in reference to arguments made by the respondents that are unrelated to those allegations.

11 We also agreed that only relevant material "gathered in the investigation" should be disclosed. We were of the view that communications between Commission and Exchange staff are not themselves "fruits of the investigation". If those communications enclose or refer to relevant material gathered in the investigation, that material would have to be disclosed; the communications themselves, however, would not.

12 Therefore, we denied Scharfe's application for disclosure of those communications.

A. SALVAIL-LOPEZ
Vice Chair
J.K. GRAF
Commissioner
R.J. MILBOURNE
Commissioner

TAB 5

Cox (Re), 2001 LNBCSC 128

British Columbia Securities Commission Decisions

British Columbia Securities Commission

B.W. Aitken, J.L. Brockman and R. Wares,

Heard: January 30, 2001.

Decision: February 16, 2001.

COR No. 01/031

2001 LNBCSC 128 | [2001] B.C.S.C.D. No. 210 | 2001 BCSECCOM 204

IN THE MATTER OF The Securities Act, R.S.B.C. 1996, c. 418 AND IN THE MATTER OF Thomas William Cox AND IN THE MATTER OF The Canadian Venture Exchange Inc.

Appearing:

For Thomas William Cox, Carey D. Veinotte K. Zimmer.

For The Canadian Venture Exchange Inc.

Larry R. Jackie.

For Commission Staff, Lorne Herlin.

DECISION OF THE COMMISSION

1 This is a hearing and review of a decision of the Canadian Venture Exchange Inc. under section 28 of the Securities Act, R.S.B.C. 1996, c. 418. Thomas William Cox applied to the Exchange for an order compelling Exchange staff to disclose to Cox an investigation report related to a citation that the Exchange has issued against Cox. An Exchange hearing panel refused the application. Cox argues that the Exchange proceeded on an incorrect principle and erred in law in making that decision and asks that we set aside the Exchange's decision and order disclosure of the report.

BACKGROUND

2 At all material times, Cox was an approved person employed by Yorkton Securities Inc., a member of the Exchange and its predecessor, the Vancouver Stock Exchange.

3 Exchange staff alleges in a citation dated February 11, 1999 that Cox:

1. sold shares from an account on instructions of a third party without appropriate authority, and
2. misled or attempted to mislead Exchange staff, contrary to the Rules and By-laws of the Exchange.

4 The alleged trading irregularities occurred on December 4, 1996. The allegation that Cox misled or attempted to mislead Exchange staff arose on August 21, 1997. In an interview with the Exchange's investigator, Chris Perkins, Cox offered an explanation of the events relating to the first allegation. Exchange staff believes its interpretation of those events is the correct one, so it concluded that Cox must be lying. This is the basis of the second allegation.

5 A date for a hearing on the merits has not been set and it appears it will be some months yet before the hearing is held.

6 After completing his investigation Perkins submitted an investigation report to the Executive Committee of the Exchange. The report recommended that proceedings be brought against Cox. Perkins' recommendation was apparently accepted, since the Executive Committee authorized the issue of the citation.

7 On April 22, 1998, the Exchange wrote Cox advising him of the particulars of the allegations. The Exchange said it was relying on the existence of the sell order from a person who had no authority to trade in the account in question and the subsequent execution of the order. Cox had told the Exchange that the sale was intended to have been made from an account of another client. The Exchange advised that it was rejecting that explanation because there was no sell order from the other client and that client's account did not contain any shares of the company that were sold.

8 In addition, Exchange staff has disclosed to Cox all material required to be disclosed under the disclosure standard established in the Cartaway and O'Neill cases (discussed below).

9 Cox also sought production of the Perkins report. Exchange staff refused.

10 Cox applied to an Exchange hearing panel for an order compelling Exchange staff to produce the drafts (if any) and the final version of the Perkins report. In refusing Cox's application on July 5, 2000, the Exchange hearing panel said:

> "For the reason that follow, we have concluded that the Exchange is not obligated to produce the drafts, if any, or the final version of the report of Mr. Chris Perkins in this case.
>
> "In reaching this conclusion, we are cognizant of the very clear direction given by the Commission in the Cartaway and [O'Neill] cases as to what constitutes procedural fairness in administrative proceedings in the securities regulatory context.
>
> "It seems clear that all materials gathered in the course of the investigation, i.e., 'the fruits of the investigation', as they were characterized in Cartaway, have been provided to Mr. Cox or his counsel, together with the particulars of the allegations made.
>
> "What has not been provided is the report, which was created by the investigator in preparation for the hearing. We agree with the Commission's statement in [O'Neill] that '[i]t is the responsibility of the hearing panel to determine whether the allegations in the Citation have been met. The views of the Exchange staff, as expressed in internally generated documents, such as investigation reports, are of no relevance in this regard.' As such, we also find the report in this case not relevant.
>
> "We have considered carefully the decision of Boyd J. in Milner, decided since both the decisions in Cartaway and [O'Neill] were rendered. . . . nothing in the decision suggests that it has any application in the securities regulatory field. The B.C. Court of Appeal in Rak v. B.C. Supt. of Brokers (1990), 51 B.C.L.R. (2d) 27 (C.A.) at 34, Hollinrake J.A., stated that 'trading in securities is not a profession in the sense that doctors, lawyers, architects, engineers, accountants and other professionally trained persons can be said to be engaged in a profession.'
>
> " . . . we are not convinced that Milner gives us any reason to doubt the proposition in [O'Neill] stated above."

11 Cox argued that the delay in bringing the matter to a hearing constituted special circumstances that would justify production of the report. Of this, the hearing panel said,

> "It is understandable that witnesses' memories may no longer be as reliable and that the attendance of all relevant witnesses may not be assured, but we do not necessarily see the link between these circumstances and the investigator's report."

ARGUMENTS AND ISSUES

12 Cox says he needs to see the Perkins report, primarily to prepare for his cross examination of Perkins with

respect to the second allegation. Cox argues that in refusing to order production of the Perkins report the Exchange proceeded on an incorrect principle or erred in law. He asks that the Exchange's decision be set aside.

13 The Exchange argues that the Exchange hearing panel followed applicable law and the Commission's directions on disclosure. The Exchange asks that the Exchange's decision be confirmed.

14 Commission staff supports the position of the Exchange.

DISCUSSION

15 The Commission has established in previous decisions that it will generally confirm a decision of the Exchange unless:

(a) the Exchange has proceeded on an incorrect principle,

(b) the Exchange has erred in law,

(c) the Exchange has overlooked some material evidence,

(d) new and compelling evidence is presented to the Commission that was not presented to the Exchange, or

(e) the Commission's view of the public interest is different from the view of the Exchange.

Disclosure under Cartaway

16 Re Cartaway Resources Corporation, [1999] 22 BCSC Weekly Summary 27 was an application by a respondent, Johnson, for disclosure by Commission staff of various documents and information. The allegations against Johnson in the notice of hearing were serious. Commission staff were seeking orders that would deny his use of exemptions under the Act, prohibit his employment in the securities industry, prohibit his acting as an officer or director of any issuer and impose administrative penalties.

17 The disclosure sought included "all of the notes, records, memos or other materials created" by the investigator.

18 Johnson argued that the disclosure standard set forth by the Supreme Court of Canada in R. v. Stinchcombe, [1991] 3 S.C.R. 326 ought to apply because it had been applied in Hammami v. College of Physicians and Surgeons of British Columbia, [1997] 9 W.W.R. 301, a professional discipline case.

19 Stinchcombe was a case involving an indictable offence under the Criminal Code (Canada). The court, after noting (at p. 333) that the "fruits of the investigation" in possession of the Crown are "the property of the public to ensure justice is done", described the Crown's disclosure obligations to the defence in such cases as follows (at p. 343):

> "With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.
>
> . . .
>
> "There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist, then a 'will say' statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call.
>
> . . .

> "I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced . . . . If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor."

20 A full understanding of the Hammami case requires information on its background. Hammami had been found by the British Columbia College of Physicians and Surgeons not to have the requisite skills and knowledge to practice and his right to practice was withdrawn. Prior to the hearing the College gave particulars of the complaints to Hammami but did not disclose the names of the patients and complaining doctors. The patients' names were eventually disclosed. Much later, after the College made its decision and as a result of requests from Hammami, the names of the doctors were also disclosed.

21 It turned out that some of the doctors on the investigating committee had treated some of the patients whose treatment by Hammami was in issue, and one of those doctors had filed a complaint against Hammami. As a result the College's decision was overturned by the British Columbia Supreme Court on the basis that the committee investigating Hammami's conduct was tainted by a reasonable apprehension of bias.

22 In later related proceedings, Hammami asked the College to disclose his complete file. The College refused. This gave rise to the Hammami case on which Johnson relied in Cartaway.

23 In Hammami, Williams C.J.S.C. of the Supreme Court of British Columbia reviewed several administrative law cases in which the application of the Stinchcombe standard was considered. The court concluded (at p. 322) that:

> " . . . in cases arising from the administrative law context where the decision of an administrative tribunal might terminate or restrict the 'accused's' right to practice that career or seriously impact on a professional reputation then the principles in Stinchcombe, in respect of disclosure may well apply.
>
> . . . in appropriate cases the court's approach should be as outlined by the Court of Appeal in G. (J.P.) v. British Columbia (Superintendent of Family & Child Services)i and that is where disclosure 'might have been useful' then disclosure should be made by the Crown (or tribunal) unless there is 'any special reason why such material should not be disclosed' and in those circumstances the special reason should be brought to the attention of the judge or tribunal."
>
> [emphasis added]

The court observed, "When I consider the background facts in the case at bar I must say that I have an uneasy feeling about what might have been revealed had the appellant been given his file" and concluded that the Stinchcombe standard should apply to the case "particularly bearing in mind its unsettling history".

24 In Cartaway, the Commission did not apply Hammami. The Commission characterized the disclosure obligation as an element of procedural fairness, observing that the Supreme Court of Canada has stated that "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case": Knight v. Indian Head School Division No. 19 of Saskatchewan, [1990] 1 S.C.R. 653 at 682.

25 Considering the context, the Commission noted that the primary objective of securities regulation is the regulation of the market and the protection of the public interest and referred to the Supreme Court of Canada decision in Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. 584 in which the court said (at p. 588):

> "The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business."

26 The Commission noted (at p. 36):

> "In several subsequent cases where certain provisions of the Act and powers of the Commission were challenged, the Supreme Court of Canada again confirmed the regulatory nature of the Act and the powers

given to the Commission to administer it. See Pezim v. British Columbia Securities Commission, [1994] 2 S.C.R. 557 and British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3 in which Sopinka J. and Iacobucci J. noted at page 39 that:

"'[T]he Securities Act is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compliance with the Act.'"

27 The Commission distinguished Stinchcombe on the basis that proceedings before the Commission were administrative, not penal, citing the Supreme Court of Canada's decision in Brousseau v. Alberta Securities Commission.ii In considering Hammami, the Commission noted that the court applied the Stinchcombe standard in light of that case's "unsettling history".

28 Considering the application before it, the Commission said (at p. 39):

"In our view, disclosure and the demands for disclosure of materials must have some relevance to the proof or defence of allegations in the section 161(1) notice of hearing. By necessity this means that Commission staff counsel will have to exercise discretion and judgment in determining what materials fit within those parameters. In our view, if Commission staff counsel view materials as "potentially relevant to the respondents" the materials would fit within the above parameters and should simply be disclosed as relevant materials but materials upon which Commission staff may not rely. In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not 'fruits of the investigation' as suggested by Johnson and need not be disclosed.

. . .

"In our view, it is appropriate to restate the standard of disclosure that we expect Commission staff counsel to make to all respondents in section 161(1) enforcement hearings. The duty on Commission staff counsel requires disclosure of:

"1. the particulars of the case against the respondents; and

"2. all relevant material gathered in the investigation relating to the allegations in the notice of hearing, whether Commission staff intend to rely on the material or not, unless there is any special reason why such material should not be disclosed and in those circumstances the special reason should be brought to the attention of the respondents. Of the relevant materials disclosed, Commission staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not."

29 Three things are noteworthy about Cartaway. First, it significantly expanded the disclosure obligation that was set out in Re Simon Fraser Resources et al., [1996] 47 BCSC Weekly Summary 25.

30 Second, the Cartaway standard is not far removed from the Stinchcombe standard. Certainly any relevant material gathered in the investigation must be disclosed under both standards. To the extent the two standards differ, the primary distinction is that in addition to "fruits of the investigation", Stinchcombe, at least as interpreted in Hammami, may require disclosure of materials created by staff in connection with the investigation or for the purposes of the hearing, where Cartaway would not.

31 Third, the Cartaway standard is consistent with the disclosure mandated for proceedings under the rules applicable to proceedings before the Ontario Securities Commission under the Securities Act (Ontario). The

Cartaway standard exceeds that mandated for proceedings before The Toronto Stock Exchange under its Rules. In those rules, only materials that the parties intend to rely on or refer to in the hearing need be disclosed.

Application of Cartaway to Exchange Proceedings: O'Neill

32 In Re Kevin Patrick O'Neill, [1999] 31 BCSC Weekly Summary 20 the Commission held that the Cartaway disclosure standard applies to proceedings before the Exchange. The Commission said, "It has been recognized by the courts that the Exchange, in exercising its regulatory responsibilities, plays a key role in the protection of the public interest in our capital markets" and cited Supreme Court of Canada decision in Pezim.

33 In Pezim, the court said (at p. 589):

> "It is important to note from the outset that the [Securities] Act is regulatory in nature. In fact, it is part of a much larger regulatory framework which regulates the securities industry throughout Canada. . . .
>
> "Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. . . . Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE [the Exchange's predecessor] falls under this head."

The Milner Case

34 Subsequent to the Cartaway and O'Neill decisions, the Supreme Court of British Columbia considered disclosure issues in Milner v. Registered Nurses Association of British Columbia (1999), 71 B.C.L.R. (3d) 372. Milner was a judicial review of a decision by the Registered Nurses Association to terminate Milner's membership in the Association. One of the grounds on which the court was invited to overturn the decision was the failure of the Association to disclose the investigator's report and notes made by the investigator of witness interviews, as well as other documents and materials.

35 After a review of the case law, the court said (at p. 380), " . . . the Courts have clearly moved toward requiring administrative disciplinary tribunals to approach, if not meet, the Stinchcombe standard" and referred to Markandey v. Board of Ophthalmic Dispensers (Ontario) (March 19, 1994), O.J. No. 284 (QL) (Ont. Gen. Div.) in which the court said (at p. 21):

> " . . . tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators."

36 Applying these standards, the court considered the non-disclosures. In a section entitled "Category 1 Documents: Investigator's Report and Notes", the court considered the non-disclosure of the notes of witness interviews, but made no mention of the investigator's report. The court carefully considered every element of non-disclosure it thought may have impaired Milner's ability to make full answer and defence, so this omission suggests that the investigator's report was not considered relevant.

Analysis

37 Cox argues that the Exchange errors are twofold. First, he says that Milner mandates the Stinchcombe standard and the Exchange erred in distinguishing Milner on the basis that brokers are not "professionals" as stated in Rak. Cox argues that what matters is the seriousness of the consequences to the respondent, not his or her "professional" status.

38 Second, Cox says that Cartaway is in error in relying on the distinction between penal and non-penal consequences. He argues that the obligation to disclose is a component of procedural fairness, which he says must be considered in the context of the tribunal, its powers and the effect on the respondent, according to Baker v. Minister of Citizenship and Immigration et al. (1999) 174 D.L.R. (4th) 193 (Supreme Court of Canada).

39 In our opinion the Exchange was correct in not following Milner, although not for the reasons it expressed. We agree with Cox that whether or not he is properly characterized as a professional is not determinative of the issue. Disclosure is a matter of procedural fairness. It is clear from the authorities, in particular Baker, that to the extent the position of the respondent is relevant to the degree of procedural fairness that applies, what matters is the potential impact of the decision on the respondent, not his or her professional status.

40 In our opinion, there is nothing in the Milner decision that casts doubt on Cartaway as the appropriate standard for disclosure by Exchange staff. Cox cited several cases, mostly professional discipline cases, expressing approval of Stinchcombe or near-Stinchcombe disclosureiii. However, it is important to consider just what was in issue in these cases. With one exception (Hammami), all of the cases dealt with witness statements, notes of witness interviews, videotapes or other materials that were clearly relevant material that would be disclosed under the Cartaway standard. Therefore, no expansion of the Cartaway standard would be necessary to ensure disclosure of such materials in proceedings before the Commission or the Exchange. So while some may be tempted to interpret these cases as importing a broader standard, in their result they required no broader a standard than Cartaway.

41 In Hammami, the court ordered the production of the entire investigation file. However, the court did not go so far as to mandate a blanket application of Stinchcombe. Furthermore, it said that disclosure of everything "useful" in the absence of "special reasons" not to disclose should be required only in "appropriate" cases. It seems clear that the "background facts" and the "unsettling history" of the case were major factors in the court's decision.

42 Milner itself mentions an investigation report, but in fact the decision deals only with material that would be disclosed under a Cartaway standard.

43 Cox argues the distinction between penal and non-penal consequences, as discussed in Cartaway, is not relevant, and to the extent that Cartaway depends on that distinction, it is wrongly decided. No authority was provided to suggest that the distinction between penal and non-penal consequences (as observed by the Supreme Court of Canada in Wigglesworth v. The Queen (1987), 45 D.L.R. (4th) 235) is now irrelevant. However, it follows that the closer the courts move to the Stinchcombe standard, the distinction assumes less importance, at least in the context of disclosure by the Exchange or the Commission.

44 It is therefore more useful, as Cox argues, that disclosure be viewed in the context of procedural fairness.

45 Baker articulated the factors to consider in determining the degree of procedural fairness that will apply. L'Heureux-DubÚ J. began by observing that:

> "I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker."

46 L'Heureux-Dube J. then identified five factors to consider:

1. The nature of the decision being made and the process followed in making it. In describing this factor, L'Heureux-DubÚ J. said:

> "The more the process provided for, the function of the tribunal, the nature of the decision-making body and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."
>
> Applying this test, we find that disciplinary proceedings before the Exchange tend to the judicial end of the spectrum.

2. The nature of the statutory scheme and the terms of the statute under which the tribunal operates. This has been described in the discussion of Cartaway and O'Neill above.
3. The importance of the decision to the individual affected. Generally, Exchange disciplinary proceedings are of significant importance to an approved person. An individual in these proceedings faces fines, suspension and expulsion.
4. The legitimate expectation of the individual with respect to the procedure to be followed. As an approved person, Cox would expect the Exchange to follow the procedures in its Rules and By-laws..
5. The authority of the tribunal to set its own procedures. The Exchange, like the Commission, has the authority to establish its own procedures for hearings.

47 Considering these factors, it is clear that disciplinary proceedings before the Exchange would attract a reasonably high level of procedural fairness. Is the Cartaway disclosure standard consistent with that level of procedural fairness?

48 We find that it is. As noted above, the Cartaway standard is not far short of Stinchcombe. To the extent it does fall short of Stinchcombe, it is consistent with the function and role of the Commission and the Exchange as part of the system of securities regulation in Canada. In Stinchcombe itself, the court cautioned against applying the standard too broadly, even within the criminal law sphere (at p. 342):

> "The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of a more limited nature."

49 Proceedings before the Exchange and the Commission are administrative. The Legislature has chosen an administrative agency to regulate securities markets because the flexibility and responsiveness of the administrative structure is well suited to the demands of the fast moving commercial sector. (The case before us is perhaps not the best example of that.) It is consistent with this intent that securities regulatory agencies afford a high level of procedural protection yet not be burdened with the highest standards possible. As the Supreme Court of Canada said in Knight (at p. 685):

> "It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (de Smith's Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create 'procedural protection' but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome."

50 It is clear from these decisions, and the other decisions of the Supreme Court of Canada cited earlier that refer specifically to securities regulation, that the court considers factors such as flexibility, expediency, pragmatism and the economic regulation function of the securities regulatory system to be significant is assessing the procedures to be followed by securities regulatory agencies.

51 In our opinion, the standard of disclosure set by Cartaway is consistent with the high level of procedural fairness to which respondents are entitled in proceedings before the Commission and the Exchange. It also reflects the role of the Commission and the Exchange in protecting the public interest in connection with the regulation of our securities markets.

52 In this case, anything contained in the Perkins report that is among the "fruits of the investigation" of Exchange staff has been disclosed to Cox under the Cartaway standard.

53 Cox argues that the delay in this case amounts to special circumstances that justify disclosure of the Perkins

report. In our opinion, Cox has not established how disclosure of the report will ameliorate the effects of the delay. The connection between the delay and disclosure of the report is no more apparent to us than it was to the Exchange hearing panel.

54 Finally, Cox argues that to defend himself against the second allegation in the citation, he needs to see the report in order to divine why Perkins chose not to believe Cox's version of the events. He says, for example, that if Perkins' view of Cox's truthfulness changed between drafts of the report, that would open a line of cross examination that he ought to be able pursue.

55 We do not agree. The hearing panel will determine whether or not Cox lied, based on the evidence. Perkins' opinion on that issue is irrelevant.

DECISION

56 We find that in refusing to order Exchange staff to produce the Perkins report, the Exchange did not proceed on an incorrect principle or err in law. The Exchange's decision is therefore confirmed.

i (1993), 77 B.C.L.R. (2d) 204 (B.C.C.A.).
ii [1989] 1 S.C.R. 301 at 323.
iii Markandey, supra; Thompson v. Chiropractors Association of Saskatchewan (1996), 36 Admin. L.R. (3d) 273; Lawrence E. Pierce v. The Law Society of British Columbia (2000), B.C.S.C. 887; Nrecaj v. Canada (Minister of Employment and Immigration) (1993), 3 F.C. 630 ; Howe v. Institute of Chartered Accountants (Ont.) (1994), 27 Admin. L.R. (2d) 118; Hammami, supra; and Milner, supra.

B.W. AITKEN
J.L. BROCKMAN
R. WARES

TAB 6

Mills (Re) IN THE MATTER OF The Investment Dealers Association of Canada, and Richard Mills, [1999] I.D.A.C.D. No. 41

Investment Industry Regulatory Organization of Canada Discipline Decisions

Investment Dealers Association of Canada

Preliminary ruling: December 16, 1999.

[1999] I.D.A.C.D. No. 41

RULING OF THE ONTARIO DISTRICT COUNCIL

Heard: December 10, 1999.
Preliminary ruling: December 16, 1999.

District Council: Taylor. P. Anisman, Chair, S. Church and K.L.

Appearances

Peter C. Wardle and Jason C. Markwell, for the respondent(applicant on the motion). Stephanie McManus, for the Investment Dealers Association of Canada (respondent on the motion).

RULING

This motion raises a narrow, but difficult issue concerning the scope of disclosure in Association disciplinary proceedings. The respondent, Richard Mills, requests that the Association disclose to him any reports prepared by Douglas Lane, one of its investigators, in connection with its investigation of the events which led to this proceeding. Mr. Lane is no longer employed by the Association and counsel for the Association has advised that he will not be called as a witness on behalf of the Association at the hearing. The Association intends to call Vanessa Gardiner, the Manager of Investigations in its Enforcement Division, to provide expert testimony. It has provided to the respondent copies of a report prepared by Ms. Gardiner, transcripts of all interviews conducted and all documents obtained in the course of its investigation. The issue before the District Council is whether the Association should be required to produce the report of an investigator who will not be called as a witness when the report appears to contain conclusions or recommendations inconsistent with the evidence to be given by another member of the Association's investigation staff.

Preliminary Issue: Waiver of Objections

After convening the hearing, the Chair of the District Council informed the parties of facts which may give rise to a perception of possible bias. First, Mr. Church's wife was employed as the compliance manager with the respondent's employer, Nesbitt Burns Inc., until approximately two months ago. Mr. Church believes it is likely that his wife knew the respondent, but he has never discussed the respondent with her and has not himself met Mr. Mills.

Second, prior to March 1996 Ms. Taylor had worked with William Haldane, the affiant on this motion who is expected to testify at the hearing on behalf of Mr. Mills. Mr. Haldane was an investigator at The Toronto Stock Exchange (the "TSE") during the period of Ms. Taylor's employment there as a compliance officer; they discussed

various enforcement matters, although none of them related to Mr. Mills. Mr. Church also believes that his wife may know Mr. Haldane, although he himself does not, apart from a few casual encounters.

Early in the course of submissions on behalf of the respondent, it became clear that the Association intends to call Ms. Gardiner as a witness. After a brief adjournment, the Chair advised the parties that Ms. Taylor and Ms. Gardiner worked together as compliance officers at the TSE. In late 1995 or early 1996 Ms. Gardiner came to the TSE from Research Capital Corporation, the member firm at which Ms. Taylor is currently employed; Ms. Taylor left to join her present firm soon thereafter. During that brief period Ms. Taylor was involved in Ms. Gardiner's orientation at the TSE, and after Ms. Taylor left the TSE they had conversations about matters at Research Capital. They have attended the same social gatherings on occasion, but they do not have a personal social relationship. Mr. Church disclosed that Ms. Gardiner's name has come up in conversations with his wife, but he has never met her, other than when she has appeared before a District Council on which he sat.

The Chair also advised that Mr. Church and Ms. Taylor believe that the relationships disclosed will not affect their impartiality or judgment in this proceeding. He asked the parties whether they had any objection to Mr. Church or Ms. Taylor continuing to sit as members of the District Council and, each time, adjourned the hearing to permit counsel for the parties to consider the matter and seek instructions.

In each case Ms. McManus, counsel for the Association, stated that the Association has no objection to Mr. Church and Ms. Taylor sitting on the District Council in this proceeding. Mr. Wardle, counsel for the respondent, stated that he was unable to reach Mr. Mills but that he had instructions on Mr. Mills' behalf to agree to the motion continuing and thought it highly unlikely that Mr. Mills would object to Mr. Church's or Ms. Taylor's participation in the remainder of this proceeding. He said that he would advise the District Council of his client's position later in the day. On this basis the District Council proceeded with the hearing of the motion. On the afternoon of December 10, 1999, Mr. Wardle informed the Chair by fax-transmitted letter that Mr. Mills "is prepared to proceed with this matter with the panel as presently constituted."

The Facts

This proceeding was initiated by a Notice of Hearing dated November 8, 1999 (the "Notice"). The Notice alleges that between January 1993 and March 1997, Mr. Mills failed to supervise the actions of Duncan Roy, a registered representative at Nesbitt Burns Inc., as required by IDA Policy II and failed to ensure that recommendations made for two clients were appropriate for them. The Notice states that both of these clients complained to the Association, Robert Long in March 1995 and Hartley Catania in July 1997 (Notice: Particulars, paras. 1 and 11). On the basis of the evidence before the District Council on this motion, which was contained in an affidavit sworn by William Haldane on December 3, 1999 (the "Haldane Affidavit"), it appears that Mr. Lane was the member of the Association's staff who investigated the initial complaints from Mr. Long, and may have participated in investigating Mr. Catania's complaint, as well. Mr. Lane completed his initial investigation in June 1996, as indicated in a "file list" attached to the Haldane Affidavit as Exhibit "C" and stamped as disclosed by the Association on December 11, 1998 (Haldane Affidavit, para. 4(d)). The file list indicates that Mr. Lane completed a "write-up" of this file "for closing" on June 26, 1996. He apparently advised Mr. Haldane, without disclosing "any information regarding the substance of his reports," that he prepared a report which recommended against taking disciplinary action against Mr. Mills (Haldane Affidavit, para. 9(a)).

Some time after receipt of Mr. Catania's complaint the investigation was reopened. In September 1998 Mr. Lane interviewed Mr. Mills and may have prepared a second report or supplemented his earlier one (Haldane Affidavit, paras. 4(e) and 9(d)). Although Mr. Lane continued to be of the same view concerning proceedings against Mr. Mills, in November 1998 the Association staff advised Mr. Mills that it intended to take disciplinary action against him (Haldane Affidavit, paras. 4(f) and 9(c)). The Notice was issued on November 8, 1999. On November 10, 1999, Mr. Wardle requested a copy of Mr. Lane's investigation report; the same day Ms. McManus refused the request on the basis that investigation reports "are confidential and it is Association practice not to include them as a part of disclosure for that reason" (Haldane Affidavit, paras. 7-8). On November 17, 1999 the Association served on Mr. Mills a report prepared by Ms. Gardiner "who has reviewed and analysed the Long and Catania accounts and offered certain opinions with respect to the issues in this hearing" (Haldane Affidavit, para. 5).

General Principles

This is a disciplinary proceeding convened pursuant to paragraph 20.11 of the Association's By-laws under which the District Council has authority to impose serious sanctions, including suspension or revocation of an individual's approval by the Association (By-laws, para. 20.10(a)). Counsel agreed on the fundamental principles applicable to a proceeding of this nature. The common law rules of natural justice apply; a respondent is entitled to minimum procedural fairness, including the right to be represented by counsel, to call, examine and cross-examine witnesses, and to receive reasonable information on the case against him. The Association's By-laws themselves provide for these elements of fairness; see paras. 20.11-20.12. In particular, paragraph 20.11(d) requires a notice of hearing to contain a summary of the facts alleged and intended to be relied on by the Association and the Association's conclusions based on those facts.

Both counsel also agreed that the prescribed contents of a notice of hearing are only a minimum. Although Mr. Wardle did not argue the application of the Canadian Charter of Rights and Freedoms to disciplinary proceedings before the District Council (as to which see, e.g., In the Matter of Derivative Services Inc., (1999) 22 O.S.C.B. 5544 (O.D.C.) at 5553), he and Ms. McManus agreed that the principles underlying the Supreme Court of Canada's Stinchcombe decision requiring disclosure to an accused in a criminal proceeding do apply. Thus, the Association has an obligation, in addition to the notice requirements in the By-laws, to make a respondent fully aware of all relevant evidence that is not privileged so that the respondent may make full answer and defence; cf. Re Howe, *(1994) 19 O.R. (3d) 483* (C.A.) at 495 (per Laskin J.A. dissenting). This obligation is intended to avoid surprise to a respondent and to ensure him a fair hearing. It thus reinforces the requirements of natural justice, as well as the policies underlying the Association's procedural by-laws; cf., e.g., In the Matter of Milewski, (1999) 22 O.S.C.B. 5404 (O.D.C.) at 5405-5406.

Both counsel also appear to accept that the Association's disclosure obligation requires disclosure of evidence that is relevant or potentially relevant to a response to the allegations in a notice of hearing, whether or not the Association's staff intends to utilize that evidence in the proceeding, and that the Association must disclose exculpatory as well as inculpatory evidence in its possession; see, e.g., In re Cartaway Resources Corp., [1999] 22 B.C.S.C. Weekly Summary 27 at 32-33. The difference between them relates to the scope of the disclosure obligation and the application of these principles to the facts of this case.

Submissions

Both counsel cited court and securities commission decisions to support their position. Mr. Wardle relied particularly on the dissenting reasons of Mr. Justice Laskin in Re Howe and the acceptance of those reasons by the Ontario Securities Commission (the "OSC"); see In re Glendale Securities Inc., (1995) 18 O.S.C.B. 5975 at 5982. Ms. McManus relied primarily on two decisions of the British Columbia Securities Commission (the "BCSC") refusing to require disclosure of investigation reports prepared in one case by BCSC staff and in another by VSE enforcement staff; see In re Cartaway Resources Corp., supra; In re O'Neill, [1999] 31 B.C.S.C. Weekly Summary 20.

Mr. Wardle argued that Mr. Lane's investigation report or reports should be disclosed as they may contain facts of which the respondent is not aware, comments concerning the credibility of Association witnesses and opinions concerning the events that occurred. He said that the information contained in the reports could be useful with respect to the evidence to be provided by Mr. Haldane on behalf of the respondent and for cross-examination of Ms. Gardiner or Mr. Long. He emphasized that because the Association does not have power to subpoena witnesses, he is unable to require Mr. Lane's attendance at the hearing. This, he said, creates an uneven playing field, as the Association intends to call Ms. Gardiner, whose evidence will relate to Mr. Mills' supervisory obligations. He submitted that Mr. Lane's opinion, as expressed in his investigation report or reports, is relevant in view of the fact that the Association intends to have another member of its staff give opinion evidence on the same matters.

Ms. McManus submitted that the Association fulfilled its disclosure obligations by providing Mr. Mills with all relevant evidence obtained by the Association in the course of its investigation. She, and Mr. Wardle, informed the District Council that Mr. Mills has received copies of Mr. Lane's interviews of Mr. Long, Mr. Roy and Mr. Mills and of

all account documentation and other relevant documents on which Mr. Lane based his report. He has also been provided with a transcript of an interview with Mr. Long's son, Richard Long, which was not conducted by Mr. Lane, and a copy of Ms. Gardiner's report, which Ms. McManus informed us is based on Ms. Gardiner's analysis of the evidence, although she did have access to Mr. Lane's investigation report.

Ms. McManus submitted that the Association's staff will be calling Ms. Gardiner as an expert witness, and will not be calling Mr. Lane, who was merely an investigator and not an expert. She submitted that Mr. Lane's opinion, as distinguished from the evidence on which it was based, is not relevant to the issues to be decided by the District Council. In response to a question from the District Council, Ms. McManus admitted that disclosure of Mr. Lane's investigation report would cause no harm to the Association in this case, but argued that it might create a precedent which could be harmful to the integrity of the Association's investigative process and the candour displayed in it.

Reasons

As Mr. Wardle submitted, none of the cases cited is binding on the District Council, although they are of persuasive value. It is also the case that none of them is directly applicable to the facts presented on this motion.[1] Re Howe, on which Mr. Wardle placed primary reliance, dealt with an investigation report that formed the basis of the charges against Mr. Howe, prepared by an investigator who was a, and possibly the, key witness for the prosecution. Mr. Justice Laskin stated that the Institute's duty to act fairly required disclosure of the investigator's "expert report on which the charges were based when the author of the report is going to testify for the prosecution" (emphasis added); see Re Howe, supra, at 497. In these circumstances, it is reasonable to interpret Mr. Justice Laskin's reference to the fact that there was "not a level playing field" (at 500) as referring to the ability of Mr. Howe to meet the case against him without being taken by surprise. Thus disclosure of the report to permit cross-examination of the person who prepared it was especially important.

Similarly, in Glendale the Ontario Securities Commission required its staff to disclose otherwise confidential settlement communications with "a critical, if not the key, witness for Commission staff", who was also a respondent in the same proceeding, because of the potential significance of such communications for the reliability and credibility of the evidence to be given by that witness. Again, the disclosure related to its potential use in cross-examining the person who made the statements. Even then, the OSC was careful to state that they might not have required disclosure of the settlement discussions had the individual in question not been both a respondent and a likely critical witness against the other respondents; In re Glendale Securities Inc., supra, at 5983.

These authorities are not directly applicable here. It

seems unlikely that the decision to proceed against Mr. Mills was based on Mr. Lane's report, which recommended against

such

proceedings, and Mr. Lane is not expected to be a witness at

the hearing. Rather, any statements made in his investigation

report are sought by the respondent for purposes of preparing

his own expert witness and cross-examining other persons to be

called as witnesses by the Association.

In the decisions cited by Ms. McManus, the BCSC refused to require disclosure of investigation reports and similar internal staff documents, drawing a distinction between evidence obtained in the course of an investigation and notes, records, memoranda and other materials "created by" investigative staff; see In re Cartaway Resources Corp., supra, at 31 and 39-40; In re O'Neill, supra. Even if these decisions were binding on the District Council, they would not be determinative. As the BCSC recognized (citing Board of Education of the Indian Head School Division No. 19 of Saskatchewan v. Knight, *[1990] 1 S.C.R. 653* at 682), procedural fairness is a flexible concept the content of which may vary from tribunal to tribunal and the application of which depends on the specific context, including the facts, of each case; see In re Cartaway Resources Corp., supra, at 33; In re O'Neill, supra, at 23-24. In neither

of these cases was the person who prepared the report to be called as a witness. Nor was there any issue raised concerning the relevance of the investigation report, or other requested material, to the evidence to be given by another member of the prosecuting organization's enforcement or investigative staff, as there is here. The decisions of the BCSC, therefore, also do not address the precise issue raised on this motion.

As a result it is necessary to consider disclosure of Mr. Lane's investigation report or reports on the basis of first principles. The District Council accepts that a disciplinary proceeding pursuant to paragraph 20.11 of the Association's By-laws is close to the judicial end of the administrative-judicial spectrum and that there is a concomitantly high obligation on the Association to provide disclosure of relevant and potentially relevant evidence in its possession or of which it is aware. This includes all of the material provided by the Association to Mr. Mills, but in the ordinary course does not include materials based on that evidence prepared by investigative or other enforcement staff of the Association; see In re Cartaway Resources Corp., supra; In re O'Neill, supra.[2] While paragraph 20.11 of the By-laws requires that notice of the Association's conclusions also be provided, it does not require disclosure prior to the hearing of the detailed analytical steps leading from the evidence to each conclusion. This distinction was accepted in general terms by both Mr. Wardle and Ms. McManus.

The difficulty in this case arises from the fact that the Association has indicated its intention to call Ms. Gardiner to provide opinion evidence on Mr. Mills' supervisory responsibilities, while Mr. Lane, it appears, in 1996 and again in 1998, on the basis of much, if not all, of the same evidence, concluded that there was no cause for the Association to proceed against Mr. Mills.

Mr. Wardle accepted that the Association's disclosure obligation with respect to an investigator's report cannot turn on whether the recommendation contained in it was positive or negative. He suggested instead that a distinction should be drawn between a report prepared prior to a "charge" being laid and a post-charge report, basing the distinction on the implicit work-product concept in the BCSC's Cartaway and O'Neill decisions. In the District Council's view, this distinction is not viable. An investigator's report is usually prepared for purposes of determining whether to initiate proceedings.[3] An obligation to disclose pre-charge reports would inevitably require disclosure of documents relating to internal deliberations related to this determination. Neither Stinchcombe nor the cases applying its principles in the regulatory context go this far. Nor, in the view of the District Council, should they, except in exceptional circumstances.

No such exceptional circumstances have been shown on this motion. Mr. Wardle's submissions that Mr. Lane's investigation report(s) may contain facts of which the respondent is not aware, comments concerning the credibility of the Association's witnesses and opinions concerning the events that occurred do not meet this standard. (1) Ms. McManus has informed the District Council that all of the evidence and documents have been provided to the respondent. In these circumstances, the District Council will not infer that additional undisclosed facts may be revealed by Mr. Lane's report(s). (2) The possibility that Mr. Lane's report(s) will contain comments concerning his views of the credibility of possible Association witnesses, presumably Mr. Long, does not satisfy the standard of potential evidence. Mr. Lane's views concerning credibility are beside the point. They will not provide a basis for cross-examination of Mr. Long; and the District Council must make its own assessment of credibility. (3) The same applies to Mr. Lane's opinions of what occurred. The District Council must reach its own conclusions on the facts on the basis of the evidence presented at the hearing, not on the basis of opinions reached by Mr. Lane during his investigation. This conclusion is all the clearer in view of the fact that the Association intends to call Richard Long, a witness who was not interviewed by Mr. Lane.

Mr. Wardle's submissions concerning potential use of Mr. Lane's investigation report also related to Mr. Haldane's proposed evidence. In his affidavit, Mr. Haldane stated his belief that it would be of "great assistance" to him in preparing his evidence "to have reviewed Lane's reports to determine the basis on which he reached" his conclusions that disciplinary proceedings against Mr. Mills were not warranted. It is difficult to understand how a review of Mr. Lane's opinions on this question is necessary to assist Mr. Haldane in reaching his own view on the facts, all of which have been disclosed to the respondent. When asked about this, Mr. Wardle informed the District Council that Mr. Haldane has prepared a report, a copy of which has been provided to the Association, and that Mr. Lane's report(s) might assist in preparing Mr. Haldane to testify. Mr. Wardle also said that the major reason for disclosure of Mr. Lane's report(s) is to enable him to prepare Mr. Mills' defence and, possibly, to cross-examine Ms.

Gardiner. In the District Council's view, it is not necessary for Mr. Haldane to review Mr. Lane's investigation report(s) to enable the respondent to meet the Association's case.

Mr. Wardle's strongest argument for disclosure is that the report(s) may assist him in cross-examining Ms. Gardiner. He submitted that if Ms. Gardiner's opinion is relevant to a determination of Mr. Mills' supervisory responsibilities, then so is that of Mr. Lane. As he is unable to compel Mr. Lane's testimony, he requested that Mr. Lane's report be disclosed to permit him to cross-examine Ms. Gardiner, implicitly equating Mr. Lane's recommendation and opinion that disciplinary action against Mr. Mills was not warranted with the opinions to be given by Ms. Gardiner in evidence. This argument is attractive, presenting as it does a semblance of equal treatment and a level playing field, especially as Ms. McManus conceded that disclosure of Mr. Lane's report(s) would not be harmful to the Association. Indeed, one member of the District Council, Mr. Church, would be prepared to require disclosure on this basis.

The majority of the District Council, however, is not persuaded. Ms. McManus stated that her intention is to call Ms. Gardiner and qualify her as an expert witness. Ms. Gardiner's opinion will be based on her review and analysis of facts to be presented in evidence, the Long and Catania accounts (Haldane Affidavit, para. 5). Although Mr. Lane's investigation report(s) was contained in the investigation file which she reviewed, there is no evidence before the District Council that she read it (although it is not unreasonable to infer that she did) or that the opinions contained in it influenced her own opinions. Mr. Mills will not be deprived of an opportunity to cross-examine Ms. Gardiner fairly and fully or of a fair hearing if he does not receive Mr. Lane's investigation report(s). The fact that another investigator two years earlier, or even in 1998, differed with her opinion is not relevant evidence.

In principle the District Council is unable to distinguish the recommendations contained in an investigator's report of his investigation from any other internal staff opinion concerning a decision to initiate proceedings against an individual or a member firm. If Mr. Lane's recommendation is relevant, it would be difficult to exclude an internal memorandum accompanying his formal report and containing only his recommendation. It would also be difficult to exclude notes of discussions within the Association's Enforcement Division in which staff members may express differing views with respect to initiating proceedings. None of these is relevant evidence. To require disclosure of any one may in principle necessitate disclosure of all such deliberations. This is not the type of information addressed in Stinchcombe or in Howe. Nor is disclosure of such documents necessary to enable a respondent to address the allegations against him, except possibly in exceptional circumstances where their evidentiary relevance to a material issue is clear.

For these reasons the District Council is not prepared at this time to require the Association to disclose Mr. Lane's investigation report(s). No issue has been identified to which the recommendation in those reports is relevant. Mr. Wardle suggested that Mr. Lane's report(s) may address the standard of supervision applicable to Mr. Mills' conduct, but the determination of the standard prescribed in the Association's By-laws and other rules is a matter for the District Council. An investigator's opinion with respect to initiating proceedings is not relevant to it; see, e.g., In re O'Neill, supra, at 30.

It is possible, however, that the report may become relevant. In explaining the delay between the closing of Mr. Lane's investigation file in 1996 and its reopening two years later, Ms. McManus candidly informed the District Council that the regulatory environment changed between 1996 and 1998. She said, in effect, that the Association's enforcement priorities changed and in 1998 there was a mandate to address issues relating to supervision, which had not previously been the case. A change in enforcement priorities is not itself relevant to whether the respondent satisfied his supervisory obligations. But supervisory practices and expectations in 1996 may be relevant to a determination of this issue or to any sanction that the District Council might be asked to consider. The District Council cannot now determine whether these issues will be raised in this proceeding. If they are, and if it becomes apparent that Mr. Lane's report contains information that is relevant to them, the question of its disclosure may have to be revisited.

At the hearing of this motion, the Chair asked Mr. Wardle whether the District Council should review Mr. Lane's report(s) to assist it in reaching its ruling. He replied that no issue of privilege was raised by the parties and the District Council would have difficulty determining relevance when it had not seen the other reports or the evidence that has been disclosed. He refrained from asking the District Council to review the report(s) and took the position

that its decision must be all or nothing - disclosure or non-disclosure - and that there is no middle ground on this issue.

If during the course of the hearing it becomes apparent that there is a reason to readdress this issue, the District Council is prepared to review the report(s) at that time, if it is then appropriate to do so. It is of the view, however, that this should not be required. As the Association's obligation to disclose is ongoing, the District Council expects that counsel for the Association will review Mr. Lane's report or reports in light of any issues that may arise in the course of the hearing of this matter, and if information contained in the reports becomes relevant to a material issue, will disclose the report or reports without a request having to be made.

Ruling

Because the hearing of this matter was scheduled to begin on December 15, 1999, the District Council informed the parties of its ruling in a letter from the Chair on December 13, 1999. The District Council ruled that it will not require the Association to disclose Mr. Lane's investigation reports. It, therefore, dismissed Mr. Mills' motion, but without prejudice to his renewing his request should the relevance of the reports become apparent in light of evidence adduced or issues raised during the course of the hearing.

Addendum

As a result of an unforeseen personal matter that arose on December 14, 1999 relating to one of the members of the District Council, it became necessary to adjourn the hearing or to continue on December 15 with a bare quorum of two members. On December 14, 1999 the Chair wrote to counsel for the parties informing them of this development and requesting their positions. At the same time he advised them that Ms. Taylor's firm, Research Capital Corporation, is currently a defendant in an action in which its supervisory activities may be in issue and in which Mr. Wardle is acting for the plaintiff and asked whether they had any objection to Ms. Taylor continuing to sit on this proceeding on this basis.

At the request of counsel, the hearing was convened, as scheduled, on December 15, 1999 to set new dates. Ms. Taylor participated by conference telephone. At this hearing counsel for both parties again stated that they have no objections to Ms. Taylor continuing to sit.

Counsel advised the District Council that the hearing is expected to take six full days. After consultation with counsel concerning availability, the hearing was adjourned to be reconvened on January 17, 2000 and to continue on January 18, 19, 20 and 31 and February 1, 2 and 3. Briefly, the hearing will run from noon to 4:00 p.m. on January 17 and 31, 9:00 a.m. to 4:00 p.m. on January 18 and 19 and February 1 and 2, and 9:00 a.m. to noon on January 20 and February 3.

Counsel also raised a question with respect to the reports of the parties' proposed expert witnesses, Ms. Gardiner, Mr. Haldane and Professor Eric Kirzner. They requested that copies of their experts' reports be circulated to members of the District Council prior to the hearing, subject to submissions at the hearing with respect to the qualification of the witnesses as experts. In view of its potential to assist the District Council, the District Council granted this request. The parties agreed to file four copies of each expert's report with Ms. MacGougan forthwith.

P. Anisman, Chair S. Church, Member
K.L. Taylor, Member

---

1 The broadest authority in a self-regulatory context, Hammami v. College of Physicians and Surgeons of British Columbia, (1997) 36 B.C.L.R. 17 (S.C.), required disclosure of the College's complete file. The disclosure requirement, however, related to the possibility of bias, reflected in a previous decision of the College concerning Dr. Hammami which had been overturned on judicial review, and should be limited to its facts. This was implicitly acknowledged by Mr. Wardle, who stated in argument that the case probably went too far. See also In re Cartaway Resources Corp., supra, at 37-38.

2 As this motion relates only to investigation reports prepared by the Association's Enforcement Division, it is not necessary to consider the Association's obligations to disclose other reports resulting from the Association's ordinary compliance activities. Because of the difference in their genesis, disclosure of such reports is more easily mandated; cf. S.E.C. Rules of Practice, ss. 201.230(a)(1)(vi) and (b)(1)(ii), 6 CCH Fed. Sec. L. Rep., 66,165.

3 This may not be so, however, of reports prepared following an ordinary compliance review by the Association; see note 2, supra. Such reports are not addressed in this ruling.

End of Document

TAB 7

Vancouver Stock Exchange (Re), 1999 LNBCSC 65

British Columbia Securities Commission Decisions

British Columbia Securities Commission

A.R. Wanstall , R. Wares and J.L Brockman

Heard: June 28, 1999

Decision: August 3, 1999

COR No. 99/201

1999 LNBCSC 65 | Also reported at: [1999] 31 BCSC Weekly Summary 20

IN THE MATTER OF The Securities Act, R.S.B.C. 1996, c. 418 AND IN THE MATTER OF Vancouver Stock Exchange AND IN THE MATTER OF Kevin Patrick O'Neill Decision

Appearing:

Patrick Robitaille, for commission staff.

Larry R. Jackie, for Vancouver Stock Exchange.

Andrew J. Pearson, for Kevin Patrick O'Neill.

DECISION OF THE COMMISSION

1. INTRODUCTION

This decision relates to a hearing and review under section 28(1) of the Securities Act, R.S.B.C. 1996. c. 418, of a decision of the Vancouver Stock Exchange. On October 30, 1998, an Exchange hearing panel ordered the Exchange to disclose certain documents to Kevin Patrick O'Neill in connection with disciplinary proceedings brought against O'Neill in a citation by the Exchange. The Exchange sought a hearing and review of that decision.

2. BACKGROUND

In July 1995, the Exchange began an investigation into the conduct of O'Neill in connection with transactions in the shares of Instep Mobile Communications Inc. and Allegiant Technologies Inc. During the period in question, O'Neill was employed by Canaccord Capital Corporation, a member of the Exchange.

On April 9, 1998, the Exchange issued a citation against O'Neill alleging infractions of Exchange Rule F.2.30 and Exchange By-law 5.01(2). The hearing into these allegations was scheduled for November 30 to December 8, 1998.

Between April and September 1998, the Exchange disclosed to O'Neill various documents relating to the allegations. O'Neill, however, requested additional documents that the Exchange refused to provide on the basis that they were not required to do so.

On September 30 and October 2, 1998, O'Neill applied to the Exchange hearing panel for disclosure of these additional documents. On October 30, 1998, the hearing panel issued its decision, in which it directed the Exchange to disclose to O'Neill the following documents:

1. VSE Investigation Report, Updated December 3, 1996;
2. VSE Investigation Report, draft November 5, 1996;
3. Draft VSE Investigation Report, JTH August 9, 1995;

4. JTH note to VSE Irene Komori July 21, 1995; and

5. TRN written notes of telephone conversation with Carol Ritmiller undated.

In its decision, the hearing panel made the following observations

> Mr. Pearson referred the Panel to the decision of the Supreme Court of Canada in the case of Regina v. Stinchcombe [1992], 1 W.W.R. 97 in support of his position that the Exchange had an obligation to provide to Mr. O'Neill all non-privileged documents in its possession whether favourable or unfavourable to the allegations against Mr. O'Neill. He also provided the panel with the decision of the Honourable the Chief Justice in the case of Hammami v. The College of Physicians & Surgeons of British Columbia [1997], 9 W.W.R. 301 which he said incorporated the principles from the Stinchcombe case into the administrative law context. Mr. Pearson took the position that the Panel should not review the documents in issue, but rather decide the matter on the general description of the documents which was provided.
>
> It was Mr. Jackie's position on behalf of the Exchange that the Exchange were obliged to produce all documents which would affect Mr. O' Neill's ability to defend himself and make full answer in defence to the allegations against him. In the result, it is unnecessary for the Panel to deal with Mr. Jackie's submission that the Hammami case is restricted to its facts and could be distinguished, as, Mr. Jackie's concession in effect goes as far as the Stinchcombe and Hammami cases in terms of appropriate disclosure. ...
>
> It is the view of the panel, however, that certain of the documents requested by Mr. Pearson do need to be disclosed. Specifically, it is the Panel's view that both the VSE investigation report draft November 5, 1996 and the VSE investigation report updated, dated December 3, 1996, should be produced. We are of this view given Mr. Jackie's comments that such reports would be producible in a criminal case.
>
> Mr. Jackie was not asked specifically about what is described above as 'Draft VSE Investigation Report, JTH, August 9, 1995.' The Panel cannot distinguish between this report and the description of the apparently similar reports of November 5th and December 3rd, 1996 and direct production of this report as well.
>
> We are also of the view that the document described as TRN written notes of telephone conversation with Carol Ritmiller [at the time, a Commission staff investigator] undated should be produced. Mr. Jackie maintained that Mr. Pearson would speak directly with Ms. Ritmiller himself and that as a result the document should not be produced. Whether or not Mr. Pearson can speak with Ms. Ritmiller or not, it is the view of the panel that Mr. Pearson is entitled to know what was discussed by telephone by Ms. Ritmiller, and should not be forced to guess what was said or rely on Ms. Ritmiller's memory of a conversation.
>
> The fifth document which the panel direct Mr. Jackie to disclose is described as " JTH Note to VSE Irene Komori July 21, 1995". Mr. Jackie advised the Panel that the document relates to a request for a company search of a numbered company. He was unable to assist the Panel as to whether the search itself was produced to Mr. Pearson, and Mr. Pearson indicated he did not believe that the search had been produced. Given the uncertainty, we are of the view that Mr. Pearson is entitled to know what search was requested so that he can, if he chooses, pursue his own search with respect to that company.
>
> On November 25, 1998, the Exchange applied to the Commission for a hearing and review of the decision, on the basis that the Exchange hearing panel applied the wrong standard of disclosure in making its decision.

On April 15, 1999, the parties appeared before us to make submissions as to whether the Exchange has standing to apply for a hearing and review of the decision. On April 28, 1999, we issued a decision in which we found that the Exchange could apply to the Commission for a hearing and review pursuant to section 28(1) of the Act.

The hearing and review was held on June 28, 1999. During the hearing, the Exchange volunteered to disclose to O'Neill two of the documents referred to in the decision: the JTH note to Komori and the TRN written note. However, the Exchange emphasized that it was providing these documents voluntarily and still took the position that they were not required to be disclosed.

3. ANALYSIS

The Commission will generally confirm a decision of the Exchange unless:

1. the Exchange has proceeded on some incorrect principle;
2. the Exchange has erred in law;
3. the Exchange has overlooked some material evidence;
4. new and compelling evidence is presented to the Commission that was not presented to the Exchange; or
5. the decision of Exchange has clearly failed to protect the public interest.

See In the Matter of Igor Rochacewich and LJI Corporate Relations Inc. [1998] 40 B.C.S.C. Weekly Summary 10.

On May 28 of this year, the Commission issued a decision In The Matter of Cartaway Resources Corporation et al. [1999] 22 B.C.S.C. Weekly Summary 27 in response to an application by a respondent in an enforcement proceeding before the Commission for further disclosure from Commission staff. In its decision, the Commission reviewed at some length the cases in this area, with a particular emphasis on Stinchcombe and Hammami.

The Commission began its review at pages 33 to 36 with the following observations respecting the need to consider context in the determination of the appropriate standard of disclosure in an administrative proceeding:

> Allegations of inadequate disclosure in an administrative context raise the issue of procedural fairness. The Supreme Court of Canada has stated that "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case" (Knight v. Indian Head School Division No. 19 of Saskatchewan, [1990] 1 S.C.R. 653, 682 (per L'Heureux-Dube J.) and the context to be taken into account therefore consists of the nature and seriousness of the matters in issue, the circumstances, and of course the governing statute.
>
> > ... Although Johnson argues that the sanctions sought against him are penal, he cites no authority for this proposition. Indeed the jurisprudence is clear that Commission hearings under section 161(1) of the Act and the sanctions available to the Commission to impose against respondents like Johnson, are administrative and regulatory in nature not penal. See Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301. ...
>
> The Court in Brosseau also recognized that this protective regulatory role, which is common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts. At page 314 the Court stated:
>
> > Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity. When a party is subjected to the enforcement proceedings contemplated by the s. 165 or s. 166 of the Act, that party is given an opportunity to present its case in a hearing before the Commission, as was done in this case.
> >
> > Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. 584, where Fauteux J. observed at p.588:
> >
> > > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, should be honest and of good

> repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.
>
> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

The Commission then turned at page 37 to the Stinchcombe and Hammami decisions:

> The principle of disclosure in Stinchcombe states that in indictable offences all relevant information, whether favourable to the accused or not, must be disclosed subject to the law of privilege and to the reviewable discretion of the Crown. No distinction should be made between inculpatory and exculpatory evidence. The court noted that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. The rationale mandating total disclosure in indictable offense proceedings is that failure to do so may impair the accused's ability to make full answer and defence and unfairly exposes the accused to incarceration.
>
> Clearly, Stinchcombe is not directly applicable to section 161(1) enforcement proceedings as they are administrative and regulatory in nature and not penal. However, is the Commission, as Johnson argues, compelled to apply as the Court did in Hammami, certain principles underlying Stinchcombe, and therefore order Commission staff to comply with every disclosure request Johnson has made?

The Commission then reviewed the Hammami decision and concluded as follows at page 39:

> While there is an acknowledgment in Stinchcombe that justice is better served when the element of surprise is eliminated from the hearing and parties are prepared to address the issues on the basis of all the relevant information of the case to be met, this case does not purport to set a standard of disclosure that must be met by administrative tribunals generally. In our view, the purpose of the relevant statutory provisions and the general nature of the Act must be a foremost consideration in determining whether the principles of disclosure underlying Stinchcombe ought to apply to section 161(1) enforcement hearings.
>
> In our view, disclosure and the demands for disclosure of materials must have some relevance to the proof or defence of allegations in the section 161(1) notice of hearing. By necessity this means that Commission staff counsel will have to exercise discretion and judgment in determining what materials fit within those parameters. In our view, if Commission staff counsel view materials as "potentially relevant to the respondents" the materials would fit within the above parameters and should simply be disclosed as relevant materials but materials upon which Commission staff may not rely. In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not "fruits of the investigation" as suggested by Johnson and need not be disclosed. ....
>
> In our view, it is appropriate to restate the standard of disclosure that we expect Commission staff counsel to make to all respondents in section 161(1) enforcement hearings. The duty on Commission staff counsel requires disclosure of:
>
> 1. the particulars of the case against the respondents; and
> 2. all relevant material gathered in the investigation relating to the allegations in the notice of hearing, whether Commission staff intend to rely on the material or not, unless there is any special reason why such material should not be disclosed and in those circumstances the special reason should be brought to the attention of the respondents. Of the relevant materials disclosed, Commissions staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not.

O'Neill argues that the standard of disclosure established in Cartaway for enforcement proceedings under the Act should not be applied to disciplinary hearings of the Exchange, for two reasons.

The first is that there are significant differences between the functions of the Commission and the Exchange and that the public protection function of the Commission should not be imported directly into the context of Exchange disciplinary proceedings. We do not agree. It has been recognized by the courts that the Exchange, in exercising its regulatory responsibilities, plays a key role in the protection of the public interest in our capital markets. In Pezim v. British Columbia (Superintendent of Brokers) [1994] 24 B.C.S.C. Weekly Summary 23, a decision of the Supreme Court of Canada, Iacobucci, J observed at page 65:

> It is important to note from the outset that the Securities Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation, at p. 1.
>
> Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The British Columbia Securities Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

The second reason put forward by O'Neill for rejecting the Cartaway standard and imposing the Stinchcombe/Hammami standard in Exchange disciplinary proceedings is his contention that the Exchange has the ability to impose penal consequences, namely a penalty of $1,000,000 or three times the pecuniary benefit realized by the respondent.

The Commission also has the power to impose a monetary penalty. If the Commission finds that a person has contravened a provision of the Act or the regulation, section 162 of the Act authorizes the Commission to order that person to pay an administrative penalty of up to $100,000. The effect of that provision on the regulatory nature of the Act was considered by the British Columbia Supreme Court in British Columbia (Securities Commission) v. Simonyi - Gindele [1992 B.C.J. No. 2893] at page 8:

> Mr. Anderson contended that the addition of s.144.1 [now section162] to the Securities Act in 1989, which introduced administrative penalties of up to $100,000, converted the statute from a regulatory act to a penal statute. I do not think that the introduction of administrative penalties changes the whole character and scheme of the act. In my opinion the Securities Act remains a regulatory statute.

The issue of whether proceedings are penal in nature was considered by the Supreme Court of Canada in a different context in Wigglesworth v. The Queen (1987), 45 D.L.R.(4th) 235. That case involved a proceeding under the Royal Canadian Mounted Police Act of Canada against a member of the RCMP who was alleged to have assaulted a prisoner. One of the issues before the Court was whether section 11 of the Charter of Rights and Freedoms, which provides a person "charged with an offence" with certain rights, was applicable to the proceeding under the RCMP Act. In considering this issue, Wilson J. observed at pages 251 to 253:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is a kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity ...
>
> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s 11, not because they are the classic kind of matter intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. In "Annotation" to R. v. Wigglesworth (1984), 38 C.R. (3d) 388 at p.389, Professor Stuart states:

> ...other punitive forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h).
>
> I would agree with this comment but with two caveats. First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One indicium of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the Royal Canadian Mounted Police Act, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the force, it is more likely that the fines are purely an internal or private matter of discipline: Royal Canadian Mounted Police Act, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the "by nature" test but passing what I have called the "true penal consequence" test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual.

We concluded earlier that, like those of the Commission, the disciplinary proceedings brought by the Exchange are regulatory in nature. We are of the view that they are primarily intended to regulate conduct within a limited sphere of activity, namely the conduct of Exchange members in connection with the trading of securities.

We are also of the view that the regulatory nature of Exchange proceedings is not altered by the magnitude of the monetary penalty that can be imposed in these proceedings. These monetary penalties are not designed to redress the harm done to society at large. They are imposed by the Exchange to regulate the conduct of its members in connection with the trading of securities. As well, all monetary penalties ordered by the Exchange are paid to the Exchange and do not form part of the Consolidated Revenue Fund. Therefore, we reject O'Neill's argument that the Exchange has the ability to impose true penal consequences.

As a result, we are of the view that the standard of disclosure set out in Cartaway for enforcement proceedings before the Commission should also apply to disciplinary hearings before the Exchange. It follows from this that the Exchange hearing panel erred in law in applying the Stinchcombe/Hammami standard in this case.

Are the three documents still in issue required to be disclosed under the Cartaway standard? In other words, are these documents "relevant material gathered in the investigation relating to the allegations in the notice of hearing"?

All of the documents were prepared by Exchange staff involved in the O'Neill investigation. We are of the view that all three squarely fall within the category of documents referred to in the following excerpt from Cartaway, which was quoted above:

> There may be materials in the Commission [or, in this case, the Exchange] staff's file that were not gathered in the course of the investigation but rather created by Commission [Exchange] staff in preparation for the hearing. In our view, these kinds of materials are not "fruits of the investigation" as suggested by Johnson and need not be disclosed.

In addition to not having been "gathered in the investigation", these documents are also, in our view, not relevant. It is the responsibility of the hearing panel to determine whether the allegations in the citation have been met. The views of Exchange staff, as expressed in internally generated documents such as investigation reports, are of no relevance in this regard.

4. DECISION

We have found that the Exchange hearing panel erred in law in its decision by applying the standard for disclosure set out in Stinchcombe and Hammami to disciplinary proceedings before the Exchange.

Therefore, pursuant to section 165(4) of the Act, we overturn the decision of the Exchange hearing panel.

A.R. WANSTALL
J.L. BROCKMAN

R. WARES
Members

End of Document

TAB 8

1991 CarswellNat 1583
Competition Tribunal

Canada (Director of Investigation & Research) v. Southam Inc.

1991 CarswellNat 1583, [1991] C.C.T.D. No. 16, 38 C.P.R. (3d) 68

In the Matter of an application by the Director of Investigation and Research for orders pursuant to section 92 of the Competition Act, R.S.C., 1985, c. C-34, as amended

In the Matter of the direct and indirect acquisitions by Southam Inc. of equity interests in the businesses of publishing The Vancouver Courier, the North Shore News and the Real Estate Weekly

The Director of Investigation and Research, Applicant and Southam Inc. Lower Mainland Publishing Ltd. Rim Publishing Inc. Yellow Cedar Properties Ltd. North Shore Free Press Ltd. Specialty Publishers Inc. Elty Publications Ltd., Respondents

Reed J., Roseman Member

Heard: June 14, 1991
Judgment: June 27, 1991
Docket: CT-90/1

Counsel: Stanley Wong, Keith C.W. Mitchell, for Director of Investigation & Research
Neil R. Finkelstein, Mark C. Katz, for Respondents, Southam Inc., Lower Mainland Publishing Ltd., Rim Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., Elty Publications Ltd.

Decision of the Board:

1 This motion raises some fundamental issues about the scope of discovery which a respondent should be entitled to obtain from the Director of Investigation and Research ("Director"). The respondents take the position that the Director should be subject to discovery in a manner analogous to any party in civil proceedings. The Director takes the position that his role before the Tribunal is not analogous to a private party, that as an applicant he is acting in a representative capacity and therefore discovery as against him is not a meaningful procedure or at least should be significantly curtailed. The answers to many of the questions which the respondents pose are refused on the ground of either litigation privilege or public interest privilege. Many of the questions are also argued to be irrelevant and some to elicit opinions or conclusions of law.

2 The Director's counsel took the position that the Director has no direct knowledge of the facts relevant to the application and thus his representative on discovery was in no position to make any admissions of fact. Counsel stated that the Director's representative was being put forward only to answer questions concerning the facts that are in the knowledge of the Director but not to make admissions with respect thereto. This is a semantic argument. To the extent that any party on discovery does not have first hand knowledge of the facts to which the questions relate, that party is only stating what is known by him, her or it at the time. In addition, insofar as "admissions" on discovery are said to be "binding" on the party making them, it is of course always open to contradict or modify such "admissions" at trial. [1] Admissions are obtained to narrow the issues. While they are said to "bind" the parties, this is not an irrevocable position.

3 Discovery has two purposes: (1) the obtaining of admissions so that the issues between the parties can be narrowed; (2) the obtaining by one party of the information in the knowledge of the other. [2] Despite the Director's contention that his representative cannot make admissions because of a lack of direct information, it is to be hoped that certain issues of fact can be agreed upon and admitted. Indeed, the Director's commitment to present an agreed statement of facts prior to the hearing belies the contention that it is not possible for him to make admissions at the discovery stage.

4 Counsel for the Director argues that the present proceedings are different from a normal discovery where parties are actually participants and have knowledge of the transactions. This is not a convincing reason to deny the respondents a right to discover a representative of the applicant. Discovery procedures work in other contexts where government investigating officers are in charge of preparing one side of the case (e.g. tax litigation). Discovery procedures have worked in other cases before the Tribunal.[3] On some occasions it may be that the complainant is the proper person to be put forward for discovery instead of an official from the Director's office. In the *Chrysler* case, the complainant was examined for discovery and this was most appropriate since the issue (refusal to deal) was one which exclusively involved the respondent and the complainant.

5 The Director's position is that discovery as against his office should not occur, that it is not a meaningful procedure because all of his investigations (information collecting activities) are privileged (public interest or litigation privilege). Counsel argues that the position of the respondents and the Director is asymmetrical, with the Director having a number of highly intrusive powers. Thus a procedure is suggested whereby the Director will provide the respondents with a summary of the evidence he plans to produce as well as "will say" statements from his witnesses at some time prior to trial. While the Director has agreed in this case, and in previous proceedings before the Tribunal, to be examined on discovery, on reflection the appropriateness of that procedure is now being questioned. At the outset of the discovery, counsel for the Director stated:

> I would like to put something on the record. The Director is of the view that the respondents should have fair disclosure of the evidence that the Director will present in the hearing of the application. I have been instructed by the Director to say the following: Counsel for the Director undertakes to provide to counsel for the respondents, prior to the commencement of the hearing, a summary of the evidence that he intends to present to the Competition Tribunal. We will advise you before the end of June the date by which this disclosure will be made. In addition, counsel for the Director intends to seek the agreement of counsel for the respondents, that as a general practice each counsel should give reasonable notice of calling a witness with a "will say" statement of that witness to opposing counsel prior to the calling of the witness.[4]

This commitment was relied upon by the Director's representative when refusing to answer a number of questions.

6 The *Competition Tribunal Rules* do not expressly require oral discovery; they do require documentary discovery. Also, in previous applications before the Tribunal, discovery (both oral and documentary) has proceeded in a reasonably normal way as between the parties. There is no reason in principle why it should not do so in this case. The procedure which the Director proposes may be of additional benefit to the respondents and to the proceedings before the Tribunal. It is not, however, a substitute for discovery particularly in the context of the present case where discovery was agreed to by the parties. Indeed, the Director's conduct on the examination for discovery was much more forthcoming than the position set out above would seem to indicate.

7 What is at the heart of the present dispute is the fact that on March 6, 1989, the Director sent the respondent Southam Inc. ("Southam") a "no-action" letter with respect to its January 27, 1989 acquisition of the *North Shore News*. The Director, however, now challenges that acquisition in the application filed November 29, 1990. The application challenges not only the January 1989 acquisition of the *North Shore News* but also the May 8, 1990 acquisition of some other community newspapers (the *Real Estate Weekly* and *The Vancouver Courier*).

8 Many of the questions which counsel for the respondents seeks to have answered relate to the nature of the investigation which was carried out prior to the issue of the no-action letter. In this context, the respondents seek information concerning discussions which occurred in the Director's office between officials prior to the no-action letter being sent, information on whether acquisitions of other newspaper mergers (Brabant) had been taken into account, information concerning the process of investigation which occurred after the letter was sent and information as to what caused the Director to change his mind. Counsel for the Director argues that answers to these types of question are covered by litigation privilege and, what is more, that they are irrelevant on the basis of the pleadings as they stand: the conduct of the Director is not in issue.

9 The Tribunal agrees that many of the questions which the Director's representative has been asked are not relevant to the present litigation: how many merger investigations have you been involved in (Q. 59); in investigating this one did you

consider other newspaper mergers (Q. 61); when you did an interview and got an answer ... did you cut your interview short (Q. 91, 92, 93); who in the Bureau had conversations with respect to Exhibit 5.[5] (Q. 183); was there disagreement between the investigating officers (Q. 186); produce any documents or correspondence relating to those disagreements or arguments (Q. 187); did any of the investigators disagree re the facts in Exhibit 5 (Q. 189); when Mr. McAllistair received Exhibit 6,[6] did he show it to anybody (Q. 193); was any agreement or disagreement expressed orally or in writing by those reviewing the transaction (Q. 203); what was Mr. Wetston thinking when he wrote the no-action letter (Q. 230); what did the Director and his staff rely on in writing the no-action letter (Q. 245); was any inquiry done by the Director and his staff between receipt of Exhibit 5 and receipt of Exhibit 6 (Q. 247).

10 The issue before the Tribunal is not the conduct of the Director's investigation. The issue is whether the challenged acquisitions are likely to result in a substantial lessening of competition and particularly the market definition which is relevant for that determination. The no-action letter is relevant only in an indirect way to these proceedings. It is *not relevant* to the *fundamental* issues before the Tribunal. It does provide evidence of the context within which the present application arises and to that extent has peripheral relevance. As has been noted, whether the Director issued his no-action letter on the basis of extensive investigation or after minimal review is not relevant. In addition, the letter itself commits the Director only to taking no action at the time when the letter was written and it is based on the knowledge then in the hands of the Director. It may occur that there are changed circumstances between the date of a no-action letter and a subsequent challenge by the Director and that as a result the time when certain information was obtained by the Director becomes relevant. There is, however, no allegation that would make that date (or dates) a relevant factor for the purpose of this case.

11 The following questions, as well as those set out above, need not be answered because they relate primarily to the conduct of the investigation, discussions within the Director's office or to other investigations which the Director might have carried on: 24, 54, 58, 60, 62, 63, 83, 105, 110, 114, 136, 137, 138, 140, 181, 184, 188, 195, 196, 210, 216, 226, 227, 229, 232, 241, 242, 243, 244, 246, 247, 248, 251, 252, 254, 255, 256, 257, 258, 259, 260, 264, 265, 270, 273, 276, 320, 321, 322, 325, 326, 333, 334, 348, 372, 373, 374, 672. Of a similar nature are questions which are directed at determining the date when the Director obtained certain information: 269, 323, 324, 331, 369. Questions 137 and 672 seek non-public documentation which is in the Director's hands and which supports the commencement of the section 10 inquiry. These questions by their breadth encompass internal memoranda prepared for the Director. These are not relevant to the present proceedings.

12 Another category of questions which can easily be disposed of is that concerning the relevance or preparation of pleadings. Some questions are irrelevant to the issues at hand, others call for conclusions of law. Two examples of such questions are: why is no reference made to the no-action letter in the Director's notice of application (Q. 144); why are paragraphs 11, 12, 13 and 14 in the notice of application (Q. 145). These need not be answered. Other questions of a similar nature which need not be answered are 163 and 423.

13 A number of questions ask for opinions from the witness and therefore need not be answered: which newspaper has a *comparable circulation* to the Courier's Wednesday edition (Q. 161); has the circulation of the Southam dailies *remained stable* (Q. 356). Question 513 is of a similar nature: "... even if there was an actual decline in retail advertising revenues by the dailies ... there's no way of calculating how much of this decline is attributable to the *north shore news* and *the courier* as opposed to other community newspapers ...?" With respect to the questions concerning comparable or stable circulation, the circulation figures for the newspapers in question are in the hands of both parties. The conclusions to be drawn therefrom are not something that a party must answer on discovery. At the same time, why answers to questions 161 and 356 were not provided, merely to expedite the discovery process, is not clear. If a co-operative attitude had prevailed at discovery it seems likely that the witness would have answered these questions as a matter of course. Also, the fact that question 513 was not answered (the answer surely being obvious) seems the result of an unduly technical approach.

14 A number of questions which peripherally relate to the internal procedures of the Director's office (filing procedures) have a direct relevance to the admissibility of evidence before the Tribunal. Questions 282, 283, 291, 292, 300 and 314 seek information concerning the files from which documents number 1 to 35 in the Director's affidavit of documents were obtained. Counsel for the respondents are of the view that these documents were obtained pursuant to a warrant and are being used for

purposes outside that warrant. The questions should be answered. The public interest, if any, which exists in the Director being entitled to keep his filing procedures confidential is clearly outweighed by the respondents' interest in having answers given.

15 With respect to question 66, counsel for the Director took it "under advisement". It is not clear why counsel for the respondents considered his response to be a refusal; the question should be answered. The question seeks information concerning the Director's merger policy in light of the *Merger Enforcement Guidelines* which were released on April 17, 1991 and the previous Information Bulletin, no. 1, June 1988.

16 Some questions were not answered because they were considered by counsel for the Director to be unreasonable. In general, individuals when being discovered need not answer questions seeking information which is in the questioner's knowledge or questions that would put a burden on the party being questioned which is out of all proportion to the benefit to be gained from the answer by the examining party. Among the questions which need not be answered for these reasons are those which relate to the allegation that *The Vancouver Courier* and the *North Shore News* have the highest circulations of the community newspapers in the Lower Mainland (Q. 148, 152, 161 and 162).[7] Question 161 might also be classified as an opinion question (*supra*). The circulation figures for the newspapers are in the hands of both parties. Indeed, the Director obtained much of his information in this regard from the respondents.

17 Another series of questions which need not be addressed for the above noted reasons are those seeking reference *to every* document which is relied upon by the Director for the allegation that community newspapers compete with the daily newspapers in the Lower Mainland (Q. 472, 475 and 477)[8] and those seeking identification by the Director of *every* document (or part thereof) on which he relies for support of the allegation that the Southam dailies were in direct competition with the *North Shore News* (Q. 564). The Director's representative answered the first series of questions by identifying some documents in schedule 2 of the Southam affidavit of documents which the Director specifically had in mind in making these allegations: document 20 and Pacific Press document 111, a confidential report entitled "Future Value of the Vancouver B.C. Marketplace". Question 564 was answered in a similar fashion by reference to illustrative documents.

18 It is unreasonable to expect a party to identify *every* document or part thereof which might be relied upon to support an allegation such as those under consideration here. The allegations by their nature are of a type that a great many documents might relate thereto, some of minimum probative value. The conclusion respecting whether competition has been substantially lessened is a complex one and, while factually based, is likely to be formed with the assistance of expert evidence. Every copy of every newspaper concerned might relate to these issues. It is sufficient if a party on discovery indicates the significant sources on which it relies for its allegation when the conclusions which these facts go to support are constructs of the type in question. It is always open to a party, if truly surprised by the sources chosen from the materials produced on discovery, upon which an opposing party relies, to object to the introduction of such evidence by reason of prejudice or to seek additional time to respond. While counsel for the respondents referred to the great quantity of documents which had been produced on discovery and to which reference might be made as support for this allegation, the Tribunal was not persuaded that there was a serious difficulty in this regard.

19 Other questions which need not be answered are those seeking identification of all the facts and documents upon which the Director relies for the allegation that there has been over the years a loss of advertising revenue from the Southam dailies to the *North Shore News* and *The Vancouver Courier*. Again a vast quantity of documents might serve in a general way as evidence for such a conclusion. It is sufficient if the Director indicates the main sources upon which he proposes to rely. This is true with respect to the request for further information both in a general sense, and secondly as found in the documents provided to the Director by Southam (Q. 489, 497, 499, 500, 501, 503). The purpose of discovery is to reveal facts on which the other party relies (an outline of the case); it is not intended to require disclosure of minute details of the evidence by which those facts will be proved.

20 The most difficult issue to resolve with respect to discovery which has been raised by the present motion is the status of those questions which seek access to information collected by the Director in reviewing the transactions in question. These questions are clearly relevant to the issues before the Tribunal. The questions which fall into this category are: Q. 87, 88, 111,

112, 115, 129, 131, 134, 135, 197, 198, 228, 246, 324, 408, 455, 483, 502, 588, 658, 665, 666, 682, 683, 706, 736. These are of the following nature: what interviews were held with industry participants, who was interviewed, what industries were looked at, what economic experts were spoken to, what information was collected, who did the interviews, produce the interview notes. The Director argues that these questions are covered by either litigation privilege or public interest privilege.

21 While the Director is opposed to providing the actual interview notes and similar detailed information, particularly the identity of the interviewees, he is not opposed to providing a summary of the information which has been obtained at least insofar as he intends to rely on it in presenting his case to the Tribunal. The nature of the dispute between the parties in this regard can be illustrated by portions of the transcript: [9]

At pp. 208-215:

> MR. WONG: Sorry, to be clear, *we're not going to tell you who said what, but we're prepared to tell you what the facts that we have derived from the investigation are in support of the case*....
>
> MR. FINKELSTEIN: I said upon what facts does the Director rely for the allegation that there is significant direct competition between the Vancouver courier and the Southam dailies.
>
> A Well, the creation of Flier Force for one thing.
>
> 575 Q Okay. Now, please explain that.
>
> A Pacific Press, or the parent corporation of Flier Force, Southam perhaps, felt necessary to be able to offer increased penetration in the market served by both the courier and also the north shore news. Presumably this was a function of the less than satisfactory or adequate penetration offered by the dailies in those markets and Flier Force would have delivered fliers as a supplement to any insert availability by the dailies in the market served by the Vancouver courier.
>
> . . .
>
> 579 A I believe a study was prepared — Excuse me. An article appeared in 1984 by Ms. Urban and it was, has been received as, it was an Exhibit during the Discovery of Mr. Ballard and it stood for the proposition that inserts had a better — We have the document here, why should I paraphrase it? Okay.
>
> MR. WONG: I think it was marked as a separate Exhibit, called the Advantage Flier wasn't it?
>
> A "Get the Inserted Advantage".
>
> MR. WONG: I don't think we have the actual Exhibit number, but we do have the actual document, but it's produced under tab 2 of Schedule 1 of the Rim productions.
>
> . . .
>
> MR. FINKELSTEIN:
>
> 583 Q Mr. Brantz, you were going through the facts upon which you rely for the proposition that flier inserts are more effective than free-standing fliers.
>
> A Correct.
>
> 584 Q Continue. Or have I heard it all?
>
> A Oh, no.

585 Q Well, let's have the rest.

MR. WONG: This is a document market as Exhibit "24" in the Discovery of Mr. Peter Ballard. It's the other part of the Urban article which was marked as Exhibit "27" to this Examination.

MR. FINKELSTEIN: Okay. Can we mark that as the next Exhibit? (EXHIBIT "28" - URBAN ARTICLE)

MR. FINKELSTEIN:

586 Q Anything else?

A Yes. The fact that fliers are dropped off in lobbies and remain there whereas community papers with inserts in them tend to be picked up at a greater rate and, therefore, penetrate in apartment buildings the higher rate than would a stand-alone flier.

587 Q Now, is that your theory or do you have some evidence in support of that?

A *That view has been expressed to us by a number of executives in the community newspaper field here in British Columbia*.

588 Q *Which I take it you're not going to tell me about?*

A Correct.

MR. WONG: That's a refusal.

A That's correct.

MR. FINKELSTEIN:

589 Q Are there any other facts upon which you rely for your proposition that flier inserts are more effective than free-standing fliers?

A Certainly. Climatic factors in British Columbia make that inserts are dryer than fliers left on the doorstep.

MR. KWINTER: What do you mean by "climatic effects"?

A They don't get wet from the rain.

MR. FINKELSTEIN:

590 Q Is that your theory or do you have some evidence in support of that?

A That is a view put to me by advertisers here in the Vancouver market.

591 Q And you're not going to tell me about that I take it?

A *I will not identify the person who made that comment*.

592 Q I see. You've heard it from one person. Is that it?

A Actually, no, I've heard it from several.

593 Q How many?

A I cannot be more specific. Two or three perhaps.

594 Q Have you got any way of finding out?

A I don't believe so.

595 Q What other facts do you rely upon in support of this proposition that flier inserts are more effective than free-standing fliers?

A Certainly the — I believe MetroVan, which was an association, is an association, was an association of community newspapers offered the possibility of offering total market coverage. I'm sorry, excuse me, you're making the proposition whether inserts are — No.

596 Q No further facts?

A None that come to mind at this time.

597 Q Well, if there are any others you'll let me know?

A Certainly.

(Emphasis added)

At pp. 230-232:

655 Q But Mr. Ballard's evidence was that the courier's most direct competitors were other community newspapers operating in the courier's market. I take it that you accept that evidence generally?

A No.

656 Q Okay. Can you tell me why not?

A Many of the community newspapers in the market served by the courier have relatively insignificant circulations, 2,200 I believe in one case, 9,500 copies in another, and as such could not be put forward as more direct competitors for advertising business than would be the case for the dailies.

657 Q Do you rely upon any other facts for your disagreement with Mr. Ballard that his most direct competitors are other community newspapers operating in his market?

A Yes. Having regard to advertisers; other community paper publishers, present or former; former employees, dailies, and I guess that's, that's about it.

658 Q *And you're not going to tell me about those conversations or anything arising out of them; is that right?*

A *I will not identify who I spoke to*.

659 Q *And I take it you also won't tell me what was said?*

MR. WONG: *We'll tell you in a general summary way what was said*.

MR. FINKELSTEIN:

660 Q I'm listening.

A It has been advanced that the courier was possibly a threat to the dailies inasmuch as it might be transformed at some future time into a daily itself. That proposition has not been advanced in respect of any other community paper in the courier market.

661 Q Is that it?

A The size of the courier in terms of the number of pages, the size of its circulation make it a more direct competitor for advertising revenues with the dailies than with other community papers.

662 Q Is that a complete summary now of what you've been told by all these people that you spoke to?

A To the extent that a premium or a, may have been paid for the courier in respect of its influence in the market-place. That might be an indice of its present or potential competition to the daily newspapers.

663 Q Is that it for the summary of the conversations?

A I believe that's the case.

664 Q *Now I'm asking you for details of all of those conversations*.

. . .

MR. WONG: *No*.

. . .

MR. WONG: *Mr. Brantz has given you a summary of the facts known to the Director concerning the questions you've asked*

MR. FINKELSTEIN: And I take it that's all he's going to give me?

MR. WONG: That's right.

(Emphasis added)

At pp. 241-243:

MR. FINKELSTEIN: Now, Mr. Wong, you've directed the witness *not to answer generally about his interview with Mr. Robson, not to say when he was interviewed, where he was interviewed, whether a transcript was kept. I take it that that instruction to the witness not to answer also includes an instruction not to inform me what it was that Mr. Robson said*.

MR. WONG: That is correct.

MR. FINKELSTEIN: If I understand you correctly the witness is relying upon information from Mr. Robson to the effect that the courier had the potential to go daily, but you're not going to tell me what it is that Mr. Robson said that the witness is relying upon for that allegation. Do I have that correct?

MR. WONG: *I will direct the witness to provide you with a summary of the information we have obtained from Mr. Robson*. Go ahead, Mr. Brantz.

MR. FINKELSTEIN: I take that as a refusal.

MR. WONG: All right.

MR. FINKELSTEIN: *So we're clear, I want the details of who did the interview, when, where, what was said, any notes and records and so on*.

MR. WONG: That's a refusal.

MR. FINKELSTEIN:

684 Q Without prejudice to that, being a refusal, let's have the summary.

A I believe Mr. Robson stated that Southam was concerned about the possibility of community papers in the Vancouver area possibly becoming dailies and threatening the cash flow generated by the Pacific Press dailies in the Vancouver area. I believe the expression was used that Southam wished to "close the back door."

685 Q On what?

A So that a weekly would not get strong enough to become a daily and decrease the — in Mr. Robson's response, "... million dollar per year profit."

686 Q You have just read that from somewhere. Could you tell me what you read it from?

A Exhibit 36 answer 2(d).

687 Q What was the source of Mr. Robson's information?

A Mr. Robson I believe had at least one — two, possibly three meetings with Mr. David Perks at which time the discussion involved the subject of the setting up of a chain of community newspapers in the lower mainland market.

688 Q And did Mr. Robson tell you that he was told by Mr. Perks that Mr. Perks was concerned that the courier would become — had the potential to become a daily newspaper?

A I cannot say whether he specifically identified the courier. I can't recall that specifically, but definitely that there was concern that community papers in the Vancouver area could possibly become dailies, yes.

689 Q Would you make inquiries of Mr. Robson to find out whether Mr. Perks specifically told him that he was concerned that the courier had the potential to become a daily newspaper?

MR. WONG: Are you asking the witness to make inquiries?

MR. FINKELSTEIN: Yes.

MR. WONG: We're not going to do that. You can speak to Mr. Robson.

MR. FINKELSTEIN:

690 Q Would you make inquiries of whoever it was who did the interview, you're not telling me who that is, to see whether they recall whether Mr. Robson said he was told specifically that the courier, or anyone at Southam was concerned that the courier had the potential to become a daily newspaper?

MR. WONG: We'll do that.

(Emphasis added)

22 The Director refuses to provide the respondents with more details concerning both the interviews which were conducted and the information collected on the ground that these are protected from disclosure by either litigation privilege or public interest privilege. The Director argues that all documents from the beginning of his review of the acquisition of the *North Shore News*, which commenced in the late fall of 1988, are covered by litigation privilege. It is argued that all of the Director's activities are in contemplation of litigation.

23 The respondents argue that documents are not covered by litigation privilege if they were prepared for the purposes of reviewing the transaction and not with a view to an actual or contemplated application to the Tribunal. It is argued that an analogy can be drawn to the preparation of appraisal and other reports prepared with a possibility of litigation in mind. [10] Counsel's argument relies heavily on the fact that most of the transactions which the Director reviews do not lead to an application being made to the Tribunal and the Director's preferred course of action is to negotiate changes with the parties involved rather than proceeding to the Tribunal. In addition, it is argued that only documents passing to or from counsel and his client are covered by the privilege.

24 Documents which were prepared before the no-action letter was sent in March 1989 cannot in any circumstances, it is argued, be covered by litigation privilege. That letter expressly states not only that litigation is not being commenced but that no inquiry for the purpose of investigating the transaction further is being undertaken. Counsel for the respondents concedes that in the present case litigation was contemplated from at least October 3, 1990. On that date a letter was sent to counsel for Southam stating that a section 10 inquiry would be commenced and an application would be filed with the Competition Tribunal.

25 A number of issues are raised by the assertion of litigation privilege. Certainly a broad definition of the privilege could undercut any meaningful discovery by a respondent of the applicant's case. It may very well be that for Tribunal purposes a distinction between a solicitor's work product and communications with the client (a distinction which pertains in some United States jurisdictions) is the appropriate dividing line to apply in order to decide when documents are protected by litigation privilege. In any event, at the very least in the present case it is difficult to consider that the review process which took place prior to September 1990 would be protected by litigation privilege. Litigation privilege protects from disclosure documents which were brought into existence for the dominant purpose of litigation (actual or contemplated). [11] The purpose for the privilege is to ensure effective legal representation by counsel for his or her client. While litigation may have been a theoretical possibility prior to September 1990, there is no reason to think that the possibility of commencing litigation was being considered in such a manner that it could be said to be in contemplation. A reasonable distinction can be drawn between the Director's initial review procedures and the more intense and focused investigating procedures provided for by section 10 which in this case at least were clearly exercised in contemplation of litigation. When a litigation privilege is asserted the party making the assertion has the burden of proof.

26 Whether or not litigation privilege applies, however, is somewhat academic since in the Tribunal's view public interest privilege covers much of what the Director seeks to keep from the respondents. The Director refuses to provide the specific interview notes, to identify the individuals interviewed, when they were interviewed and who they were interviewed by. At the same time, he has agreed to give the respondents a summary of what was said. In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents, they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-à-vis the respondents. It is in the public interest, then, to allow the Director to keep their identities confidential, to keep the details of the interviews confidential, to protect the effectiveness of his investigations. It is in the public interest to keep the interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them.

27 It is conceivable that in some cases a respondent's ability to answer a case might be impaired if information concerning the identity of those interviewed or detailed information concerning the interview is not given (although it is difficult to conceive of a situation where this would be so). In any event, there is no indication that this is the case in the present litigation. The public

interest in keeping the details of the interviews confidential outweighs any benefit that the respondents might obtain from them. This is particularly so given the fact that the Director has agreed to provide summaries of the relevant information.

28 The Director's position that a summary of the information obtained from the interviews will be provided is a reasonable one. It raises, however, three issues: (1) at what time should the information be provided; (2) whether the summary should encompass only information on which the Director intends to rely in presenting his case; (3) how is the obligation to provide accurate but general summaries to be enforced.

29 With respect to the first consideration, in the present proceedings there is an obligation to provide the information in the context of the discovery proceedings. An undertaking to provide a summary at some later time of information *which is known now* is not appropriate. In many instances the Director may in fact have already provided the information as is obvious, for example, from the answers to questions 684 to 690 set out above. If he has not done so, then he should do so now rather than promising to do it in the future.

30 With respect to the extent of the information which should be provided, the Tribunal is of the view that the Director has an obligation to provide in a general way (aggregated form) not merely information which supports his case but also information which favours the respondent. For example, some of the general descriptions and observations found in document number 59 (provided to the Tribunal in response to a request for sample documents) would satisfy this requirement. The respondents are particularly entitled to a summary of the information which was collected by the Director prior to his decision to commence an application before the Tribunal.

31 This leaves for consideration the question of how compliance with these requirements can be assured in the absence of some review of the actual documents (for example, interview notes). Ensuring compliance with a discovery obligation of this nature is no different from ensuring compliance with ordinary documentary discovery. In both cases confidence is placed in the parties to accurately produce information within their control. If a serious question were to arise in this regard it is always open to the parties to seek an order for further discovery or a review by the Tribunal.

32 One aspect of the present dispute between the parties which was not explored is the extent to which the respondents are conceding by their present request that the names, times and details of interviews and discussions they have had with various industry participants are required to be disclosed to the applicant. If the applicant is required to provide such information, would the respondents not similarly be required to do so?

33 The respondents raise in questions 74 and 79 the adequacy of the Director's claim for privilege. The Director's affidavit of documents contains a blanket clause in this respect. That clause describes the documents for which privilege is claimed as follows:

> Confidential communications and documents which, since the commencement of this proceeding or in view of this proceeding, whilst it was contemplated or anticipated, have passed between any of the Applicant, his servants or agents, his solicitors or Counsel, or have been created by them, for the purpose of obtaining or furnishing information or materials to be used as evidence on his behalf in this proceeding or to enable such evidence to be obtained and to enable solicitors and Counsel for the said Applicant to conduct this proceeding on his behalf and to advise with reference thereto. [12]

In the *Chrysler* decision [13] it was held that a general description of the above type was sufficient (at the time the documents had been filed with the Tribunal). The respondents' affidavits of documents contain a similar blanket claim. There is also authority that a more detailed listing is necessary. [14] There is no doubt that a general practice has developed in the profession of using blanket descriptions as was done in the present case. The better view is that a detailed listing should be provided but not one which by its terms breaches the confidence which it is sought to protect (e.g. by giving the name of an interviewee). At the same time, a need for practicality may require that documents be described in some group manner. In the present case there are apparently over 500 documents (not all of them relevant) which were not provided to the respondents. Within the constraint of practicality, documents for which privilege is claimed should be identified in some more specific form than by a general blanket clause.

34 Subsection 14(1) of the *Competition Tribunal Rules* require the filing and serving of an affidavit of documents which contains "a brief description of each of the documents". Subsection 14(2) provides within that context that a claim "that a document is privileged ... shall be made in the affidavit of documents". Thus, it is contemplated that claims for privilege will be made within the context of an affidavit of documents in which each document has been described.

35 That having been said, however, in the present circumstances there is no need to provide such further description because the Tribunal has already actually reviewed some of the documents and stands ready, as noted below, to review the rest. At the hearing of the present motion, the Tribunal asked counsel for the applicant to provide it with a representative sample of the 500 documents (a sample of both those which were claimed to be irrelevant and those which were relevant but claimed to be privileged). Sixty such documents were provided. These were reviewed for the purpose of assessing the public interest and litigation privileges which were asserted and for assessing the claim of irrelevancy. Only one of them in the Tribunal's view seems relevant and not privileged (document 48). If counsel for the Director wishes to make further argument in this regard it might be addressed at the next session of the pre-hearing conference.

36 Counsel for the respondents objected to counsel for the applicant being allowed to choose a sample for review. While the Tribunal has no doubt that the sample was fairly chosen, if counsel for the respondents are still of the view that all documents which *are relevant* and for which public interest or litigation privilege is claimed should be reviewed by the Tribunal, then this will be done. If such a review is requested, counsel for the respondents should inform counsel for the applicant and the Tribunal quickly so that a review can be completed before the next session of the pre-hearing conference.

37 Five questions remain to be considered: 689, 715, 725, 732 and 736. Question 689 is quoted above and asks the Director to seek information from Mr. Robson as to what he was told by Mr. Perks. Mr. Perks is the publisher of *The Gazette* in Montreal, a Southam paper, and he was involved in the Southam acquisition which the Director challenges. The question need not be answered. As indicated, it is within the respondents' ability to ask Mr. Robson this question directly. The remaining four questions relate to market definition and ask whether the Director accepts as accurate certain information set out in Exhibit 20, a report prepared for Southam in 1987 by Urban and Associates. Counsel for the Director objected to these questions on two grounds: questions of market definition are legal questions; it is unreasonable to ask the Director to go through the respondents' report page by page and say whether he thinks it is accurate.

38 With respect to the proposition that market definition is a legal question, it is not. It is a mixed question of fact and law. The Director's representative can be asked questions relating to that issue although the pleadings do define the issues between the parties on this point in a fairly clear way (whether the market should be defined as the supply of newspaper retail advertising services, print real estate advertising services or more broadly as including other forms of media such as radio and T.V.). The questions which seek to have the Director's representative state on a page by page basis whether the information contained in the Urban report is accurate are unreasonable and need not be answered.

39 In so far as discovery is resisted by the Director on the ground that discovery does not lie against the Crown, it is too late to raise that argument. If any such immunity exist, it has been waived.

40 THE TRIBUNAL THEREFORE ORDERS THAT:

1. Questions 66, 282, 283, 291, 292, 300 and 314 shall be answered. These can be answered in writing and there is no need for Mr. Brantz to reattend to answer them.

2. The Director shall provide summaries of the information he has collected, as set out in the reasons for this order, in those cases where he has not already done so. Mr. Brantz shall reattend in Vancouver for this purpose unless counsel agree that this might be done in writing.

3. Mr. Brantz shall reattend in Vancouver to answer questions about the facts and documents upon which the Director relies for his position on market definition, if counsel for the respondents so requests.

Footnotes

1 See, for example, *Holmested and Gale on the Ontario Judicature Act and Rules of Practice*, vol. 2 (Toronto: Carswell, 1983) at 1745, para. 2.12.

2 C.E. Choate, *Discovery in Canada* (Toronto: Carswell, 1977) at 8, para. 29; *Graydon v. Graydon* (1921), 51 O.L.R. 301 (Ont. S.C.) : the primary purpose of discovery is to enable the party opposite to know what is the case he has to meet and its *secondary* and subsidiary purpose is to enable the party examining to extract from his opponent admissions which may dispense with more formal proof at the hearing. See also Choate, *ibid*. at 5, para. 15 and at 8, para. 26.

3 *Canada (Director of Investigation & Research) v. Air Canada* [1989 CarswellNat 1248 (Competition Trib.)] CT-88/1, Reasons and Order, February 14, 1989; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* [1989 CarswellNat 720 (Competition Trib.)] , CT-88/4, Reasons and Order, October 13, 1989.

4 Transcript of Examination for Discovery of Andre Brantz, An Authorized Representative of the Director of Investigation and Research, vol. I at 1.

5 Southam's letter of December 15, 1988 advising the Director of the proposed acquisition of the *North Shore News* and providing information in relation thereto.

6 Letter from Southam to the Director dated January 31, 1991.

7 Although, again, why one finds it necessary to adopt so technical an approach in refusing to answer questions is difficult to understand.

8 Decisions which have considered unreasonable questions are: *Andres Wines Ltd. v. T.G. Bright & Co.* (1978), 41 C.P.R. (2d) 113 (Fed. T.D.) and *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 (B.C. C.A.) .

9 *Supra*, note 4, vol. II at 208-215, 230-232; vol. III at 241-243.

10 *Blais v. Andras*, [1972] F.C. 958 (Fed. C.A.); *Canadian National Railway v. McPhail's Equipment Co.* (1977), 16 N.R. 295 (Fed. C.A.) ; *Canadian National Railway v. Milne*, [1980] 2 F.C. 285 (Fed. T.D.); *Houle v. The Queen in Right of Canada*, 2 W.D.C.P. 439.

11 *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 61 Alta. L.R. (2d) 319 (Alta. C.A.) ; *Santa Ursula Navigation S.A. v. St. Lawrence Seaway Authority* (1981), 25 C.P.C. 78 (Fed. T.D.) ; *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.) .

12 Schedule 1, Part 2.

13 *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* , CT-88/4, Reasons and Order, July 5, 1989.

14 *Barrett v. Vardy* (Ont. Dist. Ct.) (Hawkins D.C.J.); *Grossman v. Toronto General Hospital* (1983), 35 C.P.C. 11 (Ont. H.C.) ; *Champion Truck Bodies Ltd. v. Canada* (1986), [1987] 1 F.C. 327 (Fed. T.D.).

TAB 9

Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 Comp Trib 3
File No.: CT-2021-002
Registry Document No.: 100

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Secure Energy Services Inc.
(respondent)

Date of hearing by video-conference: January 28, 2022
Before Judicial Member: Phelan, J.
Date of order: February 15, 2022

REASONS FOR ORDER AND ORDER REGARDING THE RESPONDENT'S MOTION TO COMPEL THE COMMISSIONER TO PROVIDE PROPER AND COMPLETE ANSWERS TO REFUSALS ON DISCOVERY

I. NATURE OF MATTER

[1] This is Secure Energy Services Inc.'s [Secure/Respondent] motion [Secure's Motion] following the discovery of the Commissioner's representative. It was heard along with the Commissioner's motion to compel Secure to answer certain questions. The Tribunal has ruled on the Commissioner's motion. Ultimately Secure's Motion comes down to whether some or all of the questions identified in Schedule A to Secure's Motion should be answered. This Order will address the specific questions to be answered as well as the applicable principles regarding the types of questions. Many of the disputed questions related to information arising from the Commissioner's investigation of the Tervita/Newalta merger previously described in the Tribunal's decision related to the Commissioner's discovery motion.

[2] The Commissioner has taken the position that it is only required to answer questions about facts learned related to the Tervita-Newalta merger whereas Secure takes the position that the Commissioner has a broader obligation to answer questions based on the Commissioner's "information, knowledge and belief" – the usual discovery standard.

[3] Secure recognizes, properly I add, that certain types of questions are improper to ask of the Commissioner including those seeking expert opinion and analysis – sometimes a difficult distinction. Secure does not ask for new analyses to be performed but says that the Commissioner's refusals relate to the Commissioner's existing knowledge, information and belief about a completed transaction involving one of the merging parties in (arguably) the same product and geographic market.

[4] The Tervita/Newalta merger's relevance or potential relevance to the Secure/Tervita Merger [Merger] is obvious from the facts in issue and from the pleadings in the litigation. The Commissioner does not seriously dispute the relevance of the Tervita/Newalta merger to the issues in this case. It just seeks to shield itself from disclosing some of what it learned from its review of that merger.

II. CONSIDERATIONS

[5] Generally Secure's position better reflects the discovery obligations of a party in a Tribunal matter – including the Commissioner's. The Tribunal has taken a broad approach to the discovery obligation and has provided guidance, which I adopt, in *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3 [*Live Nation*], and *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 [*VAA*].

[6] The following quotes from *Live Nation* reflect the Tribunal's approach to the discovery obligation:

> [6] … It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each

party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("VAA") at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

[7] … FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person's knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings.

[8] … At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.

…

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts known by such party, but it cannot ask for the facts or evidence relied on by the party to support an allegation (*VAA* at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) ("*Montana Band*") at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144 ("*Apotex*"), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked "upon what facts do you rely for paragraph x of your pleading" (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

[11] … The scope of permissible discovery will ultimately depend "upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles" (*Lehigh* at paras 24-25; see also *VAA* at paras 41 46).

[7] In outlining the broad scope of discovery applicable to parties, it is important to recognize the somewhat unique status of the Commissioner. This was touched upon at *VAA*, paras 43-44:

[43] **Other factors colour the examination for discovery process in Tribunal matters. First, the Commissioner is a unique litigant in proceedings before the Tribunal. The Commissioner is a non-market participant and his representatives have no independent knowledge of facts regarding the market**

> **and behaviour at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he has gathered from market participants in the course of his investigation of the matter at stake. The Commissioner and his representatives do not have the direct and primary knowledge of the facts supporting the Application. This means that it may typically be more difficult and challenging for a representative of the Commissioner to exhaustively describe "all facts known" to the Commissioner.**
>
> [44] **Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings.** Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the *VAA Privilege Decision*, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).
>
> [Tribunal's emphasis]

[8] The guiding principles for this discovery obligation are relevance and fairness as reflected in para 46 of *VAA*.

[9] While the Tribunal has recognized the limits on the source of the Commissioner's knowledge, information and belief, the Commissioner has the obligation to meet the discovery disclosure standard subject to usual issues of relevance, privilege and proportionality to name a few.

[10] In respect of relevance, discovery cannot be used as a tool to review the Commissioner's conduct of another merger investigation. The issue before the Tribunal is not the "reasonableness" of the Commissioner's decision to challenge this merger – it is not judicial review nor is it a review of the Commissioner's decision not to challenge the other related merger or any other merger. It is not about how the Commissioner conducted its investigations or the techniques used in those investigations. Whether they were proper and well conducted or botched is of no relevance to the Tribunal's consideration of the alleged substantial lessening of competition of this Merger.

[11] That being said, recognition that the Commissioner is not a typical litigant does not support the proposition that the Commissioner can be insulated from the basic tenets of discovery or of the

examination for discovery process (See *Canada (Director of Investigation and Research) v NutraSweet*, [1989] CCTD No 54 at para 35 [*NutraSweet*]).

[12] An important aspect of oral discovery is that of obtaining admissions from the opposing party. This process can involve probing inquiry of matters and issues (*VAA*, para 41).

[13] As explained in *NutraSweet* and in *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17, Secure is entitled to be provided with the relevant factual information underlying the Commissioner's application and the allegations therein, to know the case it has to meet, to obtain sufficient information respecting specific facts in issue.

[14] As with all motions regarding refusals, one must examine the questions at issue, the context, and their true nature. The Tribunal must determine the true nature of the question posed and ensure that questions are not a disguised manner of trying to obtain that which is not permitted. As acknowledged at para 63 of *VAA*, requiring the Commissioner to outline the facts and sources cannot be a disguised way to requiring disclosure of the "fact relied upon" by the Commissioner.

[15] There is no magic formula for determining whether a question should be answered. It requires a review of the question as posed, the subject matter and the context.

[16] In keeping with the underlying principles of discovery including that ultimate relevance and weight will be determined by the hearing tribunal, this stage of the litigation favours disclosure.

[17] It is not a realistic premise that if there is true surprise by matters which should have been disclosed, an adjournment can be granted to allow the surprised party time to consider their position. While such remedy does exist, in these scheduled and time managed proceedings, the process of stopping the hearing and restarting is inefficient, disruptive and difficult for the parties and the Tribunal itself. Adjournment is a last resort, not a "going in" proposition.

III. QUESTIONS IN ISSUE

A. Customer based approach

[18] Q 156 asks whether the Commissioner used "the customer based" approach and more directly phrased, Secure is seeking an admission as to the Commissioner's knowledge which is a proper line of questions.

[19] Q 157, on the other hand, seeks to question the Commissioner's decisions during the inquiry process which is not pertinent and need not be answered.

B. Product/Geographic Markets

[20] Q 332 seeks an admission that the Tervita/Newalta merger involves the same products and market as the Secure/Tervita Merger. The question could have been approached in stages of

identifying the products of each and then comparing the answers. The question posed is a more efficient way to secure an admission on a relevant issue.

[21] Q 332 includes a follow-up question seeking any differences. Both aspects should be answered within the context of the Commissioner's knowledge, information and belief.

[22] Q 332 asks questions directed at how the Commissioner dealt with product markets internally. As such, it seeks information about how the Commissioner conducted the Tervita/Newalta merger review. The Commissioner's manner of conduct is not the issue in this litigation and the question need not be answered.

[23] Q 333: for the same reasons as Q 332, it need not be answered.

[24] Q 334: as this relates to geographic markets in the same way Q 332 related to product markets, it must be answered.

[25] Q 335 is directed at the internal workings of the Commissioner's office and is irrelevant.

C. Tervita/Newalta Merger

[26] Q 339 asks about the Commissioner's post Tervita/Newalta closing conduct and is irrelevant.

[27] Q 350 to 354 asks about how the Commissioner conducted his analysis of aspects of the Tervita/Newalta merger. It is not relevant. The current litigation is not a process of comparing investigative activities as between merger reviews.

D. Dead Weight Loss

[28] Q 355-358: the series of questions focuses on dead weight loss analysis. Dead weight loss is a key defence in this litigation. Apparently the Commissioner has knowledge, information or belief of aspects of dead weight loss in what is arguably the same product and geographic markets. To the extent that the questions do not require the production of expert opinion or engage privileged communication, the information is producible.

E. Other

[29] Q 359 – 361 raises similar questions in respect to demand elasticity and for the same reasons and subject to the same caveats as above, they are to be answered.

[30] Q 362 inquires into how the Commissioner conducted the Tervita/Newalta merger review and is irrelevant.

[31] Q 363 inquires into efficiencies considered in the Tervita/Newalta merger and to the extent that the Commissioner has knowledge, information and belief on this subject and Secure is seeking

an admission, the Commissioner is to answer. The fact that there may be expert opinion on a topic does not, in and of itself, form a valid grounds of refusal.

ORDER

FOR THE REASONS GIVEN, the Tribunal orders the following questions to be answered:

Q 156, 332, 334, 355 to 358, 359 to 361 and 363

DATED at Ottawa, this 15th day of February, 2022

SIGNED on behalf of the Tribunal by the presiding judicial member Michael Phelan.

(s) Michael Phelan

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Paul Klippenstein
Ellé Nekiar

For the respondent:

Secure Energy Services Inc.

Robert Kwinter
Nicole Henderson
Brian Facey

TAB 10

1997 CarswellNat 368
Supreme Court of Canada

Canada (Director of Investigation & Research) v. Southam Inc.

1997 CarswellNat 368, 1997 CarswellNat 369, 1997 J.E. 632, [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 69 A.C.W.S. (3d) 586, 71 C.P.R. (3d) 417, J.E. 97-632

Southam Inc., Lower Mainland Publishing Ltd., RIM Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., and Elty Publications Ltd., Appellants v. Director of Investigation and Research

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Oral reasons: March 20, 1997
Docket: 24915

Proceedings: Reversing (1995), 127 D.L.R. (4th) 263, 21 B.L.R. (2d) 1, 63 C.P.R. (3d) 1, [1995] 3 F.C. 557, (sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 1)*) 185 N.R. 321 (C.A.); Affirming (1995), 127 D.L.R. (4th) 329, 21 B.L.R. (2d) 68, 63 C.P.R. (3d) 67, (sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 2)*) 185 N.R. 291 (Fed. C.A.)

Counsel: *Neil Finkelstein, Glenn Leslie* and *Mark Katz*, for appellants.
Stanley Wong, André Brantz and *J. Kevin Wright*, for respondent.

The judgment of the court was delivered by *Iacobucci J.*:

1 The principal question raised by this appeal is whether a decision of the Competition Tribunal (the Tribunal) is entitled to curial deference. Following the approach outlined by this Court in its recent jurisprudence, I conclude that the particular decision of the Tribunal here at issue is entitled to deference.

1. Facts

2 Two daily newspapers serve the region in and around Vancouver. They are the *Vancouver Sun* and the *Vancouver Province*. The appellant Southam Inc., through its subsidiary Pacific Press Limited, owns both.

3 In addition to the two dailies, many smaller community newspapers circulate in the Lower Mainland of British Columbia. These community newspapers differ from the daily newspapers in a few respects: they serve smaller regions, they are distributed free of charge to all households in the regions they serve, and they are published only once, twice, or at most three times weekly. Community newspapers have been more successful in the Lower Mainland than in any other comparable region of Canada. Daily newspapers, by contrast, have been less successful in Vancouver than in other major Canadian cities.

4 In 1986, Southam consulted Dr. Christine Urban, an American expert, about the problems its Vancouver dailies were facing. Dr. Urban identified Vancouver's strong community newspapers as the cause of the dailies' malaise. She advised Southam to act to stem the growing power of the community newspapers.

5 In September, 1986, Southam introduced a flyer delivery service to the Lower Mainland. Known as Flyer Force, the new service offered delivery of flyers to even the households that did not receive a Southam newspaper. In 1988, several community newspapers, whose business included the delivery of flyers, joined to form a group whose geographic reach would rival Flyer Force's. This group was initially called the MetroVan Group. Later in 1988, the MetroVan Group expanded and changed its name to MetroGroup.

6 In September, 1988, Southam began to publish the *North Shore Extra*. This was a bi-weekly publication whose editorial focus was on the North Shore district of the Lower Mainland. The *Extra* was inserted as a supplement into copies of the *Vancouver Sun* bound for households in the North Shore. Additionally, the *Extra* was delivered to North Shore households that did not receive the *Sun*.

7 In January, 1989, Southam began to acquire community and specialized newspapers in the Lower Mainland. By May, 1990, the company had acquired a controlling interest in 13 community newspapers, a real estate advertising publication, three distribution services, and two printing concerns. Among its acquisitions were the Lower Mainland's two strongest community newspapers, the *North Shore News* and the *Vancouver Courier*, as well as the *Real Estate Weekly*.

8 In April, 1990, Southam discontinued the *North Shore Extra*.

9 On November 20, 1990, the respondent, the Director of Investigation and Research, applied for an order requiring Southam to divest itself of the *North Shore News*, the *Courier*, and the *Real Estate Weekly*. The Director's reason for taking this step was that Southam's acquisition of these publications was likely to lessen competition substantially in the retail print advertising and real estate print advertising markets in the Lower Mainland.

10 In early 1991, Southam shut down Flyer Force.

2. Relevant Statutory Provisions

11 Section 92 of the Competition Act, R.S.C. 1985, c. C-34 (Competition Act) addresses the problem of mergers that are likely to lessen competition substantially:

> *92.* (1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially
>
> (*a*) in a trade, industry or profession,
>
> (*b*) among the sources from which a trade, industry or profession obtains a product,
>
> (*c*) among the outlets through which a trade, industry or profession disposes of a product, or
>
> (*d*) otherwise than as described in paragraphs (*a*) to (*c*),
>
> the Tribunal may, subject to sections 94 to 96,
>
> (*e*) in the case of a completed merger, order any party to the merger or any other person
>
> (i) to dissolve the merger in such manner as the Tribunal directs,
>
> (ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or
>
> (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action, ...

12 Various sections of the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), create and provide for the constitution of the Tribunal:

> *3.* ...
>
> (2) The Tribunal shall consist of

(*a*) not more than four members to be appointed from among the judges of the Federal Court — Trial Division by the Governor in Council on the recommendation of the Minister of Justice; and

(*b*) not more than eight other members to be appointed by the Governor in Council on the recommendation of the Minister.

(3) The Governor in Council may establish an advisory council to advise the Minister with respect to appointments of lay members, which council is to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour.

. . . . .

4. (1) The Governor in Council shall designate one of the judicial members to be Chairman of the Tribunal.

. . . . .

10. (1) Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member.

(2) The Chairman shall designate a judicial member to preside at any hearing or, if the Chairman is present at a hearing, may preside himself.

13 Sections 12 and 13 divide questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact, and assign responsibility for resolving those questions, both in the first instance and on appeal:

12. (1) In any proceedings before the Tribunal,

(*a*) questions of law shall be determined only by the judicial members sitting in those proceedings; and

(*b*) questions of fact or mixed law and fact shall be determined by all the members sitting in those proceedings.

(2) In any proceedings before the Tribunal,

(*a*) in the event of a difference of opinion among the members determining any question, the opinion of the majority shall prevail; and

(*b*) in the event of an equally divided opinion among the members determining any question, the presiding member may determine the question.

. . . . .

13. (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court — Trial Division.

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

3. Judgments in Appeal

A. Competition Tribunal

(i) On the merits (1992), 43 C.P.R. (3d) 161, with additional reasons (1993), 48 C.P.R. (3d) 224

14 Following 40 days of hearings, the Tribunal found that the acquisition by Southam of the community newspapers and affiliated businesses did not substantially lessen competition in the market for retail print advertising in the Lower Mainland. The Tribunal did find, however, that Southam's purchases had substantially lessened competition in the market for real estate print advertising in the North Shore region. After hearing argument on the issue of remedies, the Tribunal ordered Southam to divest itself, at its option, of either the *North Shore News* or the *Real Estate Weekly*. The Tribunal rejected Southam's proposed remedy, which was to sell the real estate section of the *North Shore News*.

15 During the hearing, the Tribunal heard from 50 witnesses and received literally volumes of documents in evidence. That the Tribunal paid heed to this prodigious body of evidence is clear from its written reasons, which occupy some 147 pages in a law report. Fortunately, it is not necessary for purposes of this appeal to reproduce the Tribunal's reasons in any detail.

16 The principal underlying question for the Tribunal was whether Southam's daily newspapers and its newly acquired community newspapers are in the same market. Its approach to this problem was to ask whether the two kinds of products are close substitutes for one another. The traditional economic measure of substitutability is cross-elasticity of demand, which is the extent to which consumers will switch from one product to another in response to slight changes in their relative prices. However, the Tribunal recognized that direct statistical evidence of cross-elasticity of demand will rarely be available. Accordingly, the members determined that recourse should be had to "indirect evidence" of substitutability. Indirect *indicia* of substitutability include (at p. 179) "the physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices". Also relevant are "the views of industry participants about what products and which firms they regard as actual and prospective competitors".

17 Almost 100 pages of the Tribunal's decision are taken up with a painstaking review and evaluation of the evidence. On the strength of this, the Tribunal concluded that daily newspapers and community newspapers, though remarkably similar at first glance, serve different retail print advertising markets. Daily newspapers, which circulate widely but reach only a relatively small percentage of households, appeal to the advertising needs of large national firms that serve customers throughout a metropolitan region. Community newspapers, by contrast, circulate only within small communities but typically reach all of the households within those communities. These newspapers appeal to local advertisers whose customers live only within a certain district. In support of this conclusion, the Tribunal presented an informal survey of the behaviour of selected advertisers in the Lower Mainland.

18 The Tribunal also cited considerable evidence to suggest that Southam regarded the community newspapers as its chief competitors. In one document, Dr. Christine Urban, an American newspaper consultant retained by Southam, identified strong community newspapers as the root of Southam's problems in the Lower Mainland. In another document quoted in the Tribunal's decision at p. 195, an official of Southam warned against the danger of conceding forever to the community newspapers "a substantial portion of what is normally daily newspaper business". However, the members did not regard this evidence of what they called "inter-industry competition" as decisive. In their view, it showed that Southam believed that it was competing with the community newspapers. But simply to state that something is believed does not guarantee that it is so, and in this case the Tribunal found that Southam's belief was unfounded. "With the present product configurations", concluded the Tribunal at p. 277, "the dailies and community newspapers are at best weak substitutes for some advertisers".

19 Because the two kinds of newspapers were at best only weak substitutes, the Tribunal concluded that they were not in the same relevant product market and therefore that the acquisition by Southam of several community newspapers and affiliated businesses did not substantially lessen competition in the market for retail print advertising in the Lower Mainland.

20 However, the Tribunal did find that the acquisition by Southam of both the *North Shore News*, with its weekly real estate supplement, and the *Real Estate Weekly*, with its North Shore edition, gave Southam monopoly power over the market for real estate print advertising on the North Shore. The result was to lessen competition substantially in that market. The Tribunal ordered the parties to appear at a later date to consider the question of the remedy.

(ii) As to remedy 199247 C.P.R. (3d) 240

21 Having heard argument on the question, the Tribunal found that the test of a proposed remedy in contested proceedings is whether it will restore the competitive situation as it existed before the merger and is not, as Southam submitted, whether it will eliminate any substantial lessening of competition that the merger may have produced. However, the Tribunal found that, even accepting Southam's proposed test, Southam's proposed remedy of selling the weekly real estate supplement to the *North Shore News* still would not be effective. The Tribunal thought it likely that the real estate supplement would founder on its

own; certainly it would not be as substantial a presence in the North Shore as a stand-alone publication as it had been as part of the *North Shore News*. The Tribunal noted that Southam had offered to reach an accommodation with any prospective buyer concerning the continuation of the supplement's association with the *North Shore News*. The Tribunal members concluded, however, that they lacked the jurisdiction to order Southam to reach an accommodation. And in any event, the Tribunal doubted whether such a negotiated association would be conducive to the fostering of a competitive environment. Accordingly, the Tribunal ordered Southam to divest itself, at its option, of either the *North Shore News* or the *Real Estate Weekly*.

B. Federal Court of Appeal

(i) On the merits, [1995] 3 F.C. 557

22 The Director of Investigation and Research appealed the Tribunal's decision on the merits and Southam appealed the Tribunal's decision on the remedy. The Federal Court of Appeal allowed the first appeal and dismissed the second.

23 Robertson J.A., writing for the court, concluded that the Tribunal, though it had stated the correct formula, had nonetheless applied the wrong legal test. He accepted the Tribunal's account of the kinds of evidence that it had to consider, but stated that the Tribunal had failed to consider all of these. He found, in particular, that the Tribunal had not considered evidence that daily newspapers and community newspapers are functionally interchangeable and evidence that the owners of the daily newspapers considered themselves to be in competition against the community newspapers. Failure to consider relevant factors, he said, is an error of law. And to his mind, the Tribunal is entitled to no deference on a question of law.

24 By way of buttressing this conclusion, he emphasized that the *Competition Tribunal Act* mandates an unusual division of labour among the members of the Tribunal. Each panel of the Tribunal, he observed, must have at least one judicial member and the judicial members of any panel are entirely responsible for the settling of such legal questions as may arise in the course of a proceeding. Section 12 of the Act provides:

> *12.* (1) In any proceedings before the Tribunal,
>
> (*a*) questions of law shall be determined only by the judicial members sitting in those proceedings; and
>
> (*b*) questions of fact or mixed law and fact shall be determined by all the members sitting in those proceedings.

Consequently, an appeal from the Tribunal on a question of law is akin to an appeal from the Trial Division of the Federal Court. What is more, an appeal lies from any decision of the Tribunal on a question of law, and no privative clause protects the Tribunal's decisions. The *Competition Tribunal Act* provides:

> *13.* (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court — Trial Division.

Robertson J.A. further stressed that the judicial members of the Tribunal are not more expert in matters of law than are judges of the Federal Court of Appeal.

25 Invoking the power of the Federal Court of Appeal to substitute its own findings for those of a tribunal, Robertson J.A. held that the evidence before the Tribunal of the functional interchangeability of daily and community newspapers and of inter-industry competition was more than sufficient to show that the two kinds of newspapers are in the same market. Accordingly, he remitted the matter back to the Tribunal with instructions that it should inquire whether the acquisition of the *North Shore News*, the *Vancouver Courier*, and the *Real Estate Weekly* had resulted in a substantial lessening of competition in the market for retail print advertising in the Lower Mainland of British Columbia.

(ii) As to remedy 199247 C.P.R. (3d) 240

26 Turning to Southam's appeal of the remedy, Robertson J.A. declined to decide what the appropriate test for a remedy is, because Southam's proposed remedy failed regardless of the test applied. In answer to Southam's protest that the Tribunal

had imposed a penalty on it, Robertson J.A. observed that the Tribunal had sought only to impose an *effective* remedy. To his mind, this way of proceeding could not be objectionable. Against the complaint that the Tribunal had wrongly placed the burden of proving the effectiveness of its proposed remedy on Southam, Robertson J.A. invoked the maxim that he who asserts must prove. To Southam's argument that the Tribunal had wrongly dismissed its proposed remedy as ineffective, he said that curial deference was due to the Tribunal on this, a finding of mixed law and fact.

4. Issues

27 This appeal raises two issues. The first is whether the Federal Court of Appeal erred in concluding that it owed no deference to the Tribunal's finding about the dimensions of the relevant market and in subsequently substituting for that finding one of its own. The second is whether the Federal Court of Appeal erred in refusing to set aside the Tribunal's remedial order.

5. Analysis

28 The principal question in this appeal concerns the limits that an appellate court should observe in deciding a statutory appeal from a decision like the one that the Tribunal reached in this case. Ultimately, this comes down to a question about the standard of review that an appellate court should apply in a case such as this one. In the reasons that follow, the answer given is that the Competition Tribunal should be held to the standard of reasonableness *simpliciter*. In other words, a court, in reviewing the Tribunal's decision, must inquire whether that decision was reasonable. If it was, then the decision should stand. Otherwise, it must fall.

29 The secondary question is whether the Tribunal chose an appropriate remedy. My conclusion is that, even though the Tribunal imposed too strict a test, its chosen remedy is appropriate.

A. Statutory Right of Appeal

30 In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, a decision which, like this one, concerned a decision of an expert tribunal that was subject to a statutory right of appeal, the Court declared that the standard of review is a function of many factors. Depending on how the factors play out in a particular instance, the standard may fall somewhere between correctness, at the more exacting end of the spectrum, and patently unreasonable, at the more deferential end. See pp. 589-590.

31 An appellate court must consider the factors with a view to determining the approach that it should take as a court sitting in appeal of the decision of the tribunal. There is no privative clause, and so jurisdiction is not at issue. The tribunal enjoys jurisdiction by virtue of its constating statute and the appellate court enjoys jurisdiction by virtue of a statutory right of appeal. The legislative intent is clear. The question is what limits an appellate court should observe in the exercise of its statutorily mandated appellate function.

32 I wish to emphasize that in cases like the instant appeal no question arises about the extent of the tribunal's jurisdiction. Where the statute confers a right of appeal, an appellate court need not look to see whether the tribunal has exceeded its jurisdiction by breaching the rules of natural justice or by rendering a decision that is patently unreasonable. The manner and standard of review will be determined in the way that appellate courts generally determine the posture they will take with respect to the decisions of courts below. In particular, appellate courts must have regard to the nature of the problem, to the applicable law properly interpreted in the light of its purpose, and to the expertise of the tribunal.

33 I propose to consider each of the relevant factors in turn.

B. The Nature of the Problem Before the Tribunal

34 The parties vigorously dispute the nature of the problem before the Tribunal. The appellants say that the problem is one of fact. The respondent insists that the problem is one of law. In my view, the problem is one of mixed law and fact.

35 Section 12(1) of the Competition Tribunal Act contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what" negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

36 For example, the majority of the British Columbia Court of Appeal in Pezim, , concluded that it was an error of law to regard newly acquired information on the value of assets as a" material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely — that newly acquired information about the value of assets can constitute a material change — was a matter of law, because it had the potential to apply widely to many cases.

37 By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

38 Part of the confusion in this case arises from the fact that the parties are arguing about two different questions. On the surface, it appears that the parties agree about the law: both say that, in determining the dimensions of the relevant market, the Tribunal must consider indirect evidence of cross-elasticity of demand. No one quarrels with the Tribunal's understanding of the kinds of indirect evidence it should consider.

39 However, the respondent says that, having informed itself correctly on the law, the Tribunal proceeded nevertheless to ignore certain kinds of indirect evidence. Because the Tribunal must be judged according to what it does and not according to what it says, the import of the respondent's submission is that the Tribunal erred in law. After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

40 The appellants, for their part, maintain that the Tribunal considered all the relevant kinds of indirect evidence, including the kinds that the respondent says it ignored. Accordingly, the appellants argue that if the Tribunal erred, it can only have been in applying the correct legal test to the facts. Such an error, say the appellants, is an error of fact. As authority for their position, they cite a passage from the decision of this Court in *Canada v. Pharmaceutical Society (Nova Scotia)*, (sub nom. *R. v.* Nova Scotia Pharmaceutical Society), [1992] 2 S.C.R. 606, at p. 647:

> In the context of s. 32(1)(*c*), the process followed and the criteria used to arrive at a determination of "undueness" are questions of law and as such are reviewable by an appellate court. The application of this process and these criteria, that

is the full inquiry, often involving complicated economic issues, into whether the impugned agreement was an undue restriction on competition, remains a question of fact. The general rule that appellate courts should be reluctant to venture into a re-examination of the factual conclusions of the trial judge applies with special force in a complex matter such as here.

41 Both positions, so far as they go, are correct. If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact. The question, then, becomes whether the Tribunal erred in the way that the respondent says it erred.

42 Even a cursory reading of the Tribunal's reasons discloses that the Tribunal did not fail to consider relevant items of evidence. The respondent charges — and the Federal Court of Appeal agreed with him on this point — that the Tribunal ignored evidence of functional interchangeability and of inter-industry competition. But this overlooks the 14 pages that the Tribunal devoted to functional interchangeability, and the 28 pages that the Tribunal devoted to inter-industry competition. See pp. 191-218 and pp. 225-238. A great part, if not actually the bulk of the Tribunal's decision is taken up with an examination of the very factors that the respondent says it ignored. Therefore, the Tribunal did not err in law by failing to consider relevant factors.

43 The suggestion remains, however, that the Tribunal might have erred in law by failing to accord adequate weight to certain factors. The problem with this suggestion is that it is inimical to the very notion of a balancing test. A balancing test is a legal rule whose application should be subtle and flexible, but not mechanical. It would be dangerous in the extreme to accord certain kinds of evidence decisive weight as, for example, by saying that evidence of inter-industry competition should always be sufficient to prove that two companies are operating in the same market. A test would be stilted and impossible of application if it purported to assign fixed weights to certain factors as, for example, by saying that evidence of inter-industry competition should weigh 10 times as heavily in the Tribunal's deliberations as does evidence of physical similarities between the products in question. These sorts of things are not readily quantifiable. They should not be considered as matters of law but should be left initially at least to determination by the Tribunal. The most that can be said, as a matter of law, is that the Tribunal should consider each factor; but the according of weight to the factors should be left to the Tribunal.

44 It seems, then, that if the Tribunal erred, it was in applying the law to the facts; and that is a matter of mixed law and fact. This is especially so if, as here, the legal principle being applied involves a balancing test, because with a typical multi-factored balancing test so many factors weigh in the balance that a duplication of any one set of relevant circumstances in the future is unlikely. At the outside, the decision of the Tribunal in this case stands for the proposition that a large daily newspaper does not compete for retail advertising business with small community newspapers though probably it does not stand even for so general a proposition as that, because the Tribunal's decision rested in part on its assessment of the behaviour of *these* parties. Depending as it does so fully on the facts and circumstances of the case, the decision is too particular to have any great value as a general precedent.

45 In short, the Tribunal forged no new legal principle, and so its error, if there was an error, can only have been of mixed law and fact. It should be noted that no one has suggested that the Tribunal erred in its findings of fact. All of this tends to suggest that some measure of deference is owed to the decision of the Tribunal because, to paraphrase what Gonthier J. stated in Nova Scotia Pharmaceutical Society, , appellate courts should be reluctant to venture into a re-examination of the conclusions of the Tribunal on questions of mixed law and fact.

C. The Words of the Tribunal's Constating Statute

46 Section 13 of the Competition Tribunal Act confers a right of appeal from orders and decisions of the Competition Tribunal:

> *13.* (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court — Trial Division.
>
> (2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

That Parliament granted such a broad, even unfettered right of appeal, as if from a judgment of a trial court, perhaps counsels a less-than-deferential posture for appellate courts than would be appropriate if a privative clause were present. However, as this Court has noted several times recently, the absence of a privative clause does not settle the question. See Pezim, ; Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)[1989] 1 S.C.R. 1722, at p. 1746.

D. The Purpose of the Statute that the Tribunal Administers

47 Parliament has described the purpose of the *Competition Act* in the following terms:

> *1.1* The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Competition Act, s. 1.1, as am. by R.S.C. 1985, c. 19 (2nd Supp.), s. 19.

48 The aims of the Act are more "economic" than they are strictly "legal". The "efficiency and adaptability of the Canadian economy" and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested it with responsibility for the administration of the civil part of the *Competition Act*. See Competition Tribunal Act, s. 8(1).

49 This Court has said in the past that the Tribunal is especially well- suited to the task of overseeing a complex statutory scheme whose objectives are peculiarly economic:

> Section 8(1) [of the *Competition Tribunal Act*] confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the [*Competition Act*] therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the [*Competition Act*] and the [*Competition Tribunal Act*] that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII [of the *Competition Act*], since it involves complex issues of competition law, such as abuses of dominant position and mergers.

See Chrysler Canada Ltd. v. Canada (Competition Tribunal)[1992] 2 S.C.R. 394, at p. 406. Because an appellate court is likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal's decisions and consequently to be less able to secure the fulfilment of the purpose of the *Competition Act* than is the Competition Tribunal, the natural inference is that the purpose of the Act is better served by appellate deference to the Tribunal's decisions.

E. The Area of the Tribunal's Expertise

50 Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review. This Court has said as much several times before, though perhaps never so clearly as in the following passage, from C.J.A., Local 579 v. Bradco Construction Ltd.[1993] 2 S.C.R. 316, at p. 335:

> ... the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* ..., it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

51 As I have already said, the Tribunal's expertise lies in economics and in commerce. The Tribunal comprises not more than four judicial members, all of whom are judges of the Federal Court - Trial Division, and not more than eight lay members,

who are appointed on the advice of a council of persons learned in "economics, industry, commerce or public affairs". See Competition Tribunal Act, s. 3. The preponderance of lay members reflects the judgment of Parliament that, for purposes of administering the *Competition Act*, economic or commercial expertise is more desirable and important than legal acumen.

52 The particular dispute in this case concerns the definition of the relevant product market — a matter that falls squarely within the area of the Tribunal's economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest *indicium* of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more, indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the *economic* significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.

53 All of this is not to say that judges are somehow incompetent in matters of competition law. Significantly, Parliament mandated that the Competition Tribunal should include judicial members, and that the Chairman should always be a judge. See Competition Tribunal Act, s. 4. Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges. However, one of the principal roles of the judicial members is to decide such questions of pure law as may arise before the Tribunal. Over those questions they have exclusive jurisdiction. See *supra* at s. 12(1)(a). But over questions of fact and of mixed law and fact, the judicial members share their jurisdiction with the lay members. See *supra* at s. 12(1)(b). Thus, while judges are able to pronounce on questions of the latter kind, they may do so only together with the lay members; and, in a typically constituted panel, such as the one that sat in this case, the lay members outnumber the judicial ones, so that in the event of a disagreement between the two camps, the lay members as a group will prevail. This makes sense because, as I have observed, the expertise of the lay members is invaluable in the application of the principles of competition law.

F. The Standard

54 In my view, considering all of the factors I have canvassed, what is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable". Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the *Competition Act* is broadly economic, and so is better served by the exercise of economic judgment; and the fact that the application of principles of competition law falls squarely within the area of the Tribunal's expertise. Other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from decisions of the Tribunal and the presence of judges on the Tribunal. Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.

55 I wish to emphasize that the need to find a middle ground in cases like this one is almost a necessary consequence of our standard-of-review jurisprudence. Because appeal lies by statutory right from the Tribunal's decisions on questions of mixed law and fact, the reviewing court need not confine itself to the search for errors that are patently unreasonable. The standard of patent unreasonableness is principally a jurisdictional test and, as I have said, the statutory right of appeal puts the jurisdictional question to rest. See *New Brunswick Liquor Corp. v. C.U.P.E., Local 963*, (sub nom. C.U.P.E., Local 963 v. New Brunswick Liquor Corp.), [1979] 2 S.C.R. 227, at p. 237. But on the other hand, appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.

56 I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an

assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

57 The difference between "unreasonable" and" patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in Canada (Attorney General) v. P.S.A.C.[1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary' patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See National Corn Growers Assn. v. Canada (Canadian Import Tribunal)[1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also Toronto (City) Board of Education v. O.S.S.T.F.,District *15*, S.C.C., No. 24724, February 27, 1997, at para. 47 [now reported at (1997), 144 D.L.R. (4th) 385] *per* Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

58 The standard of reasonableness *simpliciter* is the same standard that was applied in *Pezim*, and for good reason: the parallels between this case and that one are obvious. *Pezim* involved the decision of a securities commission, one of whose tasks was to be sensitive to and enhance capital market efficiency; this appeal involves the decision of the Competition Tribunal, one of whose tasks is to recognize and in its own way to promote the efficiency of the Canadian economy. In *Pezim*, appeals from decisions of the securities commission lay as of right; in this case, appeals from decisions of the Competition Tribunal lie as of right. The questions in *Pezim* were entirely within the competence of the commission to answer; the question in this appeal is entirely within the competence of the Competition Tribunal to answer. The principal difference between *Pezim* and this case is that *Pezim* involved what were called questions of law. However, as I have already explained, the questions in that case were questions of law only in a somewhat attenuated sense. The difference between the questions in the two cases is therefore not as great as it might at first seem.

59 The standard of reasonableness *simpliciter* is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. “Kathy K” (The) (“Storm Point” (The))1975[1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:

> ... the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were *clearly wrong rather than whether they accorded with that court's view on the balance of probability*. [Emphasis added.]

60 Even as a matter of semantics, the closeness of the" clearly wrong" test to the standard of reasonableness *simpliciter* is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to" wrong", the meaning is brought much nearer to that of" unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness *simpliciter*, falls on the *continuum* between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness *simpliciter*.

61 Putting all of the foregoing considerations into the balance and taking my cue from this Court's decisions on the subject, including particularly relatively recent decisions, I am of the view that decisions of the Competition Tribunal should be subject to review on a reasonableness standard. That this standard is appropriate and sensible becomes clear when one considers the complexity of economic life in our country and the need for effective regulatory instruments administered by those most knowledgeable and informed about what is being regulated. It bears noting, however, that the standard I have chosen permits recourse to the courts for judicial intervention in cases in which the Tribunal has been shown to have acted unreasonably.

62 In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom the issue is the weight that should be accorded to expert opinions. In other words, deference in terms of a "standard of reasonableness" and deference in terms of "weight" are two sides of the same coin. In this respect, I agree with Kerans, supra, at p. 17, who has described deference to expertise in the following way:

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly *must give great weight* to cogent views thus articulated. [Emphasis added.]

G. Application of the Standard

63 The question, then, is whether the Tribunal acted unreasonably when it decided that Southam's daily newspapers and community newspapers are in different product markets. I conclude that it did not.

64 The Federal Court of Appeal identified what it thought were two defects in the Tribunal's decision. The first is that the Tribunal failed to consider evidence that daily newspapers and community newspapers are functionally interchangeable. The second is that the Tribunal failed to consider evidence that Southam considered the community newspapers to be its principal rivals in the Lower Mainland.

65 By "functional interchangeability", the Federal Court of Appeal apparently meant "end use" or" purpose". See pp. 636-37. The Tribunal, for its part, elaborated (at pp. 225-38) at great length on the use to which advertisers put daily and community newspapers. At the end of 14 pages, it came to the conclusion with which the Federal Court of Appeal would later take issue: that advertisers use daily newspapers to reach consumers throughout the entire Lower Mainland and use community newspapers to reach smaller, "local" audiences.

66 The Federal Court of Appeal quarrelled with this conclusion on several grounds. Its first, and most general objection, was to the weight that the Tribunal assigned to the criterion of functional interchangeability. In the court's view, at p. 635, the Tribunal gave this important criterion short shrift: "the Tribunal clearly failed to consider the importance of functional interchangeability, which is not simply one of many criteria to be considered but a central part of the framework". However, as I have already noted, the weighing of criteria in a balancing test must be largely a matter of discretion. The very purpose of a multi-factored test, such as the one that the Tribunal used to determine the dimensions of the relevant product market, is to permit triers of fact to do justice in diverse particular cases.

67 As a general matter, in cases like this one, the aims and objectives of the statute may not be served by assigning principal or overriding importance to any one factor. It cannot be said as a matter of law that evidence of functional interchangeability should weigh more heavily in the balance than other kinds of evidence. The question therefore must be whether the Tribunal's attention to functional interchangeability was reasonable on the facts of this case.

68 For my part, I cannot say that the Tribunal acted unreasonably to discount the evidence of functional interchangeability. It had its reasons for doing so, and those reasons cannot be said to be without foundation or logical coherence. In particular, the Tribunal seems to have thought that daily newspapers and community newspapers serve different purposes. The former appeal to large advertisers who wish to convey their message throughout a metropolitan region. The latter appeal to smaller advertisers, who wish to reach all or many of the consumers living in a particular neighbourhood or district of a city. See the Tribunal's decision at p. 238. While I might not agree, as a matter of empirical "fact", that this description of the purposes of the respective kinds of newspaper is exhaustive, I think that it is not without its reasons. It is reasonable, if only reasonable, to suppose that advertisers are sufficiently discerning about the media they employ that they are unlikely to respond to changes in the relative prices of the two kinds of newspaper by taking their business from the one to the other. Fortunately for the Tribunal, its decision need only be reasonable and not necessarily correct.

69 However, that does not finish the matter. The Federal Court of Appeal had two other difficulties with the Tribunal's approach, and they appear to go to the reasoning that underlies the Tribunal's conclusion. The first is that it is inconsistent to lump together daily newspapers and community newspapers for purposes of distinguishing them from broadcast media but then to separate the two kinds of newspapers for purposes of distinguishing them from one another. The second is that the Tribunal's conclusion confuses geographical scope with purpose. Both alleged difficulties turn out on closer inspection not to be troubling.

70 The Federal Court of Appeal, at p. 636, described the first alleged difficulty in these terms: "If 'multiple price/product' advertising is a relevant purpose for distinguishing between print and electronic media then it must also be relevant as between advertising in daily and community newspapers". But, with respect, this conclusion does not follow. It is perfectly consistent to distinguish between the broadcast media and the print media on one ground and to distinguish further between two kinds of print media on another ground. Broadcasters attract advertisers who want to convey an "image". See the Tribunal's decision at p. 221. Newspapers attract advertisers who want to convey a great deal of specific information about a variety of products all at once. See supraat p. 221. Accordingly, the two kinds of media serve different markets. However, from the fact that newspapers in general serve a certain broad class of advertiser, it does not follow that all newspapers serve precisely the same particular advertisers, or the same relevant advertising markets. Further division of the market is possible. Thus, daily newspapers serve advertisers who wish to reach even a relatively small proportion of people throughout a large region. Community newspapers serve advertisers who wish to reach a large proportion of people in a small region. See supra, at p. 238. These markets are at least possibly, and therefore reasonably, different.

71 If the identification of an overarching, broad purpose that two kinds of products serve were sufficient to place those products in the same market, then all products could be placed in the same market, because all products serve the general purpose of satisfying consumers' needs. Certainly, following the Federal Court of Appeal's reasoning it would be possible to argue that broadcast media and print media are in the same market because both kinds of media serve advertisers. But it is not so, and the Federal Court of Appeal admitted at p. 636 that it is not so. The trick is to settle on the correct level of generality. Canadian courts have recognized as much in the past:

> ... speaking generally, it is of importance to bear in mind that the term "market" is a relative concept. In one sense, there is only one market in an economy since, to some extent, all products and services are substitutes for each other in competing for the customer's dollar.
>
> In another sense, almost every firm has its own market since, in most industries, each firm's product is differentiated, to some extent, from that of all other firms.
>
> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.

J.W. Mills & Son Ltd. v. R.[1968] 2 Ex. C.R. 275, at p. 305.

72 What has to be kept in mind is that purposes are as various as markets, and both come in different sizes. Consequently it is unhelpful to suggest that once a purpose has been identified, all those products that serve that purpose should be considered to fall within a single market. It is the *correct* or *relevant* purpose that must be found, which is to say the broadest purpose that is consistent with a high cross-elasticity of demand. For example, cars and tanks both serve the general purpose of conveying people from place to place. But no one would suggest that cars and tanks are in the same market. The reason is that consumers do not modify their car-purchasing behaviour in response to slight changes in the price of tanks, and governments do not modify their tank-purchasing behaviour in response to slight changes in the price of cars. A person who is in the market for a station wagon does not shop with an eye on the price of armaments. Again, the Minister of National Defence does not check prices at local car dealerships before announcing an acquisition of new military hardware.

73 The relevant purpose is a function of the psychology of consumption or preference. Consequently, in order to choose the relevant purpose, the adjudicator must possess in advance some idea about the behaviour of consumers. In this way, the purpose inquiry is a little circular. Tribunals inquire into purpose in order to get a grip on the tendency of consumers to substitute

one product for another, but they will not hit on the right purpose unless they already have a notion of what consumers will substitute for what. This circularity does not, however, alter the fact that more is needed to establish functional interchangeability than citation of a common purpose. That daily newspapers and community newspapers both seek the trade of "multiple price/ product" advertisers does not show, without more, that they are competing in the same market. It was open to the Tribunal to conclude, after consulting evidence of the behaviour of advertisers, that purchasing decisions in the real world are taken on the basis of some more particular purpose than to convey information about several products at once.

74 The Federal Court of Appeal at p. 636 also took issue, at a theoretical level, with the Tribunal's attention to the geographic scope of the different kinds of newspapers:

> But the fact that the community newspapers are more local in nature does not go to the question of functional interchangeability, but to the behaviour of buyers as to preference for geographical scope. This latter subjective factor should not be mingled with the purely objective factor of functional interchangeability which focuses on use or purpose.

Immediately, any argument that depends on a classification of purpose as" objective" is suspect. Purpose is at least, in part, a matter of intention and so is at least, in part, "subjective". Presumably, almost any object can be put to a multitude of uses. An axe handle, for example, can serve as a bludgeon or as an axe handle. The purpose it serves depends on the intention of the person in whose hand it is. In like manner, the purposes daily newspapers and community newspapers serve depend on the intentions of their users.

75 In the right hands, both could function as birdcage liners or as wrapping for fish and chips. At times, both probably do. However, those functions are uninteresting because they are atypical, and the Tribunal was right not to mention them. But in order to exclude those purposes and settle on the relevant ones, the Tribunal had to consider, at least implicitly, the intentions of the users of the two kinds of newspaper. Therefore, it was not illegitimate for the Tribunal to look to what the Federal Court of Appeal at p. 636 called "preference for geographical scope". Reaching consumers throughout a large region is one purpose. Reaching consumers in a neighbourhood is another purpose. It does not matter that the difference between them is in the intention of the advertiser. Intention is a component of purpose. Of course, "objective" considerations also play a part. A newspaper cannot be an aircraft, however much someone might wish that it could be. And this is reflected in the Tribunal's distinction. A community newspaper cannot reach a large audience, however much an advertiser might wish that it could, and a daily newspaper cannot reach only the consumers in a small locality.

76 It appears, then, that the Tribunal considered at length, at much greater length than did the Federal Court of Appeal, whether daily newspapers and community newspapers serve the same purpose. It concluded that they do not, and gave reasons for its conclusion. The reasons that the Federal Court of Appeal offered for questioning that conclusion are, with respect, unconvincing. Accordingly, failing the appearance of some other basic objection to the Tribunal's conclusion about functional interchangeability, that conclusion should stand.

77 The Federal Court of Appeal also found fault with the Tribunal's treatment of evidence that Southam regarded the community newspapers as its chief competitors. In particular, it objected to the Tribunal's preference for a "more focused analysis" of the evidence of inter-industry competition. In the court's view at p. 638, "[t]he evidence of broad competitiveness is sufficient to show that there is competition in fact between the Pacific Dailies and the community newspapers". It was error, said the Federal Court of Appeal, for the Tribunal to ignore that evidence.

78 In fact, the Tribunal devoted 28 pages of its reasons (pp. 191-218) to the question of inter-industry competition. The Tribunal did not "ignore" evidence of broad inter-industry competition. It simply did not regard that evidence as decisive (at pp. 191-92):

> *... determining that Pacific Press regarded the community newspapers as "competitors" is not by itself enough to place them in the same market*. Competition means many things to many people. What the tribunal must establish is whether dailies and the community newspapers are in the same product market for the purposes of assessing the implications of the acquisitions in question in this case. As discussed above in general terms, that exercise involves resolving whether

> dailies and community newspapers are effective substitutes for newspaper retail advertising services. The actions taken and the views expressed by participants in the alleged market are recognized by both parties and by expert witnesses as an *important* source of information in trying to answer this question. [Emphasis added.]

In short, the Tribunal found that although evidence of inter-industry competition suggests a certain conclusion, it is not sufficient by itself to establish that conclusion. In this it relied on the elementary principle that thinking something is so does not make it so. A company can believe that it is competing with another company without it actually (or legally) being so.

79 It is possible that if I were deciding this case *de novo*, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam's own expert, an American newspaper consultant, identified the community newspapers as the source of Southam's difficulties in the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not competitors is perhaps unusual. In that sense, the Tribunal's finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning. More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition. But again, I cannot say that the Tribunal's approach was unreasonable. Definition of the relevant market is indeed a necessary step in the inquiry; and the fact that the Tribunal dwelled on it is perhaps understandable if, as seems to have been the case, the bounds of the relevant market were not clear.

80 I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

81 Accordingly, the Tribunal's conclusion must stand.

H. Remedy

82 Having found that Southam's acquisitions had produced a substantial lessening of competition in the market for real estate print advertising on the North Shore, the Tribunal ordered Southam to divest itself, at its own option, of either the *Real Estate Weekly* or the *North Shore News*. The Federal Court of Appeal declined to disturb this remedy. I agree with the Federal Court of Appeal that the remedy settled upon by the Tribunal should be allowed to stand.

83 The appellants submit that the correct test for a remedy under the *Competition Act* is whether it eliminates any substantial lessening of competition that the merger may have caused. The appellants observe that this is the standard that has been applied in cases under s. 92(1)(e)(iii) of the Competition Act, in which the parties have consented to the remedy. See, e.g., *Canada (Director of Investigation& Research) v. Air Canada* (1989), 27 C.P.R. (3d) 476(Competition Trib.), at pp. 513–14. They observe also that substantial lessening of competition is the evil that Parliament has sought to address in the Act. Mergers themselves are not considered to be objectionable except in so far as they produce a substantial lessening of competition. Therefore, restoration to the pre-merger situation is not what is wanted. Indeed, presumably *some* lessening of competition following a merger is tolerated, because the Act proscribes only a *substantial* lessening of competition. The appellants object further to what they see as the punitive quality of the remedy that the Tribunal imposed, and to what they regard as the illicit shifting to them of the burden of showing that the proposed remedy would be effective.

84 The respondent, for his part, says that the test of a remedy is whether it restores the parties to the pre-merger competitive situation. I believe that the appellants' test is the better one.

85 The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition. See Competition Act, s. 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. This is the test that the Tribunal has applied in consent cases. The Tribunal attempted to distinguish this case from those cases on precisely the ground that here the Director did not consent to the appellants' proposed remedy. But the distinction is not a sensible one. I can think of only two reasons why the test should be more forgiving where the parties have consented to a remedy. The first is that parties who have not consented should be punished for their obduracy. The second, which is related to the first, is that the law should provide parties with an incentive to come to a consensual arrangement. Neither reason is valid on closer analysis. The burden of a harsh standard falls entirely on one of the parties: the company. No punishment falls on the Director when he or she is obdurate, and the harsh standard gives him or her no incentive to consent to a remedy. Therefore, even if there is a policy of encouraging consent and punishing obduracy, it is not well served by the imposition of a more stringent standard in cases in which the parties have not consented. The better approach is to apply the same standard in contested proceedings as in consent proceedings.

86 However, the appellants do not benefit by their proposed standard. The reason is that the Tribunal expressly found that, even accepting that the appropriate standard is the one used in consent proceedings, Southam's proposed remedy fails because it would not likely be effective in eliminating the substantial lessening of competition. Robertson J.A. accepted this finding, saying that it was entitled to deference. I agree.

87 The Tribunal's choice of remedy is a matter of mixed law and fact. The question whether a particular remedy eliminates the substantial lessening of competition is a matter of the application of a legal standard to a particular set of facts. Therefore, for reasons I have already given, the Tribunal's decision must be reviewed according to a standard of reasonableness.

88 Because the Tribunal did not decide unreasonably when it decided that Southam's proposed remedy would not be effective, its decision should be allowed to stand. What Southam proposed was that it should sell the real estate supplement that appears weekly in the *North Shore News*. But, as the Tribunal very properly pointed out, it is not clear that the supplement would prosper or even survive on its own. Even if the supplement continued to enjoy the advantages of a close association with the *North Shore News*, the closeness of the association would not tend to foster competition. See the Tribunal's decision, supra, at p. 252.

89 The appellants' other objections to the remedy are unconvincing. The remedy is not punitive, because the Tribunal found that it was the only effective remedy. If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective. As for the claim that the Tribunal wrongly required the appellants to demonstrate the effectiveness of their proposed remedy, no more need be said than that he who asserts should prove, as Robertson J.A. so aptly put it ((1995), 127 D.L.R., (4th) 329) at p. 337.

90 Therefore, I would dismiss the appeal of the remedy.

6. Conclusion

91 The Tribunal decided that the acquisition by Southam of several community newspapers did not substantially lessen competition in the market for retail print advertising in the Lower Mainland of British Columbia. That decision is entitled to deference. Because it is not unreasonable, it must be allowed to stand.

92 Accordingly, I would allow the appeal on the merits with costs throughout, set aside the judgment of the Federal Court of Appeal, and restore the order of the Tribunal. I would dismiss the appeal on the remedy with costs.

Appeal from judgment on merits allowed; appeal from judgment on remedy dismissed.

TAB 11

1969 CarswellNat 296
Exchequer Court of Canada

Susan Hosiery Ltd. v. Minister of National Revenue

1969 CarswellNat 296, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353, 69 D.T.C. 5278

SUSAN HOSIERY LIMITED, Appellant, and MINISTER OF NATIONAL REVENUE, Respondent

Jackett, P.

Judgment: February 19, 1969

Proceedings: in an application by the Minister for an order requiring the production of certain documents and the answers to certain questions

Counsel: *Benzion Sischy*, for the Appellant.
Gordon V. Anderson, for the Respondent.

***Jackett, P.*:**

1 This is a motion on behalf of the respondent for an order

> (a) requiring the Appellant to produce for inspection the memorandum prepared by the Appellant's solicitor, and referred to in question number 163 of the Examination for Discovery of Alexander Slomo Strasser;
>
> (b) requiring the Appellant to produce for inspection the letter from its auditor, Mr. A. Pal to its solicitor, W. Goodman, dated the 1st day of December 1964, and referred to in question number 175 of the Examination for Discovery of Alexander Slomo Strasser;
>
> (c) requiring the Appellant to produce the letter of the 2nd day of December 1964 from W. Goodman to Spenser, Pal & Co., and the memorandum of the 4th day of December 1964, both of which are referred to in the answer given to question number 189 of the Examination for Discovery of Alexander Slomo Strasser;
>
> (d) requiring that Alexander Slomo Stresser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

The motion came on for hearing before me at Toronto on October 15, 1968, at which time I rejected the motion in so far as paragraph (a), *supra*, was concerned and gave the parties leave to file further material and to make written submissions concerning the remainder of the motion. Since the parties indicated, by letter dated January 20 last, that they had completed their submissions, I have read the decisions cited by them and have considered their arguments.

2 I shall consider first the problem raised concerning the documents referred to in paragraphs (b) and (c) of the portion of the Notice of Motion quoted above. Two affidavits have been filed on behalf of the appellant from which the nature of these documents may be determined. The first is an affidavit of Marshall A. Cohen, sworn October 21, 1968, and reading as follows:

> 1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.
>
> 2. I have inspected the four documents referred to in the Notice of Motion, brought by the Respondent, returnable on the 15th day of October, 1968, and dated the 19th day of September, 1968. The said documents can be briefly described as follows:

(a) Typewritten memorandum of three pages dated the 10th day of November, 1964, and being a memorandum of a meeting between Mr. W. D. Goodman, Mr. Harry Wolfe and Mr. Andrew Pal.

(b) Typewritten letter of three pages dated December 1st, 1964, from Mr. Andrew Pal to Mr. W. D. Goodman.

(c) Typewritten copy of a letter of one page dated December 2nd, 1964, from Mr. W. D. Goodman to Mr. Andrew Pal.

(d) Typewritten memorandum of one page dated December 4th, 1964, relating to a telephone conversation of December 3rd, 1964, between Mr. Andrew Pal and Mr. W. D. Goodman.

3. From advice received from Mr. W. D. Goodman, Mr. Andrew Pal and Mr. Harry Wolfe, from my own knowledge including therein my inspection of the aforesaid documents I verily believe the following statements set out in paragraphs 4 to 8 inclusive to be true.

4. At all material times at which such documents aforesaid came into existence, Mr. W. D. Goodman was a member of the law firm of Goodman, Cooper, Cohen & Farano, and the said law firm and in particular Mr. W. D. Goodman was retained to give specific advice to the Appellant herein and the principal shareholders thereof.

5. At all material times at which such documents aforesaid came into existence, Mr. Harry Wolfe was a member of the law firm of Lorenzetti, Mariani and Wolfe and the said law firm and Mr. Harry Wolfe in particular were the general solicitors of the Appellant herein and it was with the concurrence of and at the suggestion of the said Mr. Harry Wolfe that Mr. W. D. Goodman was consulted as aforesaid to give specific advice to the Appellant herein and to consult with Mr. Harry Wolfe with respect to the legal problem, for which such legal advice was sought.

6. Mr. Andrew Pal is a member of the Institute of Chartered Accountants of Ontario, and at that time and now was a member of a firm of Chartered Accountants bearing the name Spencer, Pal and Company.

7. At all material times at which such documents aforesaid came into existence Mr. Andrew Pal was retained by the Appellant herein as its agent for the purpose of communicating to Mr. Wolfe and to Mr. Goodman, certain information concerning the Appellant and for the further purpose of receiving from Mr. Wolfe and Mr. Goodman certain advice and opinion for transmission by him to the Appellant herein.

8. The aforesaid documents consist solely of professional communications of a confidential character or the later written recording of oral professional communications of a confidential character between the Appellant or the Appellant's agent and its solicitors and counsel for the purpose of obtaining or giving legal advice and assistance and confidential communications or the later written recording of oral confidential communications at the instance and at the request and for the use of the Appellant's solicitors and counsel for the aforesaid purposes.

The second is a further affidavit of Mr. Cohen sworn on November 20, 1968 and reading as follows:

1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.

2. This Affidavit is made in supplement to my Affidavit filed in this action and sworn to on the 21st day of October, 1968.

3. I am informed by Mr. Pal and verily believe the following facts set out hereunder.

4. That for some years prior to the meeting of November 10th, 1964, from which the typewritten memorandum referred to in paragraph 2(a) of my Affidavit sworn to on the 21st day of October, 1968, arises Mr. Pal, in addition to his other duties as a public accountant to Susan Hosiery Limited, the Appellant herein, had been acting as financial adviser to the said Appellant and its principals.

5. That on the instructions of the principals of Susan Hosiery Limited, Mr. Pal was instructed to meet with Mr. Goodman and Mr. Harry Wolfe to discuss certain matters pertaining to the business affairs including future business affairs and "activities" of the Appellant and of the principals thereof and to obtain the advice of Mr. Goodman thereon.

6. That such meeting took place on November 10th, 1964, and that such discussion was had at such meeting and certain advice was obtained from Mr. Goodman on that day and that by reason of such advice it was decided by Mr. Pal, Mr. Wolfe and Mr. Goodman that further suggestions as to how the Appellant and its principals might wish to conduct their business affairs, including certain legal steps to be taken on their behalf should be given Mr. Goodman to enable him to advise thereon.

7. Mr. Pal thereafter and prior to December 1st, 1964, communicated to the Appellant through its principals and to the said principals the gist of the advice of Mr. Goodman and after discussion with such principals wrote on their behalf and on behalf of the Appellant to Mr. Goodman setting out suggested courses of action and giving Mr. Goodman certain instructions thereon. The said writing to Mr. Goodman is contained in the typewritten letter referred to in paragraph 2(b) of my Affidavit sworn to on the 21st day of October, 1968.

8. Mr. Goodman on receipt thereof wrote to Mr. Pal, firstly commenting upon the letter of December 1st, 1964, and asking Mr. Pal to speak to him, Mr. Goodman, about one aspect of the matters dealt with in the letter of December 1st, 1964. The said letter of Mr. Goodman is that referred to in paragraph 2(c) of my Affidavit sworn to on the 21st day of October, 1968.

9. Mr. Pal on receipt of such letter telephoned Mr. Goodman to give Mr. Goodman certain additional information required and answering the request to Mr. Goodman to speak to him as set out above. Such telephone conversation occurred on the 4th day of December, 1964, and is referred to in paragraph 2(d) of my Affidavit sworn to on the 21st day of October, 1968.

10. I verily believe that to describe the subject matter of the communications and advice above in other than general terms of "business affairs", "courses of action" and other similar terms would disclose the privilege hereby sought to be maintained.

3 The basic principles on which the appellant relies for his objection to the production of these documents are, in effect, as I understand them, unchanged from the time when they were authoritatively enunciated by Lord Blackburn in *Lyell v. Kennedy* (No. 2) (1883), 9 App. Cas. 81, where he said:

> ... the law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him.
>
> This further rule has been established, that the other side is not entitled, on discovery, to require the opponent to produce as a document those papers which the solicitor or attorney has prepared in the course of the case, and has sent to his client. ... He may shew it if he pleases; but it is a good answer to a discovery to say, "It was prepared for me by my legal adviser, my attorney, confidentially, and it is my privilege to say that you shall not read it;" and I think that it is hardly disputed that on a discovery of documents you could not discover that brief.

4 The principles had been discussed in an illuminating way in an earlier decision of the Court of Appeal in *Wheeler v. Le Marchant* (1881), 17 Ch.D. 675. In that case, it was accepted as clear

> (a) that confidential communications between a client and his legal adviser were privileged, and
>
> (b) that documents obtained by a legal adviser for the purpose of preparing for litigation, actual or anticipated, were privileged;

but an attempt to extend the privilege concerning documents obtained by a legal adviser to documents obtained in situations where litigation was not contemplated was rejected. In that case Jessel, M.R. said at page 682:

> ... The actual communication to the solicitor by the client is ... protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants.

and Cotton, L. J. said at pages 684 and 685:

> Their case is put, as I understand it, in this way: 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 be also 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 communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these.

5 None of the decisions concerning solicitor and client privilege to which I have been referred seem to me to have changed or added to the law, in so far as it is relevant to what I have to decide on this motion, as I find it laid down in the two leading decisions from which I have quoted.

6 In an attempt to avoid misunderstanding as to the effect of the decision that I propose to deliver, it may be well for me to attempt to put in my own words the law, as I understand it, on the understanding that, except in so far as is necessary for the decision of this case, I reserve the right to reconsider the precise extent of the doctrines that I am attempting to describe.

7 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.

In considering the ambit of these principles, it is well to bear in mind the reasons for them.

8 In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist if what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing.

9 Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the Court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

10 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 discovery if, otherwise, the party would be bound to give discovery of them. This appears clearly from the following passage in the judgment of Lord Blackburn in *Lyell v. Kennedy* (No. 2) *supra*, where he said at pages 86 and 87:

> But then it is argued that though that is so you may, as has been repeatedly said, search the conscience of the party by inquiring as to his information and belief from whencesoever derived, and that it consequently follows from that (this I think was the argument which was put) that although a brief has been refused, and it has been said, "You must not inspect that brief," you are nevertheless entitled to ask the party himself, "Did not you read the brief, and when you had read it what was your belief derived from reading that brief?" That, I think, was the position which was taken; and it was argued in support of it, if I understood and followed the argument rightly, that inasmuch as nobody had ever actually raised the point, and inasmuch as in all the different books of pleading and other things, where they very frequently do discuss what is the extent of discovery, nobody had hitherto discussed this point either one way or the other, the silence of people implied that it should be so, and that you ought to be able to put that question. Now as to that I believe that there is no authority, and I think that Cotton, L.J. says that there is no authority; but as it seems to me the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also. I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action", or "in the course of litigation". That would be no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone or a pedigree

> in a particular place — if the man went there and looked at it and saw the thing itself I do not think that he would be privileged at all in that case: because it is no answer to say, "I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information." That is not within the meaning of privilege. But when the interrogatory is simply "what is the belief which you have formed from reading that brief?" it seems to me (and I think that that is the effect of what Cotton, L.J. says at the end of his judgment (23 Ch. D. at p. 408)) to follow that you cannot ask that question. It is a new point; it has never been raised before; but it seems to me that that is right.

In my view, it follows that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.

11 Applying these principles, as I understand them, to materials prepared by accountants, in a general way, it seems to me

> (a) that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and
>
> (b) that, where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an accountant in carrying out such task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer; and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.

12 Turning to the application of these views to the facts here, and reading the allegations of fact in the notice of appeal in the light of the allegations in the Reply together with what is said in Mr. Cohen's affidavits, I have no difficulty in concluding that the balance of probability is that Mr. Pal and Mr. Wolfe were acting as representatives of the appellant for the purpose of obtaining legal advice on behalf of the appellant from Mr. Goodman concerning the setting up of some arrangement such as that, according to the allegations referred to, the appellant in fact entered into. I think the Court may take judicial knowledge of the fact that corporations of all kinds are continuously faced with problems as to what arrangements are advisable or expedient having regard to the intricacies of the tax laws and that, while huge corporations have staffs of lawyers and accountants of their own through whom they seek advice of counsel learned in such special areas of practice, smaller corporations employ lawyers and accountants in general practice to act for them in obtaining special advice in connection with such matters. I have no doubt as to the inherent probability of Mr. Cohen's statements that Mr. Wolfe and Mr. Pal were so acting for the appellant in obtaining Mr. Goodman's advice. While, therefore, I should have had some doubt as to whether Mr. Cohen's affidavits, based only on information and belief, would have been acceptable evidence if they had been objected to, as they have not been objected to, I reject the motion in so far as paragraphs (b) and (c) of the Notice of Motion are concerned.

13 I turn now to the order sought by the motion for an order

> (d) requiring that Alexander Slomo Strasser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

To appreciate what is being sought here, it is necessary to refer to more of the Examination for Discovery of Alexander Slomo Strasser (who was examined as an officer of the appellant company) than the questions mentioned. The following portions seem to be relevant to the order sought:

> BY MR. AINSLIE:

155 Q. There was a meeting held then on the 10th of December, 1964?

A. Yes.

156 Q. And am I correct that at that meeting was Mr. W. Goodman?

A. No.

MR. GOODMAN: Yes.

BY MR. AINSLIE:

157 Q. Mr. W. Goodman, Mr. Pal, and Mr. H. Wolfe?

A. Yes.

158 Q. And I am correct that Mr. Pal is your auditor and accountant?

A. Yes.

159 Q. And that Mr. Wolfe is your general solicitor?

A. Yes.

160 Q. And that Mr. Goodman was also your solicitor?

A. That is correct.

161 Q. And at that meeting am I correct that a memorandum was prepared as to the purport of the discussion by Mr. Goodman?

A. Yes.

162 Q. And that a copy was sent to the appellant?

A. Yes.

163 Q. I would ask you to produce the memorandum setting forth the meeting of the 10th of December, 1964.

MR. GOODMAN: No, I think it is privileged.

MR. AINSLIE: Mr. Goodman, my position is that it is not a privileged document.

MR. GOODMAN: I appreciate you take that position.

MR. AINSLIE: Well, for the purpose of the record ...

MR. GOODMAN: And your department would be very quick to claim a similar privilege in connection with memoranda passing between a lawyer and his client in a matter your department was interested in.

MR. AINSLIE: Let me just speak for the purpose of the record, my position is the document is not privileged, it is not a document for which privilege has been claimed in the affidavit on production and therefore I am demanding production of the document.

MR. GOODMAN: No. That is not so. There is a reference in part II of the affidavit on production to various communications in respect to which privilege is claimed and this is one of them.

BY MR. AINSLIE:

164 Q. In other words, am I correct that on the 10th of November, 1964, you were seeking legal advice in anticipation that difficulty would arise from this plan?

MR. GOODMAN: I do not think you are obliged to answer that question.

MR. AINSLIE: The witness is instructed not to answer that question — is that correct?

MR. GOODMAN: The witness is instructed not to answer that question.

BY MR. AINSLIE:

165. Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:

> "Since the Ontario Pension Benefit Act will come into force January 1st, 1965, there are decided advantages in having lump sums past service contributions made before that date into a new pension plan for benefit of key executives. Payments made after that date may not be withdrawn as freely by reason of the Act; however, payments made into a pension plan will now be subject to rigid statutory rules regarding investments whereas the parties would prefer that the monies simply be re-invested in the business. Accordingly I have suggested that any lump sum payments into the new pension plan before December 31st, 1964, be withdrawn before that date by the beneficiaries and immediately transferred by the beneficiaries into a deferred profit-sharing plan which will immediately be set up for their benefit."

MR. AINSLIE: I wonder if you could just read the introductory part back.

THE REPORTER:

> "Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:"

MR. GOODMAN: The answer is "no".

A. The answer is no because in fact —

MR. GOODMAN: No.

. . . . .

BY MR. AINSLIE:

171 Q. Mr. Strasser, after the 10th of November did the officers of the appellant have any further discussions with their auditor as to the advisability of entering into the pension plan?

A. It is possible.

172 Q. And am I correct that the auditor in December wrote to your solicitor setting forth certain recommendations that should be taken in regard to the financial affairs of the appellant and its tax position?

MR. GOODMAN: No, he made certain suggestions for consideration and they are considered to be of a confidential nature.

BY MR. AINSLIE:

173 Q. And those suggestions were contained in a letter which was sent to your solicitor?

A. Yes.

174 Q. And that letter is dated — could you tell me the date of the letter, please?

A. December 1st.

175 Q. I wonder if you would produce that letter, please?

MR. GOODMAN: No, we consider that it is privileged.

MR. AINSLIE: Again, Mr. Goodman, I would say that it is not privileged because in my submission it is not a letter between a solicitor and client and it is not a letter in respect of which privilege has been claimed in the affidavit on production and I ask the witness to produce it.

MR. GOODMAN: The witness declines to produce it on advice of counsel.

MR. AINSLIE: Very well. I will adjourn the discovery on this portion and also on the portion of the memorandum of the 10th of November until after we have had an opportunity of having this matter decided by the courts.

BY MR. AINSLIE:

176 Q. And, Mr. Strasser, am I correct that one of the suggestions that the accountant, that your accountant made to your solicitor, was that the appellant should wind up the pension plan and transfer to a deferred profit-sharing plan the assets in the plan?

MR. GOODMAN: Decline to answer.

THE DEPONENT: I refuse to answer.

The respondent's position, in so far as Questions 164 and 165 are concerned, is clearly set out in that part of the submission of counsel for the respondent filed October 25, 1968, which reads as follows:

3. By Notice of Motion dated September 19, 1968, the Respondent made an application to this Honourable Court requesting, *inter alia*, that Alexander Slomo Strasser be required to reattend the examination for discovery and answer Question No. 165 and such further questions as may arise from the answer given. Question No. 165 pertains to an extract of a certain memorandum, the said extract being marked Exhibit "A" for identification on the examination for discovery and found at page 94 of the Booklet being Exhibit "A" to the Affidavit of Murray Alexander Mogan filed in support of this application.

4. The extract was obtained by the Respondent in the following manner (see Affidavit of Raymond Sim, filed):

(a) Mr. Raymond Sim, employed as an assessor with the Department of National Revenue in its Toronto District Office, did in the year 1964, attend at the office of the Appellant, Susan Hosiery Limited, and was given permission by a Mr. Alexander Strasser to look at a number of documents contained in a filing cabinet.

(b) Mr. Raymond Sim found among the documents contained in the filing cabinet what appeared to be a memorandum dated November 10, 1964, relating to a meeting between Mr. W. Goodman, Mr. A. Pal and Mr. H. Wolfe.

(c) Mr. Raymond Sim made a handwritten copy of certain portions of this memorandum and has subsequently had the handwritten copy typed and placed in the Department of National Revenue, Toronto District Office, file relating to the Appellant.

5. On examination for discovery of Mr. Alexander Slomo Strasser, as an officer of the Appellant, Mr. Strasser was asked by counsel for the Respondent to confirm the accuracy of a portion of the said typewritten extract and Mr. Strasser, through his solicitor, refused to answer.

See Examination for Discovery,
p. 51 Q. 165 and pp. 52-53, Q. 166.

6. Mr. Pal is the auditor and accountant for the Appellant.

Examination for Discovery,
p. 49, Q. 158.

Mr. Wolfe is the general solicitor for the Appellant.

Examination for Discovery,
p. 49, Q. 159.

Mr. Goodman is also the solicitor for the Appellant.

Examination for Discovery,
p. 49, Q. 160.

RESPONDENT'S POSITION:

The respondent submits that secondary evidence as to the contents of a privileged document is admissible at trial; accordingly, the Respondent can use the extract from the memorandum as evidence at trial. The Respondent therefore submits that he is entitled on examination for discovery to verify the accuracy of the extract from the memorandum.

REASONS:

1. While the original memorandum of November 10, 1964 may be privileged from production on the basis of solicitor-client privilege, privilege does not encompass the extract from that memorandum which is in the possession of the Respondent.

Calcraft v. Guest, [1898] 1 Q.B. 759, 1 Q.B. 759, at 764 per Lindley, M.R.:

" '... Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?' The matter dropped there; but the other members of the Court (Lord Abinger, Gurney, B., and Rolfe, B.) all concurred in that, which I take it is a distinct authority that secondary evidence in a case of this kind may be received."

Delap v. Canadian Pacific R.W. Co. (1914), 5 O.W.N. 667 at 669 per Middleton, J.:

"It is suggested that the correspondence contains matter going to shew that the claim is not made in good faith. ... In *Calcraft v. Guest*, [1898] 1 Q.B. 759, it was held that the use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented even by fraud in the obtaining of the copies — a much stronger case than this, where the copies were not obtained fraudulently, but by the mere inadvertence of the solicitor."

Richard C.W. Rolka v. Minister of National Revenue, [1963] Ex. C.R. 138 at pp. 154-155 per Cameron, J.:

> "... The fact is that the originals did come into the hands of the Minister's representative by the voluntary act of the solicitor and such privilege as may have previously existed in regard thereto has been lost. Reference may be made to *Phipson on Evidence*, 9th ed., at p. 202, where on the authority of *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.), the principle is stated thus:
>
> > 'But, unlike the rule as to affairs of State, if the privileged document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for it has been said that the Court will not inquire into the methods by which the parties have obtained their evidence.' "

Holmested & Langton's Ontario Judicature Act, 5th Edition, at p. 1032:

> "*Secondary Evidence*. In *Calcraft v. Guest*, [1898] 1 Q.B. 759, it was held, in effect, that though documents are privileged from production, secondary evidence of them may be given, And see per Cozens-Hardy, M.R., in *Ashburton v. Pape*, [1913] 2 Ch. 469, at 473; *Delap v. C.P.R.* (1914), 5 O.W.N. 667, at 669. But the actual decision in the *Calcraft* case seems to go no further than that a copy of a privileged document, obtained by accidental transfer of possession, may be admitted; see the principle stated by Wigmore, Evid., sec. 2325(3); and see the general principle, stated by Ferguson, J.A., in *Re United States of America v. Mammoth Oil Co.* (1925), 56 O.L.R. 635, at 646, that the privilege of communications between solicitor and client is one which the Court must enforce unless its enforcement is waived by the client."

Canadian Encyclopedic Digest (Ontario), 2nd Edition, Vol. 6, at pp. 16-17:

> "The use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented."

The Annual Practice 1966, Vol. 1, at p. 526:

> "*Secondary evidence or copies of privileged document*. — Secondary evidence as to the contents of a privileged document is admissible as against the party resisting its production (*Calcraft v. Guest*, [1898] 1 Q.B. 759, C.A.). Thus if a party has an opportunity of taking or getting a copy of such a document he can use it as secondary evidence (ibid.)."

Wigmore on Evidence, 3rd Edition, Vol. VIII, at p. 629:

> "S. 2326. Third Persons Overhearing. The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy."

Halsbury's Laws of England, 3rd Edition, Vol. 12, at p. 41:

> "Particulars may be ordered of a privileged document referred to in a pleading, and secondary evidence may be given of a privileged document despite the privilege attaching to the original, although, if a copy is obtained improperly, an injunction may be granted restraining the use of that copy."

Whether an injunction may be obtained by the Appellant restraining the use of the extract is not relevant to this application since the Appellant has not commenced proceedings for an injunction.

14 Assuming that the respondent may (and I am not to be taken as expressing any doubt with regard thereto) adduce evidence as to the communications that took place between the appellant and its solicitors if it has such evidence available at the trial and it is relevant to the material facts, the appellant is nonetheless entitled to rely on its privilege not to disclose such communications either by itself or its solicitors either on discovery, or at trial, or otherwise. Having come to the conclusion that the balance of probability is that the meeting between Mr. Pal, Mr. Wolfe and Mr. Goodman on December 10, 1964 was part of the process whereby Mr. Pal and Mr. Wolfe, as representatives of the appellant, were obtaining legal advice for the appellant from Mr. Goodman, and that the appellant is therefore entitled to a privilege against producing a memorandum of what occurred at that meeting, it seems clear to me that the same privilege extends to answering any questions as to what was or is contained in that memorandum.

15 Finally, with regard to Questions 175 and 176, it follows from my conclusion that Mr. Pal was one of the representatives of the appellant for obtaining legal advice that the appellant is privileged from producing, or giving evidence as to the contents of, a letter written by Mr. Pal as part of the process of obtaining such advice.

16 The application is dismissed with costs payable by the respondent to the appellant in any even of the cause, which costs are hereby fixed at $300.

TAB 12

Blank v. Canada (Minister of Justice), [2006] 2 S.C.R. 319

Supreme Court Reports

Supreme Court of Canada

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

Heard: December 13, 2005;

Judgment: September 8, 2006.

File No.: 30553.

[2006] 2 S.C.R. 319 | [2006] 2 R.C.S. 319 | [2006] S.C.J. No. 39 | [2006] A.C.S. no 39 | 2006 SCC 39

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

(75 paras.)

Counsel

Graham Garton, Q.C., and Christopher M. Rupar, for the appellant.

Sheldon Blank, on his own behalf.

Luba Kowal, Malliha Wilson and Christopher P. Thompson, for the intervener the Attorney General of Ontario.

Wendy Matheson and David Outerbridge, for the intervener The Advocates' Society.

Raynold Langlois, Q.C., and Daniel Brunet, for the intervener the Information Commissioner of Canada.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish and Abella JJ. was delivered by

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. [page325] 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, [page326] 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 terminated. 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.

[page327]

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. 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. [page328] 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 (2003 CarswellNat 5040, 2003 FCT 462).

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, 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:

[page329]

> **23.** 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 v. Mierzwinski*, [1982] 1 S.C.R. 860, 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, *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; and *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31. 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 [page330] 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 [page331] 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).
>
> ("Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65)

29 With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, 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: *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 ("*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; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; [page332] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321.

30 American and English authorities are to the same effect: see *In re L. (A Minor)*, [1997] A.C. 16 (H.L.); *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218, and *Hickman v. Taylor*, 329 U.S. 495 (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. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or [page333] "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 [page334] privilege: *Lifford*; *Chrusz*; *Big Canoe*; *Boulianne v. Flynn*, [1970] 3 O.R. 84 (H.C.J.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (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" (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (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, at 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 [page335] 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.

[page336]

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.

[page337]

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*.

[page338]

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 [page339] 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 [page340] 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. It has been adopted in this country as well: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44 Board of School Trustees* (1981), 29 B.C.L.R. 114 (C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); *Nova, an Alberta Corporation 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 [page341] to limit the scope of this privilege [that is, the litigation privilege]. [p. 869]

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* (1884), 27 Ch. D. 1 (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 [page342] from research or the exercise 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.

The reasons of Bastarache and Charron JJ. were delivered

by

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 not does not constitute a departure from litigation privilege *per se.* Either way, the privilege is left unaffected by the [page343] 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 v. Mierzwinski*, [1982] 1 S.C.R. 860, 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. M.N.R.*, [1996] 1 F.C. 367 (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:

[page344]

> 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". *Amato v. The Queen*, [1982] 2 S.C.R. 418 (*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:

[page345]

> 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 (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.

[page346]

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 and 17 and outlined at para. 54 of the reasons of my colleague:

> 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.

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.

Solicitors

Solicitor for the appellant: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener The Advocates' Society: Torys, Toronto.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

TAB 13

Lizotte v. Aviva Insurance Company of Canada, [2016] 2 S.C.R. 521

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

Heard: March 24, 2016;

Judgment: November 25, 2016.

File No.: 36373.

[2016] 2 S.C.R. 521 | [2016] 2 R.C.S. 521 | [2016] S.C.J. No. 52 | [2016] A.C.S. no 52 | 2016 SCC 52

Karine Lizotte, in her capacity as assistant syndic of the Chambre de l'assurance de dommages, Appellant; v. Aviva Insurance Company of Canada and Traders General Insurance Company, Respondents, and Canadian Bar Association, Advocates' Society and Barreau du Québec, Interveners.

(71 paras.)

Counsel

Claude G. Leduc and *Olivier Charbonneau-Saulnier*, for the appellant.

Éric Azran and *Patrick Girard*, for the respondents.

Mahmud Jamal, *Alexandre Fallon* and *W. David Rankin*, for the intervener the Canadian Bar Association.

Douglas C. Mitchell and *Audrey Boctor,* for the intervener the Advocates' Society.

François LeBel, *Jean-Benoît Pouliot* and *Sylvie Champagne*, for the intervener Barreau du Québec.

[page527]

English version of the judgment of the Court delivered by

GASCON J.

I. Overview

1 Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. Although it differs from the professional secrecy of lawyers (solicitor-client privilege) in several respects, the two concepts do overlap to some extent. Since *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, it has been settled law that any legislative provision capable of interfering with solicitor-client privilege must be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language. The issue in this appeal is whether this principle also applies to litigation privilege.

2 In the course of an inquiry into a claims adjuster, the appellant, the assistant syndic (the "syndic") of the Chambre

de l'assurance de dommages (the "Chamber"), asked an insurer, the respondent Aviva Insurance Company of Canada, to send her a complete copy of its claim file with respect to one of its insured. Aviva refused to do so on the basis that some of the requested documents were protected by litigation privilege. In response to this refusal, the syndic filed a motion for a declaratory judgment, arguing that the relevant statutory provision created an obligation to produce "any ... document" concerning the activities of a representative whose professional conduct is being investigated by the Chamber, and that this was sufficient to lift the privilege. In the syndic's opinion, litigation privilege can be distinguished from solicitor-client privilege; it is less important and is not absolute, and should therefore be applied more flexibly.

3 The Superior Court concluded that litigation privilege cannot be abrogated absent an express provision. The Court of Appeal upheld the Superior [page528] Court's judgment, holding that even though litigation privilege is distinguishable from solicitor-client privilege, it is, to the same extent, a fundamentally important principle that cannot be overridden without express language.

4 I would dismiss the appeal. Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.

5 The requirements established in *Blood Tribe* apply to litigation privilege. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect. Because the section at issue provides only for the production of "any ... document" without further precision, it does not have the effect of abrogating the privilege. It follows that Aviva was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.

II. Background

6 The Chamber is a self-regulatory organization established by s. 284 of the *Act respecting the distribution of financial products and services*, CQLR, c. D-9.2 ("*ADFPS*"). It is responsible for overseeing the professional conduct of a number of representatives working in the insurance field, including claims adjusters, damage insurance agents and damage insurance brokers (ss. 289 and 312 *ADFPS*). In this regard, the Chamber has a role similar to that of a professional order governed by the *Professional Code*, CQLR, c. C-26, although it is not such an order. Its "mission [is] to ensure the protection of the public by maintaining discipline among and supervising the training and ethics of its members" (s. 312 *ADFPS*). For this purpose, the [page529] syndic of the Chamber inquires into any offences under the *ADFPS* or its regulations (s. 329 *ADFPS*). She may bring a complaint against a representative before the Chamber's discipline committee, and the complaint may result in a fine (ss. 352, 353 and 376 *ADFPS*).

7 In July 2008, a fire damaged the residence of a person insured by Aviva. Aviva assigned one of its claims adjusters, M.B., to investigate the claim. The syndic of the Chamber later received information to the effect that M.B. had made certain errors in managing the file. On January 24, 2011, the syndic opened an inquiry with respect to M.B. In the course of that inquiry, a member of the syndic's team sent Aviva a request for a [TRANSLATION] "complete copy of [its] file, both physical and electronic, for this claim", and for a list that would enable her "to identify the employees who worked on the file" (emphasis deleted). The syndic based this request on s. 337 *ADFPS*, which reads as follows:

> **337.** Insurers, firms, independent partnerships and mutual fund dealers and scholarship plan dealers registered in accordance with Title V of the Securities Act (chapter V-1.1) must, at the request of a syndic, forward any required document or information concerning the activities of a representative.

8 In response, Aviva produced a number of documents, but explained that it had withheld some on the basis that they were covered either by solicitor-client privilege or by litigation privilege. The syndic insisted, however, and

made several subsequent requests for the complete claim file, explaining that she could not conduct her inquiry without it.

9 On June 30, 2011, the insured person in question brought legal proceedings against Aviva to obtain compensation. While that action was still pending in court, the syndic applied in June 2012 for a declaratory judgment against Aviva in order to obtain the documents it sought. On June 26, 2013, Aviva and the insured person reached an out-of-court settlement, and on October 17, 2013, Aviva finally sent the syndic the entire file regarding the insured person's claim.

[page530]

10 Although that settled the dispute between the parties with respect to the production of the required documents, the syndic nevertheless proceeded with her motion for a declaratory judgment. As agreed by the parties, that motion raised the following question:

> [TRANSLATION] The parties agree that at the time when the ChaD (Chambre de l'assurance de dommages) made its request to the defendant on January 24, 2011, some of the documents included in the claim file of the insured person N.F. were not produced by the defendant on the basis of litigation privilege or of professional secrecy (solicitor-client privilege). Accordingly, was the defendant entitled to assert those privileges against the ChaD and to refuse on that basis to produce the documents covered by them?

11 The Superior Court judge who heard the motion held that it raised a [TRANSLATION] "genuine problem", because other insurers and claims adjusters had raised the same question in response to requests for documents from the Chamber's syndics. At the hearing of the motion, the syndic conceded that solicitor-client privilege could be asserted against her and that the issue before the court was therefore limited to litigation privilege. As well, Aviva abandoned its argument that some of the requested documents did not relate to "the activities of a representative" within the meaning of s. 337 *ADFPS*. As a result, no facts were at issue before the motion judge.

III. Judicial History

A. *Quebec Superior Court (2013 QCCS 6397)*

12 The Superior Court ruled in Aviva's favour. The motion judge began by observing that s. 9 of the *Charter of human rights and freedoms*, CQLR, c. C-12 (the "*Quebec Charter*"), grants quasi-constitutional protection to professional secrecy of lawyers, which is closely linked to [TRANSLATION] the "democratic values" (paras. 46 and 50-51 (CanLII)). Although claims adjusters are not bound to professional secrecy by law, counsel retained by a claims adjuster or an insurer is so bound (paras. 47-48). In *Blood Tribe*, it was held that an authority [page531] may not "pierce" solicitor-client privilege absent express words in the applicable legislation. Because the *ADFPS* (and s. 337 thereof) contains no express abrogation of solicitor-client privilege, the latter may be asserted against the syndic (paras. 53-56).

13 The motion judge then considered the syndic's argument that litigation privilege can be distinguished from solicitor-client privilege, in particular in that it is not protected by s. 9 of the *Quebec Charter*. In the motion judge's view, this argument represented a [TRANSLATION] "departure from the position taken by the Supreme Court in *Foster Wheeler*" (para. 63). In that case, LeBel J. had written that litigation privilege "is now being absorbed into the Quebec civil law concept of professional secrecy" (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 44). The motion judge also noted that the Federal Court had held, in two cases originating in common law provinces, that the principles applicable to solicitor-client privilege in the context of the statute at issue in *Blood Tribe* (the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*")) also applied to litigation privilege (paras. 64-67).

14 In light of the decision in *Foster Wheeler*, the motion judge considered himself bound to apply these principles to Quebec law and to find that, in the absence of express language, the *ADFPS* does not abrogate litigation privilege, which can therefore be asserted against the syndic (para. 68). He accordingly declared that both solicitor-

client privilege and litigation privilege can be asserted against the syndic of the Chamber [TRANSLATION] "by anybody who receives a request for information" (para. 83).

B. *Quebec Court of Appeal (2015 QCCA 152)*

15 The Court of Appeal upheld the judgment on the motion, concluding that litigation privilege could be asserted against the syndic. In its view, the syndic had been right to concede that solicitor-client privilege could be asserted against her, since the legislature is required to use express language to abrogate that privilege, which it had not done in [page532] this case. The court also noted that, by way of comparison, express language had been used in ss. 14.3, 60.4 and 192 of the *Professional Code* (which does not apply to claims adjusters) in the context of disciplinary inquiries (paras. 23 and 30 (CanLII)).

16 Although solicitor-client privilege and litigation privilege must be viewed as being conceptually distinct, the Court of Appeal noted that in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, this Court had written that the two rules "serve a common cause: The secure and effective administration of justice according to law" (para. 25, quoting *Blank*, at para. 31). As well, the Federal Court, the Ontario Court of Appeal and the Alberta Court of Appeal had held that litigation and/or settlement privilege cannot be abrogated without clear and explicit language (paras. 31-32). In the Court of Appeal's view, the same reasoning applies to the instant case.

17 The Court of Appeal added that this Court had also stated in *Blank* that the *Access to Information Act*, R.S.C. 1985, c. A-1, had been enacted in a context in which the term "solicitor-client privilege" was understood to include litigation privilege (para. 29). Yet the same context had also applied when the *ADFPS* was enacted in 1998, and when the legislature made amendments to that Act after *Blank* was decided, it did not add anything to abrogate solicitor-client privilege or litigation privilege even though it had done so in the *Professional Code* with respect to professional secrecy (para. 30). The Court of Appeal concluded from this that litigation privilege could be asserted against the syndic. The court allowed the appeal, but solely to amend the motion judge's conclusion such that it would apply to [TRANSLATION] "the respondents" rather than to "any person" (para. 37).

IV. Issue

18 In this Court, the syndic rightly admits that solicitor-client privilege can be asserted against her in the context of a request for documents relating to a claim file. The central issue of the appeal is therefore whether Aviva could also assert litigation privilege against the syndic in the same context. To [page533] resolve it, I will have to determine whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal language and, accordingly, whether s. 337 *ADFPS* can be interpreted as establishing a valid abrogation of the privilege. Before doing so, however, I must first review the characteristics of litigation privilege.

V. Analysis

A. *Characteristics of Litigation Privilege*

19 Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 1009-10.

20 Litigation privilege is a common law rule of English origin: *Lyell v. Kennedy (No. 2)* (1883), 9 App. Cas. 81 (H.L.). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor-client privilege, which at the time was considered to be a rule of evidence that was necessary to ensure the proper conduct of trials: A. Cardinal, "Quelques aspects modernes du secret professionnel de l'avocat" (1984), 44 *R. du B.* 237, at pp. 266-67. In an oft-cited case, Jackett P. of the former Exchequer Court of Canada explained the purpose of litigation privilege, once known as the lawyer's brief rule, as follows:

> Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that

> contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the [page534] solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system. [Emphasis added.]

(*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33-34)

21 Because of these origins, litigation privilege has sometimes been confused with solicitor-client privilege, both at common law and in Quebec law: Royer and Lavallée, at pp. 1003-4; N. J. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58 *Can. Bar Rev.* 1, at pp. 37-38.

22 However, since *Blank* was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In *Blank*, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:

* The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);
* Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);
* Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);
* Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", [page535] in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65);
* Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

23 The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para. 60). It noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).

24 While it is true that in *Blank*, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges "serve a common cause: The secure and effective administration of justice according to law" (para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165).

25 The differences identified in *Blank* between solicitor-client privilege and litigation privilege have been adopted in Quebec law: *Desjardins Assurances générales inc. v. Groupe Ledor inc., mutuelle d'assurances*, 2014 QCCA 1501, at para. 8 (CanLII); *Canada (Procureur général) v. Chambre des notaires du Québec*, 2014 QCCA 552, at para. 47 (CanLII); *Informatique Côté, Coulombe inc. v. Groupe Son X Plus inc.*, 2012 QCCA 2262, at para. 15 (CanLII); *Union canadienne (L'), compagnie d'assurance v. St-Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340, at paras. 23-24; *Imperial Tobacco Canada ltée v. Létourneau*, 2012 QCCA 2260, at paras. 7-8 (CanLII); *Société d'énergie de la Baie James v. Groupe [page536] Aecon ltée*, 2011 QCCA 646, at para. 14 (CanLII); *Fournier Avocats inc. v. Cinar Corp.*, 2010 QCCA 2278, at para. 21 (CanLII). In light of *Blank* and the subsequent case law, the earlier *obiter dictum* of LeBel J. in *Foster Wheeler* on which the motion judge relied in the instant case (para. 63) must be placed

in its proper context. In *Foster Wheeler*, LeBel J. wrote that litigation privilege "is now being absorbed into the Quebec civil law concept of professional secrecy" (para. 44). However, that observation referred to a tendency that is no longer representative of the state of the law in Quebec. Moreover, because litigation privilege applies, for example, to an unrepresented party without the involvement of a professional counsellor (*Blank*, at para. 27), it cannot be said, despite the common characteristics, that it has been absorbed into, or constitutes a component or subcategory of, the institution of professional secrecy.

26 This being said, the syndic in the case at bar is relying on *Blank* and on the differences identified in it as the basis for three arguments that support her view that litigation privilege should be given a limited scope.

27 First, she submits that litigation privilege is not a class privilege and that this distinguishes it from solicitor-client privilege, as it is intended not to protect a relationship, but solely to facilitate a process. Although taking care not to say that litigation privilege is essentially a [TRANSLATION] "case-by-case privilege", she submits that it is nevertheless a "limited privilege that must yield where the ends of justice so require or where that is justified by an overriding public interest".

28 Next, the syndic argues that litigation privilege must be subjected to a balancing test. In her view, courts must in every case assess the harm that would result from the application of the privilege and consider the opposing interests in deciding whether it should apply. The very existence of the privilege thus depends on an analysis specific to a given situation rather than on the application of certain defined exceptions as is the case for solicitor-client privilege. The syndic considers that litigation [page537] privilege no longer reflects contemporary legal realities, which require more extensive co-operation in the courts, and that it should therefore be given a very narrow scope.

29 Finally, the syndic submits that it should not be possible to assert the privilege against someone who is not a party to the litigation in question. The Court should even adopt a [TRANSLATION] "third party investigator exception". In the syndic's opinion, such an exception should apply in favour of anyone who:

> [TRANSLATION] ... (i) is not a party to the litigation that gave rise to the privilege and is therefore a "third party" to the litigation who has no interest in it; (ii) has investigative powers conferred by the legislature in relation to a function being performed in the public interest; (iii) requests the production of documents that are directly relevant to the fulfillment of that function; (iv) has a duty of confidentiality that bars him or her from disclosing the requested documents, directly or indirectly, to the opposing party in the litigation that gave rise to the privilege; and (v) is authorized to disclose the documents only in a forum that itself is obligated and has the ability to maintain their confidentiality for at least as long as the duration of the litigation that gave rise to the privilege (and any related litigation). [A.F., at para. 136]

30 I note that this last argument goes well beyond the narrow issue of legislative abrogation of the privilege raised in this appeal. The proposed exception, which is based on a balancing test, could cause the privilege to be inapplicable even before that issue arises. In support of the exception, the syndic asserts that her oath of discretion and duty of confidentiality substantially limit, or even eliminate, any risk of harm. In short, in a situation like the one in this case, the very limited scope of litigation privilege means that it should yield given the importance of the syndic's function of protecting the public.

31 I find these three arguments to be without merit. Although litigation privilege is distinguishable from solicitor-client privilege, the fact remains that [page538] (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case-by-case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality.

(1) Litigation Privilege Is a Class Privilege

32 There are two types of privileges in our law: class privileges and case-by-case privileges. A class privilege entails a presumption of non-disclosure once the conditions for its application are met. It is "more rigid than a privilege constituted on a case-by-case basis", which means that it "does not lend itself to the same extent to be

tailored to fit the circumstances": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 46. On the other hand, "[t]he scope of [a] case-by-case privilege", as the name suggests, "will depend, as does its very existence, on a case-by-case analysis, and may be total or partial" (*National Post*, at para. 52). The four "Wigmore criteria", the last of which is a balancing of the interests at stake, are applied:

> The "Wigmore criteria" consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good ("Sedulous[ly]" being defined ... as "diligent[ly] ... deliberately and consciously"). Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth... .
>
> ...
>
> The fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the [page539] investigation of a particular crime (or national security, or public safety or some other public good). [paras. 53 and 58]

33 In my opinion, litigation privilege is a class privilege. Once the conditions for its application are met, that is, once there is a document created for "the dominant purpose of litigation" (*Blank*, at para. 59) and the litigation in question or related litigation is pending "or may reasonably be apprehended" (para. 38), there is a "*prima facie* presumption of inadmissibility" in the sense intended by Lamer C.J. in *R. v. Gruenke*, [1991] 3 S.C.R. 263:

> The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). [Emphasis deleted; p. 286]

34 From this perspective, litigation privilege is similar to settlement privilege and informer privilege, which the Court has already characterized as class privileges: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 12; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at para. 22. Like them, litigation privilege has long been recognized by the courts and has been considered to entail a presumption of immunity from disclosure once the conditions for its application have been met: *Blank*, at paras. 59-60; *Compagnie d'assurances AIG du Canada v. Solmax International inc.*, 2016 QCCA 258, at paras. 4-8 (CanLII); *Groupe Ledor inc.*, at paras. 8-9; *St-Pierre*, at para. 41; *Axa Assurances inc. v. Pageau*, 2009 QCCA 1494, at para. 2 (CanLII); *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 83 O.R. (3d) 792 (C.A.), at paras. 20-21; *College of Physicians and Surgeons [page540] of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, 23 C.P.R. (4th) 185, at paras. 31-33 and 72; *Apotex Fermentation Inc. v. Novopharm Ltd.* (1994), 95 Man. R. (2d) 186 (C.A.), at paras. 18-20; *R. v. Brouillette* (1992), 78 C.C.C. (3d) 350 (Que. C.A.), at p. 368; *Opron Construction Co. v. Alberta* (1989), 100 A.R. 58 (C.A.), at para. 5.

35 Furthermore, several courts and authors have, although sometimes diverging on the basis for the privilege or the applicable criteria, explicitly concluded that litigation privilege is in fact a class privilege: *R. v. Lanthier*, 2008 CanLII 13797 (Ont. S.C.J.), at para. 6; *Kennedy v. McKenzie* (2005), 17 C.P.C. (6th) 229 (Ont. S.C.J.), at para. 22; *R. v. Soomel*, 2003 BCSC 140, at para. 76 (CanLII); H. C. Stewart, *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-183; B. Billingsley, "'Ingathered' Records and the Scope of Litigation Privilege in Canada: Does Litigation Privilege Apply to Copies or Collections of Otherwise Unprivileged Documents?" (2014), 43 *Adv. Q.* 280, at pp. 283-85.

36 Thus, although litigation privilege differs from solicitor-client privilege in that its purpose is to facilitate a process - the adversary process (*Blank*, at para. 28, quoting Sharpe, at paras. 164-65) - and not to protect a relationship, it is nevertheless a class privilege. It is recognized by the common law courts, and it gives rise to a presumption of

inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation (*Blank*, at para. 60).

37 This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue (*National Post*, at para. 58).

[page541]

(2) Litigation Privilege Is Subject to Clearly Defined Exceptions and Not to a Case-by-Case Balancing Exercise

38 Despite the fact that litigation privilege is a class privilege, the syndic proposes that the Court adopt the balancing test developed by Doherty J.A. of the Ontario Court of Appeal in his dissenting reasons in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

> Litigation privilege claims should be determined by first asking whether the material meets the dominant purpose test ... . 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. [Emphasis added; p. 365.]

39 I disagree. In the context of privileges, the exercise of balancing competing interests is associated with case-by-case privileges (*National Post*, at para. 58), not class privileges. Rosenberg J.A., who wrote reasons concurring with those of Carthy J.A. for the majority in *Chrusz*, refused to apply such a test, citing the uncertainty that would be caused by a case-by-case approach of balancing the advantages and disadvantages of applying the privilege. I adopt his comments on this point:

> 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 ... . I am concerned that a balancing test would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation.
>
> That is not to say that litigation privilege is absolute. The Supreme Court of Canada has made it clear that all of the established privileges are subject to some exceptions... .
>
> 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 [page542] 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 ... . [Emphasis added; p. 369.]

40 Moreover, other courts have cited Justice Rosenberg's analysis with approval: *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84, at paras. 57-58; *Llewellyn v. Carter*, 2008 PESCAD 12, 278 Nfld. & P.E.I.R. 96, at para. 52; *Kennedy*, at para. 39; *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512 (S.C.J.), at paras. 43-46. Similarly, in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, this Court discussed the certainty that was needed in the case of another fundamental privilege, that of the police informer, explaining as follows why a case-by-case determination of whether relevant information is privileged would undermine the confidence of those who are protected by the privilege:

> Police rely heavily on informers. Because of its almost absolute nature, the privilege encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob informers of that assurance and sap their willingness to cooperate. [Emphasis added; para. 30.]

The same considerations apply to litigation privilege.

41 What must be done therefore is to identify, where appropriate, specific exceptions to litigation privilege rather

than conducting a balancing exercise in each case. In this regard, the Court held in *Smith v. Jones*, [1999] 1 S.C.R. 455, that the exceptions that apply to solicitor-client privilege are all applicable to litigation privilege, given that solicitor-client privilege is the "highest privilege recognized by the courts" (para. 44). These include the exceptions relating to public safety, to the innocence of the accused and to criminal communications (paras. 52-59 and 74-86). They also include the exception to litigation privilege recognized in *Blank* [page543] for "evidence of the claimant party's abuse of process or similar blameworthy conduct" (para. 44).

42 Other exceptions may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances. From this perspective, Aviva is proposing a new exception that is narrower than the balancing exercise being advocated by the syndic and that would apply only in the cases of urgency and of necessity. Unsurprisingly, the syndic says that she agrees with the substance of this exception.

43 The idea of an exception based on urgency and necessity is of course appealing. It would help compensate for the fact that, even though litigation privilege is temporary, it may sometimes delay access to certain documents that another party urgently needs in order to prevent serious harm. Such an exception would be based on criteria such as the need to obtain evidence to prevent serious harm, the impossibility of obtaining it by other means and the urgency of obtaining it before the [TRANSLATION] "natural" lapsing of the effects of litigation privilege.

44 This exception would certainly be much narrower than the excessively broad balancing exercise proposed by the syndic. What would be required would be not to ask in each case whether litigation privilege should protect a document whose dominant purpose is preparation for litigation, but to lift the privilege in the rare cases in which a party succeeds in discharging its heavy burden with regard to this exception. Therefore, in a situation similar to the one in this case, it would not be enough for a syndic to simply invoke the need to sanction alleged disciplinary breaches in order to lift the privilege. If that did suffice, such a request would always be sufficient to establish the urgency exception, and that exception would then become the rule. This, in my view, would be improper. To establish the urgency exception in a disciplinary context, the existence of an urgent investigation in which extraordinary harm [page544] is apprehended during the period in which litigation privilege applies would instead be needed.

45 However, the record of this appeal from a declaratory judgment reveals no facts that might be presented as concrete examples of circumstances that could justify the application of such an exception. Because the urgency that is required may vary in nature depending on the legal context of the case and the nature of the relationship between the parties, I consider it preferable to leave the actual adoption of such an exception and a detailed analysis of the conditions for its application for a later date. For now, it would be advisable to limit this discussion to the defined exceptions that have been mentioned above.

(3) Litigation Privilege Can Be Asserted Against Third Parties, Including Third Party Investigators Who Have a Duty of Confidentiality

46 At the hearing, the syndic submitted, lastly, that in every case, it should not be possible to assert litigation privilege against third parties: it should apply only to parties to the litigation in question. In the case at bar, because the syndic is not a party to any litigation related to the litigation between the insurer and the insured person, that privilege cannot, in her opinion, be asserted against her. This is because of the limited purpose of the privilege, which is intended to facilitate the adversarial process in which the parties alone are involved. In the alternative, the syndic proposes the adoption of an exception to the effect that the privilege cannot be asserted against third party investigators who have a duty of confidentiality.

47 These arguments are unconvincing. I instead agree with the courts that have held that litigation privilege can be asserted against anyone, including administrative or criminal investigators, not just against the other party to the litigation: *R. v. Kea* (2005), 27 M.V.R. (5th) 182 (Ont. S.C.J.), at paras. 43-44; *D'Anjou v. Lamontagne*, 2014 QCCQ 11999, at paras. 92-93 (CanLII).

48 There are several reasons that justify this conclusion. The first is that the disclosure of [page545] otherwise

protected documents to third parties who do not have a duty of confidentiality would entail a serious risk for the party who benefits from the protection of litigation privilege. There would be nothing to prevent a third party to whom such documents are disclosed from subsequently disclosing them to the public or to the other party, which could have a serious adverse effect on the conduct of the litigation in question. The documents could then be presented to the court in a manner other than that contemplated by the party protected by the privilege. This is the very kind of harm that litigation privilege is meant to avoid: *Susan Hosiery Ltd.*, at pp. 33-34. Moreover, in *Blank*, which concerned the *Access to Information Act*, this Court held that a provision authorizing the government to invoke solicitor-client privilege could also be used to invoke litigation privilege in order to deny a request for access to information by a third party to the litigation (for example, the media or a member of the public) (para. 4).

49 There are also cases in which the courts have held that disclosure to a third party of a document covered by litigation privilege could result in a waiver of the privilege as against all: *Rodriguez v. Woloszyn*, 2013 ABQB 269, 554 A.R. 8, at para. 44; *Aherne v. Chang*, 2011 ONSC 3846, 337 D.L.R. (4th) 593, at paras. 12-13. The decisions in those cases are based on the assumption that litigation privilege can be asserted against third parties. To conclude that there are consequences associated with disclosure to third parties, one must first assume that confidentiality in relation to those parties corresponds to a normal application of the privilege.

50 As for the exception the syndic proposes for third party investigators who have a duty of confidentiality, it is hardly more justifiable. Even where a duty of confidentiality exists, the open court principle applies to proceedings that can be initiated by a syndic (s. 376 *ADFPS* and s. 142 of the *Professional Code*; art. 11 of the *Code of Civil Procedure*, CQLR, c. C-25.01). If, in the case at bar, the syndic had decided to file a complaint with the Chamber's discipline committee, or if she had decided to turn to the common law courts (to obtain, for example, an injunction against the person being investigated, [page546] as the syndic of the Barreau du Québec did in *Guay v. Gesca ltée*, 2013 QCCA 343, [2013] R.J.Q. 342), it is far from certain, in light of the open court principle, that the documents that would otherwise be protected by litigation privilege would not have had to be disclosed in the course of those proceedings.

51 In *Basi*, this Court held that informer privilege could not be lifted in favour of defence counsel merely because those counsel were bound by orders and undertakings of confidentiality. In the Court's opinion, "[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies" (para. 44). In that case, the fact that the third parties had duties of confidentiality and the reduced risk of harm did not preclude asserting informer privilege against them.

52 This reasoning applies with equal force to litigation privilege. It would not be appropriate to exclude third parties from the application of this privilege or to expose the privilege to the uncertainties of disciplinary and legal proceedings that could result in the disclosure of documents that would otherwise be protected. Moreover, even assuming that there is no risk that a syndic's inquiry will result in the disclosure of privileged documents, the possibility of a party's work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done. This makes it clear why it must be possible to assert litigation privilege against anyone, including a third party investigator who has a duty of confidentiality and discretion. I am thus of the view that unless such an investigator satisfies the requirements of a recognized exception to the privilege, it must be possible to assert the privilege against him or her.

53 I would add that any uncertainty in this regard could have a chilling effect on parties preparing for litigation, who may fear that documents otherwise [page547] covered by litigation privilege could be made public. The United States Supreme Court gave a good description of this chilling effect, which litigation privilege (referred to as the "work product doctrine") is in fact meant to avoid:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. 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. That is the historical and the necessary way in which

> lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. [Emphasis added.]

(*Hickman v. Taylor*, 329 U.S. 495 (1947), at pp. 510-11)

54 In short, in the instant case, the courts below were right to hold that the litigation privilege invoked by Aviva could be asserted against the syndic. None of the exceptions to its application justify lifting the privilege in this case. Thus, all that remains to be determined is whether the privilege [page548] can, as the syndic submits, be lifted by applying the statutory provision - s. 337 *ADFPS* - that is central to the case.

B. *Was It Open to Aviva to Assert Litigation Privilege Against the Syndic in Order to Refuse to Produce the Requested Documents?*

55 The syndic argues that the rule from *Blood Tribe* on abrogating solicitor-client privilege must not apply to litigation privilege. She submits that a legislature may abrogate litigation privilege by statute without using express language. In her view, the words "any ... document" in s. 337 *ADFPS* must be interpreted in light of the statute's purpose, namely the protection of the public, and it must be concluded that litigation privilege cannot be asserted against the syndic, because that would [TRANSLATION] "interfere with" her work by delaying her access to the documents to which it applies.

56 Because litigation privilege is a common law rule, it will be helpful to reiterate the general principle that applies to legislative departures from such rules. This Court has held that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077; see also R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 504-5. Professor Sullivan writes in this regard that "[t]he stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes" (p. 504).

57 The Court has therefore imposed strict requirements for the amendment or abrogation of certain fundamental common law rules. For example, in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the Court emphasized the need for clear and explicit [page549] language to oust the inherent general jurisdiction of the provincial superior courts (para. 46). The requirement for such language in this context, which originated in English law (*Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88), is based on the fundamental role played by the inherent jurisdiction of the superior courts in the common law system inherited by Canada.

58 Similarly, in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, the Court refused to consider informer privilege to have been abrogated by a provision of the *Code of Civil Procedure*, CQLR, c. C-25.01, finding that it was not "specific" enough (p. 103). In so doing, the Court emphasized the "public order" and "public interest" nature of informer privilege (p. 93). It was the fundamental importance of that privilege that led the Court to require explicit language for its abrogation.

59 *Blood Tribe*, on which much of the argument in this appeal was focused, was to the same effect. In it, the issue was whether solicitor-client privilege had been abrogated or diluted by a statutory provision that authorized an administrative investigator to compel a person to produce any records the investigator considered necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive

and accept any evidence and other information ... that the [investigator] sees fit, whether or not it is or would be admissible in a court of law" (s. 12 *PIPEDA*, now s. 12.1 (S.C. 2010, c. 23, s. 83)). The Court held that the provision at issue was insufficient to abrogate solicitor-client privilege: "Open-textured language governing production of documents [does] not ... include solicitor-client documents" (para. 11 (emphasis deleted)). Instead, the legislature must use "clear and explicit language" to abrogate solicitor-client privilege (para. 2). The Court stated that the privilege "cannot be abrogated by inference" and added that any provisions that allow incursions on the privilege must be interpreted restrictively (para. 11).

[page550]

60 To justify these requirements, the Court relied on the unique and foundational importance of solicitor-client privilege, which is "fundamental to the proper functioning of our legal system" (*Blood Tribe*, at para. 9). The Court cited a significant body of case law to the effect that the privilege is a "fundamental policy of the law" (para. 11) that must be "as close to absolute as possible to ensure public confidence and retain relevance" (para. 10, quoting *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 35). The Court also noted that solicitor-client privilege is of paramount importance because it promotes "access to justice", the "quality of justice" and "[the] free flow of legal advice" (para. 9). What I take from this is that in *Blood Tribe*, the Court held that there is a requirement similar to the one that applies in Quebec under s. 9 of the *Quebec Charter*, which provides that an "express" legislative override is necessary in order to abrogate professional secrecy.

61 This being said, *Blood Tribe* represents neither a return to the "plain meaning rule" nor an abandonment of the modern approach to statutory interpretation, the goal of which is not to focus solely on the specific words of the provision, but to read the words "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Blood Tribe*, at para. 26. First of all, the legislature does not necessarily have to use the term "solicitor-client privilege" in order to abrogate the privilege. An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege. Next, even where there is a specific reference to solicitor-client privilege, the chosen words must nevertheless be interpreted in order to determine whether there is in fact an abrogation and, if so, to assess its scope. The Court recently applied this modern approach to a statute that expressly abrogated solicitor-client privilege in order to determine its meaning and scope in *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at paras. 22-34. But in accordance with *Blood Tribe*, unless clear, explicit and [page551] unequivocal language has been used to abrogate solicitor-client privilege, it must be concluded that the privilege has not been abrogated.

62 In the syndic's view, these requirements that must be met in order to override certain rules of fundamental importance should not apply to litigation privilege. She bases this argument on the limited nature of the privilege, which is not absolute and which, in her opinion, requires a balancing of competing harms and interests.

63 I disagree. The requirements discussed in *Blood Tribe* apply with equal force to litigation privilege. Not only is litigation privilege a class privilege, but it serves an overriding "public interest" as that expression is used in *Bisaillon*. This public interest, as was explained in *Blank*, is "[t]he secure and effective administration of justice according to law" (para. 31). The purpose of litigation privilege is to "ensure the efficacy of the adversarial process" (*Blank*, at para. 27) by maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165). By maintaining a protected area for the preparation of litigation, litigation privilege in its own way promotes "access to justice" and the "quality of justice" (*Blood Tribe*, at para. 9).

64 There is of course no question that litigation privilege does not have the same status as solicitor-client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct. Nonetheless, like solicitor-client privilege, litigation privilege is "fundamental to the proper functioning of our legal system" (*Blood Tribe*, at para. 9). It is central to the adversarial system that Quebec shares with the other provinces. As a number of courts have already pointed

out, the Canadian justice system promotes the search for truth by allowing the parties to put their best cases before the court, thereby enabling the court to reach a decision with the best information possible: *Penetanguishene Mental Health Centre v. Ontario*, 2010 ONCA 197, 260 O.A.C. 125, at para. 39; *Slocan Forest Products Ltd. v. Trapper [page552] Enterprises Ltd.*, 2010 BCSC 1494, 100 C.P.C. (6th) 70, at para. 15. The parties' ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of this process. In Quebec, as in the rest of the country, litigation privilege is therefore inextricably linked to certain founding values and is of fundamental importance. That is a sufficient basis for concluding that litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it.

65 This conclusion is consistent with a robust line of authority. Like the Quebec Court of Appeal in the instant case, the Alberta Court of Appeal has also held that a party should not be denied the right to claim litigation privilege without "clear and explicit legislative language to that effect": *TransAlta Corp. v. Market Surveillance Administrator*, 2014 ABCA 196, 577 A.R. 32, at para. 36. As well, the Federal Court has applied the principles from *Blood Tribe* to litigation privilege in two cases: *Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429, at paras. 14 and 30-37 (CanLII); *State Farm Mutual Automobile Insurance Co. v. Privacy Commissioner of Canada*, 2010 FC 736, at para. 115 (CanLII).

66 In the case at bar, s. 337 *ADFPS*, on which the syndic is relying, merely authorizes a request for the production of "any ... document" without further precision. This is what the Court characterized in *Blood Tribe* as a "general production provision that does not specifically indicate that the production must include records for which ... privilege is claimed" (para. 21). In fact, s. 337 *ADFPS* is even less specific than the provisions at issue in *Blood Tribe*, which empowered the investigator to obtain all the evidence he or she wished to obtain, "whether or not it is or would be admissible in a court of law" and "in the same manner and to the same extent as a superior court of record" (s. 12 *PIPEDA*, now s. 12.1).

[page553]

67 A provision that merely refers to the production of "any ... document" does not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege. There are a number of statutes that provide for the disclosure or production of "any ... document" without further precision. As the intervener Advocates' Society points out, Quebec's *Code of Civil Procedure* does so, as do the rules of civil procedure of several other provinces. Some courts have held in the past that rules of civil procedure providing for the disclosure of documents in very general terms did not contain the language that would be required in order to abrogate litigation privilege: *Louch v. Decicco*, 2007 BCSC 393, 39 C.P.C. (6th) 8, at para. 63; *Ward v. Pasternak*, 2015 BCSC 1190, at paras. 37-38 (CanLII). The same conclusion applies in the instant case.

C. *Collateral Issue: The Professional Code and Litigation Privilege*

68 I must address one final point. In response to certain comments made in the Court of Appeal's reasons, the Barreau du Québec has intervened in this Court to raise a collateral issue with respect to the scope of s. 192 of the *Professional Code*, as amended in 1994. That section explicitly abrogates professional secrecy in the context of a disciplinary inquiry, but does not refer to the assertion of litigation privilege by a professional in such a context. In its reasons, the Court of Appeal made two references to s. 192 (at paras. 23 and 30) to illustrate a situation in which the legislature has expressly abrogated professional secrecy, which it has not done in s. 337 *ADFPS*.

69 Wishing to clear up any ambiguity concerning the scope of those comments, the Barreau submits that s. 192 should be read as abrogating not only professional secrecy, but also litigation privilege, even though it does not actually mention the latter. The Barreau relies on *Blank*, in which this Court held that the protection afforded to solicitor-client privilege by s. 23 of the *Access to Information Act*, which did not mention litigation privilege, also applied to the latter privilege.

[page554]

70 Although I am mindful of the concerns expressed by the Barreau, I am of the opinion that it would not be appropriate for the Court to rule on this issue at this time without full argument in an adversarial context by all parties who might have an interest in it.

VI. Disposition

71 Litigation privilege is a class privilege that is distinct from solicitor-client privilege and is subject to certain defined exceptions that do not apply in this case. Given the absence of clear, explicit and unequivocal language in the *ADFPS* providing for the abrogation of this privilege, it may be asserted against the syndic, and the Superior Court and Court of Appeal were right to reach this conclusion. I would accordingly dismiss the appeal with costs to Aviva.

Appeal dismissed with costs.

Solicitors:

Solicitors for the appellant: Mercier Leduc, Montréal.

Solicitors for the respondents: Stikeman Elliott, Montréal.

Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Montréal.

Solicitors for the intervener the Advocates' Society: Irving Mitchell Kalichman, Montréal.

Solicitors for the intervener Barreau du Québec: Langlois lawyers, Québec.

TAB 14

R. v. Husky Energy Inc., [2017] S.J. No. 579

Saskatchewan Judgments

Saskatchewan Court of Queen's Bench

Judicial Centre of Regina

J.D. Kalmakoff J.

December 20, 2017.

Docket: QBG 1751 of 2017

[2017] S.J. No. 579 | 2017 SKQB 383

Between Her Majesty the Queen (Canada), Applicant, and Husky Energy Inc., Respondent

(71 paras.)

Counsel

Carol L. Carlson and Stephen W. Jordan, for the appellant.

Scott H.D. Bower and David R. McKinnon, for the respondent.

JUDGMENT

J.D. KALMAKOFF J.

1 This is an application by the Crown, as represented by the Public Prosecution Service of Canada, seeking the release of certain documents seized under the authority of a search warrant. The documents in question were seized from the respondent, Husky Energy Inc. [Husky]. Husky asserts that the documents are protected either by solicitor-client privilege or litigation privilege (and in some cases, both), and as such should not be released to the Crown.

BACKGROUND

2 Husky owns and operates an oil pipeline knows as the 16TAN pipeline in Saskatchewan. On July 21, 2016, a leak occurred in that pipeline where it crosses the North Saskatchewan River near Maidstone, Saskatchewan. A significant quantity of oil spilled into the river.

3 As a result of the spill, the office of Environment and Climate Change Canada [ECCC] began an investigation. Part of the focus of that investigation was determining whether Husky had committed offences under the *Fisheries Act*, RSC 1985, c F-14 [*Act*]. In particular, ECCC was investigating potential violations of ss. 36(3), 38(5) and 38(6) of that *Act*. Those subsections read as follows:

> **Deposit of deleterious substance prohibited**
>
> 36(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.
>
> ...

Duty to notify -- deleterious substance

38(5) If there occurs a deposit of a deleterious substance in water frequented by fish that is not authorized under this Act, or if there is a serious and imminent danger of such an occurrence, and detriment to fish habitat or fish or to the use by humans of fish results or may reasonably be expected to result from the occurrence, then every person shall without delay notify an inspector, a fishery officer or an authority prescribed by the regulations if the person at any material time

(a) owns or has the charge, management or control of

(i) the deleterious substance, or

(ii) the work, undertaking or activity that resulted in the deposit or the danger of the deposit; or

(b) causes or contributes to the occurrence or the danger of the occurrence.

Duty to take corrective measures

(6) Any person described in paragraph (4)(a) or (b) or (5)(a) or (b) shall, as soon as feasible, take all reasonable measures consistent with public safety and with the conservation and protection of fish and fish habitat to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from it.

4 As part of the investigation, a search warrant was obtained by Andrew Moss, an officer with ECCC, on March 15, 2017. The warrant authorized ECCC to search for documents and records in Husky's possession relating to the alleged offences. Prior to the warrant being obtained, ECCC had, by letter, requested certain records from Husky, and advised Husky that it planned to obtain a warrant to search for those records in due course. Husky cooperated with the request, enlisting in-house and external legal counsel, and also engaging Deloitte Forensic to locate, search, identify and analyze the records requested.

5 A staggering number of records were collected, organized and reviewed by Deloitte Forensic, Husky, and Husky's counsel. Eventually, they determined that approximately 25,000 electronic records were responsive to ECCC's request, as well as a large number of non-electronic records.

6 On March 23, 2017, ECCC executed the search warrant. The records seized under its authority were provided to ECCC in hard copy form where the documents were not in electronic form, and in electronic form otherwise. However, Husky asserted privilege over approximately 580 records, and turned those over in sealed packaging.

7 Over the ensuing months, discussions between counsel for the Crown and counsel for Husky led to further review of the documents. This review led Husky to determine that some of the documents over which it originally asserted privilege were not in fact privileged. The non-privileged documents were released to the Crown. Further discussion and review also determined that there was significant duplication and overlap in the documents in which Husky continued to assert privilege. As a result of that review, the number of documents over which Husky continues to assert privilege has been distilled down to 96. Those documents remain sealed, and are currently stored in the Sheriff's Office at the Court of Queen's Bench in Regina, Saskatchewan. Husky claims litigation privilege with respect to all 96 of those documents. It also claims solicitor-client privilege with respect to nine of them.

8 Once the oil spill occurred, Husky conducted an internal investigation. According to Husky, it did so in preparation for defending two types of legal proceedings: (i) regulatory prosecution, of the sort being conducted by the Crown on behalf of ECCC; and (ii) civil litigation that may be brought against it by parties affected by the oil spill (which may also involve Husky counter-claiming, or pursuing claims against third parties).

9 According to Husky, the documents over which it asserts privilege generally fall into four categories:

1. Investigation charter related records: records related to the establishment of Husky's internal investigation of the oil spill and the creation of Husky's investigation charter, which guided the internal investigation;
2. Investigation records: records concerning the conduct of the investigation, including scheduling site visits and the conduct of interviews;
3. Miscellaneous records from the internal investigation, such as records that attract solicitor-client privilege, and records about the control room and alarm histories; and
4. Expert reports.

THE ISSUE

10 The issue in this hearing is whether, and to what extent, the documents over which Husky asserts privilege are in fact protected by privilege. To the extent that privilege exists, the documents or records cannot be examined by the prosecuting authority. To the extent that privilege does not exist, the documents may be unsealed, turned over to ECCC, and used in the normal course of the investigation: *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink,* 2002 SCC 61, [2002] 3 SCR 209.

THE PROCESS

11 This Court has inherent jurisdiction to hear and determine applications such as this one: *Redhead Equipment v Canada (Attorney General),* 2016 SKCA 115, 402 DLR (4th) 649 [*Redhead Equipment*].

12 In this sort of application, the documents in question must be reviewed by the court in order to determine whether claims of privilege are legally valid. The method of review is a matter of judicial discretion but must, of necessity, include a review by the judge who hears the application: *R v Douglas*, 2017 MBCA 63, [2017] 10 WWR 446; *Attorney General v Law Society of Upper Canada,* 2010 ONSC 2150; *R v Kelleher,* 2012 SKQB 440, 410 Sask R 109; *Solosky v The Queen,* [1980] 1 SCR 821 at 837 [*Solosky*].

13 Claims of privilege cannot be asserted in bulk. Privilege can only be claimed on a document by document basis. Each document over which the claim is asserted must meet the criteria for privilege to apply: *Solosky; Keefer Laundry Ltd. v Pellerin Milnor Corp.,* 2006 BCSC 1180 at para 96, 59 BCLR (4th) 264.

14 The party claiming privilege in a document bears the onus of establishing the existence of that privilege on a balance of probabilities. Where solicitor-client privilege is claimed, reasonable evidence must be adduced of the presence of a solicitor-client relationship in respect of each individual document in question. With respect to litigation privilege, the claimant must establish that each document, or bundle of documents, was created for the dominant purpose of litigation which was already ongoing, or was reasonably apprehended. Simply showing that a document was derived from an internal investigation does not demonstrate that the document was created for the dominant purpose of litigation: *Alberta v Suncor Inc.,* 2017 ABCA 221, [2017] 9 WWR 478 [*Suncor*].

15 Where the privilege claimed is solicitor-client privilege, if a document contains both privileged and non-privileged information, the portion which is privileged should be redacted, and copies of the redacted document made available to the Crown: *Smith v Jones*, [1999] 1 SCR 455.

RELEVANT LEGAL PRINCIPLES

(1) Solicitor-client privilege

16 Solicitor-client privilege is fundamental to the proper functioning of our legal system, and a cornerstone of access to justice. It is to be jealously guarded, and should only be set aside in the most unusual circumstances. It must remain as close to absolute as possible, and should not be interfered with unless absolutely necessary. It is a privilege that only yields in limited and clearly defined circumstances: *Alberta (Information and Privacy*

Commissioner) v University of Calgary, 2016 SCC 53, at paras 34-43, [2016] 2 SCR 555 [*University of Calgary*]. Those "limited and clearly defined circumstances" include situations (i) where the allegedly privileged communications are made to facilitate the commission of a crime; (ii) where overriding privilege is necessary to permit an accused person to make full answer and defence; and (iii) where public safety is at stake: *University of Calgary; Canada (Privacy Commissioner) v Blood Tribe Department of Health,* 2008 SCC 44, [2008] 2 SCR 574.

17 The scope of solicitor-client privilege is broad. It applies to all communications made with a view to obtaining legal advice. As the Supreme Court noted in *Maranda v Richer,* 2003 SCC 67, at para 22, [2003] 3 SCR 193, quoting from *Descôteaux v Mierzwinski,* [1982] 1 SCR 860:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within a framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

18 The party asserting solicitor-client privilege bears the burden of proof in an application such as this one. In order to establish solicitor-client privilege, that party must demonstrate, on a balance of probabilities, that the document or record in question is a communication between solicitor and client, which entails the seeking or giving of legal advice, and is intended by the parties to be confidential: *Redhead Equipment*, at para 31; *Solosky* at 837.

19 In *Redhead Equipment,* the court expanded on these concepts, at paras. 33 - 36:

> 33 The nature or content of the communication must involve legal advice. A lawyer must be acting as a lawyer giving legal advice rather than in some other non-legal capacity (*Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44 (S.C.C.) at para 10, [2008] 2 S.C.R. 574 (S.C.C.)). Purely business or policy advice, as opposed to legal advice, is not privileged (*R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.) at para 50). Documents of an accounting or factual nature or those providing strategic business direction are not privileged (*Belgravia Investments Ltd. v. R.*, 2002 FCT 649 (Fed. T.D.) at paras 72 and 74-75, (2002), 220 F.T.R. 246 (Fed. T.D.) [*Belgravia*]). Documents which simply come into the possession of a lawyer that are not related to the provision of legal advice are not privileged (*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.) [*Chrusz*]). A document that is clothed with no privilege does not acquire privilege simply because it goes into the hands of a lawyer. Where the timing, format and/or nature of the factual information provided would not allow the nature of the legal advice being sought to be discerned, the communication is not privileged (*Maranda c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67 (S.C.C.) at paras 30-32, [2003] 3 S.C.R. 193 (S.C.C.)).
>
> 34 The privilege is not confined to telling the law but includes advice regarding what should be done in the relevant legal context (*Samson* at 769 [*Samson Indian Nation and Band v Canada* (1995), 125 DLR (4th) 294 (FCA)]). It is not necessary that the communications specifically request or offer advice as long as it can be placed within the "continuum" of communication in which the solicitor tenders advice.
>
> 35 The meaning of "continuum" was the subject of comment in *Canada (Information Commissioner) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 104, 360 D.L.R. (4th) 176 (F.C.A.):
>
> > [27] Part of the continuum protected by privilege includes "matters great and small at various stages...includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client." See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 *per* Taylor L.J.; *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 111.

> [28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice": *Balabel*, *supra* at page 1048. If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege -- namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?
>
> 36 A significant analytical factor at play on a document by document examination of whether privilege applies is whether the lawyer was performing the function of a legal adviser at the exact moment of the communication (*Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.) at 873). This suggests that while a communication, for example, in the morning may be privileged, one in the afternoon on a related topic but where no legal advice is given might not be privileged.

20 The bottom line is this: if a communication forms part of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege: *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner),* 2013 FCA 104, 360 DLR (4th) 176.

2) Litigation privilege

21 Litigation privilege is a common law rule that gives rise to immunity from disclosure of documents and communications whose dominant purpose is preparation for litigation. Its purpose is to create a zone of privacy in relation to pending or ongoing litigation: *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52, [2016] 2 SCR 521 [*Lizotte*].

22 Litigation privilege is distinct from solicitor-client privilege in a number of ways. First, while solicitor-client privilege protects a relationship, litigation privilege protects the efficacy of the adversarial process. Second, solicitor-client privilege is permanent; litigation privilege is time-limited, and expires with the end of the litigation in question. Third, unlike solicitor-client privilege, litigation privilege applies to unrepresented parties and non-confidential documents: *Lizotte,* at paras 22 - 24; *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 [*Blank*]. Fourth, litigation privilege is to be applied more narrowly, rather than being seen as an equal partner to solicitor-client privilege. A claim of litigation privilege will not be made out simply because litigation support is one of the purposes of a document's preparation, even if it is a substantial purpose. Litigation must be the dominant purpose in order for litigation privilege to exist: *Blank*; *TransAlta Corporation v Market Surveillance Administrator*, 2015 ABQB 180, 613 AR 165 [*TransAlta Corporation*].

23 Despite these differences, litigation privilege, like solicitor-client privilege, is a class privilege. Documents which fall into that class (*i.e.* those whose dominant purpose is preparation for litigation) will be protected by immunity from disclosure unless an exception applies. The exceptions to litigation privilege are narrow and clearly defined. They include those which apply to solicitor-client privilege (*i.e.* criminal communications, innocence of an accused person, and public safety), as well as circumstances where the communication or document in question is evidence of abuse of process or similarly blameworthy conduct on the part of the claimant: *Lizotte; Blank.*

24 Litigation privilege can also be asserted against third parties, including third party investigators who have a duty of confidentiality: *Lizotte* at para 31.

25 As with solicitor-client privilege, in an application such as this one, the party claiming litigation privilege bears the onus of proving, on a balance of probabilities, that it applies. Litigation privilege will apply where the dominant purpose of the creation of the document or communication in question is to prepare for litigation, and the litigation in question (or related litigation) is pending or may reasonably be apprehended: *Lizotte* at para 33.

26 Like solicitor-client privilege, litigation privilege must be assessed on a document by document basis: *Canadian Natural Resources Limited v ShawCor Ltd.,* 2014 ABCA 289, 376 DLR (4th) 581 [*ShawCor*]. Where a document has been prepared for mixed purposes, it is the task of the court to review the document to determine the dominant purpose of its preparation. The nature of the document and the timing of its creation are important factors in that

determination: *Ottawa (City) v Lauzon,* 2013 ONSC 2619, as is a litigant's usual practice or policy of information gathering following an incident.

27 The mere prospect of litigation at the time a document is created is not enough to trigger litigation privilege. Also, if the document in question is prepared in the ordinary course of business, or would have come into existence regardless of the litigation, it does not fall under the protection of litigation privilege: *TransAlta Corporation*; *Canada Southern Petroleum Ltd. v Amoco Canada Petroleum Co.* (1995), 35 Alta LR (3d) 42 (Alta QB) [*Canada Southern*]. Documents which are always produced, as a matter of policy, in response to a certain type of incident cannot be said to be created for the dominant purpose of litigation simply because there is, in the particular instance at hand, a reasonable prospect of litigation.

28 There must be sufficient evidence before the court to establish the dominant purpose of the creation of the communication or document in question, in order to support a claim of litigation privilege. The evidence must lift the claim's foundation from the general to the particular: *Seely v Corrier,* 2009 NBCA 3, 307 DLR (4th) 78. That said, the evidence provided need only permit the judge hearing the application to determine whether a *prima facie* claim of privilege exists. It does not need to be so detailed as to enable the opposing party to indirectly discover the content of the privileged documents: *Brewster v Quayle Agencies Inc.*, 2008 SKQB 137, 332 Sask R 192.

3) Waiver

29 Privilege, whether solicitor-client or litigation, may be waived by the party who holds it. Both types of privilege may be either expressly or implicitly waived. The onus of establishing waiver is on the party asserting that there has been a waiver.

30 Privilege may be expressly waived by a party who knows of the privilege and the right to claim it, and voluntarily demonstrates an intention to waive it: *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.,* [1983] 4 WWR 762 (BCSC) [*S & K*]; *Popowich v Saskatchewan,* [1998] 8 WWR 355 (Sask QB); *Canada (Citizenship and Immigration) v Mahjoub*, 2011 FC 887 [*Mahjoub*].

31 An express intention to waive solicitor-client privilege is not always required, however. Waiver of solicitor-client privilege may also occur in the absence of an intention to waive it where fairness and consistency require waiver. For instance, where a litigant relies on legal advice as an element of his or her claim or defence, the privilege which would otherwise attach to the advice is lost: *S & K* at para 10; *Petro Can Oil & Gas Corp. v Resource Service Group Ltd.* (1988), 59 Alta LR (2d) 34 (Alta QB).

32 In order for waiver of solicitor-client privilege to be implied, the party's state of mind must be in issue, and that state of mind must be relevant to the determination of the case. If the client puts the substance of the legal advice into issue, and attempts to rely on it to establish an element of his claim or defence, waiver will occur: *Doman Forest Products Ltd. v GMAC Commercial Credit Corp. -- Canada,* 2004 BCCA 512, 245 DLR (4th) 443; *ProSuite Software Ltd. v Infokey Software Inc.,* 2015 BCCA 52, 382 DLR (4th) 698.

33 An implied waiver of litigation privilege may also be found where fairness so demands, for instance, in a situation where the party holding the privilege releases a portion of the material covered by it. Where that occurs, there is an implied waiver of all material necessary to ensure fairness, *i.e.* to ensure that the other party is not misled: *Mahjoub; O'Scolai v Antrajenda*, 2008 ABQB 77, 447 AR 357; *Wigmore v Myler*, 2014 ONSC 6744, 123 OR (3d) 446. In this sense, the standard for finding waiver of litigation privilege is less stringent than the standard for finding waiver of solicitor-client privilege: *R v Fast*, 2009 BCSC 1671, 90 MVR (5th) 233.

34 Disclosure by a party of a portion of a privileged document does not necessarily amount to waiver of the entire document or the rest of the information subject to privilege. For instance, mere references to an opinion contained in a confidential report, or to privileged investigation reports do not necessarily amount to waiver of privilege in the entire contents of those reports, unless fairness and consistency requires their production: *3464920 Canada Inc. v*

Strother, 2001 BCSC 949 [*Strother*]; *British Columbia v Canadian National Railway*, 2004 BCSC 283, 24 BCLR (4th) 175 [*CNR*].

35 Disclosure of privileged information under compulsion of statute is not waiver, and does not necessarily result in a loss of privilege. In such instances, privilege may be considered retained for all purposes other than that for which disclosure is specifically required: *Re Herman and Deputy Attorney-General of Canada* (1979), 103 DLR (3d) 491 (Ont CA); *Interprovincial Pipe Line Inc. v M.N.R.*, [1996] 1 FCR 367 (Fed Ct); *Philip Services Corp. v Ontario Securities Commission* (2005), 77 OR (3d) 209 (Ont Sup Ct). This is so even where the disclosure goes beyond what is mandated by the statute. Such action does not necessarily result in waiver of privilege as a whole: *Stevens v Canada (Prime Minister)*, [1998] 4 FC 89.

ANALYSIS

36 Having reviewed the contested documents, and having considered the affidavit evidence, the briefs of law and the submissions of counsel, I turn now to the application of the legal principles outlined above. Where I refer to documents, I will do so primarily by the reference numbers provided by Husky.

37 I begin the analysis by making two observations, about points that are really not in dispute.

38 First, in the circumstances, it is clear that litigation was reasonably apprehended by Husky soon after the oil spill was discovered. In fact, I am satisfied that Husky reasonably apprehended that they would face litigation by the early afternoon of July 21, 2016. I will explain.

39 This was a significant oil spill, which affected a major waterway. I can logically infer from the evidence that a company of Husky's stature in the oil industry employs experienced and knowledgeable persons in positions of importance, and those persons would be well aware that both civil litigation and regulatory prosecution would almost inevitably follow such an event. In that respect, I accept the evidence in the affidavit of Susan Anderson that, as of 12:30 p.m. on July 21, 2016, litigation was reasonably apprehended, and Husky had begun preparing to deal with that eventuality.

40 The second observation is that, if Husky establishes privilege in a document, whether it be solicitor-client privilege, or litigation privilege, the onus shifts to the Crown to establish waiver. That is because, in the circumstances of this case, none of the other exceptions to privilege apply. There is nothing to suggest that any of the documents for which privilege is claimed contain criminal communications, or that disclosure is necessary to establish the innocence of an accused person, or for reasons of public safety. There is also nothing to suggest that Husky has engaged in any conduct that would amount to abuse of process, or conduct of a similarly blameworthy nature. Accordingly, where Husky establishes, on a balance of probabilities that privilege applies to a document, that document will remain sealed, and will be returned to Husky, unless the Crown can establish waiver on a balance of probabilities.

Solicitor -client privilege

41 I am satisfied, on a balance of probabilities, that solicitor-client privilege exists in the following documents:

PRI000014:

This document contains communications between various parties made for the purpose of providing information required for retaining and briefing legal counsel.

PRI000196, PRI000238, PRI000272, PRI000432, PRI000436, PRI000437, PRI000442, PRI000443, and PRI000459:

These documents are emails which contain communications passed on to, or exchanged with legal counsel for the purpose of seeking or providing legal advice about a number of topics, including determining what information would be disseminated to the public, the media, and various stakeholders.

42 There is no evidence upon which I am able to conclude that Husky waived privilege in the communications or information contained in any of those documents. Accordingly, those documents must remain sealed and must be returned to Husky.

Litigation privilege

43 In this case, the bulk of the documents over which Husky asserts litigation privilege came into existence as a result of the internal investigation it conducted following the oil spill. Husky asserts that this investigation was conducted to prepare for litigation, and as such, the documents had litigation as the dominant purpose for their creation. Husky also asserts litigation privilege over a number of expert reports, which it says were prepared by parties personally retained by Husky's in-house legal counsel, to prepare for litigation.

44 The Crown argues that the analysis is not that straightforward. It points out that Husky was obligated to conduct an investigation in order to comply with its statutory duty to report an incident of this nature to the authorities. The existence of this obligation, says the Crown, means that the investigative documents would have been created regardless of whether or not litigation was anticipated, and as such litigation cannot be said to be the dominant purpose. The Crown also argues that litigation privilege does not exist in documents which were generated in accordance with Husky's internal policies, separate and apart from any litigation-related concerns. The Crown also argues that certain portions of the expert reports over which Husky claims privilege were included in the final report that Husky was obligated to provide to the authorities, and that the use of portions of those expert reports in the "final report" amounts to waiver of any privilege that might have existed.

45 As a result of the oil spill in this case, Husky had two separate legislatively mandated reporting obligations. The first was under ss. 38(7) of the *Fisheries Act*, which requires someone in Husky's position to provide a written report to an inspector or other persons designated under that *Act* "as soon as feasible" after the occurrence of an event such as an oil spill into a waterway. Subsection 38(7) reads as follows:

> 38(7) As soon as feasible after the occurrence or after learning of the danger of the occurrence, the person shall provide an inspector, fishery officer or an authority prescribed by the regulations with a written report on the occurrence or danger of the occurrence.

46 The second reporting obligation was in accordance with ss. 20 and 21 of *The Pipelines Regulations, 2000*, RRS c P-12.1 Reg 1 [*Regulations*] which require filing a written report with the Saskatchewan Government Ministry responsible for the administration of *The Pipelines Act, 1998,* SS 1998, c P-12.1 (currently the Ministry of Energy and Resources) within 30 days. Such a report must include a description of the cause of the incident, and certain related technical reports. The relevant portions of the *Regulations* read as follows:

> 20(1) Every operator shall immediately notify the ministry, by the most expeditious method, of the occurrence of any of the following:
>
> ...
>
> (d) a break, leak, malfunction of any equipment or a worker error that results in the escape or release of:
>
> (i) oil, salt water, condensate or other product;
>
> ...
>
> 21(1) Every operator shall, within 30 days after notifying the ministry pursuant to section 20, submit a written report to the ministry containing:
>
> (a) the date and time and exact location where the incident occurred;
>
> (b) the action taken by the operating personnel, including details of any remedial clean-up steps taken, in progress or proposed;
>
> (c) the human injuries or fatalities;

(d) a description of any environmental damage;

(e) a description of the quantities of substances spilled, lost or burnt and a further estimate of any subsequent recovery;

(f) a description of the cause of the incident, including any related technical report; and

(g) a description of the preventative action the operator intends to take to prevent a similar future occurrence.

47 The existence of a statutory obligation to report on an incident does not necessarily preclude claims of litigation privilege in material created during an investigation conducted, in part, to comply with that reporting obligation. Nor, however, does the existence of potential litigation mean that all material gathered during the investigation is necessarily created for the dominant purpose of litigation: *Suncor*. Each document or group of documents must be examined, and the analysis must focus on the purpose for which the document was created, not the purpose for which it was obtained: *ShawCor*.

48 In this case, I am satisfied that the documents which relate to the creation of Husky's investigation charter in the immediate aftermath of the oil spill incident were created for the dominant purpose of litigation, and as such are subject to litigation privilege. It is true that the investigation may have served other purposes, given that Husky had a statutory obligation to report on the incident to both ECCC and the Saskatchewan Ministry of the Environment. Preparing to comply with that reporting obligation would have required some investigation and evidence gathering. Be that as it may, I am satisfied, based on the circumstances of the case and the evidence before me, that the dominant purpose of Husky's investigation in this instance was to prepare for the defence of anticipated civil litigation and regulatory prosecution. I will explain.

49 Ms. Anderson, in-house legal counsel for Husky, deposed that, almost immediately after the oil spill was discovered, Husky officials realized that an internal investigation was needed to prepare for the litigation that would inevitably follow. She deposed that the internal investigation was conducted on a confidential and privileged basis, under her direction, and with that purpose in mind. Documents created for the investigation have been treated confidentially, and have not been disclosed outside of the sphere of confidentiality she describes. I accept that evidence, in large part because the timing and circumstances of the creation of the investigation charter are consistent with what Ms. Anderson describes as its purpose. Accordingly, even though Husky was subject to a statutory and regulatory obligation to provide a report to the authorities, which undoubtedly required some investigative work on its part, I am still satisfied that the dominant purpose of the creation of the investigation charter was to prepare for litigation.

50 The investigation charter is a document created to establish the parameters of the investigation. It sets out the purpose, scope, objectives, methods and strategies of the investigation. It identifies persons who are to be involved in the investigation, and their roles. It defines terminology and sets timelines for the completion of certain steps. It identifies stakeholders. It was prepared with a realization, as noted in Ms. Anderson's affidavit, that in addition to any other investigation Husky might need to undertake, an investigation into the circumstances of the incident was necessary for the purpose of defending or prosecuting litigation. It was prepared under the direction of, and with the advice of legal counsel, and with the expectation from the outset that it would remain confidential. Cumulatively, these facts compel the conclusion that this was not simply an investigation into what happened. Rather, it was an investigation undertaken for the dominant purpose of addressing potential litigation. Accordingly, the document governing the investigation itself falls under the umbrella of litigation privilege. In my view, then, the documents which relate the investigation charter's creation also fall under the litigation privilege umbrella. Those documents include email communications between various parties discussing the wording of the charter, offering suggested edits, attaching draft versions of the charter, and discussing previous versions or examples of such a charter used as boiler plates. The following documents fall into this category:

PRI000110, PRI000111, PRI000112, PRI000113, PRI000114, PRI000116, PRI000117, PRI000118, PRI000119, PRI000121, PRI000122, PRI000123, PRI000124, PRI000125, PRI000131, PRI000164, PRI000253, PRI000255, PRI000257, PRI000259, PRI000261, PRI000275, PRI000276, PRI000380, PRI000382, PRI000383, PRI000384, PRI000387, PRI000397, PRI000398, PRI000399, PRI000403,

PRI000405, PRI000412, PRI000413, PRI000414, PRI000416, PRI000417, PRI000418, PRI000420, PRI000422, PRI000423, PRI000424, PRI000425, PRI000426, PRI000427, PRI000428, PRI000447, PRI000463 and PRI000470.

51 There is no evidence from which I can conclude that Husky waived privilege in any of the documents mentioned in the preceding paragraph. Accordingly, they shall remain sealed, and will be returned to Husky.

52 Similarly, documents which involve communication between various persons regarding the progress of the investigation, organization and assignment of tasks, the timing and location of interviews and site visits, and the scheduling and logistical aspects necessary to complete these investigative steps, are communications which occurred only because of the investigation. As such, the dominant purpose of their creation was preparation for litigation, and they fall under the protection of litigation privilege. The following documents fall into this category:

PRI000003, PRI000126, PRI000127, PRI000128, PRI000131, PRI000140, PRI000141, PRI000263, PRI000264, PRI000371, PRI000372, PRI000373, PRI000374, PRI000375, PRI000376, PRI000377, PRI000382, PRI000390, PRI000391, PRI000392, PRI000393, PRI000394, PRI000395, PRI000396, PRI000445, PRI000447, PRI000457, PRI000460 and PRI000461.

53 Again, there is no evidence from which I can conclude that Husky waived privilege in any of the documents mentioned in this category. Accordingly, they shall remain sealed, and are to be returned to Husky.

54 Certain records containing summaries of information provided to investigators are a product of the internal investigation and, as such, Husky argues that the dominant purpose of their creation was preparation for litigation. Document PRI000163 falls into this category. It is described in the affidavit of Ms. Anderson as being created by the internal investigation, for the purpose of litigation. At para. 28(d) of her affidavit, Ms. Anderson labels this document a "witness statement". I would say that description is somewhat inaccurate, given that the document appears to be more of a summary of information gathered during the investigation, from various persons. I am not satisfied, on the basis of the evidence before me, that the dominant purpose of the creation of this document or its content was to assist in preparation for litigation.

55 Not every piece of information gathered or recorded during the course of the investigation can be said to have been created for the dominant purpose of litigation. Some of the information gathered and recorded was simply factual information, collected and retained for the purpose of determining what happened, and complying with Husky's legislated reporting obligation. With respect to document PRI000163, there is not sufficient detail in the evidence regarding the timing of its creation, or the nature of the source of the information contained in it to satisfy me that its dominant purpose was to assist in preparing for litigation, as opposed to simply collating information required for the purpose of reporting to the authorities. I expect that litigation preparation was a substantial purpose, but I am not satisfied from the evidence that it was the dominant purpose. As such, document PRI000163 is not subject to privilege and must be released to the Crown.

56 Document PRI000571 falls into this category as well. It appears to be a flow chart of sorts, made up of a summary of information gathered during the internal investigation. Ms. Anderson deposes that it was not a document created in the ordinary course of business, but rather as part of the internal investigation. Once again, there is insufficient evidence regarding the timing and circumstances of its creation to satisfy me that the dominant purpose of its creation was preparation for litigation. Accordingly, it is not subject to litigation privilege, and must be released to the Crown.

57 Document PRI000572 is described as a Husky Leak Alarm Detailed History for July 20-21, 2016. I am not satisfied that litigation privilege attaches to this document. Ms. Anderson deposes that this undated record was not a document created in the ordinary course of business, or in fulfillment of the requirements of Husky's general Policies and Procedures Manual. Mr. Moss, however, in his supplemental affidavit, deposes that an internal investigation in response to an oil spill is something that occurs in the ordinary course of business in the oil industry, and that Husky's internal procedures and policies require it to print off all pertinent data if a line break is suspected. The relevant portion of that policy reads as follows:

4 Procedure 4-1) Response to Alarms in the 2-60-1440 Minute Windows:

...

5) A Leak Alarm indicates an active leak and there is unaccounted fluid leaving the pipeline system. The operator must perform several functions in order to validate the leak information.

...

i) If a line break is suspected, shut down the facility and/or the associated facilities. Immediately notify the area operator to have facility or system checked. Notify the Product Movement Coordinator or the Supervisor on call. Print off all pertinent data and trends.

58 A document which would have come into existence regardless of litigation cannot be said to have been created for the dominant purpose of litigation: *TransAlta Corporation; Canada Southern*. Based on the portion of Husky's policy cited above, I am unable to find that document PRI000572 was created for the dominant purpose of litigation. While Husky argued that this document was different than the one generated by virtue of policy, nothing in the evidence explains how it was different. Furthermore, the policy clearly suggests that a document containing this type of data is to be generated, as a matter of course, each time a line break is suspected, regardless of whether or not litigation is apprehended. That means the data contained in this document was generated before litigation involving Husky was a prospect. Gathering information that has already been created does not change the purpose for which it was created, and the information in this document was clearly "created" before there was any prospect of litigation. Accordingly, I am unable to conclude, on the basis of the evidence before me, that preparation for litigation was the dominant purpose of the creation of this document. PRI000572 must be released to the Crown.

59 A number of documents fall into the category of expert reports. They are as follows:

- PRI000573: DNV-GL Report entitled "Saskatchewan Gathering System Leak Investigation Timeline", dated September 26, 2016;
- PRI000574 -- Schneider Electric-Telvent Report, entitled "Post Spill Review and Assessment Report", dated October 17, 2016, authored by Jared Bladon;
- PRI000575 and PRI000576 -- two reports authored by Don Scott of Précis-EC, entitled "Husky Energy Leak Detection Gap Assessment of Compliance to CSA Z662 Annex E and Related Causes" and "CSA Z662 Leak Detection Gap Analysis for Husky";
- PRI000578 -- Rosen Canada Ltd. report entitled "Summary of 2013 and 2015 In Line Inspection (ILI) Findings", dated October 5, 2016;
- PRI000579 -- Rosen Canada Ltd. report entitled "Summary of In Line Inspection Findings 2007 - 2013", dated September 29, 2016; and
- PRI000580 -- NDT Global Report entitled "Global Strain Report", dated September 13, 2016.

60 Husky asserts that these reports are subject to litigation privilege, and that privilege in them has not been waived. The Crown argues that the timing of the creation of these reports, and their use in preparation of the "final report" submitted by Husky in compliance with its statutory reporting obligations, demonstrates that litigation was not the dominant purpose for their creation, but simply a concurrent purpose to compliance with those obligations. In the alternative, the Crown argues that Husky, by relying on the expert reports, and using portions of them to prepare the "final report", has effectively waived privilege.

61 For reasons that follow, I have determined that all seven of the aforementioned expert reports are subject to litigation privilege, which has not been waived. Accordingly, they must all remain sealed and be returned to Husky.

62 According to the evidence of Ms. Anderson, all of the expert reports in question were prepared by persons or companies personally retained by her, in her capacity as Husky's internal legal counsel, for the purpose of

preparing for litigation. All of the documents are marked as "privileged and confidential", and none of the documents were created in the ordinary course of business.

63 It is apparent from the evidence that, in the circumstances, certain technical inspections would have been conducted by Husky as part of its investigation into the cause of the spill, and that some of that information would have been used to fulfil its reporting requirements under the *Fisheries Act* and the *Regulations.* Technical and expert reports would have been of assistance to Husky in meeting those obligations. That said, however, I am satisfied from the evidence that the primary purpose of the retention of the various entities who created and prepared these reports was preparation for litigation. The nature and depth of the analysis conducted, and the nature of the information gathered went well beyond what was necessary for Husky to fulfil its reporting obligations. That, in my view, tips the balance in favour of finding that, even though the reports assisted in the reporting requirement (given that certain information from the expert reports was included in the statutorily-mandated report), the dominant purpose of their creation was for use in litigation.

64 The Crown takes the position that, even if litigation privilege applies to the expert reports, waiver has been established, because Husky used substantial portions of the reports in preparing the "final report" created to satisfy its reporting obligations under the legislation.

65 With respect, I disagree. Waiver of privilege requires an awareness of the existence of privilege, and an intention to waive it. In this case, Husky's awareness of the privilege is clear, but I am not satisfied that the evidence demonstrates an intention on Husky's part to waive it.

66 Providing information under compulsion of statute does not demonstrate an intention to waive privilege. Nor does mere reference to the existence of a privileged document and its conclusions, without more, amount to a waiver: *Strother*; *CNR.* In this case, while there is reference to each of the expert reports at various places in the "final report", those references are not extensive, and simply provide summaries of certain relevant findings, as they relate to Husky's obligation to report to the authorities. Section 21 of the *Regulations* requires a party in Husky's position to submit a written report to the Minister, which describes the cause of the incident, and includes any relevant technical reports. I see nothing in the nature of the information disclosed in the "final report" that suggests any intention on the part of Husky to disclose more of those reports than necessary to comply with that obligation.

67 I must also keep in mind, at this point, that we are at an early stage of the proceedings, where a search warrant has been executed, and the Crown is seeking to compel production of information from Husky on an involuntary basis. If this were, for instance, a situation where Husky was voluntarily using the "final report" to advance a defence at trial, its intention with respect to waiver of privilege would likely be viewed in a different light. But that is not the case. In the circumstances before me, the inclusion by Husky of certain information from the expert reports in the "final report" does not evince an intention on Husky's part to waive privilege.

68 Nor, in the circumstances of this case, does fairness require that a waiver of privilege be implied. Having reviewed the documents, and having compared the material in the expert reports with the portions of those reports contained in the "final report", there is no basis upon which I can conclude that the Crown would be misled if waiver of privilege is not implied, or that fairness and consistency require the production of the privileged documents. Husky has not, in my view, unfairly cherry-picked the material to include in the "final report", nor has it inaccurately or characterized the nature of the expert reports. In short, I am unable to conclude that fairness or consistency requires that waiver of privilege be implied.

69 Accordingly, documents PRI000573, PRI000574, PRI000575, PRI000576, PRI000578, PRI000579 and PRI000580 shall remain sealed, and be returned to Husky.

CONCLUSION

70 In conclusion, I have determined that only the following documents at issue in this application are not subject to privilege: PRI000163, PRI000571 and PRI000572. I make an order authorizing the release of those documents by

the Sheriff to Her Majesty the Queen as represented by the Office of the Director of Public Prosecutions (Canada), specifically to Andrew Moss of ECCC or his designate. I order that all other documents at issue in this application shall remain sealed, and must be returned by the Sheriff to legal counsel for Husky.

71 The orders made herein shall not take effect until the expiry of 30 days following the release of this decision.

J.D. KALMAKOFF J.

TAB 15

2018 FC 344, 2018 CF 344
Federal Court

PMG Technologies Inc. c. Canada (Transports)

2018 CarswellNat 1274, 2018 CarswellNat 1523, 2018 FC 344, 2018 CF 344, 291 A.C.W.S. (3d) 228

PMG TECHNOLOGIES INC. (Applicant) and TRANSPORT CANADA (Respondent)

Peter Annis J.

Heard: January 24, 2018
Judgment: March 28, 2018
Docket: T-2052-16

Counsel: Claire R. Durocher, for the Applicant
Lindy Rouillard-Labbé, Sarah Chênevert-Beaudoin, for the Respondent

***Peter Annis J.*:**

[ENGLISH TRANSLATION]

I. Introduction

1 This is an application for judicial review dated November 29, 2016, under section 44 of the *Access to Information Act*, RSC 1985, c. A-1 [ATIA], of the decision [Decision] made by the respondent, Transport Canada [Transport Canada], and communicated to the applicant, PMG Technologies Inc. [PMG], in a letter dated November 2, 2016, to disclose to a third party the documents attached to said decision, in the context of access to information request A-2016-00032 [the Access to Information Request].

2 For the following reasons, the application is allowed in part.

II. The facts

3 The applicant operates the Centre d'essais de véhicules automobiles [CEVA] under an operating agreement with Transport Canada dated October 25, 2007, for the CEVA site.

4 As a contractor operating a government institution, PMG communicates with Transport Canada representatives on a regular basis regarding the CEVA's activities.

5 On July 10, 2014, the City of Blainville provided formal notice to PMG, Transport Canada and G1 Tour, a PMG customer, to stop or have stopped all luxury sport car rental events by G1 Tour or anyone else. According to the City, the named parties were violating municipal noise and zoning by-laws. After failing to comply with the formal notice, counsel for the City of Blainville stated that they were given the mandate to undertake legal proceedings.

6 On July 21, 2014, the City of Blainville and five residents filed a motion for an interim injunction, an interlocutory motion and a permanent injunction before the Terrebonne Superior Court against PMG and G1 Tour. Transport Canada was not named as a respondent in the motion.

7 By letter dated May 26, 2016, the Transport Canada Chief, Access to Information and Privacy, notified the director general of PMG that an Access to Information Request had been filed and that it was intended to obtain [TRANSLATION] "correspondence between Transport Canada and PMG as part of their landlord-tenant relationship with respect to the use of

the leased premises and, incidentally, its total or partial subletting", as well as correspondence with the applicant regarding to the rental activities as advertised on its website.

8 Transport Canada subsequently invited PMG to file its written submissions to show cause why the documents attached to the letter dated May 26, 2016, should not be subject to full disclosure.

9 PMG sent its submissions to Transport Canada by letter dated June 30, 2016, raising several counts of exception to disclosure, including litigation privilege.

10 Negotiations between PMG and Transport Canada regarding what was to be disclosed took place on August 17, 2016, and August 22, 2016.

11 By a final letter dated November 2, 2016, Transport Canada informed PMG of the Decision, following the further submissions filed by the applicant. This decision involves disclosing to the author of the Access to Information Request documents attached to the letter dated November 2, 2016, [the Documents] and not having the reference *consult witheld* [sic].

12 Before the hearing, the parties agreed that certain communications were in fact subject to litigation privilege. Accordingly, this application for judicial review involves disclosure of redacted copies of communications between the parties including pages 1, 8, 24, 34, 36, 37 and 38, and full exclusion of the internal memo on pages 40, 41 and 42 of the Documents.

III. Legislative framework

13 Section 23 of the ATIA is relevant in this case:

> **Solicitor-client privilege**
>
> **23** 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.
>
> **Secret professionnel des avocats**
>
> **23** Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

IV. Issues and standard of review

14 At the hearing, the respondent stated that it would not attempt to exercise its discretion as to whether it was nonetheless appropriate to disclose the Documents, even though it has been established that they are privileged. Consequently, the sole issue before this Court is whether the applicant discharged its burden of proof with respect to litigation privilege applicable to the Documents or certain excerpts thereof.

15 Nothwithstanding the primary purpose of the ATIA, discretion exercised by a federal institution must be consistent with the objectives of the effective administration of justice and the protection essential to the proper operation of the adversarial process, which includes applying the principles of litigation privilege. It is common ground that this issue is subject to the correctness standard: *Blank v. Canada (Justice)*, 2006 SCC 39at paras 27-31 [*Blank*]; *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 268.

V. Analysis

A. State of the Law

16 Litigation privilege "[...] 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)". *Blank*, *supra* above at para

28, citing R. J. Sharpe (now judge of the Court of Appeal), "Claiming Privilege in the Discovery Process" (1984) Spec Lect of the LSUC, 163 at pp 164-165.

17 The party invoking litigation privilege must demonstrate its existence. To do so, it must establish that the primary or dominant purpose of the documents in question is preparation for litigation and that this litigation is ongoing or reasonably apprehended: *Lizotte v. Aviva Insurance Company of Canada*, [2016] 2 S.C.R. 521at para 19; *Blank*, above, at para 60.

18 The British Columbia Court of Appeal recently set out the parameters required for a claim to privilege in *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 at para 32 [*Gichuru*], citing *Keefer Laundry Ltd v. Pellerin Milnor Corp et al*, 2006 BCSC 1180at paras 96-99, which the Court also adopts, as follows:

> [96] Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:
>
> 1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
>
> 2. that the dominant purpose of creating the document was to prepare for that litigation.
>
> (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada (2005)*, 40 B.C.L.R. (4th) 245, 2005 BCCA 4 (CanLII) at paras. 43-44.)
>
> [97] The first requirement will not usually be difficult to meet. Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it. (*Hamalainen v. Sippola*, *supra*.)
>
> [98] To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it. Care must be taken to limit the extent of the information that is revealed in the process of establishing "dominant purpose" to avoid accidental or implied waiver of the privilege that is being claimed.

19 In *Gichuru*, the Court also recognized at paragraphs 38 and 39 that these requirements were not necessary if the dominant purpose is plain and obvious on the face of the documents.

20 The respondent's main objection in this case is that based on the Documents under review, the applicant has failed to sufficiently establish the circumstances to support a litigation privilege claim.

21 The Court agrees with the respondent that the explanation for the privilege claim provided by the applicant, as stated in paragraph 41 of Gilles Marleau's confidential affidavit dated January 31, 2017, lacks detail. The affidavit states that the Documents deal with [TRANSLATION] "communications between PMG representatives and Transport Canada representatives that relate to analyses by PMG's counsel regarding the state of the law, details of defence strategies and collaboration between PMG and Transport Canada to defend against the City of Blainville's proceedings." Accordingly, unless the Court finds that the Documents demonstrate on their face their dominant purpose of the ongoing litigation between the applicant and the City of Blainville, the privilege claim should be dismissed.

22 Despite this, the Court finds that the respondent has come a long way in implicitly supporting the applicant's cause by agreeing to redact extensive excerpts of most of the Documents in issue (including those on pages 013, 018, 024-025, 028-029, 038 and 042). These redactions can only be based on the acceptance that their contents merit protection by litigation privilege.

23 Although the respondent did not implicitly recognize the application of litigation privilege, the Court is of the view that there is sufficient evidence of the plain and obvious dominant purpose of the ongoing litigation in the majority of the contentious correspondence between the applicant and Transport Canada officials. This correspondence demonstrates that the parties share a common interest in a potential negative outcome arising from the litigation as a result of zoning changes or other restrictions that

could result in the continuation of the application for a permanent injunction. The corrective action sought by the municipality could have an adverse effect on the use of the property owned by Transport Canada and used by the applicant.

24 The Court finds that the applicant and Transport Canada shared a common interest in defending themselves against Blainville's legal proceedings. Thus, the principles of common interest privilege apply in the same way, such that the disclosure of information by the applicant to Transport Canada does not constitute a waiver to any privileged information: *Buttes Gas and Oil Co v Hammer*, [1980] 3 All ER 475 (HL); *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31at paras 23-24. The Court also entertains that the Documents in question make their purpose plain and obvious based on their start date, July 11, 2014, when the applicant attempted to convince Transport Canada to participate in its dispute against the municipality. The communications intended to obtain the support of interested parties, namely to intervene as a co-respondent or simply to provide help with the dispute, are certainly protected by litigation privilege.

25 The Court's only concern is whether a disclosure by a client to a third party concerning involvement and assistance with a dispute, not by the client's counsel, or sufficiently detailed to be made at the request of the client's counsel, is subject to litigation privilege. Privilege applies both to counsel and persons who are not represented, but there does not appear to be any cases where a represented client undertakes on their own initiative to discuss privileged information with a third party. In the Court's view, privilege should be upheld, perhaps even on the basis of an involuntary waiver of privilege. In any event, given the respondent's acceptance of the litigation privilege applicable to the other communications, without raising any issue relating to waiver of shared interest privilege, the Court declines to deal with the matter in this case.

26 In summary, the Court finds that the respondent's arguments with respect to the adequacy of the dominant purpose evidence do not apply, since it recognizes that the extensive correspondence between the applicant and Transport Canada is protected by litigation privilege, and the correspondence itself clearly indicates that the disputed information was created for the purpose of defending a shared interest against the ongoing dispute with the municipality. The Court's analysis is therefore limited to considering the objections in the disputed Documents, namely whether each specific piece of correspondence should be recognized as falling within the area of personal privacy created by litigation privilege.

B. Analysis of correspondence in the Documents allegedly protected by litigation privilege

27 The dispute between the parties deals with the disclosure of specific excerpts found in the Documents involving exchanges between the applicant and Transport Canada, as well as the disclosure of an internal memo containing the applicant's instructions to an employee for the purpose of obtaining details relevant to the municipality of Blainville. The specific pages of the Documents are listed in paragraph 13 of Gilles Marleau's confidential affidavit dated March 23, 2017, in Attachment GMC-3.

(1) Applicant's email to Transport Canada dated July 11, 2015 (page 001 of GMC-3)

28 The respondent already redacted short excerpts on the page as being protected by litigation privilege.

29 The Court accepts that the disputed excerpt beginning with "PMG entered" and ending with "the complaints" is not protected by litigation privilege. The correspondence provides basic facts that should be disclosed during the discovery process beforehand or the trial.

30 The rest of the document, which already includes some excerpts protected by litigation privilege, is protected as a work product of the applicant regarding the dispute with Blainville. Furthermore, it is noted that the paragraph starting with "Of concern" describes that shared interest of the parties in the dispute, as well as the involvement of counsel.

(2) Series of emails between the applicant and Transport Canada dated from July 21 to 23, 2014 (pages 008-9 of GMC-3)

31 The Court finds that the excerpts to whose disclosure the applicant objects should be subject to litigation privilege. The exchange of emails refers to the action taken by the applicant with respect to the dispute and Transport Canada's questions regarding matters relating to the dispute.

(3) Emails between the applicant and Transport Canada dated July 25 and 28, 2014 (page 024 of GMC-3)

32 The majority of page 024, which includes parts of page 025, was redacted as privileged. Likewise, the first two paragraphs from the Transport Canada employee relate to the strategy that addresses the shared concerns about the litigation outcomes and the positive leverage factors in in support of the applicant's case.

(4) Applicant's email to Transport Canada dated August 26, 2014 (page 034 of GMC-3)

33 The Court dismisses the claim to litigation privilege as requested with respect to this document, insofar as its primary purpose is to provide responses to complaints contained in a briefing note to the Minister.

(5) Transport Canada emails to the applicant dated August 25 and 26, 2014 (page 036 of GMC-3)

34 The excerpts beginning with the words "As you point out" in the third paragraph until the words "their noise case" at the end of the fifth paragraph, which contain previously redacted information in each of the three paragraphs, also constitute correspondence protected by litigation privilege. The impugned portions of the paragraphs refer to shared concerns and assistance from Transport Canada, as well as shared action taken or to be taken.

(6) Email between Transport Canada and the applicant dated August 25, 2014 (page 037 of GMC-3)

35 Once again, the important portions of the Document were drafted in recognition of the fact that it was privileged communication. Transport Canada asked for an update through a series of questions to which the applicant responded, all relating to the ongoing dispute and strategic concerns. The communication is protected by litigation privilege.

(7) Applicant's email to Transport Canada dated May 7, 2015 (page 038 of GMC-3)

36 The first two paragraphs are not protected by litigation privilege, insofar as they merely relate facts that should be disclosed as part of examinations for discovery or the trial and whose disclosure does not constitute an incursion in the privileged area of the dispute.

37 The following three paragraphs beginning with the words "Afin d'éviter" [TRANSLATION] "In order to avoid" and ending with "Transport Canada" are protected by litigation privilege. They describe problems and intervention strategies, tasks to be completed within a certain timeframe and requests for assistance from Transport Canada. All this information relates to strategies and the conduct of the ongoing dispute.

38 The last two paragraphs, including the reference to the attached summary, which comprises the three last pages (040-042) containing the impugned communications, are not challenged as being subject to litigation privilege.

(8) Internal memo from the applicant dated May 5, 2015, attached to the email dated May 7, 2015 (pages 040 to 042 of GMC-3)

39 The memo was prepared specifically for the dispute and already contains extensive portions that were redacted in recognition of the fact that the communication is protected by litigation privilege. It is not obvious to the Court why the entire Document, which was prepared specifically for the purposes of a dispute and communicated to Transport Canada along with the analysis carried out by counsel for the applicant, should not be subject to litigation privilege.

VI. Conclusion

40 Since the results are somewhat mixed, although primarily in favour of the applicant, the applicant shall be awarded 75% of its costs, in accordance with Column III of the Federal Court tariff: *Federal Courts Rules*, SOR/98-106, s. 407, Tariff B. If the parties are unable to agree on the costs, brief submissions may be filed to the Court for review.

JUDGMENT in T-2052-16

THE COURT ORDERS AND ADJUDGES that the applicant's litigation privilege claims are confirmed or dismissed in accordance with the above reasons; costs are awarded to the applicant and should be assessed at 75%, in accordance with Column III of the Federal Court tariff: *Ibid*.

Application granted in part.

TAB 16

Samson Indian Nation and Band v. Canada (C.A.)

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Pratte, MacGuigan and Décary JJ.A.

Heard: Vancouver, April 4, 1995.

Judgment: Ottawa, May 12, 1995.

Court File Nos. A-472-94, T-1386-90, T-1254-92

[1995] 2 F.C. 762 | [1995] F.C.J. No. 734

Chief Victor Buffalo acting on his own behalf and on behalf of the other members of the Samson Indian Nation and Band and The Samson Indian Band and Nation (Plaintiffs) (Respondents) v. Her Majesty the Queen in Right of Canada, The Honourable Pierre Cadieux, Minister of Indian Affairs and Northern Development, The Honourable Michael Wilson, Minister of Finance and Donald Goodwin, Assistant Deputy Minister, Department of Indian Affairs and Northern Development (Defendants) (Appellants) Chief Jerome Morin acting on his own behalf as well as on behalf of all the members of Enoch's Band of Indians and the Residents thereof on and of Stony Plain Reserve No. 135 (Plaintiffs) (Respondents) v. Her Majesty the Queen in Right of Canada (Defendant) (Appellant) Chief John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn, the elected Chief and Councillors of the Ermineskin Band and Nation suing on their own behalf and on behalf of all the other members of the Ermineskin Indian Band and Nation (Plaintiffs) (Respondents) v. Her Majesty the Queen in Right of Canada, The Honourable Thomas R. Siddon, Minister of Indian Affairs and Northern Development and The Honourable Donald Mazankowski, Minister of Finance (Defendants) (Appellants)

Case Summary

Practice — Privilege — Solicitor-client privilege — Privilege now extending broadly to include any consultation for legal advice, whether litigious or not — Litigation privilege not limited to advice — As to general solicitor-client privilege in case involving alleged trust relationship between Crown, Indians, Crown's responsibility to all Canadians to be taken into account — Privileged documents not ordered disclosed for reasons of equity, openness — No implied waiver of privilege.

Native peoples — Crown asserting solicitor-client privilege for documents in breach of trust actions — Alleged trust relationship between Crown, Indians not superseding privilege claim — Practices covering private trusts not automatically applicable to Crown trusts — Crown acting not only for Indians — Accountable to all Canadians — Solicitor-client privilege not ousted by equity, openness considerations.

Crown — Trusts — Crown asserting solicitor-client privilege for documents in breach of trust actions brought by Indian Bands — Whether alleged trust relationship superseding privilege — Practices relating to private trusts not automatically applicable to Crown trusts — Crown not ordinary "trustee" — Acting in interest of Indians but accountable to all Canadians.

In three actions for breach of trust, the Crown claimed privilege, inter alia, with respect to documents a) on the basis of solicitor-client privilege in litigation and b) on the basis of a general solicitor-client privilege, the legal professional privilege. The Motions Judge allowed the Crown's claim with respect to documents for which solicitor-client privilege in litigation was claimed but only to the extent that they were initiated for the "dominant purpose of advising in the conduct of this litigation". The Motions Judge ordered the production of the documents for which the legal professional privilege was claimed, "subject to objection by [the Crown] to production where [its] concern is more than reliance on general solicitor-client privilege". This was an appeal from that decision.

Held, the appeal should be allowed.

The recognition of privileged communications between lawyers and their clients, originally only an exemption from testimonial compulsion, today includes communications exchanged during other litigation, those made in contemplation of litigation, and, ultimately, any consultation for legal advice, whether litigious or not. The privilege has gradually been given a particularly broad scope. Solicitor-client privilege, therefore, is not to be interfered with except to the extent absolutely necessary, and any conflict should be resolved in favour of protecting confidentiality.

With respect to the litigation privilege, the Motions Judge has unduly restricted its scope when he used the words "documents . . . initiated for the dominant purpose of advising in the conduct of this litigation". Privilege in relation to litigation is not limited to advice. And it extends to communications in respect of any litigation, actual or contemplated. The order will therefore be amended to read: "documents . . . initiated for the dominant purpose of the conduct of litigation".

With respect to the general solicitor-client privilege or legal advice privilege, the respondents invoked the alleged trust relationship between the Crown and the Indians to argue that this relationship superseded the claim of privilege. The first condition for the application of the trust principle (that the legal advice sought by the trustee belongs to the beneficiaries) at the discovery stage is fulfilled: whatever may be the precise nature of the relationship between the Crown and the Indians, it would prima facie qualify as a trust-style relationship for this purpose. However, the rules and practices developed with respect to private trusts do not apply automatically to Crown "trusts". The Crown is no ordinary "trustee". It acts not only on behalf or in the interest of the Indians, but it is also accountable to the whole Canadian population. It is engaged in many regards in continuous litigation. Considering the Crown's many "clients" or "beneficiaries", one cannot assume that all documents at issue concern the respondents.

It is preferable to err on the side of caution and protect privilege, particularly since the respondents will have the opportunity before a motions judge to challenge the claim of privilege document by document.

Reasons of equity and openness cannot found an order of disclosure of privileged documents.

There was no basis to the argument that where a fiduciary puts its state of mind at issue by pleading that it had acted honestly and reasonably there is an implied waiver of privilege and all documents relating to the alleged breach of its legal obligations must be disclosed. This is certainly so where, as here, the pleadings do not expressly allege reliance on legal advice.

Statutes and Regulations Judicially Considered

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 39. Federal Court Rules, C.R.C., c. 663, RR. 448 (as am. by SOR/90-846, s. 15), 450 (as am. idem).

Cases Judicially Considered

Applied:

Solosky v. The Queen, [1980] 1 S.C.R. 821; (1979), 105 D.L.R. (3d) 745; 50 C.C.C. (2d) 495; 16 C.R. (3d) 294; 30 N.R. 380; Descôteaux et al. v. Mierzwinski, [1982] 1 S.C.R. 860; (1982), 141 D.L.R. (3d) 590; 70 C.C.C. (2d) 385; 28 C.R. (3d) 289; 1 C.R.R. 318; 44 N.R. 462; Re Ballard Estate (1994), 20 O.R. (3d) 350 (Gen. Div.); Guerin et al. v. The Queen et al., [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120; 20 E.T.R. 6; 55 N.R. 161; 36 R.P.R. 1; R. v. Sparrow, [1990] 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385; [1990] 4 W.W.R. 410; 46 B.C.L.R. (2d) 1; 56 C.C.C. (3d) 263; [1990] 3 C.N.L.R. 160; 111 N.R. 241.

Distinguished:

R. v. Stinchcombe, [1991] 3 S.C.R. 326; (1991), 120 A.R. 161; [1992] 1 W.W.R. 97; 83 Alta. L.R. (2d) 93; 68 C.C.C. (3d) 1; 8 C.R. (4th) 277; 130 N.R. 277; 8 W.A.C. 161.

Referred to:

R. v. Littlechild (1979), 19 A.R. 395; 108 D.L.R. (3d) 340; [1980] 1 W.W.R. 742; 51 C.C.C. (2d) 406; 11 C.R. (3d) 390 (C.A.); Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27; [1969] C.T.C. 353; (1969), 69 DTC 5278; Weiler v. Canada (Department of Justice), [1991] 3 F.C. 617; (1991), 37 C.P.R. (3d) 1; 46 F.T.R. 163 (T.D.); Balabel v Air-India, [1988] 2 All ER 246 (C.A.); Crompton (Alfred) Amusement Machines Ltd v Commissioners of Customs and Excise (No 2), [1973] 2 All ER 1169 (H.L.); Shell Canada Ltd. (In re), [1975] F.C. 184; (1975), 55 D.L.R. (3d) 713; 22 C.C.C. (2d) 70; 18 C.P.R. (2d) 155; 29 C.R.N.S. 361 (C.A.); IBM Canada Limited-IBM Canada Limitée v. Xerox of Canada Limited, [1978] 1 F.C. 513; (1977), 32 C.P.R. (2d) 205; 15 N.R. 11 (C.A.); Canada (Minister of Industry, Trade and Commerce) v. Central Cartage Company et al. (1987), 10 F.T.R. 225 (F.C.T.D.).

APPEAL from an order of the Motions Judge (Samson Indian Band v. Canada, [1994] F.C.J. No. 1448 (T.D.) (QL)) on claims of solicitor-client privilege with respect to documents which the Bands wanted the Crown to produce at the discovery stage of actions for breach of duty in the administration of a trust.

Counsel

Barbara Ritzen for defendants (appellants). Edward H. Molstad, Q.C. and Owen Young for plaintiffs (respondents) (Chief Victor Buffalo and The Samson Indian Band and Nation). L. Leighton Decore for plaintiffs (respondents) (Chief Jerome Morin and members of Enoch's Band of Indians and the Residents therof on and of Stone Plain Reserve No. 135). Marvin R. V. Storrow, Q.C. and Maria A. Morellato for plaintiffs (respondents) (Chief John Ermineskin, Lawrence Widcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn).

Solicitors

Deputy Attorney General of Canada for defendants (appellants). Molstad, Gilbert, Edmonton for plaintiffs (respondents) (Chief Victor Buffalo and The Samson Indian Band and Nation). Biamonte, Cairo & Shortreed, Edmonton, for plaintiffs (respondents) (Chief Jerome Morin and members of Enoch's Band of Indians and the Residents thereof on and of Stone Plain Reserve No. 135). Blake, Cassels & Graydon, Vancouver, for plaintiffs (respondents) (Chief John Ermineskin, Lawrence Widcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn).

The following are the reasons for judgment rendered in English by

MACGUIGAN AND DÉCARY J.J.A.

1 This appeal relates to three actions, T-2022-89, T-1386-90, T-1254-92, in which the statements of claim are very similar and the issues at law and of fact are the same. The actions are to be tried together on common evidence.

2 The various respondents in these proceedings ("Samson Band", "Enoch Band", and "Ermineskin Band", respectively) commenced action against the various appellants (hereinafter referred to as "the Crown") on the basis of a breach by the Crown of trust, trust-like, fiduciary or other equitable obligations owed to the respondents in respect of natural resources of and royalties from Indian reserves, moneys paid in trust to the Crown in relation to royalties, and moneys for programs and services.

3 As required by subsection 448(1) of the Federal Court Rules [C.R.C., c. 663 (as am. by SOR/90-846, s. 15)] the Crown filed affidavits of documents in respect of the respondents' actions. Pursuant to subsection 448(2) [as am. idem], the Crown identified, in a separate list, all those documents which are or were in the possession, power or control of the Crown and for which privilege is claimed.

4 By notice of motion the respondents sought an order requiring production of 1,000 or more documents over which the Crown had claimed privilege. The Motions Judge [[1994] F.C.J. No 1448 (T.D.) (QL)] ordered the Crown to file an amended affidavit of documents, pursuant to Federal Court Rules, Rules 448 and 450 [as am. idem], identifying in separate lists the following five categories of documents in respect of which privilege had originally been claimed by the Crown: (A) those already produced or agreed to be produced to the respondents; (B) those to be certified by production of a certificate pursuant to section 39 of the Canada Evidence Act[1]; (C) those claimed to be privileged on the basis of solicitor-client privilege in litigation; (D) those which the Crown claims are irrelevant to these actions; (E) those which the Crown claims are subject to a general solicitor and client privilege, the legal professional privilege.

5 No order was made by the Motions Judge with respect to group A. With respect to group B he held that the Crown had not complied with section 39 of the Canada Evidence Act, and gave directions as to compliance, which have not been appealed. With respect to class D, he held that the Court would not order the production of irrelevant documents, but that the onus was on the Crown to establish irrelevance, and that the Court would review the documents if necessary. The Crown's appeal to this order relates to classes C and E, which read as follows (Appeal Book, Vol. III, at pages 415-416):

> Schedule IIC - Documents for which solicitor and client privilege is claimed on the ground they were initiated for the dominant purpose of advising in the conduct of this litigation. If there is any question or dispute the Court will examine the documents and rule in each case whether it is privileged or is to be produced.
>
> . . .
>
> Schedule IIE - Documents, which are relevant, for which the defendants claim solicitor and client privilege. These documents shall be produced forthwith to the plaintiffs, subject to objection by defendants to production where the defendants' concern is more than reliance on general solicitor and client privilege. If objection not be resolved by agreement, any party may apply for disposition of the matter by the Court.

6 It should be noted that the parties have signed a confidentiality document which restricts the use of all documents to the purposes of this litigation only.

Solicitor and client privilege: description

7 The recognition of privileged communications between lawyers and their clients, as fundamental to the due administration of justice, dates back some four centuries, and originally was only an exemption from testimonial compulsion. The privilege has gradually been extended to include communications exchanged during other litigation, those made in contemplation of litigation, and, ultimately, any consultation for legal advice, whether litigious or not.

8 Today, it is generally recognized that there are two distinct branches of solicitor and client privilege: the litigation privilege and the legal advice privilege. The litigation privilege protects from disclosure all communications between a solicitor and client, or third parties, which are made in the course of preparation for any existing or contemplated litigation. The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

9 The principles relating to solicitor and client privilege apply in both civil and criminal cases, and they apply regardless of whether the solicitor is in private practice or is a salaried or government solicitor.[2]

10 In recent years the privilege has been given a particularly broad scope. In Solosky v. The Queen, Dickson J. (as he then was) stated:[3]

> Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits.

In the subsequent case of Descôteaux et al. v. Mierzwinski, the Supreme Court, per Lamer J. (as he then was), went on to say:[4]

> It is quite apparent that the Court in that case [Solosky] applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.
>
> It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:
>
> 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.

Contrary to the contention of the respondent Samson Band, solicitor-client privilege, therefore, is not to be interfered with except to the extent absolutely necessary, and any conflict should be resolved in favour of protecting confidentiality.[5]

Appeal with respect to class C (the litigation privilege)

11 With respect to the third class (the litigation privilege, Schedule IIC of the order), the Crown's contention is that the privilege was unduly restricted by the Motions Judge when he used the words "documents . . . initiated for the dominant purpose of advising in the conduct of this litigation" (our emphasis).

12 We accept that contention. On the one hand, privilege in relation to litigation is not limited to advice. On the other hand, it extends to communications in respect of any litigation, actual or contemplated.[6] It would therefore seem more accurate to amend the Motions Judge's statement in the first sentence of Schedule IIC to read: "documents . . . initiated for the dominant purpose of the conduct of litigation".

13 The Crown appears to have been particularly concerned about the revelation of documents from this case in other similar pending cases and from related completed cases in this case. Counsel for the Enoch Band, which appears to be the only respondent having such an issue, disclaimed before us any intention to challenge the Crown

on this point, so that it may be regarded here as a non-issue. In any event the amendment above should take care of that problem, if it arises.

Appeal with respect to class E (the legal advice privilege)

14 It is settled law that where there is a trust relationship, no privilege attaches to communications between a solicitor and the trustee as against the beneficiaries who have a joint interest with the trustee in the subject-matter of the communications. The matter was recently canvassed by Lederman J. in Re Ballard Estate, where it was said:[7]

> Both counsel recognized the principle that communications passing between an executor or trustee and a solicitor are not privileged as against beneficiaries who are claiming under the will or trust. The rationale was set out in the classic statement of Lord Wrenbury in O'Rourke v. Darbishire, [1920] A.C. 581 at pp. 626-27, [1920] All E.R. Rep. 1 (H.L.), as follows:
>
> > If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries.

Lederman J. added that (at page 353):

> When Lord Wrenbury used the phrase "proprietary right" he was saying no more than the documents in question are in a sense the beneficiary's and is therefore entitled to access them. They are said to belong to the beneficiary not because he or she literally has an ownership interest in them but, rather, because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust.

The Court continued (at page 356):

> Moreover, the cases have stated that, whatever approach to the claim of privilege is taken, in actions where the beneficiary is alleging lack of good faith or breach of fiduciary duty, this information is to be made available to him or her. In Froese v. Montreal Trust Co. of Canada, [1993] B.C.J. No. 1529 (B.C. Master), leave to appeal refused [1993] B.C.J. No. 1847, the Master put it this way at para. 27:
>
> > I am of the opinion that in the context of litigation in which the plaintiff alleges breach of duty in the administration of a trust and the documents which are sought to be examined are relevant to that issue the plaintiff may succeed on the basis of proprietary right if he makes out a prima facie case that he is a beneficiary of the trust and establishes that the documents are documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee. In my view, to require the plaintiff to pursue and complete an action to determine this preliminary issue before documents relevant to the issue of the breach of the alleged trust can be produced would not promote the economical and expeditious resolution of disputes and would not be in the interests of justice.

15 The respondents rely on what we shall refer to as the "trust principle" to argue that the alleged trust relationship between the Crown and the respondents, if established on a prima facie basis, supersedes the claim of privilege. The Motions Judge refused to decide the issue on that basis for the following reason (at pages 14-15):

> Determination of the relationship between the parties, and the responsibilities arising in that relationship, is a key to resolution of these actions by the plaintiffs. As noted by counsel for the plaintiffs there are references in relevant statutes that support the concept of a trust relationship of the Crown to aboriginal

> peoples or to their bands, but ultimately determination of the relationship and attendant responsibilities in this case, in my opinion, must await the hearing of evidence and argument by the trial judge. At this stage there is inadequate basis for that relationship to be determined, or for a decision on production of documents to be based upon a presumption of that relationship.

16 He nevertheless decided in favour of the respondents on what were, essentially, reasons of equity and openness which cannot, in our respectful view, found an order of disclosure of privileged documents. Indeed, before us, the respondents, while obviously supporting the order of the Motions Judge, did so essentially on the basis of the "trust principle".

17 In order for the trust principle to apply at the discovery stage of an action for breach of duty in the administration of a trust, two conditions, in our view, must be fulfilled: the alleged trust relationship must be established on a prima facie basis, and the documents allegedly belonging to the beneficiaries must be documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee. We have here little concern with respect to the first condition. Our concern is, rather, with the second one.

18 We are prepared, because of the very special relationship between the Crown and the Indians[8] and because the Crown is to be held to "a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by Guerin et al. v. The Queen et al."[9], to accept that whatever may be the precise nature of the relationship between the Crown and the Indians, it would prima facie qualify as a trust-type relationship for the purposes of the application of the trust principle at the discovery stage.

19 That being said, however, it does not necessarily flow that the rules and practices developed with respect to private trusts apply automatically to Crown "trusts" such as those alleged in the present proceedings.

20 The basis of the trust principle, as appears from Mr. Justice Lederman's reasons in Re Ballard Estate, is the assumption, in cases of private trusts, that legal advice sought by the trustee belongs to the beneficiaries "because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust"[10].

21 That assumption cannot be applied to Crown "trusts". The Crown can be no ordinary "trustee". It wears many hats and represents many interests, some of which cannot but be conflicting. It acts not only on behalf or in the interest of the Indians, but it is also accountable to the whole Canadian population. It is engaged in many regards in continuous litigation. It has always to think in terms of present and future legal and constitutional negotiations, be they with the Indians or with the provincial governments, which negotiations, it might be argued, can be equated in these days and ages with continuous litigation. Legal advice may well not have been sought or obtained for the exclusive or dominant benefit of the Indians, let alone that of the three bands involved in these proceedings. Legal advice may well relate to policy decisions in a wide variety of areas which have nothing or little to do with the administration of the "trusts". It is doubtful that payment of the legal opinions given to the Crown is made out of the "private" funds of the "trusts" it administers . . . .

22 There being many possible "clients" or "beneficiaries", there being many possible reasons for which the Crown sought legal advice, there being many possible effects in a wide variety of areas deriving from the legal advice sought, it is simply not possible at this stage to assume in a general way that all documents at issue, in whole and in part, are documents which were obtained or prepared by the Crown in the administration of the specific "trusts" alleged by the respondents and in the course of the Crown carrying out its duties as "trustee" for the respondents.

23 As noted by Dickson J. (as he then was) in Solosky[11], "privilege can only be claimed document by document". We have not seen the documents at issue; we do not know what argument nor what line of argument, if any, may be developed by the parties with respect to each of the documents and, eventually, to a class of them. Furthermore, we cannot rely on any practical precedent in the case law, for this is an approach to the law of privilege which is peculiar to the yet unsettled relationship between the Crown and the Indians. It is not possible in the abstract to resolve the conflict between the alleged right of the Crown to privilege and the alleged right of the respondents to

disclosure otherwise than in the manner suggested by the Supreme Court in Descôteaux[12], i.e. in favour of protecting privilege.

24 It would be ill-advised for a court of appeal, in the circumstances, to blindly order the production by the Crown of the documents listed in class E, albeit in the presence of a confidentiality order. We would rather err on the side of caution, particularly so when one considers that the respondents will have the opportunity before a motions judge to challenge the claim of privilege document by document.

25 By the same token, and unfortunately for the motions judge, we are not prepared, so early in these proceedings and so early in this type of litigation, to set out specific guidelines without having seen the documents, without knowing what line of argument will be developed with respect to each document or with respect to classes of documents and without learning from the motions judge's experience and reasoning in dealing with the issue on a document by document basis.

26 We would therefore rephrase as follows the Motions Judge's order with respect to Schedule IIE:

> Documents for which the defendants claim solicitor and client privilege on the ground that they are protected by the legal advice privilege. If there is any question or dispute the Court will examine the documents and rule in each case, in light of the unique status of the Crown as "trustee" and in light of the unique relationship between the Crown and the Indians, whether it is privileged or is to be produced.

Implied waiver

27 A word, in closing, on the argument of implied waiver of privilege raised by the respondents. Counsel argue that where a fiduciary puts its state of mind at issue by pleading, in effect, that it has acted honestly and reasonably, all documents relating to the alleged breach of its legal obligations must be disclosed. That may be so where the pleadings expressly allege reliance on legal advice, but certainly is not so in the absence of any such express pleading. Counsel has cited no authority, and we know of none, to the effect that by simply alleging good faith a party waives the privilege which attaches to its communications with its solicitor.

28 We would allow the appeal and replace Schedules IIC and IIE of the Motions Judge's Order by the following:

> Schedule IIC: Documents for which solicitor and client privilege is claimed on the ground they were initiated for the dominant purpose of the conduct of litigation. If there is any question or dispute the Court will examine the documents and rule in each case whether it is privileged or is to be produced.
>
> Schedule IIE: Documents for which the defendants claim solicitor and client privilege on the ground that they are protected by the legal advice privilege. If there is any question or dispute the Court will examine the documents and rule in each case, in light of the unique status of the Crown as "trustee" and in light of the unique relationship between the Crown and the Indians, whether it is privileged or is to be produced.

29 We would make no order as to costs.

30 Pratte J.A.: I agree.

---

1 R.S.C., 1985, c. C-5.

2 See: Solosky v. The Queen, [1980] 1 S.C.R. 821, at p. 836; Descôteaux et al. v. Mierzwinski, [1982] 1 S.C.R. 860; R. v. Littlechild (1979), 19 A.R. 395 (C.A.); Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27; Weiler v. Canada (Department of Justice), [1991] 3 F.C. 617 (T.D.); Balabel v Air-India, [1988] 2 All ER 246 (C.A.); Shell Canada Ltd. (In re), [1975] F.C. 184 (C.A.); Crompton (Alfred) Amusement Machines Ltd v Commissioners of Customs and Excise (No 2), [1973] 2 All ER 1169 (H.L.); IBM Canada Limited-IBM Canada Limitée v. Xerox of Canada Limited, [1978] 1 F.C. 513 (C.A.); Canada (Minister of Industry, Trade and Commerce) v. Central Cartage Company et al. (1987), 10 F.T.R. 225 (F.C.T.D.).

3 Supra, note 2, at p. 836.

4 Supra, note 2, at p. 875.

5 We do not find R. v. Stinchcombe, [1991] 3 S.C.R. 326, the relevance of which was urged on us by the Crown, helpful in this context, because of its relating so exclusively to criminal procedure.

6 See: Solosky, supra note 2, at p. 834.

7 (1994), 20 O.R. (3d) 350 (Gen. Div.), at pp. 351-352.

8 See: Guerin et al. v. The Queen et al., [1984] 2 S.C.R. 335.

9 See: R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1109.

10 Supra, note 7, at p. 353.

11 Supra, note 2, at p. 837.

12 Supra, note 2.

TAB 17

Canada (Information Commissioner) v. Canada (Minister of Public Safety and Emergency Preparedness)

Federal Court Judgments

Federal Court of Appeal

Ottawa, Ontario

Evans, Stratas and Near JJ.A.

Heard: April 9, 2013.

Judgment: April 17, 2013.

Docket A-375-12

[2013] F.C.J. No. 439 | 2013 FCA 104 | 444 N.R. 268 | 360 D.L.R. (4th) 176 | 2013 CarswellNat 1087 | 226 A.C.W.S. (3d) 701

Between The Minister of Public Safety and Emergency Preparedness and The Minister of Justice Canada, Appellants, and The Information Commissioner of Canada, Respondent

(52 paras.)

Case Summary

Government law — Access to information and privacy — Access to information — Governmental or public information — Inspection of public documents — Bars and grounds for refusal — Solicitor-client privilege — Appeals and judicial review — Appeal by Ministers from order to disclose protocol allowed in part — Protocol set out procedures to be followed when RCMP documents were sought in civil litigation against federal Crown — All but small portion of protocol should be disclosed — Small portion of protocol embodied legal advice and was covered by solicitor-client privilege — Remainder of protocol was negotiated policy setting out roles and procedures and it was impossible to tell whether it was based on earlier legal advice — Disclosure of policy disclosed nothing of content of legal advice and did not undercut purposes served by solicitor-client privilege — Access to Information Act, ss. 21(1)(a), 23.

Appeal by the Minister of Public Safety and Emergency Preparedness and the Minister of Justice from an order requiring them to disclose a protocol. In 2006, the RCMP and the Department of justice received a request under the Access to Information Act for the protocol. The protocol was entitled "Principles to Implement Legal Advice on the Listing and Inspection of RCMP Documents in Civil Litigation." It was available to relevant personnel in the RCMP and the Department of Justice. The protocol set out the RCMP and Attorney General's roles and the procedures to be followed when the RCMP possessed documents relevant to civil litigation against the federal Crown. The signatories were the RCMP Director of Federal Services and the Assistant Deputy Attorney General. The RCMP and Department of Justice disclosed the protocol, but excised everything except the title and signatories to the document. The RCMP and Department of Justice resisted disclosure on the basis of ss. 21(1)(a) and 23 of the Access to Information Act, claiming the information was subject to solicitor-client privilege, or contained information that was advice or recommendations developed for a minister of the Crown. The requester complained to the Information Commissioner alleging the protocol did not fall within any exemptions to disclosure under the Act. The Commissioner investigated and concluded the protocol did not fall within the exemptions. The Commissioner applied to the Federal Court seeking disclosure of the protocol. The Federal Court granted the Information Commissioner's application agreeing the protocol did not fall within the exceptions. The court found the protocol was not protected by solicitor-client privilege, as it was a negotiated agreement between the RCMP and Department of Justice and did not contain legal advice. Nor was the protocol concerned with providing legal advice. The court concluded disclosing the protocol would not harm the interest the exemption was designed to protect.

The Ministers appealed the order arguing none of the protocol should be disclosed as it was all covered by the solicitor-client exemption under the Access to Information Act. They submitted the access to information coordinators property exercised their discretion not to disclose the protocol.
HELD: Appeal allowed in part.

The question of whether the exemptions applied was reviewable on the standard of correctness. The question of whether the discretion was properly exercised was reviewable on the standard of reasonableness. All but a small portion of the protocol should have been disclosed. That small portion was covered by the exemption for solicitor-client privilege as it embodied legal advice. The remainder of the protocol was a negotiated and agreed-upon operational policy formulated after any legal advice had been given and after any continuum of communication that was necessary to be protected in light of the purposes behind the privilege. It defined the RCMP and Department of Justice's respective roles and set out the procedures they should follow concerning documents the RCMP held. It was impossible to tell whether those roles and procedures were based on any earlier legal advice. Disclosure of the policy disclosed nothing about the content of any earlier legal advice or related communications and did not in any way undercut the purposes served by solicitor-client privilege. The access coordinators were to decide whether the portion of the protocol protected by solicitor-client privilege ought to be disclosed.

Statutes, Regulations and Rules Cited:

Access to Information Act, R.S.C. 1985, c. A-1, s. 21(a), s. 23, s. 25, s. 30, s. 42

A Appeal From:

Appeal from a judgment of the Honourable Madam Justice Gleason dated July 12, 2012, Nos. T-146-11 and T-147-11, [2012] F.C.J. No. 1527.

Counsel

Brian Harvey, for the Appellants.

Jill Copeland, Allison Knight, for the Respondent.

The judgment of the Court was delivered by

STRATAS J.A.

1 The Ministers appeal from a decision of the Federal Court (*per* Justice Gleason) dated July 12, 2012: 2012 FC 877.

2 Acting under the *Access to Information Act*, R.S.C. 1985, c. A-1, the Federal Court ordered that all of a particular protocol should be disclosed to a person seeking access to it. The Protocol sets out the procedures to be followed by the Department of Justice and the RCMP when RCMP documents are sought in civil litigation against the federal Crown.

3 In this Court, the appellant Ministers submit that none of the Protocol should be disclosed. All is covered by the solicitor-client exemption under the Act. The respondent Information Commissioner says that all of the Protocol should be disclosed. None of it is covered by the solicitor-client exemption under the Act.

4 For the reasons set out below, I largely agree with the Information Commissioner. All but a small portion of the Protocol should be disclosed. That small portion is covered by the exemption for solicitor-client privilege. Accordingly, I would allow the appeal in part.

5 As a matter of discretion, the access coordinators of the Department of Justice and the RCMP could decide to disclose the small portion covered by solicitor-client privilege. Accordingly, I would remit the small portion to the access coordinators for their reconsideration.

A. The request for the Protocol

6 The RCMP and the Department of Justice received a request under the Act for the Protocol. They disclosed it, but excised everything except its title and the signatories to the document.

7 The Protocol is entitled "Principles to Implement Legal Advice on the Listing and Inspection of RCMP Documents in Civil Litigation." It is available to relevant personnel in the RCMP and the Department of Justice. The Protocol sets out the roles of the RCMP and the Attorney General and the procedures to be followed when the RCMP possesses documents relevant to civil litigation against the federal Crown. The signatories are Assistant Commissioner William Lenton, RCMP Director of Federal Services, and James D. Bissell, Assistant Deputy Attorney General.

8 In resisting disclosure under the Act, the RCMP and the Department of Justice invoked two exemptions: "solicitor-client privilege" (section 23) and "advice or recommendations developed by or for a government institution or a minister of the Crown" (paragraph 21(1)(*a*)).

B. Proceedings before the Information Commissioner of Canada

9 Faced with the refusal of the RCMP and the Department of Justice to disclose the substance of the Protocol, the requester complained to the Information Commissioner under section 30 of the Act, alleging that the Protocol does not fall within any exemptions to disclosure under the Act.

10 The Information Commissioner conducted an investigation, examined the Protocol and a number of documents leading up to it, and concluded that the Protocol did not fall within the exemptions.

11 Having reached that conclusion, the Information Commissioner applied to the Federal Court under section 42 of the Act, seeking disclosure of the Protocol.

C. Proceedings in the Federal Court

12 The Federal Court granted the Information Commissioner's application, agreeing with her that the Protocol did not fall within the exemptions.

13 First, on the issue of solicitor-client privilege, the Federal Court noted that certain formal matters worked against the existence of the privilege (at paragraph 25):

> ...the Protocol was negotiated; legal advice is not the subject of negotiation between solicitor and his or her client. In addition, the Protocol is signed by both the putative lawyer (the DOJ) and the putative client (the RCMP); a communication providing or seeking legal advice is not typically signed by both the client and the lawyer.

14 However, in the core of its decision, the Federal Court concluded that the Protocol does not contain legal advice, nor is it concerned with providing legal advice. Instead (at paragraph 25),

> ...it is an agreement [in which]...the parties have moved past the stage of seeking or providing advice and have entered into a document that reflects their understanding as to their respective roles and obligations regarding the way in which they will operate when the RCMP is in possession of documents, obtained through its criminal investigative powers, that might be relevant in civil litigation against the federal Crown.

15 The Federal Court concluded that the Protocol was no different from other memoranda of understanding or agreements that the Department of Justice has entered into with other departments.

16 Next, on the issue of the exemption for advice, the Federal Court found that the Protocol was not, in itself, advice but rather an agreement setting out respective roles and responsibilities. Further, the Federal Court noted that it could not tell from the text of the Protocol whether it reflected earlier legal advice obtained by the DOJ. Accordingly, in the Court's view, disclosing the Protocol would "in no way harm the interests that the exemption...is designed to protect" (at paragraph 32).

17 The Ministers appeal to this Court. They submit that the solicitor-client exemption applies. Further, they submit that the access to information coordinators properly exercised their discretion not to disclose the Protocol.

D. Analysis

(1) The standard of review

18 The parties agree on the standard of review. The question whether the exemptions apply is reviewed on the basis of correctness. The question whether the discretion was properly exercised is reviewed on the basis of reasonableness. See, for example, *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2001 FCA 254 at paragraph 47.

19 In this Court, the parties agreed that the Federal Court's characterizations of the Protocol, to the extent they are suffused by matters of fact, can only be set aside on the basis of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

(2) The solicitor-client privilege exemption (section 23)

(a) A preliminary consideration

20 In their memorandum of fact and law, the Ministers addressed the issue of solicitor-client privilege as an all-or-nothing matter: either the whole Protocol is privileged or none of it is privileged.

21 This overlooks the fact that sometimes only part of a document is privileged. Further, the Act does not regard disclosure as an all-or nothing matter. Indeed, under section 25 of the Act, a head of a government institution must sever any part of a record that does not contain exempt material if it can be reasonably severed. If only part of the Protocol is privileged, the issue of severance must be addressed.

(b) General principles

22 The parties broadly agree on the general principles to be applied. Indeed, the Ministers conceded that at paragraphs 15-22 of its reasons the Federal Court correctly stated the general principles.

23 Throughout their submissions in this Court, the Ministers stressed the importance of solicitor-client privilege, relying upon broad statements in cases such as *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574.

24 However "fundamental," "all-encompassing" and "nearly absolute" the privilege may be, these cases confirm that not everything uttered by a lawyer to a client is privileged: see, *e.g.*, *Pritchard*, *supra*, at paragraph 20; *Blood Tribe*, *supra*, at paragraph 10. Before us, counsel for the Ministers quite properly conceded that comments by lawyers to clients about matters wholly unrelated to their solicitor-client relationship are not privileged.

25 Rather, communications must be viewed in light of the context surrounding the solicitor-client relationship and

the relationship itself: *Pritchard*, *supra* at paragraph 20; *Miranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193 at paragraph 32. In particular, heed must be paid to the nature of the relationship, the subject-matter of what is said to be advice, and the circumstances of the document in issue: *R. v. Campbell*, [1999] 1 S.C.R. 565 at paragraph 50.

26 All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 at paragraph 8.

27 Part of the continuum protected by privilege includes "matters great and small at various stages...includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client." See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 *per* Taylor L.J.; *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 111.

28 In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice": *Balabel*, *supra* at page 1048. If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege - namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

29 For example, where a Director of a government department receives legal advice on how certain proceedings should be conducted and the director so instructs those conducting proceedings, the instructions, essentially cribbed from the legal advice, form part of the continuum and are protected: *Minister of Community and Social Services v. Cropley* (2004), 70 O.R. (3d) 680 (Div. Ct.). Disclosing such a communication would undercut the ability of the director to freely and candidly seek legal advice.

30 In some circumstances, however, the end products of legal advice do not fall within the continuum and are not privileged. For example, many organizations develop document management and document retention policies and circulate them to personnel within the organization. Often these are shaped by the advice of counsel. However, such policies are usually disclosed, without objection, because they do not form part of an exchange of information with the object of giving legal advice. Rather, they are operational in nature and relate to the conduct of the general business of the organization.

31 Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice - the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner - is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.

32 In argument before us, counsel for the Ministers quite properly conceded that policies of these sorts are not covered by the privilege.

33 It follows, then, that I agree with the Federal Court's suggestion (at paragraph 25) that documents and actions shaped by legal advice are not necessarily themselves legal advice and do not necessarily form part of the protected continuum of communication. There are occasions where parties have moved "past the stage of seeking or providing advice," *i.e.*, beyond the protected continuum, and start to act on the advice for the purposes of conducting their regular business.

(c) The Federal Court's application of these principles

34 As previously mentioned, the Federal Court characterized the Protocol not as legal advice or within the

continuum of legal advice but rather as a statement of the respective roles of the RCMP and the Department of Justice and the procedures they will follow when RCMP documents may be relevant in civil litigation.

35 For the purposes of this appeal, I would divide the seventeen paragraph Protocol into two parts: the first three paragraphs and the last fourteen paragraphs. In my view, there is no ground to interfere with the Federal Court's characterization of the last fourteen paragraphs of the Protocol. That characterization is founded upon a number of factual findings made by the Federal Court (at paragraphs 25-26) that stand absent any demonstration of palpable and overriding error. The Ministers have not demonstrated any such error. However, the first three paragraphs embody legal advice and are covered by solicitor-client privilege.

The last fourteen paragraphs of the Protocol

36 The last fourteen paragraphs of the Protocol are a negotiated and agreed-upon operational policy formulated after any legal advice has been given and after any continuum of communication that is necessary to be protected in light of the purposes behind the privilege. They resemble the sort of document management policy seen in many organizations. As the Federal Court found, the fourteen paragraphs define the respective roles of the RCMP and the Department of Justice and set out procedures they should follow concerning documents held by the RCMP. The fourteen paragraphs guide personnel in the RCMP and the Department of Justice who are engaged in the day-to-day, operational business of locating RCMP documents for the purpose of disclosing them in litigation. Nothing is said about any legal obligations.

37 The Protocol itself is an agreement. This is not just an insignificant matter of form. Rather, it affects how one characterizes the substance of the communication: the roles and procedures defined in the Protocol are a product of negotiation and compromise. They do not necessarily embody or reflect any advice previously given.

38 On this, the Federal Court noted that it impossible to say whether the matters set out are consistent with or conflict with any earlier legal advice. I agree. Indeed, it is impossible to tell whether or not they are based on any earlier legal advice. Thus, disclosing this policy discloses nothing about the content of any earlier legal advice or related communications and does not in any way undercut the purposes served by solicitor-client privilege.

39 In this regard, the case at bar differs from *Cropley*, *supra*. In *Cropley*, the instructions disseminated by the Director embodied the legal advice and were not the product of negotiation and compromise. I agree and adopt the Federal Court's conclusion on this point (at paragraph 27):

> [*Cropley*] involved requests for disclosure of standing instructions and advice to counsel regarding the way in which litigation was to be conducted, which were drafted by in-house counsel for the Ministry and were intended to be provided to counsel retained to act on behalf of the Ministry. Here, on the other hand, the Protocol does not provide advice or instructions, but, as noted, reflects an agreement between the DOJ and the RCMP regarding their respective roles and responsibilities.

40 The Ministers submitted that the Federal Court fastened only on whether the Protocol gave legal advice and not whether the Protocol was part of the continuum of communication associated with the giving and receiving of legal advice. I disagree. The Federal Court was alive to the fact that there is a protected continuum of communication, as is well-seen by its consideration of the *Cropley* case.

41 Were the Ministers' submissions on the scope of the protected continuum accepted, all acts and communications taking place after legal advice is dispensed and relating to any subject-matters covered by the legal advice would be confidential. As a result, many departments' operational policies and memoranda of agreement between departments - currently public - might suddenly become confidential even though they do not disclose advice or other communications essential to the purposes served by the privilege.

42 In my view, that would overshoot the mark. The scope of confidentiality would be extended beyond any of the purposes served by solicitor-client privilege - there would simply be secrecy for secrecy's sake.

43 Accordingly, like the Federal Court, and for many of its reasons, I find the last fourteen paragraphs of the Protocol are not privileged.

The first three paragraphs of the Protocol

44 The first three paragraphs of the Protocol are different. They memorialize, as background, the content of certain legal obligations of the federal Crown for the benefit of the RCMP and the Department of Justice and their personnel engaged in document management.

45 This is legal advice falling under the exemption in section 23 of the Act. Accordingly, the first three paragraphs of the Protocol are privileged and can be kept confidential.

(3) The access coordinators' discretion not to disclose the Protocol

46 I have found that the last fourteen paragraphs of the Protocol are not exempt and should be released to the requester. However, the first three paragraphs remain exempt. That is not the end of the matter - as a matter of discretion, the access coordinators could still release those three paragraphs.

47 As previously mentioned, the access coordinators exercised their discretion earlier against disclosing the whole Protocol, a document they viewed as wholly exempt. Now, in light of these reasons, the vast majority of the document is not exempt and must be disclosed.

48 Certain new questions for the consideration of the access coordinators now arise. Given these reasons, might they now release the first three paragraphs? Might the disclosure of the first three paragraphs bolster in the eyes of the public the credibility and soundness of the documentary procedures the RCMP and Department of Justice are following? Might there now be a greater public interest in disclosing the paragraphs? Or are there still important considerations that warrant keeping the first three paragraphs confidential?

49 These questions are for the access coordinators to decide afresh. That discretion is to be exercised mindful of all of the relevant circumstances of this case, the purposes of the Act, and the principles set out in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 66.

E. Proposed disposition

50 For the foregoing reasons, I would allow the appeal in part. In paragraph 2 of the Federal Court's judgment, after the words "[t]he respondents shall disclose," I would add the words "the last fourteen paragraphs of."

51 I would remit to the access coordinators of the RCMP and Department of Justice the question whether, as a matter of discretion, the first three paragraphs of the Protocol should be disclosed even though they are exempt from disclosure under the Act under section 23 of the Act as privileged solicitor-client communications.

52 The respondent Information Commissioner has not sought her costs and so none shall be awarded.

STRATAS J.A.
EVANS J.A.:— I agree.
NEAR J.A.:— I agree.

TAB 18

2004 SCC 31
Supreme Court of Canada

Pritchard v. Ontario (Human Rights Commission)

2004 CarswellOnt 1885, 2004 CarswellOnt 1886, 2004 SCC 31, [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, 12 Admin. L.R. (4th) 171, 19 C.R. (6th) 203, 2004 C.L.L.C. 230-021, 33 C.C.E.L. (3d) 1, 47 C.P.C. (5th) 203, 49 C.H.R.R. D/120, 72 O.R. (3d) 160 (note), J.E. 2004-1087, REJB 2004-61849

Colleen Pritchard, Appellant v. Ontario Human Rights Commission, Respondent and Attorney General of Canada, Attorney General of Ontario, Canadian Human Rights Commission and Manitoba Human Rights Commission, Interveners

Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: March 23, 2004
Oral reasons: March 23, 2004
Written reasons: May 14, 2004
Docket: 29677

Proceedings: additional reasons to *Pritchard v. Ontario (Human Rights Commission)* (2004), 2004 CarswellOnt 1874, 2004 CarswellOnt 1875 (S.C.C.)**Proceedings: affirming *Pritchard v. Ontario (Human Rights Commission)* (2003), 2003 CarswellOnt 182, 22 C.C.E.L. (3d) 201, 27 C.P.C. (5th) 223, 167 O.A.C. 356, 223 D.L.R. (4th) 85, 63 O.R. (3d) 97 (Ont. C.A.)**reversing *Pritchard v. Ontario (Human Rights Commission)* (2002), 2002 CarswellOnt 4626 (Ont. Div. Ct.)**Proceedings: affirming *Pritchard v. Ontario (Human Rights Commission)* (2001), 2001 CarswellOnt 2423, 148 O.A.C. 260, *(sub nom. Pritchard v. Ontario (Human Rights Commission) (No. 2))* 40 C.H.R.R. D/261 (Ont. Div. Ct.)**

Counsel: Geri Sanson and Mark Hart for appellant
Anthony D. Griffin and Hart Schwartz for respondent
Christopher M. Rupar for intervener Attorney General of Canada
Leslie M. McIntosh for intervener Attorney General of Ontario
Andrea Wright and Monette Maillet for intervener Canadian Human Rights Commission
Aaron L. Berg for intervener Manitoba Human Rights Commission

***Major J.*:**

I. Introduction

1 The appellant, Ms Colleen Pritchard, filed a human rights complaint with the respondent Ontario Human Rights Commission, against her former employer Sears Canada Inc., alleging gender discrimination, sexual harassment and reprisal. The Commission decided, pursuant to s. 34(1)(b) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, not to deal with her complaint. The appellant sought judicial review and brought a motion for production of all documents that were before the Commission when it made its decision, including a legal opinion provided to the Commission by in-house counsel.

2 The motions judge, MacFarland J. of the Divisional Court, ordered production and a three-judge panel of that court later upheld that decision. The Ontario Court of Appeal overturned the decision, holding instead that the opinion was privileged. The appeal was dismissed with reasons to follow.

II. Factual Background

3 The appellant's employment with Sears was terminated on July 19, 1996. In January 1997 she filed a human rights complaint alleging that she had been subjected to gender discrimination, sexual harassment and reprisal. With regard to reprisal, the complaint alleged that the appellant was denied re-employment for an advertised position in December 1996 because of earlier complaints she made to the Commission (in 1994) regarding sexual harassment and discrimination, and Sears' failure to deal with the issues she raised appropriately.

4 On January 20, 1998, the Commission decided, pursuant to s. 34(1)(b) of the Code, not to deal with most of the appellant's complaint. The Commission was of the view that the appellant had acted in bad faith in bringing the complaint because she had previously signed a release, which expressly released Sears from any claims under the Code.

5 In particular, it stated that she released Sears from any claims relating to her employment, including "any claims for severance or termination pay under the *Employment Standards Act* or claims under the *Human Rights Code*." In exchange for the release, the appellant was paid her statutory entitlement under the *Employment Standards Act*, R.S.O. 1990, c. E.14, plus two weeks' salary.

6 On June 23, 1998, the Commission decided, pursuant to an application by the appellant for reconsideration under s. 37 of the Code, not to deal with the termination issues; in essence, they upheld the January 20 decision not to address most of the complaint.

7 On October 28, 1998, the appellant commenced an application for judicial review of the Commission's decisions. The Commission did not defend the application. Instead, it provided the court and the appellant with a letter from its legal counsel setting out the reasons why it would not defend the application and why the entire complaint should be remitted for investigation. The Commission also offered to settle the matter, over the objections of Sears. The Superior Court of Justice, Divisional Court, quashed the Commission's decisions, finding that the Commission had misinterpreted the meaning of "bad faith" and had applied the wrong criteria in its reconsideration ((1999), 45 O.R. (3d) 97 (Ont. Div. Ct.)). The matter was remitted back to the Commission for a redetermination under s. 34 of the Code. An appeal by Sears was dismissed.

8 In its consideration of the complaint anew, the Commission again exercised its discretion under s. 34(1)(b) of the Code not to deal with most of the appellant's complaint. On December 20, 2000, the Commission issued its decision not to deal with it based on a set of reasons that were strikingly similar to the first, again claiming that the appellant acted in bad faith. On January 11, 2001, the appellant brought a second application for judicial review. The notice sought to quash the Commission's second decision on the basis of jurisdictional error, including excess of jurisdiction, denial of procedural fairness, and violations of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

9 In the context of this second judicial review application, the appellant requested production of various documents, including a legal opinion provided to the Commissioners. The Commission refused the request for documents, and the appellant brought a motion before MacFarland J. of the Superior Court requesting "all information - both oral and written - which was placed before the Commission for its consideration of her complaint which resulted in the Commission's decision under s. 34(1)(b) of the Code."

III. Judicial History

10 On July 6, 2001, MacFarland J., of the Superior Court of Justice, Divisional Court, granted the appellant's motion and ordered production of all the documents, including the legal opinion which had been prepared by in-house counsel for the Commission ((2001), 148 O.A.C. 260 (Ont. Div. Ct.)). Six months later, on January 10, 2002, a three-judge panel of the Divisional Court ([2002] O.J. No. 1169 (Ont. Div. Ct.)) heard the expedited appeal on the sole issue of the production of the legal opinion, and confirmed MacFarland J.'s order. Neither of the lower courts was provided with a copy of the legal opinion at issue.

11 On January 29, 2003, the Ontario Court of Appeal allowed the appeal, set aside the lower court orders pertaining to the legal opinion, and ordered that the copies of the legal opinion which had been filed with the appellate court be sealed ((2003), 63 O.R. (3d) 97 (Ont. C.A.)).

IV. Relevant Statutory Provisions

12 While this appeal can be decided on the basis of case law alone, ss. 34, 37 and 39 of the Code provide the context in which the Commission made its decisions. For convenience, these sections are reproduced below.

> 34.(1) Where it appears to the Commission that,
>
> (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
>
> (b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
>
> (c) the complaint is not within the jurisdiction of the Commission; or
>
> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
>
> the Commission may, in its discretion, decide to not deal with the complaint.
>
> (2) Where the Commission decides to not deal with a complaint, it shall advise the complainant in writing of the decision and the reasons therefor and of the procedure under section 37 for having the decision reconsidered.
>
> . . . . .
>
> 37.(1) Within a period of fifteen days of the date of mailing the decision and reasons therefor mentioned in subsection 34(2) or subsection 36(2), or such longer period as the Commission may for special reasons allow, a complainant may request the Commission to reconsider its decision by filing an application for reconsideration containing a concise statement of the material facts upon which the application is based.
>
> (2) Upon receipt of an application for reconsideration the Commission shall as soon as is practicable notify the person complained against of the application and afford the person an opportunity to make written submissions with respect thereto within such time as the Commission specifies.
>
> (3) Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final.
>
> . . . . .
>
> 39(6) A member of the Tribunal hearing a complaint must not have taken part in any investigation or consideration of the subject-matter of the inquiry before the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the inquiry with any person or with any party or any party's representative except upon notice to and opportunity for all parties to participate, but the Tribunal may seek legal advice from an advisor independent of the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

V. Issues

13 The sole issue in this appeal is whether the Court of Appeal erred in overturning the decision of the motions judge ordering production of the legal opinion. The question is whether a legal opinion, prepared for the Ontario Human Rights Commission by its in-house counsel, is protected by solicitor-client privilege in the same way as it is privileged if prepared by outside counsel retained for that purpose.

VI. Analysis

A. Solicitor-Client Privilege Defined

14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), at para. 46.

15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 837, as "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice, and (iii) which is intended to be confidential by the parties." Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky*, *supra*, at p. 834.

16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established." The scope of the privilege does not extend to communications (1) where legal advice is not sought or offered, (2) where it is not intended to be confidential, or (3) that have the purpose of furthering unlawful conduct: see *Solosky*, *supra*, at p. 835.

17 As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.), at para. 2:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

18 In *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.), this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*, *supra*:

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

(Arbour J. in *Lavallee*, *supra*, at para. 36, citing Major J. in *McClure*, *supra*, at para. 35)

19 Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.), at para. 49. In *Shirose*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.

20 Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not

the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Shirose*, *supra*, at para. 50.

21 Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

B. The Common Interest Exception

22 The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a "joint interest" with the client in the subject-matter of the communication. This "common interest" or "joint interest" exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.

23 The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A. at p. 245:

> The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication . . . .

24 The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning M.R. described it in *Buttes Gas & Oil v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (Eng. C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.

25 The Commission neither has a trust relationship with, nor owes a fiduciary duty to, the parties appearing before it. The Commission is a statutory decision-maker. The cases relied on by the appellant related to trusts, fiduciary duty, and contractual obligations. These cases are readily distinguishable and do not support the position advanced by the appellant. The common interest exception does not apply to an administrative board with respect to the parties before it.

26 The appellant relied heavily on the decision of the New Brunswick Court of Appeal in *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 146 N.B.R. (2d) 294 (N.B. C.A.). In that case, the court ordered a new hearing based on a failure by the Workers' Compensation Board to observe procedural fairness in the processing of the appellant's claim. The court held that several significant errors were made at the review committee level, negating the review committee's duty to act fairly. Among these errors were the failure to provide the appellant with its first decision, the decision to turn the appellant's claim into a test case without her knowledge and partly at her expense, and the introduction of new evidence not disclosed to the appellant. For these reasons the court, in its *ratio*, concluded that "the taint at the intermediate level of the Review Committee has irrevocably blemished the proceedings" (para. 31). Other comments made by the Court of Appeal, pertaining to the production of legal opinions, were *obiter dicta*. The proper approach to legal opinions is to determine if they are of such a kind as would fall into the privileged class. If so, they are privileged. To the extent that *Melanson* is otherwise relied on is error.

C. Application to the Case at Bar

27 As stated, the communication between the Commission and its in-house counsel was protected by solicitor-client privilege.

28 The opinion provided to the Commission by staff counsel was a *legal opinion*. It was provided to the Commission by in-house or "staff" counsel to be considered or not considered at their discretion. It is a communication that falls within the class of communications protected by solicitor-client privilege. The fact that it was provided by in-house counsel does not alter the nature of the communication or the privilege.

29 There is no applicable exception that can remove the communication from the privileged class. There is no common interest between this Commission and the parties before it that could justify disclosure; nor is this Court prepared to create a new common law exception on these facts.

30 With respect, the motions judge erred in following the comments made by the New Brunswick Court of Appeal in *obiter dicta* in *Melanson* and in ordering production of the legal opinion.

31 Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may coexist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

32 Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, provides:

> 10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

33 Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively: see *Lavallee*, *supra*, at para. 18. Solicitor-client privilege cannot be abrogated by inference. While administrative boards have the delegated authority to determine their own procedure, the exercise of that authority must be in accordance with natural justice and the common law.

34 Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the "whole of the record" includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality. Beyond that, whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise in this appeal.

35 Section 10 of the *Judicial Review Procedure Act*, in any event, does not clearly or unequivocally express an intention to abrogate solicitor-client privilege, nor does it stipulate that the "record" includes legal opinions. As such, "record of the proceedings" should not be read to include privileged communications from Commission counsel to the Commission.

VII. Disposition

36 The communication between the Ontario Human Rights Commission and its in-house counsel is protected by solicitor-client privilege. It was a communication from a professional legal advisor, the Commission's in-house counsel, in her capacity as such, made in confidence to her client, the Commission. Accordingly, this appeal is dismissed and the decision of the Ontario Court of Appeal is confirmed. There is no order for costs as against the parties before this Court. Any order of costs pertaining to the judicial review should properly be considered by the Divisional Court undertaking the review.

Order accordingly.

Ordonnance en conséquence.

TAB 19

2001 SCC 14
Supreme Court of Canada

R. v. McClure

2001 CarswellOnt 496, 2001 CarswellOnt 497, 2001 SCC 14, 2001 J.E. 564, [2001] 1 S.C.R. 445, [2001] S.C.J. No. 13, 142 O.A.C. 201, 151 C.C.C. (3d) 321, 195 D.L.R. (4th) 513, 266 N.R. 275, 40 C.R. (5th) 1, 48 W.C.B. (2d) 514, 80 C.R.R. (2d) 217, J.E. 2001-564, REJB 2001-22807

J.C., Appellant v. Her Majesty the Queen, Respondent and David Edward McClure, Respondent and The Advocates' Society and the Criminal Lawyers' Association (Ontario), Intervenors

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: October 5, 2000
Judgment: March 2, 2001
Docket: 27109

Counsel: *Anthony Moustacalis*, *Daniel Lawson*, for Appellant
Christine Bartlett Hughes, for Respondent, Her Majesty the Queen
Maureen Forestell, *Samantha G. Peeris*, for Respondent, McClure
John M. Rosen, for Intervenor, Advocates' Society
Leslie Pringle, *Steven Skurka*, for Intervenor, Criminal Lawyers' Assn. (Ontario)

The judgment of the court was delivered by *Major J.*:

1 This appeal revisits the reach of solicitor-client privilege. This privilege comes with a long history. Its value has been tested since early in the common law. Its importance has not diminished.

2 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

3 Interests compete within our legal system. The policy justifying the existence of solicitor-client privilege might clash with an accused's right under s. 7 of the *Canadian Charter of Rights and Freedoms* to make full answer and defence. This appeal raises the issue of whether the solicitor-client privilege of a third person should yield to permit an accused to make full answer and defence to a criminal charge, and, if so, when.

4 Solicitor-client privilege and the right to make full answer and defence are integral to our system of justice. Solicitor-client privilege is not absolute so, in rare circumstances, it will be subordinated to an individual's right to make full answer and defence. The problem is when and under what circumstances the right to full answer and defence will override the solicitor-client privilege.

5 For the reasons that follow, I conclude with respect that the occasions when the solicitor-client privilege yields are rare and the test to be met is a stringent one. The circumstances in this case did not justify invading the privilege. The trial judge should not have ordered the litigation file of the third party produced to the accused.

I. Facts

6 The respondent, David Edward McClure, was a librarian and teacher at the Cherokee Public School attended by the appellant, J.C., in the mid-1970s. The respondent McClure was arrested on February 19, 1997 and charged with sexual offences against 11 former students alleged to have occurred between 1962 and 1993.

7 After reading about McClure's arrest in the newspaper, the appellant J.C. retained a lawyer and, on March 21, 1997, gave a taped statement to police alleging incidents of sexual touching by McClure. The appellant's allegations were eventually added to the indictment against the respondent. The appellant met with a therapist and, on May 27, 1997, brought a civil action in the Ontario Court (General Division) against both the respondent McClure and the North York Board of Education.

8 On November 2, 1997, McClure sought production of confidential records from 10 of the 11 complainants, including a demand for the appellant's civil litigation file. The appellant's litigation file was sought, it was submitted, to determine the nature of the allegations first made by the appellant to his solicitor and to assess the extent of the appellant's motive to fabricate or exaggerate the incidents of abuse.

II. Judicial History

A. Ontario Court (General Division), Ruling of Hawkins J., November 25, 1998.

9 Hawkins J. stated that in accordance with *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), the appellant's therapeutic records, school records and solicitor-client records had to be produced to him for review.

10 The trial judge emphasized that he was only dealing with the first step of the "*O'Connor* test", to determine if the record was"' likely relevant' to some specific issue or the issue of credibility", sufficient to order production to the trial judge for further screening prior to ordering production to the defence.

11 Hawkins J. concluded that the "unusual chronological order" of the revelations of the appellant — to the lawyer, police, therapist, and then the start of a civil suit — could raise the question of motive and pointed to the likely relevance for the defence of the appellant's privileged instructions to his lawyer.

B. Ontario Court (General Division), Ruling of Hawkins J., December 4, 1998.

12 At the second hearing, presumably being satisfied that the first step had been met, Hawkins J. granted McClure access to J.C.'s litigation file. He concluded that the accused should be entitled to question the motive of the appellant at the trial of the accused in an attempt to show that the appellant's complaint in the criminal proceeding was made merely to bolster the civil action against the accused and the North York School Board. Although most of this information was available to the respondent McClure without access to the appellant's litigation file, the trial judge nonetheless found that certain matters of sequence were significant, and not necessarily available to the defence without access to the complainant's file.

13 He concluded that the balance between the confidentiality of the litigation file and the right of the respondent McClure to make full answer and defence could be met by ordering all references to quantum of settlement and fees deleted from the produced file.

14 The trial judge's order was stayed pending appeal: [*R. v. McClure*], (April 23, 1999), Hawkins J. (Ont. S.C.J.). The two counts involving the appellant were severed and never prosecuted. The respondent McClure was ultimately convicted of 11 counts, in relation to 6 other complainants.

15 There is no court of appeal judgment. The third party appellant, J.C., was not a party in the criminal trial. Consequently, he could not appeal the interlocutory order for the production of his private records. An application was made directly to this Court (s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26) for leave to appeal the "final order" ordering production of his litigation file.

III. Issues

16

1. Should the solicitor-client privilege ever give way to an accused's right to full answer and defence and if so in what circumstances?

2. If solicitor-client privilege should yield, what is the appropriate test?

3. Should the trial judge have ordered the litigation file to be disclosed in the circumstances of this case?

IV. Analysis

A. Evolution of Solicitor-Client Privilege

17 Solicitor-client privilege is part of and fundamental to the Canadian legal system. While its historical roots are a rule of evidence, it has evolved into a fundamental and substantive rule of law.

18 There is academic dispute over the origins of solicitor-client privilege. The commonly accepted history of the privilege was set out by Wigmore in *Evidence*, vol. 8 (McNaughton rev. 1961), at p. 543. In Wigmore's "honor theory," the rationale for solicitor-client privilege stems from "a consideration for the *oath and honor* of the attorney rather than for the apprehensions of his client" (emphasis in original).

19 This theory was referred to in subsequent case law in Canada. In *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), Dickson J., as he then was, at p. 834, stated that the history of the privilege could be traced to the reign of Elizabeth I:

> [Solicitor-client privilege] stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion.

20 The honor theory was expounded by J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999) at p. 728:

> The solicitor-client privilege is the oldest of the privileges for confidential communications with roots in the 16th century. The basis of the early rule was the oath and honour of the solicitor, as a professional man and a gentleman, to keep his client's secret. Thus, the early privilege belonged solely to the solicitor, and the client benefited from it only incidentally. [Footnotes omitted.]

21 The honor theory was rejected by J. Auburn in his book *Legal Professional Privilege: Law and Theory* (2000) at pp. 6-7:

> When "honour" was invoked in the sixteenth century in the context of witness testimony, it meant an alternative basis for the taking of evidence, i.e. that evidence should be taken on one's word or in writing, rather than on the strength of the oath. It did not mean that evidence should not be taken at all. [Footnotes omitted.]
>
> . . . . .
>
> The Wigmorean view of the origin of the privilege is flawed, both in regard to the original rationale for the privilege and in seeing it as an immediate reaction to testimonial compulsion. The privilege was not so obviously important that it immediately commended itself as a natural exception to compulsion. It may have arisen gradually, and some time after the advent of compulsion, as a rule grounded more on practicality and the apparent illogicality of having a lawyer testify to matters his client could not have spoken of.

The debate surrounding the origin of solicitor-client privilege while of some interest need not be resolved here. Whatever the origin of the privilege, it has clearly evolved into a substantive rule of law in Canada.

22 The solicitor-client privilege began in Canada as a rule of evidence. See *R. v. Colvin* (1970), 1 C.C.C. (2d) 8 (Ont. H.C.), *per* Osler J. at p. 13:

> Finally, the question of solicitor-client privilege is, in this connection, a troublesome one. On the one hand, no authority should be given *carte blanche* to search through the files in a solicitor's office in hopes of discovering material prepared for the purpose of advising the client in the normal and legitimate course of professional practice. The privilege, however, is exclusively that of the client and does not extend to correspondence, memoranda or documents prepared for the purpose of assisting a client to commit a crime. ...
>
> There can be no sure way of classifying the various types of material in advance and, in any event, it must be remembered that the rule is a rule of evidence, not a rule of property. [Emphasis added.]

23 In time, the status of solicitor-client privilege as a rule was elevated in the common law. See *Solosky*, *supra*, *per* Dickson J., at p. 836:

> Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room.

This was expanded in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.). Lamer J., as he then was, recognized the implications of *Solosky*, *supra*, at p. 875:

> The Court [in *Solosky, supra*] in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.

24 In *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), at p. 383, Wilson J. confirmed that in *Solosky*, *supra*, solicitor-client privilege was a "fundamental civil and legal right". Finally, in *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), Cory J. for the majority stated at para. 45:" solicitor-client privilege has long been regarded as fundamentally important to our judicial system" and at para. 48: "now it has evolved into a substantive rule."

25 The existence of solicitor-client privilege as a fundamental legal right answers little. The solicitor-client privilege must be examined in the context of other types of privileges to demonstrate its unique status within the legal system.

B. Types of Privilege

26 The law recognizes a number of communications as worthy of confidentiality. The protection of these communications serves a public interest and they are generally referred to as privileged.

27 There are currently two recognized categories of privilege: relationships that are protected by a "class privilege" and relationships that are not protected by a class privilege but may still be protected on a "case-by-case" basis. See *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), *per* Lamer C.J., at p. 286, for a description of "class privilege":

> The parties have tended to distinguish between two categories: a" blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category. ... [Emphasis in original.]

28 For a relationship to be protected by a class privilege, thereby warranting a *prima facie* presumption of inadmissibility, the relationship must fall within a traditionally protected class. Solicitor-client privilege, because of its unique position in our legal

fabric, is the most notable example of a class privilege. Other examples of class privileges are spousal privilege (now codified in s. 4(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5) and informer privilege (which is a subset of public interest immunity).

29 Other confidential relationships are not protected by a class privilege, but may be protected on a case-by-case basis. Examples of such relationships include doctor-patient, psychologist-patient, journalist-informant and religious communications. The Wigmore test, containing four criteria, has come to govern the circumstances under which privilege is extended to certain communications that are not traditionally-recognized class privileges (Wigmore, *supra*, at p. 527):

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

30 Medical therapist records are different because, although a traditional common law privilege does not attach to these documents, a right to confidentiality exists upon balancing individual rights: the reasonable expectation of privacy of the third person versus the right to make full answer and defence to a criminal charge. The procedure for protection of such records is codified in ss. 278.1 - 278.9 of the *Criminal Code*, R.S.C. 1985, c. C-46.

C. Rationale of Solicitor-Client Privilege

31 The foregoing privileges, such as communication between a doctor and his patient, do not occupy the unique position of solicitor-client privilege or resonate with the same concerns. This privilege, by itself, commands a unique status within the legal system. The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself. The solicitor-client relationship is a part of that system, not ancillary to it. See *Fosty*, *supra*, per Lamer C.J. at p. 289:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication (see: *Geffen v. Goodman Estate*, *supra*, and *Solosky v. The Queen*, *supra*). In my view, religious communications, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor-client communications surely are.

It is this distinctive status within the justice system that characterizes the solicitor-client privilege as a class privilege, and the protection is available to all who fall within the class.

32 That solicitor-client privilege is of fundamental importance was repeated in *Jones*, *supra*, *per* Cory J. at para. 45:

> The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649, the importance of the rule was recognized:
>
> > The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, ... to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence ... that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept

> secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

33 The importance of solicitor-client privilege to both the legal system and society as a whole assists in determining whether and in what circumstances the privilege should yield to an individual's right to make full answer and defence. The law is complex. Lawyers have a unique role. Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.

D. Scope of Solicitor-Client Privilege

34 Despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances. *Jones*, *supra*, examined whether the privilege should be displaced in the interest of protecting the safety of the public, *per* Cory J. at para. 51:

> 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.

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

36 Not all communications between a lawyer and her client are privileged. In order for the communication to be privileged, it must arise from communication between a lawyer and the client where the latter seeks lawful legal advice. Wigmore, *supra*, sets out a statement of the broad rule, at p. 554:

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

37 As stated, only communications made for the legitimate purpose of obtaining lawful professional advice or assistance are privileged. The privilege may only be waived by the client. See M. M. Orkin, *Legal Ethics: A Study of Professional Conduct* (1957), at p. 84:

> It is the duty of a solicitor to insist upon this privilege which extends to "all communication by a client to his solicitor or counsel for the purpose of obtaining professional advice or assistance in a pending action, or in any other proper matter for professional assistance" [Ludwig, 29 C.L. Times 253; *Minet v. Morgan* (1873), 8 Ch. App. 361]. The privilege is that of the client and can only be waived by the client.

E. Full Answer and Defence

38 While solicitor-client privilege is almost absolute, the question here is whether the privilege should be set aside to permit the accused his right to full answer and defence by permitting him access to a complainant's civil litigation file. It is agreed that the file in this case qualifies for solicitor-client privilege. The solicitor-client privilege and the accused's *Charter* right to full answer and defence are both protected by law. Which prevails when they clash?

39 *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), at p. 607, opened this question:

> The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s. 11(*d*) of the *Charter*. It has long been recognized that an essential facet of a fair hearing is the "opportunity adequately to state [one's] case". ... This applies with particular force to the accused, who may not have the resources of the state at his or her disposal. Thus ... our courts have held that even informer privilege and solicitor-client privilege may yield to the accused's right to defend himself on a criminal charge: ... *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.).

40 Rules and privileges will yield to the *Charter* guarantee of a fair trial where they stand in the way of an innocent person establishing his or her innocence (see *R. v. Leipert*, [1997] 1 S.C.R. 281 (S.C.C.), at para. 24, *per* McLachlin J., as she then was). This Court has held that informer privilege will yield in circumstances where to fail to do so will result in a wrongful conviction. Our system will not tolerate conviction of the innocent. However, an accused's right to make full answer and defence in our system, while broad, is understandably not perfect. Section 7 of the *Charter* entitles an accused to a fair hearing but not always to the most favourable procedures that could possibly be imagined (see *R. v. L. (T.P.)*, [1987] 2 S.C.R. 309 (S.C.C.), *per* La Forest J., at p. 362).

F. Solicitor-Client Privilege vs. Full Answer and Defence

41 Solicitor-client privilege and the right to make full answer and defence are principles of fundamental justice. The right of an accused to full answer and defence is personal to him or her and engages the right to life, liberty, security of the person and the right of the innocent not to be convicted. Solicitor-client privilege while also personal is broader and is important to the administration of justice as a whole. It exists whether or not there is the immediacy of a trial or of a client seeking advice.

42 The importance of both of these rights means that neither can always prevail. In some limited circumstances, the solicitor-client privilege may yield to allow an accused to make full answer and defence. What are those circumstances?

G. Existing Tests

43 In determining those circumstances, there are two useful tests which help to identify when the right to make full answer and defence will prevail over the need for confidentiality. While useful, neither test sufficiently addresses the unique concerns evoked by solicitor-client privilege and, as explained later, more is needed.

44 The first test originated in *O'Connor*, *supra*, relative to procedures to govern production of medical or therapeutic records that are in the hands of third parties. Subsequently, Parliament codified the procedure in ss. 278.1 to 278.9 of the *Criminal Code* and its constitutionality was upheld in *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.). The *O'Connor* test and ss. 278.1 to 278.9 of the *Criminal Code* were created with the sensitivity and unique character of third party therapeutic records in mind. They focus on an individual's privacy interest and not the broader policy objectives underlying the administration of justice.

45 The other test is the innocence at stake test for informer privilege, see *Leipert*, *supra*. This test details the circumstances under which the identity of an informer might have to be revealed. The value of reliable informers to the administration of justice has been recognized for a long time, so much so that it too is a class privilege. This explains why the high standard of showing that the innocence of the accused is at stake before permitting invasion of the privilege is necessary. Should the privilege be invaded, the State then generally provides for the protection of the informer through various safety programs, again illustrating the public importance of that privilege. The threshold created by the innocence at stake test comes the closest to addressing the concerns raised in this appeal as it is appropriately high. Both informer privilege and solicitor-client privilege are ancient and hallowed protections. See *Leipert*, *supra*, *per* McLachlin J. at para. 12:

> Informer privilege is of such importance that once found, courts are not entitled to balance the benefit enuring from the privilege against the countervailing considerations, as is the case, for example, with Crown privilege or privileges based on Wigmore's four-part test:. ...

H. The Innocence at Stake Test for Solicitor-Client Privilege

46 In granting the respondent McClure access to the complainant's civil litigation file, the trial judge applied the *O'Connor* test for disclosure of confidential therapeutic records. With respect, this was an error. The appropriate test by which to determine whether to set aside solicitor-client privilege is the innocence at stake test, set out below. Solicitor-client privilege should be set aside only in the most unusual cases. Unless individuals can be certain that their communications with their solicitors will remain entirely confidential, their ability to speak freely will be undermined.

47 In recognition of the central place of solicitor-client privilege within the administration of justice, the innocence at stake test should be stringent. The privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction.

48 Before the test is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way.

49 By way of illustration, if the accused could raise a reasonable doubt at his trial on the question of *mens rea* by access to the solicitor-client file but could also raise a reasonable doubt with the defence of alibi and/or identification, then it would be unnecessary to use the solicitor-client file. The innocence of the accused would not be at stake but instead it is his wish to mount a more complete defence that would be affected. On the surface it may appear harsh to deny access as the particular privileged evidence might raise a reasonable doubt, nonetheless, the policy reasons favouring the protection of the confidentiality of solicitor-client communications must prevail unless there is a genuine danger of wrongful conviction.

50 The innocence at stake test is applied in two stages in order to reflect the dual nature of the judge's inquiry. At the first stage, the accused seeking production of a solicitor-client communication must provide some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to his guilt. At this stage, the judge has to decide whether she will review the evidence.

51 If the trial judge is satisfied that such an evidentiary basis exists, then she should proceed to stage two. At that stage, the trial judge must examine the solicitor-client file to determine whether, in fact, there is a communication that is likely to raise a reasonable doubt as to the guilt of the accused. It is evident that the test in the first stage (could raise a reasonable doubt) is different than that of the second stage (likely to raise a reasonable doubt). If the second stage of the test is met, then the trial judge should order the production but only of that portion of the solicitor-client file that is necessary to raise the defence claimed.

(1) Stage #1

52 The first stage of the innocence at stake test for invading the solicitor-client privilege requires production of the material to the trial judge for review. There has to be some evidentiary basis for the request. This is a threshold requirement designed to prevent "fishing expeditions". Without it, it would be too easy for the accused to demand examination of solicitor-client privileged communications by the trial judge. As this request constitutes a significant invasion of solicitor-client privilege, it should not be entered into lightly. On the other hand, the bar cannot be set so high that it can never be met. The trial judge must ask: "*Is there some evidentiary basis for the claim that a solicitor-client communication exists that could raise a reasonable doubt about the guilt of the accused*?"

53 It falls to the accused to demonstrate some evidentiary basis for his claim that there exists a solicitor-client communication relevant to the defence he raises. Mere speculation as to what a file might contain is insufficient.

54 That is then followed by a requirement that the communication sought by the accused could raise a reasonable doubt as to his guilt. This must be considered in light of what the accused knows. It is likely that the accused who, it must be remembered, has had no access to the file sought, may only provide a description of a possible communication. It would be difficult to produce and unfair to demand anything more precise. It is only at stage two that a court determines conclusively that such a communication actually exists.

55 The evidence sought should be considered in conjunction with other available evidence in order to determine its importance. It is the totality of the evidence that governs. However, when the accused is either challenging credibility or raising collateral matters, it will be difficult to meet the standards required of stage one.

56 Where an accused fails to show that the information sought could raise a reasonable doubt as to guilt, the solicitor-client privilege prevails.

(2) Stage #2

57 Once the first stage of the innocence at stake test for setting aside the solicitor-client privilege has been met, the trial judge must examine that record to determine whether, in fact, there exists a communication that is likely to raise a reasonable doubt as to the accused's guilt. The trial judge must ask herself the following question: "*Is there something in the solicitor-client communication that is likely to raise a reasonable doubt about the accused's guilt*?"

58 After a review of the evidence of the solicitor-client communication in question, the judge must decide whether the communication is *likely to raise a reasonable doubt* as to the guilt of the accused. In most cases, this means that, unless the solicitor-client communication goes directly to one of the elements of the offence, it will not be sufficient to meet this requirement. Simply providing evidence that advances ancillary attacks on the Crown's case (e.g., by impugning the credibility of a Crown witness, or by providing evidence that suggest that some Crown evidence was obtained unconstitutionally) will very seldom be sufficient to meet this requirement.

59 The trial judge does not have to conclude that the information definitely will raise a reasonable doubt. If this were the case, the trial would effectively be over as soon as the trial judge ordered the solicitor-client file to be produced. There would be nothing left to decide. Instead, the information must likely raise a reasonable doubt as to the accused's guilt. Also, upon reviewing the evidence, if the trial judge finds material that will likely raise a reasonable doubt, stage two of the test is satisfied and the information should be produced to the defence even if this information was not argued as a basis for production by the defence at stage one.

60 In determining whether or not the solicitor-client communication in question is likely to raise a reasonable doubt as to the guilt of the accused, the trial judge should consider that the communication in the solicitor-client file cannot be marginal but must be sufficient to establish the basis for its admission. It is the totality of the evidence then available that the trial judge considers in determining whether it is likely that the evidence can raise a reasonable doubt.

61 The difficulties described in successfully overcoming solicitor-client privilege illustrate the importance and solemnity attached to it. As described earlier, it is a cornerstone of our judicial system and any impediment to open candid and confidential discussion between lawyers and their clients will be rare and reluctantly imposed.

I. Application to the Case at Bar

62 In this case, the litigation file should not have been produced to the defence.

63 With respect, the trial judge erred in using the earlier *O'Connor* test for the production of third party confidential therapeutic records to govern whether the litigation file should have been produced to the defence.

64 The first stage of the innocence at stake test for solicitor-client privilege was not met. There was no evidence that the information sought by the respondent McClure could raise a reasonable doubt as to his guilt. Even if the chronology of events in this case — i.e. lawyer, police, therapist, civil suit — was unusual, it does not justify overriding solicitor-client privilege. This "unusual" chronology does not rise to a level that demonstrates that the litigation file could raise a reasonable doubt as to guilt and so fails at the first stage.

65 In addition, the accused would be able to raise the issue of the complainant's motive to fabricate events for the sake of a civil action at trial from another source, simply by pointing out the sequence of events and the fact that a civil action was initiated.

66 The third party appellant, J.C., could not appeal the interlocutory order for production of his litigation file because he was not a party in the criminal trial. Instead, he applied directly to this Court pursuant to s. 40(1) of the *Supreme Court Act* for leave to appeal the final order ordering production of his litigation file. This avenue of appeal is unsatisfactory. The usual avenue for appeal should be to the court of appeal of the province. That court has broad powers of review and is the desirable forum for appeals of first instance. This appeal is not the first demonstration of the anomaly of a direct appeal of an interlocutory order to the Supreme Court of Canada. The only apparent method of resolving this problem is by legislative amendment. It is appropriate to echo the statements of Lamer C.J. in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), in dealing with a similar situation when, at p. 874, he said:

> I hope that Parliament will soon consider filling this jurisdictional *lacuna* and establishing statutory rights of appeal for third parties. ...

V. Disposition

67 The appeal is allowed and the order for production by Hawkins J. is set aside.

Appeal allowed.

Pourvoi accueilli.

TAB 20

1999 CarswellOnt 2898
Ontario Court of Appeal

General Accident Assurance Co. v. Chrusz

1999 CarswellOnt 2898, [1999] O.J. No. 3291, 124 O.A.C. 356, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, 45 O.R. (3d) 321, 92 A.C.W.S. (3d) 26

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)

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.

***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 1 st , 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, stating at p. 26:

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

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

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

35 After a thorough analysis of the authorities, the principal one of which is *Lyell v. Kennedy (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 communication. ...

67 In attempting to reconcile these principles, I do not start from the premise that one principle, access to all the facts, is a good thing in that it promotes the search for truth and that the other principle, confidentiality, is a necessary evil to be tolerated only in the clearest of situations. Both principles have a positive value to the community and individuals, and when viewed from a broad perspective, both serve the goal of ascertaining truth by means which are consistent with the important societal values of fairness, personal autonomy and access to justice.

The Facts:

68 The appellants ("Chrusz") are the owners of a hotel property in Thunder Bay. The respondent insurers insured that property against fire loss. The respondent, General Accident Assurance Company ("General Accident"), is the lead insurer and has carriage of this litigation. For 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." [1] His suspicion was based on the finding of traces of an accelerant in the bar area of the hotel. That part of the hotel had been leased by Chrusz to a tenant.

70 On November 16, 1994, upon being informed of the possibility of arson, Mr. Cook retained Mr. David Eryou, a barrister and solicitor, "for the purpose of determining any and all issues relating to the loss occasioned to the insured premises." The retainer extended to "what type of strategy could be taken with respect to the proof of loss when it was submitted by the insured party, and general legal advice on processing of the claim as long as the file was open." On the same day, Mr. Cook told Mr. Bourret that Mr. Eryou had been retained and that Mr. Bourret "was to investigate the fire loss and report directly to Mr. Eryou." Mr. Bourret confirmed these instructions with Mr. Eryou and further confirmed that he was to take instructions from Mr. Eryou in respect of his investigation.

71 Mr. Bourret prepared some 19 reports between November 1994 and October 1996. The first two reports, dated November 24 and December 16, 1994, were sent to General Accident with copies to Mr. Eryou. Beginning with the third report, dated January 12, 1995, the remaining reports were sent to Mr. Eryou. General Accident did not receive copies of these reports. [2]

72 On January 9, 1995, Chrusz delivered a proof of loss claiming over $1.5 million. Shortly afterwards (no date is specified in the material), General Accident advanced $100,000.00 in partial payment of the claim. In April 1995, General Accident agreed to advance a further $505,000.00 to Chrusz and paid some part of that amount before May 23, 1995. There is no suggestion in the record that arson, or at least the possible involvement of Chrusz in any arson, remained a concern when these payments were made.

73 On May 23, 1995, matters took a dramatic turn. Mr. Pilotte made a lengthy statement under oath to Mr. Bourret and Mr. Eryou. Although privilege is claimed with respect to the statement, subsequent events make it clear that Mr. Pilotte made

allegations that Chrusz was attempting to dishonestly inflate his insurance claim. [3] Mr. Pilotte also turned over a videotape and certain business records to Mr. Eryou. According to Mr. Pilotte, he made these disclosures on his own initiative to clear his conscience and for no other reason. Mr. Pilotte had been fired by Chrusz about four months earlier.

74 The statement was transcribed. Although Mr. Pilotte did not request a copy, Mr. Eryou promised to give him one and asked that he keep it confidential. On June 2, 1995, Mr. Eryou turned a copy of the transcript of the statement and a copy of the videotape that he had received from Mr. Pilotte over to Mr. Pilotte's lawyer.

75 On June 3, 1995, General Accident commenced an action against Chrusz alleging fraud, concealment and misrepresentation. According to the statement of claim, General Accident became aware of Chrusz's fraud on May 23, 1995, the date on which Mr. Pilotte made his statement to Mr. Eryou. General Accident sought a declaration that Chrusz's insurance policy was void and a declaration that it was entitled to the return of the money paid under that policy. It also claimed damages in excess of $1 million.

76 On November 14, 1995, Chrusz filed a statement of defence and denied the allegations. Chrusz also counterclaimed against General Accident, Mr. Bourret and his company. In addition to claiming that General Accident had breached its obligations under the insurance contract, Chrusz alleged that General Accident had improperly relied on the "reckless, uncorroborated and malicious" statements of Mr. Pilotte. The counterclaim also made a claim against Mr. Pilotte for defamation. Although not particularized, the claim would appear to be based in part on the statement made by Mr. Pilotte on May 23, 1995.

The Privilege Claims Advanced by the Respondents:

77 The documents over which the insurers claimed privileged are described in Schedule "B" to the affidavits of documents of Mr. Bourret and Mr. Cook. Many of the documents referred to in Schedule "B" of Mr. Bourret's affidavit are obviously the product of his investigation of the fire (e.g. blueprints, photographs, drawings, videotapes, reports). Other documents referred to in that schedule are not adequately described to permit any inference as to their subject matter or purpose (e.g. 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 23 rd 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 counter-claim, he may be examined for discovery on steps he, or others on his behalf, took to investigate the fire as well as on observations made and information gathered in the course of that investigation.

91 The rationale underlying the privilege informs the perimeters of that privilege. It is often justified on the basis that without client-solicitor privilege, clients and lawyers could not engage in the frank and full disclosure that is essential to giving and receiving effective legal advice. Even with the privilege in place, there is a natural reluctance to share the "bad parts" of one's story with another person. Without the privilege, that reluctance would become a compulsion in many cases: *Anderson v. Bank of British Columbia* (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* , 4 th 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 litigation privilege. At this stage of my reasons, I am concerned only with the client-solicitor privilege claim and not the litigation privilege claim. There is also no distinction to be drawn between communications made before May 23, 1995 and those made after that date when assessing the client-solicitor privilege claim. That date becomes important when the litigation privilege claim is considered.

104 Claims for client-solicitor privilege, unlike claims for litigation privilege, are usually framed in terms of communications directly between a client and a solicitor. It is, however, well-settled that client-solicitor privilege can extend to communications between a solicitor or a client and a third party: [4] *Bunbury v. Bunbury* (1839), 48 E.R. 1146 (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 unanimously held that the communications between the surveyor and the solicitor were not protected by client-solicitor privilege. Cotton L.J. concluded at p. 684:

> ... It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must also be privileged. That is a fallacious use of the word "representatives." If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice . [Emphasis added.]

109 *Wheeler* has not escaped academic criticism: see J.D. Wilson, *Privilege in Experts' Working Papers* (1997), 76 Can. Bar Rev. 346 at 361-365. But it has received repeated judicial approval here and in other common law jurisdictions: see *Learoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. D. 686 (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. [5]

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

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

127 The position of the Divisional Court provides incentive to a client who has the necessary means to direct all parties retained by the client to deposit any information they gather with the client's lawyer so as to shield the results of their investigations with client-solicitor privilege. The privilege would thus extend beyond communications made for the purpose of giving and receiving legal advice to all information relevant to a legal problem which is conveyed at a client's request by a third party to the lawyer. This view of client-solicitor privilege confuses the unquestioned obligation of a lawyer to maintain confidentiality of information acquired in the course of a retainer with the client's much more limited right to foreclose access by opposing parties to information which is material to the litigation. Client-solicitor privilege is intended to allow the client and lawyer to communicate in confidence. It is not intended, as one author has suggested, to protect "... all communications or other material deemed useful by the lawyer to properly advise his client...": Wilson, *Privilege In Experts' Working Papers, supra* , at 371. While this generous view of client-solicitor privilege would create what clients might regard as an ideal environment of confidentiality,

it would deny opposing parties and the courts access to much information which could be very important in determining where the truth lies in any given case.

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

129 The true function assigned to Mr. Bourret by General Accident must be determined from the entirety of the circumstances. Mr. Bourret's or General Accident's characterization of his function is not determinative of one of the very issues that the motion judge was called upon to decide: *Hamalainen (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. [6] The affidavits of Mr. Bourret and Mr. Cook indicate that Mr. Bourret was to report the results of his investigations to Mr. Eryou and take instructions from him. The affidavits do not suggest that Mr. Bourret was given any authority to seek legal advice from Mr. Eryou on behalf of General Accident, or any authority to give instructions on legal matters on behalf of General Accident to Mr. Eryou. His authority did not reach inside the client-solicitor relationship between Mr. Eryou and General Accident. Instead, Mr. Bourret's function was to educate Mr. Eryou as to the circumstances surrounding the fire so that General Accident could receive the benefit of Mr. Eryou's informed advice and could instruct Mr. Eryou as to the legal steps to be taken on its behalf.

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

The Litigation Privilege Claims:

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

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

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

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

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

• his adoption of the dominant purpose test as being consistent with contemporary notions of full pre-trial discovery [paras. 29-32];

• his conclusion that any litigation privilege General Accident may have had with respect to communications prior to May 23rd disappeared when General Accident no longer suspected Chrusz of any involvement in arson [paras. 50-54]; and

• his conclusion that communications from or to Mr. Bourret by General Accident and or Mr. Eryou after May 23rd are subject to litigation privilege assuming they are not subject to disclosure under the applicable *Rules of Civil Procedure* [para. 56].

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

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

136 Carthy J.A., while acknowledging the line of authority which supports the position taken by the Divisional Court, prefers the view of Craig J.A., in dissent, in *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (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 permits production upon a showing by the party seeking production that there is "a substantial need" for the material and that the party is "unable without undue hardship to obtain the substantial equivalent of the material." This statutory language reflects some of the factors which, in my view, should be considered in determining whether a document should be produced even though it fulfills the conditions precedent to the operation of litigation privilege. [7]

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

151 Litigation privilege claims should be determined by first asking whether the material meets the dominant purpose test described by Carthy J.A. If it meets that test, then it should be determined whether in the circumstances the harm flowing from 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. [8]

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

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

156 I am satisfied that all or parts of the statement are potentially admissible as substantive evidence. To the extent that it contains admissions against interest, it is clearly admissible against Mr. Pilotte. I am also satisfied, given the circumstances in which the statement was made, that all or parts of it may be admissible under the principled approach to hearsay evidence: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (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.

Appeal allowed.

Footnotes

1 In his affidavit in support of the privilege claim, Mr. Cook states that Mr. Bourret said that "the fire had been deliberately set." Given subsequent events, it would appear that Mr. Bourret's recollection is more accurate.

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

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

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

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

6 The insignificance to Mr. Bourret's function resulting from the insertion of Mr. Eryou into the relationship is evident by the fact that Mr. Bourret's reports did not start to go to Mr. Eryou directly until some two months later.

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

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

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

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

TAB 21

1988 CarswellBC 437
British Columbia Court of Appeal

Hodgkinson v. Sims

1988 CarswellBC 437, [1988] B.C.J. No. 2535, [1988] B.C.J. No. 5235, [1989] 3 W.W.R. 132, 13 A.C.W.S. (3d) 60, 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 47 C.C.L.T. 94, 55 D.L.R. (4th) 577

HODGKINSON v. SIMMS, WALDMAN and SIMMS & WALDMAN

McEachern C.J.B.C., Taggart and Craig JJ.A.

Heard: November 18, 1988
Judgment: December 13, 1988
Docket: Vancouver No. CA010003

Counsel: *G. Walsh*, for appellant.
G. Urquhart and *S.M. Larter*, for respondents.

***McEachern C.J.B.C. (Taggart J.A.* concurring):**

1 This appeal [from [1988] B.C.W.L.D. 3523] is concerned with an important practice question relating to the privilege of a solicitor's brief, particularly 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.

2 The plaintiff alleges that he invested substantial funds in MURB projects on the advice of the defendant accountants. The investments not having turned out as expected, the plaintiff alleges various breaches of duty including the acceptance by the defendants of secret commissions from the MURB developers, and negligence in the advice upon which the plaintiff says he relied. These investments were made in 1980 and 1981.

3 The defendants have moved their offices four times since these investments were made and there have been mergers with other firms and departures of accountants within this firm, as a consequence of which the defendants say they do not have complete files on some or all of these transactions.

4 The plaintiff's solicitor, however, has conducted investigations in the course of which he has obtained photocopies of numerous documents said to be relevant to the issues in the action for which he claims privilege. The plaintiff says the defendants could find these documents for themselves but the defendants, without making very serious investigations, say they are entitled to see the documents the plaintiff's solicitor has "ingathered" into his brief as they are not privileged.

5 These documents have been mentioned in the plaintiff's supplementary list of documents in the following terms:

> Documents obtained by the Solicitor for the Plaintiff after this litigation arose for the dominant purpose of preparing for this litigation and forming a part of the Plaintiff Solicitor's brief ...

6 Following the above are 31 separate items which may be illustrated by quoting just a few:

> 1. 80 06 12 to 84 01 15 ..... 64 photocopied documents
>
> 2. Undated ..... 2 photocopied documents
>
> 3. Undated ..... 4 handwritten documents (photocopies)

13. 80 09 02 to 85 12 03 ..... 15 photocopied documents

26. Various ..... 7 photocopied documents

7 It is apparent that a serious question of practice arises. The defendants say there is no privilege for copies of unprivileged documents and for that reason, and for the further reason that there is said to be a general trend toward full disclosure and the avoidance of ambush, the plaintiff must disclose these documents.

8 The plaintiff says such copies are privileged and that great mischief will result if, in an adversarial system, counsel of one party is entitled to "dip" into the solicitor's brief of opposing counsel.

9 The learned chambers judge, in a careful judgment, applied the dominant purpose theory. He concluded (at appeal book pp. 57-59) [pp. 10-12]:

> For a "communication" from a third party to attract the privilege, he who has caused it to come into being (its genesis) must have done so with the dominant purpose of its being used by the solicitor in the matter of his forming an opinion with respect to an issue or issues arising in litigation already underway or of litigation of which there is a reasonable prospect of becoming underway. *Shaughnessy Golf & Country Club v. Uniguard Services Ltd.* (1986) 1 B.C.L.R. (2d) 309 (C.A.), and *Lust v. Lewis*, Vancouver No. CA 008155, 27th November 1987 (not yet reported) ...
>
> It is manifest that whoever was the author of the original documents whose existence Mr. Walsh has uncovered, and of which he holds copies, that author did not create them with the dominant purpose of their being used in this litigation. Mr. Walsh ingathered them with that dominant purpose, but he was not their creator. Accordingly, they do not satisfy the dominant purpose test and were it not for certain authorities to which I am about to refer, I would not hesitate to hold that these copies held by Mr. Walsh are not entitled to the protection of the privilege.

10 The chambers judge went on to discuss a number of authorities, particularly *Lyell v. Kennedy* (1884), 27 Ch. D. 1 (C.A.); *Re Hoyle Indust. Ltd.*, [1980] C.T.C. 501, 80 D.T.C. 6363 (Fed. T.D.); *Crown Zellerbach v. Dep. A.G. Can.*, [1982] C.T.C. 121, 82 D.T.C. 6116 (B.C.S.C.), which appear to support the claim to privilege but nevertheless concluded there is a material distinction between collections of documents which were in issue in those cases and the copies of documents in dispute in this case. At p. 61 he said [p. 14]:

> It seems to me that there is a material distinction between the "documents" collected in these tax cases and the copies of the "documents" (other than the "communications" referring to these "documents") ingathered by Mr. Walsh. The former were "communications", properly speaking, as described by Esson, J. in *Crown Zellerbach*, supra, at p. 123, whereas the latter never were.

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

12 Similarly, I do not find it helpful to attempt a distinction between solicitor privilege and the "lawyer's work product" that was recognized by the United States Supreme Court in the leading case of *Hickman v. Taylor*, 67 S. Ct. 385, 329 U.S. 495, 91 L. Ed. 451 (1946), and which distinction some commentators attempt to extract from some of the cases: Neil J. Williams, "Civil Litigation Trial Preparation in Canada" (1980), 58 Can. Bar Rev. 1 at p. 50. "Lawyer's work product" is a convenient term to describe the kinds of material that, subject to controlling authorities such as *Voth*, infra, are protected by privilege, but I see no need to recognize a separate category of immunity against production.

13 The learned chambers judge also perceived a policy, said to be approved by this court, of moving "from privilege to complete disclosure." This is said to arise from two unreported decisions of this court which are mentioned in *Wipfli v. Britten* [1979 CarswellBC 1565 (B.C. S.C.)], which is also unreported, Vancouver No. C781186, 15th May 1979.

14 The first of these decisions, *Gergely v. Ellingson*, CA780747, 11th September 1978 (unreported), was a case where the defendant driver, who had vision difficulties, was ordered to submit to a medical examination and to submit his eyeglasses for inspection and analysis.

15 The second case was *Blackstock v. Patterson*, CA780814, 3rd November 1978 [9 C.P.C. 277, 95 D.L.R. (3d) 362], where there was a question about who was driving a vehicle, and certain portions of a damaged motor vehicle, which carried signs of human blood and hair, were ordered produced for inspection and analysis.

16 The *Wipfli v. Britten* case related to an application to have the plaintiff, a birth-damaged child, examined by a physician appointed by the defendants.

17 In each of these three decisions there are pronouncements about the advantages of full disclosure. In *Gergely* the court stated that the modern philosophy is that trials by ambush should be avoided and there should be full disclosure. It is said that both sides should be fully informed of the other's case for two purposes, (1) to prevent ambush if a trial does take place, and (2) to facilitate settlement before proceeding to trial on known facts.

18 I pause to say that I have difficulty with the word "ambush" in connection with this case. Documents to be relevant would have to relate to the transactions in question and the defendants are just as able as the plaintiff to make the inquiries necessary to discovery these documents. One who seeks to ambush another does not disclose that fact in advance.

19 While I have no hesitation associating myself with the fullest possible disclosure, it seems to me with respect that the cases cited are not authority for the proposition that privilege must give way to disclosure. In fact, the cases cited do not deal with solicitor's privilege at all. There are strong and valid reasons for privilege which should not lightly be diluted, and conflicting policies, even where they collide head-on, often coexist, with one subject to the other. While I favour full disclosure in proper circumstances, it will be rare, if ever, that the need for disclosure will displace privilege.

20 In my view it is highly desirable to maintain the sanctity of the solicitor's brief which has historically been inviolate. The cases are replete with explanations for such a privilege. In *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at 33-34, [1969] C.T.C. 353, 69 D.T.C. 5278, Jackett P., in a much quoted passage, said:

> Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

21 With respect, I do not think the learned president has fully explained the reason for a solicitor's privilege and I would place possible misunderstandings of context at the lower end of the scale of importance. More to the point, in my view, is the statement of Cotton L.J. in *Lyell v. Kennedy*, supra, at pp. 18-19 where he said:

> Now the only privilege which can be claimed, and such as here the Defendant desires to claim, is what is called "professional privilege," that is to say, that if a man does not employ a solicitor he cannot protect that which, if he had employed a solicitor, would be protected; the reason for this privilege being, as has frequently been stated, that the English law being technical, the greatest facilities ought to be afforded to every one who is involved in litigation to consult a solicitor and to

receive from his solicitor communications which shall be privileged, and to enable the legal adviser of the party employing him to make a sufficient investigation, and so obtain the fullest means of ascertaining what advice he shall give as to the course to be adopted, without affording the opportunity to an opponent of prying into those communications, those searches, those responses, which are according to English law all of a confidential character.

22 To the same effect are the judgments in *Anderson v. Bank of B.C.* (1876), 2 Ch. D. 644 (C.A.), as follows:

> Again, the solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as solicitor for the purpose of the litigation, and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor. You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged. (per Jessel M.R. at pp. 649-50)
>
> Looking at the *dicta* and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief. (per James L.J. at p. 656)

23 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.

24 Thus it appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely, (a) confidential communications with a client, and (b) the contents of the solicitor's brief, it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.

25 It is obvious, however, that everything a client says to a solicitor and everything a solicitor does or collects cannot be privileged and it is important to define, with as much precision as possible, what falls within and what falls outside the privilege.

26 There are really two overlapping questions here. The first problem relates to the dominant purpose rule and the second is whether solicitor's privilege extends to the kind of documents in question on this application.

1. The dominant purpose rule

27 In *Voth Bros. Const. (1974) Ltd. v. North Vancouver Sch. Dist. 44 Bd. of Sch. Trustees*, 29 B.C.L.R. 114, [1981] 5 W.W.R. 91, 23 C.P.C. 276, and *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 Int. Inc.)* 26 D.L.R. (4th) 298, this court adopted the dominant purpose rule described in *Waugh v. Br. Ry. Bd.*, [1980] A.C. 521, [1979] 3 W.L.R. 150, [1979] 2 All E.R. 1169 (H.L.). That rule is stated in the following terms [*Voth*, p. 117, quoting Barwick C.J. in *Grant v. Downs*]:

> ... 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.

28 It is conceded by plaintiff's counsel that the original documents he discovered in his investigation, being documents which were created before litigation was anticipated, and not for the purpose of litigation, are not privileged and he asserts no claim in that behalf.

29 It is also apparent, in my view, that the photocopies of these unprivileged documents, resting in Mr. Walsh's brief, were produced or brought into existence with the dominant purpose of being used in the conduct of litigation.

30 Mr. Urquhart argues that a copy of a pre-existing unprivileged document cannot become privileged by being added to counsel's brief. Mr. Walsh disagrees. It is necessary to turn to the second question.

2. Does solicitor's privilege extend to these copy documents?

31 The starting point in any discussion of solicitor's privilege is *Lyell v. Kennedy*, supra, the facts of which are significantly close to the facts of this case. It was a pedigree action where the solicitor for a party procured copies and extracts from certain entries in public registers and also photographs of certain tombstones and houses, for all of which privilege was claimed.

32 This claim to privilege was challenged but the Court of Appeal upheld the privilege. Cotton L.J. at pp. 25-26 said:

> What ought we to do here? Here is a litigation about pedigree and the heirship to a lady who died many years ago; and it is sworn by the Defendant that for the purpose of defending himself against various claimants he has made inquiries, and that he has obtained every one of those documents for the purpose of protecting himself, and that he has got them, not himself personally, but that his solicitors have got them, for the purpose of his defence, for the purpose of instructing his counsel, and for the purpose of conducting this litigation on his behalf. Now no case has been quoted where documents obtained under such circumstances have been ordered to be produced. 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.

33 Mr. Walsh argues that there is no proper distinction between a photograph of an unprivileged tombstone and a photocopy of an unprivileged document, provided of course that they are both obtained for the purposes of litigation.

34 In the same case, Bowen L.J. at p. 31 said:

> Then comes the point as to documents, and as to the documents, I agree with everything that has been said by the Lord Justice. We are not dealing now with documents which the party has procured himself; we are dealing with documents which have been procured at the instigation of a solicitor; and, bearing in mind the rule of privilege which the law gives in respect of information obtained by a solicitor, it seems to me we cannot make the order asked for by Mr. *MacClymont* without doing very serious injustice in this case. A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or *virtuoso*, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them. I entirely agree, therefore, with what has been said, and without saying what ought to be done in another case, I am satisfied that in this case we could not make the order asked for without infringing the principle on which the Court acts, nor is it necessary to say what would be done as to any particular document if a right to inspection were made out.

35 In *Watson v. Cammell Laird & Co.*, [1959] 1 W.L.R. 702, [1959] 2 All E.R. 757 (C.A.), the solicitors for the plaintiff in a personal injury case made a copy of case notes prepared by a hospital regarding the plaintiff's treatment. After that the hospital refused the defendant similar access to its records. In an application to require the plaintiff to disclose its notes, there being no equivalent to our R. 26(11), it was held that the notes were privileged. At pp. 703-705 Lord Evershed M.R. said:

> ... the facts are clear: this document, this copy of the case notes, was undoubtedly, and admittedly, prepared by the solicitors for the plaintiff after the litigation had either commenced or was — clearly — contemplated; and also it is not in doubt

that the document was prepared by the solicitors for the purpose of assisting and advising their client, the plaintiff, in connection with his claim ...

It has, however, been contended with vigour by Mr. Clothier that that general rule ought not to apply where the document is a mere verbatim copy of a document not itself the subject of privilege, because, he says, the making of such a copy involves in itself no exercise of skill, properly so called. He says that if the solicitor had exercised some kind of eclectic judgment in making the copy, leaving out bits that were irrelevant or unhelpful, then it would be another matter: but since (says he) the actual case notes would be liable to be produced at the trial, on service on the appropriate hospital officer of a subpoena duces tecum, and since therefore the original would never be privileged, in any proper sense, so a mere verbatim copy can be in no better position.

I am unable to accept that view. The question of privilege does not really have any significance in regard to the original: that is a document which is not, and never has been, in the possession or power of the plaintiff. It is a document which is in the possession of a third party; and undoubtedly by the appropriate means it can be produced at the trial. But that fact seems to me to have very little to do with the question whether this document — this copy document — did or did not come into existence in the way I have indicated, namely, by being obtained by the solicitor for the purpose of advising his client in regard to the litigation ...

It seems to me that in this case (as in *The Palermo*) the document with which we are concerned is a copy which was made by the plaintiff's advisers for the purposes of the litigation in which the solicitors were acting for the party. That being so, it seems, I think, clear that the judge was right to say that he could not make the order.

36 The same conclusion had been reached in chambers and on appeal in *The Palermo* (1883), 9 P.D. 6 (C.A.), which was cited in *Watson v. Cammell Laird*.

37 There are two cases on point in Canada. First, in *Re Hoyle Indust. Ltd.*, supra, privilege was claimed for files seized from a solicitor in the course of an investigation into a tax fraud. The solicitor who was retained after the investigation commenced requested the client to obtain copies of certain telex messages from third parties. With respect to these copies, Collier J. at p. 503 said:

This was, it appears to me, necessary for the solicitor to advise the clients as to their position. It was contended by the Crown that no privilege attached to the originals in the first instance; therefore no privilege could attach to the copies obtained at a later date. I agree, speaking generally, that copies of non-privileged documents are themselves not privileged.

But there are situations where the copies may, and in particular circumstances, acquire the category of privilege. See *Lyell v. Kennedy*, [1884] 27 Ch. D. 1. I quote from the head note:

> Held (affirming Bacon, VC), that although mere copies of unprivileged documents were themselves unprivileged, the whole collection, being the result of the professional knowledge, skill, and research of his solicitors, must be privileged — any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case.

That principle, in my view, applies in this case. The whole file, including the copies of the telexes, is privileged, and will be returned to the solicitors.

38 The same conclusion was reached by Esson J. (as he then was) in *Crown Zellerbach Can. Ltd. v. Dep. A.G. Can.*, supra, where he said at p. 124:

In respect of a number of the files, I have applied the rule that where the documents or copies of documents which are not otherwise privileged from part of the collection assembled by or at the request of the lawyer, the whole of the collection is privileged: *Lyell v. Kennedy* (1884), 27 Ch. D. 1. That rule was applied by Collier, J. *In re Hoyle Industries Ltd. and Hoyle Twines Ltd...*

39 In the schedule to his judgment Esson J. said, with respect to a particular file (at p. 129):

> **23. Bleach Kraft Pulp Contract — CZ Corp and Elk Falls Co. Ltd. — A1-51**
>
> This is a large file including a number of memoranda which appear elsewhere in the files. It apparently was assembled in relation to the present issues as to tax liability and while litigation was in contemplation. Mr. Thorsteinsson was involved in some parts of it. The whole of the file is privileged.

40 Lastly, in connection with this historical review of cases, is *R. v. Bd. of Inland Revenue; Ex parte Goldberg*, [1988] 3 W.L.R. 522, [1988] 3 All E.R. 248 (Q.B.), which was apparently not before the learned chambers judge in this case. The Board of Inland Revenue was investigating certain transactions relating to commissions allegedly paid to a Mr. Al-Atia on oil shipments from Abu Dhabi to an American company. Mr. Rickless, an American attorney based in London, took copies of docu ments in the possession of Mr. Al-Atia and delivered them to Mr. Goldberg, a barrister in London, for the purpose of obtaining legal advice for clients including Mr. Al-Atia, whose whereabouts, along with the documents, had become unknown. The board sought access to these copy documents and other documents in the possession of Mr. Goldberg. At p. 532 the court said:

> But in this case we are concerned with copy documents which, on the evidence, came into existence for the purpose and only for the purpose of obtaining legal advice from Mr. Goldberg. As the law stands we have no hesitation in saying that because the documents came into existence for that purpose they do attract privilege so that Mr. Goldberg cannot without the consent of his client comply with the requirements of the notice which has been served upon him. It may be that the documents are also privileged because as Mr. Rickless asserts in his affidavit he personally "reviewed and photocopied the relevant files." If the review involved a process of selection as to what should be photocopied and submitted to counsel then it would seem to follow that the product of that review is also privileged for the reasons set out in *Lyell v. Kennedy*, 27 Ch. D. 1, but we do not find it necessary finally to decide whether or not that was the case.

41 As I have said, these passages seem to furnish strong support for the claim to privilege which has been made in this case.

42 But Mr. Urquhart refers to a number of passages in these and other judgments as authority for the proposition that a copy of a pre-existing unprivileged document does not become privileged just because it is given to a legal adviser. He cites the dictum of Lord Blackburn in *Lyell v. Kennedy* (1883), 9 App. Cas. 81 (H.L.), at p. 87:

> I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action," or "in the course of litigation." That would be no privilege at all.

43 I confess I do not understand what is meant by this passage. I think it means that if a party is entitled to see an unprivileged deed, it does not become privileged because it is obtained by a lawyer. I do not think Lord Blackburn was directing his mind to a situation under consideration in this case but I agree that a document or a copy of a document in the possession of a party before litigation, or "ingathered" by a party before that time in the ordinary course of events and not for the dominant purpose of litigation, does not become privileged just because it or a copy of it is later given to a solicitor.

44 Next, Mr. Urquhart refers to the passage from *Re Hoyle*, supra, quoted above, where Collier J. said that, generally speaking, copies of non-privileged documents are themselves not privileged. But, as also quoted above, that learned judge went on to say that there are situations where such copies are privileged, particularly where a collection of such documents is the product of professional knowledge, skill and research.

45 Mr. Urquhart also referred to *Buttes Gas & Oil Co. v. Hammer*, [1981] Q.B. 223, [1980] 3 W.L.R. 668, [1980] 3 All E.R. 475, where Lord Denning M.R. at p. 244 said in obiter:

> ... if the original is not privileged, a copy of it also is not privileged — even though it was made by a solicitor for the purpose of the litigation: see *Chadwick v. Bowman* (1886), 16 Q.B.D. 561.

46 Lord Denning M.R. also went on to say that there are cases which "appear to give privilege to copies on their own account, even when the originals are not privileged" and he cited *The Palermo* and *Watson v. Cammell Laird & Co.*, both supra. He also referred to the Sixteenth Report of the Law Reform Committee on Privilege in Civil Proceedings (1967), which doubted the authority of some of the older cases and went on to recommend the abolition of privilege for copy documents.

47 *Buttes Gas & Oil Co. v. Hammer* was considered in *Goldberg*, supra, at p. 530 where the comments of Lord Denning M.R. were said to be obiter and were expressly not followed.

48 Mr. Urquhart also argues that these authorities, except *Goldberg*, were decided before *Waugh* and *Voth* but they do not conflict with those authorities unless it may be said that no distinction can be made between originals and copies. Considering the purpose for privilege, I see no reason why a collection of copy documents which satisfy all the requirements of *Voth*, including literal creation, should not be privileged even though the uncollected originals are not privileged because they do not satisfy the same test.

49 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.

50 I reach this conclusion because of the authorities cited which state the law accurately and authoritatively and because this does no violence to the dominant purpose rule established by *Waugh* and *Voth*, both supra. This conclusion merely extends the application of that rule to copies made for the dominant purpose of litigation. It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test (*Voth*) as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not.

51 I would not wish it thought that the foregoing applies only to collections of copies. It could apply also to a single copy document, or to a number of unrelated copies if they meet the test of *Voth* as I have described it.

52 Mr. Walsh adds a further argument with which I respectfully agree. He says that what the defendants seek is not just to look at these copy documents but also to look into counsel's mind to learn what he knows, and what he does not know, and the direction in which he is proceeding in the preparation of his client's case. That, in my view, would be a mischief that should be avoided.

53 I turn to another question which was argued before us. There is no doubt the onus of establishing privilege rests with the party claiming or alleging that a document is privileged: *Steeves v. Rapanos*, 39 B.C.L.R. 60, [1982] 6 W.W.R. 244, 29 C.P.C. 141 (S.C.).

54 In this case the claim to privilege was made in the language quoted which was taken from Lord Atkin's Court Forms and Precedents in Civil Proceedings (1941), vol. 8, p. 49.

55 In my view, the claim is adequately made in the plaintiff's supplementary list. But the authorities are clear that the documents for which privilege is claimed must be sufficiently identified so that the court may make an effective order for production in a proper case. I do not think the plaintiff has sufficiently described the documents in its supplementary list. The plaintiff has a difficult problem in this connection because it does not wish to even hint at the nature or source of the document. Presumably there is some order in the organization of the documents on the supplementary list and I think it would be sufficient if the plaintiff followed the practice with respect to each item in its list suggested in Lord Atkin's 1983 edition, vol. 15, p. 115, as follows:

> Letters ... and copies ... tied up in a bundle marked "A.B. 1", numbered consecutively Nos. 1-26, the same being initialled by me.

56 I do not suggest the documents must be described such as "letters"; "documents" would be sufficient. If this is done the parties will know that documents being produced by an order for production or at trial, if any, have been disclosed on the list.

57 But in the particular circumstances of this case I would not deprive the plaintiff of its right of privilege because of an insufficient identification of the documents. The plaintiff must, however, forthwith deliver an amended supplementary list.

58 I would allow the appeal and dismiss the defendants' application for production with costs to the plaintiff throughout.

Craig J.A. **(dissenting):**

59 The plaintiff appeals from the judgment of a judge in chambers [[1988] B.C.W.L.D. 3523] ruling that copies of certain documents in his possession were not privileged.

60 The Chief Justice has set out the facts and circumstances in his reasons for judgment, and I will not repeat them except to the extent that I feel it necessary to illustrate why I have reached a different conclusion from my colleagues. I would dismiss this appeal. I would rigidly circumscribe the ambit of the lawyer brief privilege.

61 Rule 26(1) requires a party to an action to deliver, on demand, a list of documents which are or have been in his possession or control relating to any matter in question in the action and produce these documents. The courts have universally adopted the judgment of Lord Esher in *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at 63 (C.A.), as determining when a document relates to a matter in question. Rule 26(2) provides that where a claim is made that a document is "privileged from production", counsel must claim privilege for a specified document and "a statement of the grounds of the privilege."

62 Counsel for the plaintiff relies on the case of *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, Jackett P. stated that there were two principles involved in legal professional privilege. I will refer to them, briefly, as (1) solicitor-client privilege and (2) lawyer brief privilege (sometimes referred to as litigation privilege). According to Jackett P. the privilege under (2) relates to "all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated ..."

63 Although counsel for the plaintiff concedes that the original of the documents obtained from third parties are not privileged, he submits that the photocopies are privileged because they were obtained in the course of preparing the lawyer's brief. I think that it is appropriate to recall what Wigmore said about solicitor-and-client privilege (adopted by the Supreme Court in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, [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 [Alta.]). In vol. 8, (McNaughton rev.) para. 2285, p. 527, Wigmore states:

> Looking ... upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception ... four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> Only if these four conditions are present should a privilege be recognized. [author's emphasis]

As the lawyer brief privilege is simply an aspect of solicitor-client privilege, I would circumscribe the ambit of the lawyer brief privilege by a reference to these four rules.

64 McCormick on Evidence, 3rd ed., observes at p. 171 that the vast majority of the rules of evidence "... have as their common purpose the elucidation of the truth ..." He continues at p. 171:

> By contrast the rules of privilege ... are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.

65 In *Waugh v. Br. Ry. Bd.*, [1980] A.C. 521, [1979] 3 W.L.R. 150, [1979] 2 All E.R. 1169, Lord Edmund-Davies observed at p. 1182:

> Justice is better served by candour than by suppression. For, as it was put in the *Grant v. Downs* majority judgment, "*privilege ... detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise"*. [my emphasis]

66 Rule 1(5) states that:

> (5) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

In my view, we may attain this object only if we promote full disclosure and rigidly circumscribe the concept of privilege, including the lawyer brief privilege. I think that this has been the trend of the decisions of this court in recent years: *Gergely v. Ellingson*, CA780747, 11th September 1978 (unreported); *Dufault v. Stevens* (1978), 6 B.C.L.R. 199, 86 D.L.R. (3d) 671; *Bates v. Stubbs* (1979), 15 B.C.L.R. 65, 11 C.P.C. 299, 101 D.L.R. (3d) 623; *Blackstock v. Patterson* (1978), 9 C.P.C. 277, 95 D.L.R. (3d) 362; *Voth Bros. Const. (1974) Ltd. v. North Vancouver Sch. Dist. 44 Bd. of Sch. Trustees*, 29 B.C.L.R. 114, [1981] 5 W.W.R. 91, 23 C.P.C. 276 (C.A.); *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 Int. Inc.)* 26 D.L.R. (4th) 298 (C.A.).

67 In *Gergely*, Chief Justice Farris gave the judgment of the majority. He said at p. 4 of his judgment:

> I take the position that this rule is remedial [R. 30(1)(4)] and it is intended to give litigants the right to know each other's case in advance. It is part of the modern philosophy that there should not be trials by ambush but that there should be full disclosure between the two parties in order (a) that the matter may be settled, without going to court, or (b) that, if it goes to court, there will be a trial with both sides being fully informed as to the other side's case. Therefore, I think this rule should not receive a restricted interpretation.

68 Members of this court have referred to this passage with approval from time to time in the course of dealing with the object of the rules: see *Bates v. Stubbs* at pp. 629-30.

69 In the *Voth Bros. Const.* case, this court adopted the approach of the House of Lords in the *Waugh* case, namely, that the test for privilege should be the dominant purpose test. In adopting the dominant purpose test for privilege, the House of Lords preferred the view of Barwick C.J., who dissented, in the Australian case of *Grant v. Downs* (1976), 135 C.L.R. 674, 11 A.L.R. 577. The majority of the court in *Grant v. Downs* decided that privilege should only be granted to documents which were brought into being for the sole purpose of litigation. The House of Lords decided that the dominant purpose test enunciated by Barwick C.J. was the more appropriate. The headnote in the report of *Waugh* to which I have referred above, accurately sets out what I think is the ratio of the case:

> The court was faced with two competing principles, namely that all relevant evidence should be made available for the court and that communications between lawyer and client should be allowed to remain confidential and privileged. *In reconciling those two principles the public interest was, on balance, best served by rigidly confining within narrow limits the privilege of lawfully withholding material or evidence relevant to litigation. Accordingly, a document was only to be accorded privilege from production on the ground of legal professional privilege if the dominant purpose for which it was*

prepared was that of submitting it to a legal advisor for advice and use in litigation. Since the purpose of preparing the internal enquiry report for advice and use in anticipated litigation was merely one of the purposes and not the dominant purpose for which it was prepared, the board's claim of privilege failed and the report would have to be disclosed. [my emphasis]

70 At p. 1172, Lord Wilberforce made certain observations which I consider to be apt in this case:

> ... before I consider the authorities, I think it desirable to attempt to discern the reason why what is (inaccurately) called legal professional privilege exists. It is sometimes ascribed to the exigencies of the adversary system of litigation under which a litigant is entitled within limits to refuse to disclose the nature of his case until the trial. Thus one side may not ask to see the proofs of the other side's witnesses or the opponent's brief or even know what witnesses will be called: he must wait until the card is played and cannot try to see it in the hand.

71 The fact that a party may be required to disclose the memorandum or statement of a prospective witness does not necessarily mean that person will be called as a witness. It does provide, however, an opportunity for counsel for the opposite party to investigate circumstances and to be prepared for the eventuality in case that person does testify.

72 Counsel for the defendant concedes that in this case he is not entitled to see the brief of counsel for the plaintiff but he submits that if the documents are not privileged, initially, they should be produced for discovery if they relate to a matter in question, otherwise the defendant will be taken by surprise at the trial. I agree with this submission. I reiterate that the object of the rules is set out in R. 1(5) and that we can attain this object only by rigidly circumscribing the concept of lawyer brief privilege. I think that this principle is the essence of the decision in the cases of *Waugh, Voth Bros. Const.* and *Shaughnessy Golf & Country Club*.

73 There is no case which requires this court to adopt the lawyer brief rule, to the extent proposed by counsel for the plaintiff, including the cases of *Anderson v. Bank of B.C.* (1876), 2 Ch. D. 644, and *Lyell v. Kennedy* (1884), 27 Ch. D. 1. The courts decided these cases over one hundred years ago, and they certainly do not manifest the so-called "modern" approach. I appreciate that in *Watson v. Cammell Laird & Co.*, [1959] 1 W.L.R. 702, [1959] 2 All E.R. 757, the Court of Appeal followed *Lyell v. Kennedy*, but I think that these decisions are not in accord with the avowed purpose of our rules as set out in R. 1(5) and, certainly, are contrary to the decisions in *Voth Bros. Const.* and *Shaughnessy Golf & Country Club*.

74 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.

75 I think that the chambers judge was right in considering that since the documents were not brought into being for the dominant purpose of getting advice from a lawyer, or for use in litigation (actual or anticipated) they were not privileged and that the copies should not be privileged even though they were used in the lawyer's brief. Unless the party advancing a claim for privilege is able to depose that the documents owe their origin to the dominant purpose of obtaining legal advice or to conduct or aid in the conduct of litigation which at the time of its origin was in reasonable prospect, the court should refuse a claim for privilege: *Shaughnessy Golf & Country Club*. I am not prepared to accept the proposition that documents which originally were not privileged should become privileged simply because they have become part of the lawyer's brief in his preparation for trial.

76 The defendants submit, also, that the plaintiff has not sufficiently identified the documents for which he claims privilege in the list of documents. I agree with this submission.

77 Accordingly, I would dismiss the appeal.

Appeal allowed.

TAB 22

2008 CarswellOnt 365
Ontario Superior Court of Justice (Divisional Court)

Ontario (Ministry of Correctional Services) v. Goodis

2008 CarswellOnt 365, [2008] O.J. No. 289, 163 A.C.W.S. (3d) 643, 233 O.A.C. 245, 290 D.L.R. (4th) 102, 77 Admin. L.R. (4th) 133, 89 O.R. (3d) 457

MINISTRY OF CORRECTIONAL SERVICES (Applicant) and DAVID GOODIS, Senior Adjudicator, and JANE DOE, Requester (Respondents)

JANE DOE, Requester (Applicant) and MINISTRY OF CORRECTIONAL SERVICES and DONALD HALE, Adjudicator (Respondents)

Lane, Kiteley, Swinton JJ.

Heard: October 24-25, 2007
Judgment: January 29, 2008 *
Docket: 381/01, 14/04

Counsel: Sara Blake for Applicant/ Respondent, Ministry of Correctional Services
William S. Challis for Respondents, David Goodis, Donald Hale
Christine L. Lonsdale for Respondent/ Applicant, Jane Doe

***Swinton J.*:**

1 The Ministry of Correctional Services (the "Ministry") and Jane Doe, Requester, have both brought applications for judicial review of decisions of the Information and Privacy Commissioner (the "IPC") relating to the release of certain records. This case raises issues of the scope of the employment-related exclusion in s. 65(6) of the *Freedom of Information and Privacy Act*, R.S.O. 1990, c. F.31, as amended ("the Act"), as well as the exemptions for privileged records and personal information.

Background

2 In 1999, the Requester, Jane Doe, a journalist, made four access requests to the Ministry for "any and all records related to any and all allegations of misconduct or sexual, physical or other abuse between 1975 and 1995 by [certain individuals] in your Cornwall, Ontario office".

3 At the time of the request, there was past, ongoing and anticipated litigation against the Crown and some of its employees and former employees respecting these allegations. One civil action against the Crown and two deceased employees had recently been settled, and two other actions had commenced. In each case, it was alleged that the Crown was vicariously liable for torts committed by employees in the course of their employment. Therefore, the Ministry claimed that the requested records fell outside the scope of the Act pursuant to s. 65(6), which excludes certain employment-related records.

4 The Requester appealed this decision to the IPC, which resulted in *Order PO-1905* [(May 10, 2001), Doc. PO-1905 (Ont. Information & Privacy Comm.)], made by Senior Adjudicator Goodis on May 10, 2001.

5 The records at issue, consisting of 459 pages, are described in a subsequent order PO-1999 as follows (Application Record, p. 25):

> ... notes, correspondence, newspaper articles, pleadings, investigation reports, facsimiles, e-mails and various other documents. The records have been grouped by the Ministry on the basis of their place of origin in its record-holdings.

Record Groups A and B, consisting of 50 and 28 pages of documents respectively, were located in the Ministry's Community and Young Offender Services Division. Record Group C, consisting of 381 pages of documents originated in a litigation file compiled by the Ministry's Legal Services Branch.

The IPC determined that the records were not excluded from the Act by s. 65(6) and ordered the Ministry to make a decision on the access request.

6 Although the Ministry applied for judicial review, it made the decision, as ordered, and refused to disclose the records on two grounds. First, the Ministry concluded that the records were subject to solicitor-client privilege or were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation and, therefore, exempt pursuant to s. 19 of the Act. Second, the records were exempt under s. 21 of the Act, as disclosure would constitute an unjustified invasion of the personal privacy of employees and clients.

7 The Requester appealed, resulting in a decision by Senior Adjudicator Hale on March 13, 2002 [*Ontario (Ministry of Correctional Services), Re*, [2002] O.I.P.C. No. 38 (Ont. Information & Privacy Comm.)] in Order PO-1999. This decision ordered the disclosure of a limited number of records: a letter from plaintiff's counsel in a civil action enclosing a list of undertakings, advisements and refusals given at the examination for discovery of a representative of the Crown, and employer's notes, memoranda and fax cover pages concerning a public complaint received by the employer that alleged sexual assault against a particular probation officer.

8 In the meantime, the Court of Appeal had issued a decision on August 8, 2001, which overturned three other orders of the IPC concerning the interpretation of s. 65(6) of the Act (*Ontario (Solicitor General) v. Ontario (Assistant Information & Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (Ont. C.A.)). The IPC advised the parties that it would reconsider its decision in *Order PO-1905*, given this decision of the Court of Appeal.

9 On January 20, 2003, Senior Adjudicator Hale issued Reconsideration *Order PO-2102-R* [(January 20, 2003), Doc. PO-2102-R (Ont. Information & Privacy Comm.)], in which he declined to reconsider those records in *Order PO-1905* that had not been ordered disclosed in Order PO-1999. He found that certain of the remaining records should not be disclosed for reasons other than s. 65(6). However, he concluded that the remaining records that were to be disclosed did not fall within the exclusion in s. 65(6), as they did not arise in an employment or labour relations context (Application Record, p. 57). As a result of this decision, 19 pages of the 459 pages of records were ordered disclosed in whole or in part.

The Issues

10 Three issues arise in the Ministry's application for judicial review:

1. Did the IPC err in its interpretation and application of the exclusion provision in s. 65(6) of the Act?

2. Did the IPC err in failing to find that the letter from opposing counsel was privileged?

3. Was the IPC's decision unreasonable in ordering disclosure of personal information protected by s. 21 of the Act?

11 Three issues are raised in the application for judicial review brought by the Requester:

1. Did the IPC improperly apply principles of litigation privilege as if they were principles of solicitor-client privilege?

2. Did the IPC err in its application of the principles of litigation privilege?

3. Did the IPC err by failing to apply s. 23, the public interest override, to all the records at issue?

Did the IPC err in its interpretation and application of the exclusion provision in s.65(6) of the Act?

12 Subsection 65(6) of the Act reads as follows:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

13 In this case, the Ministry relied on subclauses 1 and 3 of s. 65(6) in asserting that all the records are excluded from the Act. It took the position that allegations of misconduct committed by an employee in the course of his employment are "employment-related matters" within subclause 3 of s. 65(6). As well, a civil action against the Crown alleging vicarious liability for employee misconduct is a proceeding before a court relating to the employment of a person by the institution within paragraph 1 of the subsection.

14 In *Order PO-1905*, the IPC held that the records at issue were created and/or compiled in the context of continuing and anticipated proceedings between the Ministry and individuals who alleged that they were harmed by the tortious conduct of Ministry employees. As well, the IPC held that the records were being maintained in relation to meetings, consultation and/or discussions that have been or may be required in the context of the current or anticipated civil proceedings (Application Record, p. 16).

15 However, the IPC rejected the Ministry's argument that the records were employment-related because they were collected for litigation in which the Crown might be held vicariously liable, stating (Application Record, p. 19):

> In short, the fact that the records may have been collected, maintained, used and/or disclosed in relation to current and anticipated litigation in which the Ministry may be held vicariously liable for actions of its employees is not alone sufficient to qualify the records as arising in an employment or labour relations context.

16 The IPC went on to hold that certain records, which might once have been considered to be employment-related, were no longer so because of the passage of time. In other words, the exclusion ceased to apply when the institution no longer had a current legal interest in an employment-related matter, or when the proceedings related to employment had concluded. The balance of the records, created or compiled in the course of continuing or anticipated litigation, did not arise in an employment or labour relations context, and, therefore, the Ministry failed to establish the requisite legal interest (Application Record, p. 20).

17 This decision was reconsidered in *Order PO-2102-R* because of the decision of the Court of Appeal in *Ontario (Solicitor General)*, *supra.* The Court in that case had found two errors in the IPC's approach to the interpretation of s. 65(6): the "time sensitive" element and the requirement for a "legal" interest, rather than an interest.

18 On reconsideration, the IPC held that it was necessary to reconsider its earlier decision only in light of the records that had been ordered disclosed in Order P0-1999, as no useful purpose would be served by revisiting decisions related to records that were not to be disclosed. Once again, the IPC held that the records ordered disclosed did not arise in an employment or labour relations context (Application Record, p. 57).

19 All parties are agreed that the standard of review of an IPC decision interpreting and applying s. 65(6) of the Act is correctness (*Ontario (Solicitor General)*, *supra*, at para. 31).

20 In my view, the interpretation suggested by the Ministry is not in accordance with the language of s. 65(6) when the provision is read in context and in light of its legislative history and the purpose of the Act. The exclusion in s. 65(6) does not

exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.

21 In determining the proper interpretation of s. 65(6), it is useful to bear in mind the modern approach to statutory interpretation described by Iacobucci J. in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, where he quoted Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

22 In my view, the language used in s. 65(6) does not reach so far as the Ministry argues. Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* — that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.

23 Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.

24 The scope of s. 65(6) is made clearer when one looks at the relationship between it and s. 65(7), as well as the legislative history of the provision. Subsection 65(6) is subject to s. 65(7), which states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The fact that the Act applies to the documents in subclauses 1 through 3 of s. 65(7) suggests that the type of records excluded from the Act by s. 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

25 This conclusion is reinforced by the legislative history of these provisions. Subsection 65(6) was added to the Act by the *Labour Relations and Employment Statute Law Amendment Act*, S.O. 1995, c. 1, s. 82. In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a "package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations" (Legislative Assembly of Ontario, Official Report of Debates (*Hansard*), October 4, 1995). The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were "to ensure the confidentiality of labour relations information" (*ibid.*).

26 Moreover, s. 65(6) should be interpreted in light of the purpose of the Act, which is found in s. 1. It states:

The purposes of this Act are:

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government. If the interpretation were accepted, it would potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the public accountability purpose of the Act (*Ontario (Ministry of Transportation) v. Cropley*, [2005] O.J. No. 4047 (Ont. C.A.) at para. 28).

27 Two decisions of the Court of Appeal dealing with the interpretation of s. 65(6) reinforce the conclusion that the provision protects the confidentiality of records pertaining to terms of employment or conditions of work in an employer-employee or collective bargaining relationship or a quasi-collective bargaining relationship. In *Ontario (Solicitor General)*, *supra*, the Court stated (at para. 35):

> Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Subclause 1 deals with records relating to "proceedings or anticipated proceedings . . . relating to labour relations or to the employment of a person *by the institution*" (emphasis added). Subclause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person *by the institution* . . ." (emphasis added). Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, [See Note 11 at end of document] and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the subclause when it does not appear, introduces a concept there is no indication the legislature intended.

The endnote reference in that passage is to the bill which introduced s. 65(6) and includes the quotation from the Hon. David Johnson found at paragraph 25 of these reasons.

28 The Ministry submitted that the Court of Appeal approved a broad interpretation of the exclusion, as it quashed the decisions of the IPC and restored the decisions of the heads of the respective Ministries involved in the case (at para. 42). One of the records at issue in the case was a copy of a public complaint file of the Police Complaints Commission. The Ministry of the Solicitor General and Correctional Services had taken the position that the file was excluded under s. 65(6). The IPC agreed that the investigation of a complaint of police misconduct was an employment-related matter. However, it had ordered the file disclosed because there were no existing or anticipated proceedings before a court, tribunal or other entity (*Ministry of the Solicitor General and Correctional Services*, Order PO-1618 at pp. 4 and 6).

29 Thus, there was no dispute in that case that the file documenting the investigation of the complaint was employment-related — not surprisingly because of the potential for disciplinary action against a police officer. However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the Act, even if they are in files

pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document.

30 The Court of Appeal also dealt with s. 65(6) in *Ontario (Minister of Health & Long Term Care) v. Ontario (Assistant Information & Privacy Commissioner)*, [2003] O.J. No. 4123 (Ont. C.A.), where it held that the provision excluded records pertaining to negotiations between the government and physicians concerning the remuneration of physicians. The Court held that "labour relations" in s. 65(6)3 extended to relations and conditions of work beyond those arising in collective bargaining and employer-employee relationships. It held that the term "labour relations" included the relationship between the government and physicians and the work of the Physician Services Committee. In my view, this case further supports the interpretation that s. 65(6) excludes records related to collective bargaining, broadly interpreted, and employment-related matters.

31 In *Reynolds v. Ontario (Registrar, Information & Privacy Commissioner)*, [2006] O.J. No. 4356 (Ont. Div. Ct.), this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the Act, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

32 Therefore, the IPC did not err in rejecting the suggested interpretation of s. 65(6) that would exclude any records in which the action of an employee might lead to vicarious liability of the Crown. However, there is no question that the IPC did err in its interpretation of s. 65(6) in *Order PO-1905*, by using a time sensitive approach and requiring a legal interest. Nevertheless, the IPC in *Order PO-2102-R* applied the correct interpretation of the provision to the records that were ordered disclosed. I agree with the Senior Adjudicator that despite the error in the original decision, no purpose would be served in referring all the records back for examination under s. 65(6), given the few records ordered disclosed. As judicial review is a discretionary remedy, I would not interfere with the original decision, despite the error in interpretation, as the reconsideration decision applied the correct interpretation to the records in issue.

The Privilege Issues

33 Both the Ministry and the Requester have raised issues concerning the interpretation and application of s. 19 of the Act. It reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

34 The parties are agreed that the standard of review in the interpretation and application of s. 19 is correctness (*Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)* (2002), 62 O.R. (3d) 167 (Ont. C.A.) at para. 4).

35 Section 19 has two branches. Branch 1 incorporates common law solicitor-client privilege, while Branch 2 contains a further statutory privilege for a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. It is a form of work product or litigation privilege, but unlike litigation privilege at common law, the privilege in s. 19 is permanent and does not end with the litigation (*Ontario (Attorney General)*, *supra*, at paras. 12-13). In the latter case, the privilege covered photographs and a video gathered in preparation for litigation.

36 The Requester suggested that the Supreme Court of Canada called the holding in the *Ontario (Attorney General)* case into question in *Ontario (Ministry of Correctional Services) v. Goodis*, [2006] S.C.J. No. 31 (S.C.C.), when Rothstein J. stated that s. 19 recognizes two common law privileges: solicitor-client privilege and litigation privilege (at para. 12). However, there is no suggestion in the reasons in *Goodis* that the Supreme Court intended to overrule the earlier decision of the Court of Appeal.

Indeed, the Supreme Court went on to state that the parties had restricted their arguments to solicitor-client privilege and had not addressed litigation privilege (at para. 13).

37 Nor does the decision of the Supreme Court of Canada in *Blank v. Canada (Department of Justice)*, [2006] S.C.J. No. 39 (S.C.C.) call into question the Court of Appeal's holding in the *Ontario (Attorney General)* case. In *Blank*, the Supreme Court was addressing the scope of solicitor-client privilege in s. 23 of the federal *Access to Information Act*, R.S.C. 1985, c. A-1. Despite the absence of any express reference to litigation privilege in s. 23, the Court held that solicitor-client privilege included litigation privilege (at para. 4). The latter, it was noted, is of temporary duration (at para. 8). Again, this case does not address the interpretation of s. 19 of the Ontario Act, which is differently worded, nor does it expressly call into question the decision of the Court of Appeal in *Ontario (Attorney General)*, supra.

38 Therefore, given the *Ontario (Attorney General)* case, there are two branches to s. 19: Branch 1, solicitor-client privilege, and Branch 2, a form of statutory privilege that protects a lawyer's work product and communications between counsel and third parties in the course of preparing for litigation (*Ontario (Attorney General)*, *supra*, at para. 12). Branch 2 is not simply synonymous with common law litigation privilege, as it does not terminate when the litigation terminates (*Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Ont. Div. Ct.) at paras. 27-28).

39 No issue is taken with the IPC's findings with respect to solicitor-client privilege, except to the extent that the Requester submits that the IPC erroneously applied principles of litigation privilege as if they were solicitor-client principles. The major issue in these applications for judicial review is the application of Branch 2.

40 The purpose of litigation privilege is to protect the adversary process by protecting the lawyer's work product (*Ontario (Attorney General)*, *supra*, paras. 10-11). As stated by the Supreme Court in *Blank*, *supra* (at para. 27):

> 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.

Further on in the reasons, the Court stated that the purpose of litigation privilege "is to create a 'zone of privacy' in relation to pending or apprehended litigation" (at para. 34).

Did the IPC err in failing to find that the letter from opposing counsel was privileged?

41 Among the documents ordered disclosed is a letter prepared by plaintiff's counsel in the course of civil litigation, listing undertakings, advisements and refusals given on behalf of the Crown in a discovery. This document was found in the operational files of the Ministry and is apparently also contained in the litigation file.

42 The Ministry suggests that there is an inconsistency in the IPC's decision. Records 13 to 17 of Group B were held not to be privileged, because they are a communication between Ministry counsel and counsel for the opposing party. However, the IPC went on to include Records 12-17 in Group B on a list with a large number of other documents that were exempted from disclosure because of solicitor-client privilege (Application Record, p. 30).

43 It is apparent to me that there must have been a typographical error when the IPC included Records 13 through 17 in the solicitor-client privilege list, as the IPC stated that each of the records listed were confidential communications between a solicitor and a client, a Ministry lawyer or an employee. Each was found to contain legal advice or a request for legal advice. Having examined Records 13 to 17, I am satisfied that they do not fall within this description, and they should not have been included in the list of records subject to solicitor-client privilege. Only Record 12 from Group B should have been on this list.

44 I see no basis to conclude that the IPC erred in holding that the letter from plaintiff's counsel and the list of undertakings (Records 13-17) were not exempt from disclosure. These records were prepared by opposing counsel. At common law, communications between opposing parties are not considered privileged (*Flack v. Pacific Press Ltd.* (1970), 14 D.L.R. (3d) 334

(B.C. C.A.), at 358). Nor are these records part of the work product of Crown counsel, prepared by it or for it by third parties, in order to assist Crown counsel in the litigation. Therefore, they are not privileged under Branch 2 of s.19.

45 This conclusion is consistent with the decision of this Court in *Ontario (Attorney General) v. Big Canoe*, *supra*, which held that letters from defence counsel to Crown counsel in the course of a prosecution were not "prepared ... for Crown counsel ... for use in litigation" (at para. 45).

46 The Ministry submitted that the records should be exempt because of the deemed undertaking rule. That rule of civil procedure prohibits parties engaged in litigation from using information obtained on discovery for a collateral purpose (*Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (Ont. C.A.), at pp. 363 -64). Here, the deemed undertaking rule is said to apply because the records at issue are informed by and reveal information learned on discovery.

47 I see no basis to read the implied undertaking rule into s. 19 of the Act. As Lane J. observed in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Doc. Toronto 21670/87Q (Ont. Gen. Div.) (unreported), the *Rules of Civil Procedure* and the disclosure mechanisms under the Act operate independently of one another.

48 The Ministry relies on *Andersen Consulting v. R.*, [2001] 2 F.C. 324 (Fed. T.D.) in support of the proposition that s. 19 in effect incorporates the deemed undertaking rule. However, this case does not assist in determining whether records provided by opposing counsel to government counsel are privileged. *Andersen* dealt with a motion brought by a plaintiff for return or destruction of documents that were copied by the plaintiff and provided to the government as part of the discovery process. Following settlement of the proceedings, government officials refused to return or destroy the documents on the basis that they were required to turn the documents over to the National Archives pursuant to the *National Archives Act*, R.S.C. 1985 (3rd Supp.), c. 1. The Court held that the documents were not under the control of the Department of Justice because of the implied undertaking.

49 Similarly, the case of *Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc.* (2001), 204 D.L.R. (4th) 331 (S.C.C.) does not assist. That case dealt with the existence of the implied undertaking rule in Quebec, not access to information legislation.

50 In any event, the implied undertaking rule does not apply to these records. To the extent that these records reveal information provided on discovery, the information originates with the Ministry and is not subject to an implied undertaking in its hands.

51 Therefore, I would give no effect to this ground for judicial review.

Did the IPC improperly apply principles of litigation privilege as if they were principles of solicitor-client privilege?

52 The IPC found that two categories of documents were covered by solicitor-client privilege: documents that were direct communications of a confidential nature between a solicitor and client and the legal advisor's working papers directly related to the seeking, formulating and giving of legal advice. In doing so, the IPC relied on *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 (Can. Ex. Ct.).

53 In that case, the Court stated at p. 33:

> 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.

I note that the second category described would today be understood as litigation privilege, rather than solicitor-client privilege.

54 The IPC found as a fact that a number of documents, including newspaper articles and Ministry Issue notes, were directly related to seeking, formulating or giving legal advice. The IPC went on to say that these and other documents were compiled by the Ministry solicitors to assist in the formulation and giving of legal advice. Branch 2 of s. 19 exempts a record prepared by or for Crown counsel for use in giving legal advice. Therefore, given the Adjudicator's findings of fact, I see no error in his classification of these documents as privileged.

Did the IPC err in its application of the principles of litigation privilege?

55 The Supreme Court of Canada set out the test for litigation privilege in *Blank* (at paras. 35-37 and 58-60): the document must have been created for the dominant purpose of existing or reasonably contemplated litigation, and the litigation for which the document was created must still be in existence.

56 The Requester submits that the IPC erred in applying Branch 2 of s. 19 to exempt documents that were not made for the dominant purpose of litigation and by failing to consider that litigation privilege ends with the litigation to which it is related, or with very closely related litigation.

57 The Ministry argued that the IPC erred in failing to exempt the documents relating to the complaint under Branch 2, since the copies at issue were contained in Crown counsel's litigation files. As such, the copies were prepared for Crown counsel's use in litigation.

58 I do not accept the Requester's submission that the IPC erred in failing to consider that litigation privilege ends with the litigation to which it is related. Earlier in these reasons, I concluded that the Supreme Court of Canada in *Blank* and *Goodis* has not overruled the Ontario Court of Appeal's holding in *Ontario (Attorney General)*, *supra* that the statutory privilege found in Branch 2 of s. 19 of the Act is permanent.

59 Nor do I accept the argument of the Requester that if s. 19 extends a statutory privilege to the Crown distinct from litigation privilege, the statutory privilege is limited to the Crown acting in a criminal capacity. The section does not extend the statutory privilege only to Crown attorneys, but to Crown counsel. Thus, it applies both in a civil and criminal context.

60 The major area of dispute is the treatment of some of the documents found in the litigation file, such as copies of newspaper articles and copies of documents made prior to the commencement of litigation. In the *Blank* case, the Supreme Court of Canada observed that there were conflicting decisions of the Courts of Appeal in British Columbia and Ontario on the application of litigation privilege to documents gathered or copied, but not created, for the purpose of litigation and found in a lawyer's litigation file. However, the Court did not find it necessary to resolve the issue whether litigation privilege attaches to such documents (at paras. 62-63).

61 In *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (B.C. C.A.), McEachern C.J.B.C. held that copies of public documents gathered by a solicitor are privileged. The majority reasons in *Blank* state that a majority of the Ontario Court of Appeal rejected this position in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.). However, there are, in fact, three sets of reasons in *Chrusz*, and only Carthy J.A. expressly rejects the approach in *Hodgkinson* (at p. 335). Doherty J.A. preferred the approach 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.), which held that copies of non-privileged documents might be privileged, if they were the result of selective copying or the result of research or the exercise of skill and knowledge on the part of the solicitor. However, Doherty J.A. left open the question "when, if ever, copies of non-privileged documents can be protected by litigation privilege" (at p. 361). Rosenberg J.A., like Doherty J.A., preferred the approach in *Nickmar*, but also left open the question of privilege with respect to copies of non-privileged documents (at p. 370).

62 The Supreme Court of Canada in *Blank* suggested a preference for the approach in *Hodgkinson* (at para. 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 exercise 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.

63 The documents at issue include copies of newspaper articles, as well as copies of documents made by Ministry employees before litigation was anticipated. The Ministry takes the position that all the copied material is subject to Branch 2 of s. 19, as it was prepared by or for Crown counsel for use in litigation. The Requester submits the IPC erred in not applying the dominant purpose test.

64 The IPC found that a number of the documents were created many years before the litigation and were assembled and put into the litigation brief. Therefore, they did not qualify under the dominant purpose test for litigation privilege. However, the Adjudicator determined that a number of the records were gathered by the solicitor for inclusion in the litigation brief. He concluded:

> These records related to the fact-finding and investigation process undertaken by counsel in formulating the Ministry's response to the actions brought against it. The inclusion of these records in the litigation brief served to inform the solicitor of the Ministry's evidence in order to assist in the preparation of its defence. Accordingly, I find that these records qualify under the litigation component of section 19 using the criteria described in *Nickmar Pty. Ltd.* and reiterated in Assistant Commissioner Mitchinson's reasoning in Order MO-1337-I. (Application Record, p. 31)

65 I need not determine whether the Ministry is correct in the submission that Branch 2 protects any document simply copied for inclusion in the Crown brief. The Adjudicator appropriately applied the test in *Nickmar* and concluded that the records related to the fact-finding and investigation process of counsel to assist in defending the Ministry in the civil actions. I see no basis to interfere with his conclusions.

66 The Adjudicator did not expressly state why the Group C records which he ordered disclosed were not subject to privilege. However, on examination of those documents, I am satisfied that he did not err in ordering disclosure. The documents originate from the Ministry, and there is nothing to indicate any research or exercise of skill by the Crown counsel in obtaining them for the litigation brief.

Was the IPC's decision unreasonable in ordering disclosure of personal information protected by s. 21?

67 The parties are agreed that the standard of reasonableness applies to a decision of the IPC interpreting and applying the privacy exemption in s. 21 of the Act, including the definition of "personal information" in s. 2(1) (*Ontario (Minister of Health & Long-Term Care) v. Ontario (Assistant Information & Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (Ont. C.A.) at para. 39).

68 Section 21(1) requires a head to refuse disclosure of "personal information" to any person other than the individual to whom it relates except in the circumstances set out in paragraphs (a) through (f). Paragraph (f) permits disclosure "if the disclosure does not constitute an unjustified invasion of personal privacy". Subsection 21(2) then sets out criteria to be considered in determining whether there is an unjustified invasion of personal privacy, while subsection 21(3) sets out circumstances where there is a presumed invasion of personal privacy.

69 "Personal information" is defined in s. 2(1) as "recorded information about an identifiable individual" and includes the types of information listed under that definition. The test for personal information is as follows:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

(*Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (Ont. C.A.) at paras. 2 and 7).

70 The Ministry submitted to the IPC that the records revealed personal information about Ministry employees, offenders and other identifiable individuals. The IPC found that certain records contained personal information about former Ministry

employees and clients, while other documents did not contain personal information. While some of those documents identified Ministry employees, they were identified in their professional capacities regarding appropriate government action.

71 The IPC then went on to apply s. 21, finding that six pages of records in Group C were exempt because they fell within the presumptions in s. 21(3)(a) and (d), as information relating to the medical, psychiatric, psychological or employment history of former Ministry clients. The IPC found that none of the presumptions in 21(3)(b), (f) or (g) applied to the remaining records.

72 The IPC then applied the factors under s. 21(2) and held that certain records were exempt. The Adjudicator ordered disclosure of Group B records 13-17 and Group C records 105 and 111, but concluded that disclosure of the names of Ministry clients would constitute an unjustified invasion of their personal privacy. Therefore, the Adjudicator held that their names and other identifying information, as well as the name of any person who was accused of abuse, would be exempt from disclosure under s. 21(1) and should be severed from the material ordered disclosed. However, disclosure of the remainder of the records, with personal identifiers severed, would not constitute an unjustified invasion of personal privacy.

73 The IPC then considered the public interest override in s. 23, which reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

This section requires a balancing of the compelling public interest in disclosure of the records against the purpose of any exemption that applies (*Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)*, [1999] O.J. No. 484 (Ont. C.A.) at para. 3). In this case, while the IPC found that there was a compelling public interest in disclosure of the information as a whole, the privacy interests must prevail, given that the documents are highly sensitive and identify both victims and alleged perpetrators of sexual abuse (Application Record, pp. 39-40).

74 The IPC then ordered the disclosure of certain records "which are not highlighted". It appears that there is an inconsistency between this order and the earlier part of the reasons, as the names of the alleged perpetrators were not highlighted.

75 It is clear from the IPC's reasons in Order PO-1999 that the Adjudicator found that there should be no disclosure of the names of victims and Ministry employees who are alleged to have committed abuse. Therefore, I shall proceed on the basis that the highlighting in the documents to be disclosed must be corrected so that the names of the alleged perpetrators are severed.

76 Nevertheless, the Ministry submits that a comparison of the information in the records ordered disclosed with other information available to the press will make it easy to identify the complainants and an employee. The Ministry asserts that the Adjudicator erred in failing to compare the information in the records to information available in the press to determine whether the records, in combination with other information, would identify an individual.

77 The Ministry's submissions to the IPC do not make reference to specific newspaper articles that would make the individuals in the particular records identifiable, and it is not obvious from reading the contested document that a particular individual would be identified. In applying these provisions, the IPC used its expertise, and its decision is entitled to deference. It cannot be said that the decision to order disclosure was unreasonable, provided the highlighting is corrected to reflect the decision that the names of the alleged perpetrators should be severed.

Did the IPC err by failing to apply s. 23, the public interest override, to all the records at issue?

78 The Requester relies upon the decision of the Court of Appeal in *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, [2007] O.J. No. 2038 (Ont. C.A.) for the proposition that the public interest override in s. 23 of the Act applies to the records that the IPC held were exempted under s. 19.

79 In the *Criminal Lawyers' Assn.* case, a majority of the Court of Appeal held that s. 23 is a violation of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and unconstitutional to the extent that ss. 10, 14, 19 and 23 operate to unjustifiably deny access to records (at para. 97). Leave to appeal has been sought from the Supreme Court of Canada.

80 The IPC agreed with the Requester that there was a compelling public interest in the disclosure of the information contained in the records, when those records were taken as a whole. However, the Adjudicator did not apply the public interest override to records exempt under s. 19.

81 In light of the *Criminal Lawyers' Assn.* decision, the IPC erred in not applying the public interest override to all the records at issue. However, it is not appropriate for this Court, on an application for judicial review, to apply that section to the records, as requested by the Requester. Given the IPC's expertise in applying this section, the matter must be referred back to it.

Conclusion

82 The Ministry's application for judicial review is allowed only to the extent that the highlighting of employee names must be corrected in the records that are to be disclosed. Otherwise, the application is dismissed.

83 The Requester's application is granted in part, and the matter is referred back to the IPC to apply the public interest override in s. 23 to the records exempted pursuant to s. 19. If the IPC concludes that the public interest override applies to any of these records, the IPC shall consider whether such records are excluded pursuant to s. 65(6) or exempt pursuant to s. 21.

84 The IPC does not seek costs and asks that no costs be awarded against it. However, the Ministry and the Requester have indicated that they seek costs. If they cannot agree, they may make written submissions, submitted to the Divisional Court office, within 30 days of the release of this decision.

Applications granted in part.

Footnotes

* Additional reasons at *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 2008 CarswellOnt 3853 (Ont. Div. Ct.).

TAB 23

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to January 16, 2020

Last amended on June 17, 2019

À jour au 16 janvier 2020

Dernière modification le 17 juin 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Costs of solicitor

(3) On motion, the Court may, in special circumstances, order that the costs of a solicitor assisting a person to be examined under rule 238 be included in the amounts paid under subsection (1).

Questioning by other parties

(4) A person being examined under rule 238 may also be questioned by any other party.

Cross-examination or hearsay

(5) A person being examined under rule 238 shall not be cross-examined and shall not be required to give hearsay evidence.

Use as evidence at trial

(6) The testimony of a person who was examined under rule 238 shall not be used as evidence at trial but, if the person is a witness at trial, it may be used in cross-examination in the same manner as any written statement of a witness.

Scope of examination

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

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

Obligation to inform self

241 Subject to paragraph 242(1)(d), a person who is to be examined for discovery, other than a person examined under rule 238, shall, before the examination, become informed by making inquiries of any present or former officer, servant, agent or employee of the party, including any who are outside Canada, who might be expected to have knowledge relating to any matter in question in the action.

Objections permitted

242 (1) A person may object to a question asked in an examination for discovery on the ground that

Indemnité additionnelle

(3) La Cour peut, sur requête, si des circonstances spéciales le justifient, ordonner qu'un montant équivalent aux frais de l'avocat qui assiste la personne à interroger soit inclus dans les sommes versées conformément au paragraphe (1).

Interrogatoire par les autres parties

(4) Toute autre partie à l'action peut également interroger la personne interrogée aux termes de la règle 238.

Contre-interrogatoire interdit

(5) La personne qui est interrogée aux termes de la règle 238 ne peut être contre-interrogée ni tenue de présenter un témoignage constituant du ouï-dire.

Utilisation en preuve

(6) Le témoignage de la personne interrogée aux termes de la règle 238 ne peut être utilisé en preuve à l'instruction mais peut, si celle-ci sert de témoin à l'instruction, être utilisé dans le contre-interrogatoire de la même manière qu'une déclaration écrite d'un témoin.

Étendue de l'interrogatoire

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

a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;

b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.

L'obligation de se renseigner

241 Sous réserve de l'alinéa 242(1)d), la personne soumise à un interrogatoire préalable, autre que celle interrogée aux termes de la règle 238, se renseigne, avant celui-ci, auprès des dirigeants, fonctionnaires, agents ou employés actuels ou antérieurs de la partie, y compris ceux qui se trouvent à l'extérieur du Canada, dont il est raisonnable de croire qu'ils pourraient détenir des renseignements au sujet de toute question en litige dans l'action.

Objection permise

242 (1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :

(a) the answer is privileged;

(b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;

(c) the question is unreasonable or unnecessary; or

(d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.

a) la réponse est protégée par un privilège de non-divulgation;

b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;

c) la question est déraisonnable ou inutile;

d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

Objections not permitted

(2) A person other than a person examined under rule 238 may not object to a question asked in an examination for discovery on the ground that

(a) the answer would be evidence or hearsay;

(b) the question constitutes cross-examination.

Objection interdite

(2) À l'exception d'une personne interrogée aux termes de la règle 238, nul ne peut s'opposer à une question posée lors d'un interrogatoire préalable au motif que, selon le cas :

a) la réponse constituerait un élément de preuve ou du ouï-dire;

b) la question constitue un contre-interrogatoire.

Limit on examination

243 On motion, the Court may limit an examination for discovery that it considers to be oppressive, vexatious or unnecessary.

Droit de limiter l'interrogatoire

243 La Cour peut, sur requête, limiter les interrogatoires préalables qu'elle estime abusifs, vexatoires ou inutiles.

Examined party to be better informed

244 (1) Where a person being examined for discovery, other than a person examined under rule 238, is unable to answer a question, the examining party may require the person to become better informed and may conclude the examination, subject to obtaining answers to any remaining questions.

Obligation de mieux se renseigner

244 (1) Lorsqu'une partie soumet une personne, autre que celle visée à la règle 238, à un interrogatoire préalable et que celle-ci est incapable de répondre à une question, elle peut exiger que la personne se renseigne davantage et peut mettre fin à l'interrogatoire préalable à la condition d'obtenir les réponses aux questions qu'il lui reste à poser.

Further answers

(2) A person being examined who is required to become better informed shall provide the information sought by the examining party by submitting to a continuation of the oral examination for discovery in respect of the information or, where the parties agree, by providing the information in writing.

Renseignements additionnels

(2) La personne contrainte de mieux se renseigner fournit les renseignements demandés par la partie en se soumettant à nouveau à l'interrogatoire préalable oral ou, avec le consentement des parties, en fournissant les renseignements par écrit.

Information deemed part of examination

(3) Information provided under subsection (2) is deemed to be part of the examination for discovery.

Effet des renseignements donnés

(3) Les renseignements donnés aux termes du paragraphe (2) sont réputés faire partie de l'interrogatoire préalable.

Inaccurate or deficient answer

245 (1) A person who was examined for discovery and who discovers that the answer to a question in the

Réponse inexacte ou incomplète

245 (1) La personne interrogée au préalable qui se rend compte par la suite que la réponse qu'elle a donnée à une

TAB 24

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to August 28, 2022

Last amended on June 23, 2022

À jour au 28 août 2022

Dernière modification le 23 juin 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Definition of *competitor*

(11) In subsection (1), ***competitor*** includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

2009, c. 2, s. 429; 2018, c. 8, s. 115; 2018, c. 10, s. 87; 2022, c. 10, s. 263.

Mergers

Definition of *merger*

91 In sections 92 to 100, ***merger*** means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Order

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

Définition de *concurrent*

(11) Au paragraphe (1), ***concurrent*** s'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence de l'accord ou de l'arrangement.

2009, ch. 2, art. 429; 2018, ch. 8, art. 115; 2018, ch. 10, art. 87; 2022, ch. 10, art. 263.

Fusionnements

Définition de *fusionnement*

91 Pour l'application des articles 92 à 100, ***fusionnement*** désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45.

Ordonnance en cas de diminution de la concurrence

92 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

a) dans un commerce, une industrie ou une profession;

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;

d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) de le dissoudre, conformément à ses directives,

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45; 1999, ch. 2, art. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market;

(g.1) network effects within the market;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2022, c. 10, s. 264.

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

g.1) les effets de réseau dans le marché;

g.2) le fait que le fusionnement réalisé ou proposé contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2022, ch. 10, art. 264.

Exception

94 The Tribunal shall not make an order under section 92 in respect of

(a) a merger substantially completed before the coming into force of this section;

(b) a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan*

Exception

94 Le Tribunal ne rend pas une ordonnance en vertu de l'article 92 à l'égard :

a) d'un fusionnement en substance réalisé avant l'entrée en vigueur du présent article;

b) d'une fusion réalisée ou proposée aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés*

Companies Act in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest — or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

(c) a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* and in respect of which the Minister of Transport has certified to the Commissioner the names of the parties; or

(d) a merger or proposed merger that constitutes an existing or proposed *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1991, c. 45, s. 549, c. 46, ss. 592, 593, c. 47, s. 716; 1999, c. 2, s. 37; 2000, c. 15, s. 14; 2001, c. 9, s. 579; 2007, c. 19, s. 62; 2018, c. 10, s. 88.

d'assurances ou de la *Loi sur les sociétés de fiducie et de prêt*, et à propos de laquelle le ministre des Finances certifie au commissaire le nom des parties et certifie que cette fusion est dans l'intérêt public ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

c) d'une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard de laquelle le ministre des Transports certifie au commissaire le nom des parties;

d) d'une fusion — réalisée ou proposée — constituant une *entente*, au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1991, ch. 45, art. 549, ch. 46, art. 592 et 593, ch. 47, art. 716; 1999, ch. 2, art. 37; 2000, ch. 15, art. 14; 2001, ch. 9, art. 579; 2007, ch. 19, art. 62; 2018, ch. 10, art. 88.

Exception for joint ventures

95 (1) The Tribunal shall not make an order under section 92 in respect of a combination formed or proposed to be formed, otherwise than through a corporation, to undertake a specific project or a program of research and development if

(a) a project or program of that nature

(i) would not have taken place or be likely to take place in the absence of the combination, or

(ii) would not reasonably have taken place or reasonably be likely to take place in the absence of the combination because of the risks involved in relation to the project or program and the business to which it relates;

(b) no change in control over any party to the combination resulted or would result from the combination;

(c) all the persons who formed the combination are parties to an agreement in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;

(d) the agreement referred to in paragraph (c) restricts the range of activities that may be carried on pursuant to the combination, and provides that the agreement terminates on the completion of the project or program; and

Exceptions pour les entreprises à risques partagés

95 (1) Le Tribunal ne rend pas d'ordonnance en application de l'article 92 à l'égard d'une association d'intérêts formée, ou dont la formation est proposée, autrement que par l'intermédiaire d'une personne morale, dans le but d'entreprendre un projet spécifique ou un programme de recherche et développement si les conditions suivantes sont réunies :

a) un projet ou programme de cette nature :

(i) soit n'aurait pas eu lieu ou n'aurait vraisemblablement pas lieu sans l'association d'intérêts,

(ii) soit n'aurait, en toute raison, pas eu lieu ou n'aurait vraisemblablement pas lieu sans l'association d'intérêts en raison des risques attachés à ce projet ou programme et de l'entreprise qu'il concerne;

b) aucun changement dans le contrôle d'une des parties à l'association d'intérêts n'a résulté ou ne résulterait de cette association;

c) toutes les parties qui ont formé l'association d'intérêts sont parties à une entente écrite qui impose à au moins l'une d'entre elles l'obligation de contribuer des éléments d'actif et qui régit une relation continue entre ces parties;

d) l'entente visée à l'alinéa c) limite l'éventail des activités qui peuvent être exercées conformément à l'association d'intérêts et prévoit sa propre expiration au terme du projet ou programme;

(e) the combination does not prevent or lessen or is not likely to prevent or lessen competition except to the extent reasonably required to undertake and complete the project or program.

e) l'association d'intérêts n'a pas, sauf dans la mesure de ce qui est raisonnablement nécessaire pour que le projet ou programme soit entrepris et complété, l'effet d'empêcher ou de diminuer la concurrence ou n'aura vraisemblablement pas cet effet.

Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(2) Il est entendu que le présent article ne s'applique pas à l'égard de l'acquisition d'éléments d'actif d'une association d'intérêts.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Facteurs pris en considération

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l'article 92 à l'égard d'un fusionnement qui est essentiellement complété depuis plus d'un an.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

TAB 25

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Act

Loi sur le Tribunal de la concurrence

R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2e suppl.)

NOTE

[*1986, c. 26, assented to 17th June, 1986*]

NOTE

[*1986, ch. 26, sanctionné le 17 juin 1986*]

Current to August 28, 2022

Last amended on November 1, 2014

À jour au 28 août 2022

Dernière modification le 1 novembre 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Jurisdiction and Powers of the Tribunal

Jurisdiction

8 (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

Powers

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

Power to penalize

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

R.S., 1985, c. 19 (2nd Supp.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.

Costs

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

Payment

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

Award against the Crown

(3) The Tribunal may award costs against Her Majesty in right of Canada.

Costs adjudged to Her Majesty in right of Canada

(4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from

Compétence et pouvoirs du Tribunal

Compétence

8 (1) Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

Pouvoirs

(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

Outrage au Tribunal

(3) Personne ne peut être puni pour outrage au Tribunal à moins qu'un juge ne soit d'avis que la conclusion qu'il y a eu outrage et la peine sont justifiées dans les circonstances.

L.R. (1985), ch. 19 (2e suppl.), art. 8; 1999, ch. 2, art. 41; 2002, ch. 16, art. 16.1.

Frais

8.1 (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

Détermination

(2) Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

Couronne

(3) Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.

Frais adjugés à Sa Majesté du chef du Canada

(4) Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou

Her Majesty in right of Canada in respect of the services so rendered.

Amounts to Receiver General

(5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.

2002, c. 16, s. 17.

pour toute autre raison, admis à recouvrer de Sa Majesté du chef du Canada les frais pour les services ainsi rendus.

Versement au receveur général

(5) Les sommes d'argent ou frais accordés à Sa Majesté du chef du Canada sont versés au receveur général.

2002, ch. 16, art. 17.

Court of record

9 (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Cour d'archives

9 (1) Le Tribunal est une cour d'archives et il a un sceau officiel dont l'authenticité est admise d'office.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Procédures

(2) Dans la mesure où les circonstances et l'équité le permettent, il appartient au Tribunal d'agir sans formalisme, en procédure expéditive.

Interventions by persons affected

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

Intervention des personnes touchées

(3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Procédure sommaire

(4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la *Loi sur la concurrence* et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

R.S., 1985, c. 19 (2nd Supp.), s. 9; 1999, c. 2, s. 42; 2002, c. 16, s. 18.

Pouvoirs du juge

(5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.

L.R. (1985), ch. 19 (2e suppl.), art. 9; 1999, ch. 2, art. 42; 2002, ch. 16, art. 18.

Organization of Work

Sittings of Tribunal

10 (1) Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member.

Judicial member to preside at hearings

(2) The Chairman shall designate a judicial member to preside at any hearing or, if the Chairman is present at a hearing, may preside himself.

Organisation du Tribunal

Séances du Tribunal

10 (1) Sous réserve de l'article 11, toute demande présentée au Tribunal est entendue par au moins trois mais au plus cinq membres siégeant ensemble et, parmi lesquels il doit y avoir au moins un juge et un autre membre.

Président de séance

(2) Le président désigne, pour chaque séance du Tribunal, un juge à titre de président, mais s'il est présent, il peut lui-même la présider.

TAB 26

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to August 28, 2022

À jour au 28 août 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

electronic transmission includes transmission by electronic mail (e-mail) or via the Tribunal website. (*transmission électronique*)

file means to file with the Registrar. (*déposer*)

intervenor means

(a) a person granted leave to intervene by the Tribunal in accordance with rule 46;

(b) an attorney general who intervenes under section 88 or 101 of the Act; or

(c) the Commissioner who intervenes under section 103.2 or subsection 124.2(3) of the Act. (*intervenant*)

originating document means either a notice of application, a notice of reference, or an application for leave under section 103.1 of the Act. (*acte introductif d'instance*)

paper hearing means a hearing in which documents are provided in paper form to the registry and are presented in paper form in the course of the hearing. (*audience sur pièces*)

party means an applicant or a respondent. (*partie*)

person includes a corporation, a partnership and an unincorporated association. (*personne*)

reference means the reference of a question to the Tribunal for determination under section 124.2 of the Act. (*renvoi*)

Registrar means the Registrar of the Tribunal. (*registraire*)

registry means the Registry of the Tribunal. (*greffe*)

respondent means a person who is named as a respondent in a notice of application. (*défendeur*)

magnétoscopique ou informatisé, ou toute reproduction totale ou partielle de ces éléments d'information. (*document*)

greffe Le greffe du Tribunal. (*registry*)

intervenant Selon le cas :

a) toute personne à qui le Tribunal a accordé la permission d'intervenir aux termes de la règle 46;

b) le procureur général qui intervient en vertu des articles 88 ou 101 de la Loi;

c) le commissaire, lorsqu'il intervient en vertu de l'article 103.2 ou du paragraphe 124.2(3) de la Loi. (*intervenor*)

Loi La *Loi sur la concurrence*. (*Act*)

membre judiciaire Sauf à la partie 10, juge nommé au Tribunal aux termes de l'alinéa 3(2)a) de la *Loi sur le Tribunal de la concurrence*. (*French version only*)

partie Demandeur ou défendeur. (*party*)

personne S'entend notamment d'une personne morale, d'une société de personnes et d'une association sans personnalité morale. (*person*)

président Membre judiciaire nommé président du Tribunal en application du paragraphe 4(1) de la *Loi sur le Tribunal de la concurrence*. (*Chairperson*)

registraire Le registraire du Tribunal. (*Registrar*)

renvoi Renvoi d'une question au Tribunal conformément à l'article 124.2 de la Loi. (*reference*)

transmission électronique S'entend notamment de la transmission par courrier électronique (courriel) ou au moyen du site Web du Tribunal. (*electronic transmission*)

Rules Applicable to All Proceedings

Dispensing with Compliance

Variation

2 (1) The Tribunal may dispense with, vary or supplement the application of any of these Rules in a particular case in order to deal with all matters as informally and

Règles applicables à toutes les instances

Dispense d'observation des règles

Dérogation

2 (1) Le Tribunal peut, dans des cas particuliers, modifier ou compléter les présentes règles ou dispenser de l'observation de tout ou partie de celles-ci en vue d'agir

expeditiously as the circumstances and considerations of fairness permit.

Urgent matters

(2) If a party considers that the circumstances require that an application be heard urgently or within a specified period, the party may request that the Tribunal give directions about how to proceed.

Time Limits

Interpretation Act

3 Unless otherwise provided in these Rules, time limits under these Rules or under an order of the Tribunal shall be calculated under sections 26 to 30 of the *Interpretation Act*.

Calculating time limits

4 (1) If the time for doing an act expires on a holiday or a Saturday, the act may be done on the next day that is not a holiday or a Saturday.

Time limit less than six days

(2) If a time limit is less than six days, holidays and Saturdays shall not be included in the calculation of the time limit.

Varying time limits

5 The time limits prescribed by these Rules may only be shortened or extended by an order or a direction of a judicial member.

Documents

Memorandum of fact and law

6 Where in these Rules a reference is made to a memorandum of fact and law, the memorandum of fact and law shall contain a table of contents and, in consecutively numbered paragraphs,

(a) a concise statement of fact;

(b) a statement of the points in issue;

(c) a concise statement of the submissions;

(d) a concise statement of the order sought, including any order concerning costs;

(e) a list of the authorities, statutes and regulations to be referred to; and

(f) an appendix, and if necessary as a separate document, a copy of the authorities (or relevant excerpts)

sans formalisme et en procédure expéditive dans la mesure où les circonstances et l'équité le permettent.

Demandes urgentes

(2) La partie qui est d'avis que les circonstances exigent qu'une demande soit entendue sans délai ou dans un délai précis peut demander au Tribunal de lui donner des directives sur la façon de procéder.

Délais

Loi d'interprétation

3 Sauf disposition contraire des présentes règles, le calcul des délais prévus par celles-ci ou fixés par une ordonnance du Tribunal est régi par les articles 26 à 30 de la *Loi d'interprétation*.

Calcul de délais

4 (1) Le délai qui expirerait normalement un jour férié ou un samedi est prorogé jusqu'au jour suivant qui n'est ni un jour férié ni un samedi.

Délai de moins de six jours

(2) Les jours fériés et les samedis ne comptent pas dans le calcul de tout délai de moins de six jours.

Modification de délais

5 Les délais prévus par les présentes règles ne peuvent être abrégés ou prorogés que par une ordonnance ou une directive d'un membre judiciaire.

Documents

Mémoire des faits et du droit

6 Le mémoire des faits et du droit comprend une table des matières, est divisé en paragraphes numérotés consécutivement et comporte les éléments suivants :

a) un exposé concis des faits;

b) les points en litige;

c) un exposé concis des arguments;

d) un énoncé concis de l'ordonnance demandée, notamment toute ordonnance relative aux frais;

e) la liste des décisions, des textes de doctrine, des lois et des règlements qui seront invoqués;

f) en annexe et, au besoin, dans un document distinct, copie des arrêts cités — ou des extraits pertinents de ceux-ci — et des dispositions législatives ou

Technology

(2) The Tribunal may give directions requiring the use of any electronic or digital means of communication, storage or retrieval of information, or any other technology it considers appropriate to facilitate the conduct of a hearing or case management conference.

Questions as to practice or procedure

34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Courts Rules* may be followed.

Tribunal may direct

(2) If a person is uncertain as to the practice or procedure to be followed, the Tribunal may give directions about how to proceed.

PART 2

Contested Proceedings

Application

Application of Part

35 This Part applies to all applications to the Tribunal, except applications for interim or temporary orders (Part 4), applications for specialization agreements (Part 5), applications for leave under section 103.1 of the Act (Part 8) and applications for a loan order (Part 9).

Notice of application

36 (1) An application shall be made by filing a notice of application.

Form and content

(2) A notice of application shall be signed by or on behalf of the applicant and shall set out, in numbered paragraphs,

(a) the sections of the Act under which the application is made;

(b) the name and address of each person against whom an order is sought;

(c) a concise statement of the grounds for the application and of the material facts on which the applicant relies;

Directives sur la technologie

(2) Il peut donner des directives qui exigent l'utilisation de moyens électroniques ou numériques de communication, de stockage ou d'extraction de renseignements, ou de tout autre moyen technique qu'il juge indiqué, afin de faciliter la tenue d'une audience ou d'une conférence de gestion d'instance.

Questions concernant la pratique ou la procédure

34 (1) Les *Règles des Cours fédérales* peuvent s'appliquer aux questions qui se posent au cours de l'instance quant à la pratique ou à la procédure à suivre dans les cas non prévus par les présentes règles.

Directives du Tribunal

(2) En cas d'incertitude quant à la pratique ou à la procédure à suivre, le Tribunal peut donner des directives sur la façon de procéder.

PARTIE 2

Instances contestées

Demandes

Application de la présente partie

35 La présente partie s'applique à toutes les demandes présentées au Tribunal, à l'exception des demandes d'ordonnance provisoire ou temporaire (partie 4), des demandes relatives aux accords de spécialisation (partie 5), des demandes de permission présentées en vertu de l'article 103.1 de la Loi (partie 8) et des demandes d'ordonnance de prêt de pièces (partie 9).

Avis de demande

36 (1) La demande est introduite par dépôt d'un avis de demande.

Forme et contenu

(2) L'avis de demande est signé par le demandeur ou en son nom, est divisé en paragraphes numérotés et comporte les renseignements suivants :

a) les dispositions de la Loi en vertu desquelles la demande est présentée;

b) les nom et adresse de chacune des personnes contre lesquelles une ordonnance est demandée;

c) le résumé des motifs de la demande et des faits importants sur lesquels se fonde le demandeur;

(a) a use to which the person who disclosed the evidence consents;

(b) the use, for any purpose, of

(i) evidence that is filed with the Tribunal,

(ii) evidence that is given or referred to during a hearing; or

(iii) information obtained from evidence referred to in subparagraph (i) or (ii),

(c) the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding, or

(d) the use of evidence or information in a subsequent Tribunal proceeding.

a) l'utilisation d'éléments de preuve ou de renseignements à laquelle consent la personne qui a divulgué ceux-ci;

b) l'utilisation, à une fin quelconque, de ce qui suit :

(i) les éléments de preuve qui sont déposés auprès du Tribunal,

(ii) les éléments de preuve qui sont présentés ou mentionnés au cours d'une audience,

(iii) les renseignements tirés des éléments de preuve visés aux sous-alinéas (i) ou (ii);

c) l'utilisation d'éléments de preuve obtenus au cours d'une instance, ou de renseignements tirés de ceux-ci, pour attaquer la crédibilité d'un témoin dans une autre instance;

d) l'utilisation d'éléments de preuve ou de renseignements dans des instances subséquentes devant le Tribunal.

Non-application

(4) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the Tribunal may, on motion, order that the deemed undertaking referred to in subrule (2) does not apply to the evidence or to information obtained from it, and may impose any terms and give any directions that are just.

Ordonnance de non - application

(4) S'il est convaincu que l'intérêt de la justice l'emporte sur tout préjudice que pourrait subir une partie qui a divulgué les éléments de preuve, le Tribunal peut ordonner que la présomption d'engagement implicite visée au paragraphe (2) ne s'applique pas aux éléments de preuve ou aux renseignements tirés de ceux-ci, et imposer les conditions et donner les directives qu'il estime justes.

Supplementary affidavit

63 A party who has served an affidavit of documents and who comes into possession or control of or obtains power over a relevant document, or who becomes aware that the affidavit of documents is inaccurate or deficient, shall as soon as possible serve a supplementary affidavit of documents listing the document or correcting the inaccuracy or deficiency.

Affidavit supplémentaire

63 La partie qui a signifié un affidavit de documents et qui soit entre en possession d'un document pertinent, en assume la garde ou le prend sous son autorité, soit constate que l'affidavit comporte des renseignements inexacts ou incomplets signifie sans délai un affidavit supplémentaire qui fait état du document ou qui complète ou corrige l'affidavit original.

Examination for discovery

64 (1) Examination for discovery shall occur as of right.

Interrogatoire préalable

64 (1) L'interrogatoire préalable est un droit des parties.

Power of the Tribunal

(2) The Tribunal may, in case management, make rulings to deal with the timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.

Pouvoirs du Tribunal

(2) Le Tribunal peut, dans le cadre de la gestion d'instance, rendre des décisions sur le moment, la durée, la portée et la forme des interrogatoires préalables, ainsi que sur les personnes qu'il convient d'interroger.

CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.

Intervenors

BOOK OF AUTHORITIES

ATTORNEY GENERAL OF CANADA

Department Of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

Derek Leschinsky
Tel: 613-818-1611
derek.leschinsky@cb-bc.gc.ca

Ryan Caron
Tel: 819-635-3797
jonathan.bitran@cb-bc.gc.ca

Jonathan Bitran
Tel: 416-605-1471
jonathan.bitran@cb-bc.gc.ca

Counsel to the Commissioner of Competition