LITIGATION PRIVILEGE AND DISCLOSURE OF EXPERT'S FILE

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INTRODUCTION

Expert opinion at trial is an exception in the law of evidence. The unique role of the testimonial expert, together with the fact that the expert is permitted to give opinion evidence where normally opinions are inadmissible, in part explain the steady expansion of disclosure over privilege in civil litigation.

The *de facto* incorporation of the expert into the fact-finding function of the court in areas where the court, unaided, is not capable of drawing the proper inferences from raw data or factual evidence, calls for caution in the judicial treatment of expert evidence. The willingness of judges to countenance an intrusion into otherwise privileged territory is more readily understandable considering that, in effect and to a significant degree, the court delegates a judicial function to experts. The court must, accordingly, be satisfied that the experts – whose opinions are to be adopted – are beyond reproach.[1]

The expert witness offering his opinion to the court is expected to shed his partisan affiliations. The court expects of him to offer impartial and objective assessments of raw evidence that is not possible to understand without the unrefracted lense of the expert's special expertise. While, in an adversarial system – where experts are called and remunerated by parties to proceedings having an interest in the ultimate disposition of those proceedings – this objectivity may appear to be a legal fiction, it is nevertheless the main premise upon which experts are permitted to give their opinions and upon which expert evidence that is trusted is

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[1] In British Columbia, for example, the bulk of the case law has established that recourse to the expert's file by cross-examining counsel ensures that the expert's opinion will be vigorously tested and that if objectivity has been compromised in any way, that distortion of the expert's opinion will almost certainly be revealed. See generally: Donald Brenner, Brian Samuels, & Thomas Woods, *Expert Evidence in British Columbia Civil Proceedings*, 2d ed. (Vancouver: Continuing Legal Education Society of British of Columbia, 2005) c. 4 at 4.2 and 4.9.

received.[2] Indeed, where the court perceives that the expert has adopted the role of an advocate, the expert's opinion will either be ruled inadmissible or accorded little or no weight.[3]

Judicial cynicism towards the objectivity and reliability of experts' opinions and reports is increasingly prevalent.[4] Although counsel must work closely with any necessary expert to present a coherent and carefully elaborated opinion, the close relationship that often develops between lawyer and expert raises concerns of bias and fairness.[5]

Canadian trial judges increasingly take a dim view of experts' "opinions" as being nothing more than the by-products of mercenary work. An apparently qualified expert will say one thing, while another similarly-qualified expert in the same field will say the opposite. "The impression that he who pays the piper calls the tune is sometimes inescapable."[6] Witnesses-for-sale or hired-guns are not welcome in court since experts are expected to be neutral.[7] Their testimony is meant to assist the court and the trier of fact, not to bolster the theory of the case presented by one of the two sides.[8]

Would our systems of civil litigation function more fairly and effectively if production of all written communications between counsel and expert were

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2 *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd (The 'Ikarian Reefer')*, [1993] 2 Lloyd's Rep. 68; see also *Day v. Karagianis et al.*, [2005] N.L.T.D. 21; *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.* (1995), 92 F.T.R. 26 (Fed. T.D.); *Yewdale v. Insurance Corporation of British Columbia*, [1995] 6 B.C.L.R. (3d) 324 (S.C.); *Baniuk v. Filliter*, 2003 N.B.J. No. 181 (C.A.); and *Fesser v. Patterson* (1998), [1999] 1 W.W.R. 206 (Sask.Q.B).

3 In the United Kingdom, the common law requirement of objectivity has been codified as an overriding duty to the court in *Civil Procedures Rules1998*, S.I. 1998/3132, s.35.3 which provides as follows:

> 35.3 (1) It is the duty of an expert to help the court on the matter within his expertise.
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

Civil procedure reform initiatives *afoot* in several Canadian provinces appear to be poised to follow the English example and incorporate a comparable overriding duty into rules of court in Canada as well. See, for example, British Columbia's "Effective and Affordable Civil Justice: A Report of the Civil Justice Reform Working Group to the Justice Review Task Force", Victoria: C.J.R.W.G., 2006, at 30-31.

4 *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49 (S.C.), Ferguson, J. at 63 [*Browne*].

5 Mark Freiman and Mark Berenblut, *The Litigator's Guide to Expert Witnesses* (Aurora, Ont.: Canada Law Book, 1997) at 21.

6 *O'Neill v. Campbell et al.* (1995), 161 N.B.R. (2d) 1 (Q.B.), Creaghan, J .

7 Thomas Woods, "'Impartial Expert or Hired Gun?' Recent Developments at Home and Abroad" (2002), online: Lawson Lundell <http://www.lawsonlundell.com>.

8 *Browne*, *supra* note 4 at 62-63.

mandatory?[9] Would inefficiency and unfairness result if litigation privilege was not available?[10] Courts are at loggerheads on this issue, which includes whether production of instructing letters of counsel and expert preliminary reports should be protected by litigation privilege.

The law is in a state of flux on this narrow aspect of Canadian civil litigation and even the legal reasoning of the Supreme Court of Canada is still a work in progress.[11]

1. Clash of Titans: The Common Law in Motion

Competing legal theories are at play both at discovery and trial. Issues of production come at the forefront of litigation initially at discovery or afterwards at trial. In either case, there is a clash of conflicting values between the contradictory policy objectives of encouraging broad disclosure in litigation and protecting litigation privilege. In all cases, the issues at stake are a function of the civil process of dispute adjudication.

Adversarial proceedings are traditionally the hallmark of the system of adjudication of dispute in common law jurisdictions. Every jurisdiction throughout the Canadian federation has inherited this typical English system of civil justice with the notable exception of the Province of Québec.

One feature of modern Canadian systems of civil justice has been the perpetual dynamic tension between disclosure and privilege. Why?

Under modern-day rules of discovery, it is accepted as an article of faith that generous disclosure of documents and information is the underpinning of fairness in the adjudicative process. The ever-expanding scope of disclosure has been tempered, however, by the assertion of privilege for both solicitor-client privilege and litigation privilege, which are at the forefront of the adversarial setting.

Solicitor-client privilege has been given full status as a substantive legal right that can be exerted outside the scope of adversarial proceedings.[12] However, litigation privilege has been steadily eroded under the unrelenting pressure of modern-day rules of disclosure in Canadian civil proceedings. Nowhere has this been more obvious than in the area concerning access to expert work product. These

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[9] *Morrissey v. Morrissey* (2000), 196 D.L.R. (4th) 94 at para 37 (Nfld. C.A.) [*Morrissey*].

[10] *Turner (Litigation Guardian of) v. Dyck*, [2002] O.J. No. 4775 at para. 17 (S.C.) [*Turner*]. Claims of litigation privilege require the determination of questions of mixed law and fact rather than the exercise of discretion: *Torchia v. Royal Insurance Co. of Canada* (2000), 20 C.C.L.I. (3d) 229 (Ont. S.C.J.).

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

[12] Andrew Moran, Q.C., "Legal Professional Privilege - Know the Boundaries and Keep the Privilege" at para. 6, online: Byrom Street Chambers Symposium 2004 <http://www.byromstreet.com>.

privileges therefore provide unequal protection against mandatory compelled disclosure.[13]

(A) *Movements of the Tectonic Plates of Common Law: Top Courts on the Move*

Recently, the highest courts in Canada and England considered litigation privilege and solicitor-client or legal advice privilege. In 2004, the House of Lords in *Three Rivers District Council v. Governor and Company of the Bank of England*[14], , significantly widened the scope of the solicitor-client privilege, but left critical issues to be resolved in the future. In *Blank v. Canada (Minister of Justice)*[15] the Supreme Court of Canada dealt with, for the first time, the issue of litigation privilege.

A factual review of the circumstances of these cases is necessary, since at common law, legal principles are advanced incrementally on the facts of particular cases rather than in a factual vacuum.[16]

In *Three Rivers*, the Chancellor of the Exchequer and the Bank of England ("Bank") had set up an inquiry into the collapse of a secondary bank ("BCCI"). It was clear from the outset that the inquiry might criticize the Bank's conduct and affairs with BCCI and would likely lead to legal proceedings against the Bank by creditors of BCCI and others who had lost money in consequence of BCCI's collapse.

The Bank agreed to make submissions to the inquiry with respect to the collapse. A number of its employees and ex-employees agreed to give evidence to the inquiry. The Bank set up a small group of employees as an inquiry unit ("BIU") specifically for the purpose of liasing with external lawyers in relation to the inquiry. Freshfields, the Bank's solicitors, were instructed to assist the Bank with advice on both the preparation and presentation of the submissions and further on evidence to be given to the inquiry by employees and ex-employees of the Bank.

Certain employees and ex-employees of the Bank, some who were members of the BIU, prepared documents with the intention of sending them to Freshfields to aid its task of advising on the submissions and the evidence. Subsequent to the creation of these documents, various external parties sued the Bank for misfeasance in public

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[13] Anne-Marie Sheahan, "The Litigation and Legal Advice Privileges: Unequal Exceptions to Mandatory Disclosure", online: <http://www.mcarthy.ca>.

[14] *Three Rivers District Council v. Governor and Company of the Bank of England*,[2004] U.K.H.L. 48 (H.L.) [*Three Rivers*].

[15] *Blank, supra* note 11. See also Lyette Doré, and Arslanian, Chahé-Phillipe, « Grandeur et misères des privilèges liés au secret professionnel de l'avocat : les arrêts Goodis et Blank en Cour Suprême! » (2006) 8 Revue de la common law en français 353.

[16] *Krouse v. Chrysler Canada Ltd.*, [1970] 3 O.R. 135 at 136 (H.C.); *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3rd) 778 at 782; *Halton Hills (Town) v. Kerouac* (2006), 270 D.L.R. (4th) 479 (Ont. S.C.).

office with respect to the collapse of BCCI. In the course of that litigation, the appellants sought disclosure and inspection of all documents including the Freshfields documents.

In the context of English law, the inquiry did not constitute adversarial litigation. Hence, the documents could not be subject to litigation privilege. However, the Bank contended that the documents were shielded from disclosure on account of legal advice privilege (*i.e.* solicitor-client privilege).

The Bank decided to forego a claim to litigation privilege based on the fact that, although it contemplated litigation at the time of the inquiry, the dominant purpose for which documents were produced was not for possible future litigation, but for presentation of submissions and evidence to the inquiry itself. The inquiry did not constitute an adversarial proceeding and, in contrast to court proceedings, it was a fact-finding process. The Bank therefore sought to rely on legal advice privilege to shield the documents created both by members of the BIU and those documents prepared by other employees. The issue before the court was therefore the scope of the legal advice privilege.

The House of Lords dealt only with this issue on appeal; although the Court of Appeal of England had also issued a restrictive definition of "who is the client" for the purpose of receiving that advice. The appeal before the House of Lords dealt strictly with the scope of legal advice and not with the issue of who is the lawyer's client in the context of a large organization. It follows that guidance from the House of Lords as to the issue of "who is the client" remains to be obtained.

This factual background led to five different sets of concurring reasons issued by the panel of the House of Lords:

(a) The Court noted the close proximity between legal advice privilege and litigation privilege, and then set out the broad scope of the legal advice privilege.

(b) The Court held that legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context. Legal advice, which would attract privilege, was defined to include that which related to the rights, liabilities, obligations, or remedies of the client.

(c) The modern lawyer does not simply give black and white advice on the construction of legal principles. Legal advice now extends to practical advice such as the protection of the client's reputation, provided such advice arises out of a given legal context.

(d) However, the traditional business solicitor may find himself exceeding the boundaries of legal advice privilege if he advises a client on all business matters, including in relation to investments and finances outside a legal context.

(e) The advice given to a client concerning the evidence he will give at an inquiry or an inquest does attract legal advice privilege. It will not attract the other type of legal professional privilege, litigation privilege, since the proceedings are not adversarial. This is described as presentational advice.

(f) In general, it does not matter that litigation may not ultimately result from the inquiry or inquest – the defence of personal reputation and integrity is also important.

(g) Furthermore, Lord Scott, specifically referred to concerns about planning inquiries. Accordingly, advice given by lawyers to a developer in relation to his rights under planning laws and to objectors to a proposed development would also come under legal advice privilege and thus be shielded from compellable disclosure.

Several issues in relation to the scope of the legal professional or legal advice privilege, which protects communications between solicitor and client irrespective of pending or anticipated litigation, have remained unanswered by the House of Lords. These issues typically arise when privileged documents are disclosed by a company to its auditors or in the course of a regulatory investigation. The decision of the House of Lords in *Three Rivers* provides the basis for an argument that the courts ought to adopt a liberal view of legal advice privilege and to extend the protection of privilege to a wide range of documents prepared by in-house counsel.[17]

One issue unanswered by the House of Lords relates to who would be the client in a situation similar to the factual background of *Three Rivers*. The Court of Appeal had held that the clients for privilege purposes were only the members of the BIU. Communication between any other employee of the Bank, even the Governor of the Bank and its lawyer, did not attract legal advice privilege. Consequently, the Court of Appeal had held that no privilege could be claimed over documents prepared by other employees and ex-employees of the Bank and sent to Freshfields. Thus, "who is the client" has been defined restrictively.

Therefore, great care needs to be taken over the creation of internal documents in a large organization concerning an issue that may ultimately lead to litigation. The free use of e-mail, for example, both internally for discussion and externally with lawyers and third parties is also potentially dangerous. Caution ought to rule the day until such time as the issue is resolved.[18]

In the footsteps of the House of Lords' judgement, the Supreme Court of Canada entered the fray and for the first time; they dealt with the nature, scope, and duration of litigation privilege and its difference from another exemption from

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[17] Neil Guthrie, "Recent Developments in the Law of Privilege" (2006) 31 Advoc. Q. 23.

[18] Miranda Whiteley, "Privilege and Three Rivers (No. 6)" (11 November 2004), online: <http://www.mills-reeve.com>.

compelled disclosure: solicitor-client privilege. In doing so, it clarified many areas of the law relating to litigation privilege and prepared the groundwork for future issues.

In *Blank*, the Crown had laid 13 charges against the respondent and a company for regulatory offences. Those charges were quashed and new charges laid by the Crown were subsequently stayed prior to trial. The respondent sued the federal government and sought damages for abuse of its prosecutorial powers among other grounds.

In that civil action, the respondent sought disclosure of all records relating to the criminal prosecution under the *Federal Access to Information Act* (the *Act*).[19] The request was denied on various grounds including solicitor-client privilege under Section 23 of the *Act*. Certain documents were released to the respondent after he lodged a complaint with the Information Commissioner while other documents were found to be properly exempted. The respondent was successful in judicial review under Section 41 of the *Act* and the requested documents were to be released provided the litigation to which they related had ended. The Federal Court of Appeal upheld that decision and the matter went to the Supreme Court of Canada.

Blank is essential reading for all litigators. In what respect does the contribution of the Supreme Court of Canada constitute much needed – and anticipated – guidance? A review of the conflicting case law is needed to answer this question.

(B) *Regulatory Framework*

In Ontario, the *Rules of Civil Procedure*[20] provides the regulatory framework. Rule 31.06(3) mandates disclosure of findings, opinions, and conclusions of an expert at the discovery stage:

> 31.06(3) A party may, on an examination for discovery, obtain disclosure of findings, opinions, and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
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> > (a) the findings, opinions, and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
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> > (b) the party being examined undertakes not to call the expert as a witness at the trial.[21]

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[19] *Federal Access to Information Act*, R.S.C. 1985, C. A-1.

[20] *Rules Of Civil Procedure*, R.R.O. 1990, Reg. 194.

Rules similar to Ontario's 31.06(3) can be found in varying shades in all Canadian jurisdictions. Typically, rules of court at the discovery stage require that counsel disclose the existence of expert evidence. However, compliance with the relevant rule does not require producing an expert report if an expert is retained. What is required, however, is the disclosure of expert evidence relied on (that is the findings, opinions, and conclusions) of any expert to be called at trial that relates to a matter in issue in the action as well as the expert's name and address. The disclosure of the factual basis of such expert evidence is not restricted to written reports. The rule requires the disclosure of any expert's finding, opinion, or conclusion. expressed in a sufficiently coherent manner that it can be used by counsel.[22] The rule therefore challenges what is now known as the "zone of privacy" protected by litigation privilege.

Of course, findings, opinions, and conclusions of the expert made in preparation for contemplated or pending litigation and for no other purpose, need not be disclosed if the party undertakes *not* to call the expert as a witness at trial.

On the other hand, Rule 53.03(1) requires a party who intends to call an expert witness at trial to serve a signed report that sets out the substance of an expert's proposed testimony no less than 90 days before the trial or they must seek leave of the trial judge. The rule provides as follows:

> 53.03(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert setting his or her name, address and qualifications and the substance of his or her proposed testimony.[23]

In other Canadian jurisdictions, the equivalent rule has the common requirement of serving a notice setting out the substance of the expert's proposed testimony at trial. The difference lies mostly in the timeframe within which the notice must be issued.

However, once the expert goes into the witness box at trial, the issue is whether privilege is waived on the contents of the expert file including materials received from counsel and preliminary reports.

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[21] *Rules Of Civil Procedure*, R.R.O. 1990, Reg. 194, s.31.

[22] David Hooley, "Scope of Examination at Oral Discovery" in T. Archibald and M. Cochrane, eds., *Annual Review of Civil Litigation 2002* (Toronto: Carswell, 2002).

[23] *Rules Of Civil Procedure*, R.R.O. 1990, Reg. 194. s.53.

(C) *Discoverability and Production*

Rules of disclosure in a civil action mandate full, frank and open disclosure during the discovery process.[24] The goal is to provide parties greater opportunity to settle their cases and avoid surprises at trial. Questions posed in an examination for discovery must be answered if the questions have a semblance of relevancy to the matters at issue, as defined in the pleadings. "Wide latitude" is permitted at discovery, which is bound only by the requirement that the information sought relates to any matter at issue in the action. Similar principles apply to documentary disclosure.[25]

However, not all cases are settled out of court. Parties must therefore always be concerned to protect what has been traditionally known as the barrister's brief: documents, ideas, strategies, and other materials needed to prepare and conduct the trial. The challenge both for the bar and the bench is to know where to draw the line between disclosure and privilege.

The modern trend in the direction of complete discovery is the direct consequence of the historical changes in the way in which litigation, coast to coast, has been conducted both through reforms in rules of procedure and case law development in the later part of the 20th century.[26] In the Common Law world, the recognition of the necessity of full disclosure for proper litigation has resulted in a shift from the historic ambush model to full disclosure. It is well established that the mutual knowledge of all the relevant facts gathered by both parties is now essential to proper litigation.[27]

(D) *Confidentiality and Zone of Privacy*

Withholding relevant evidence on account of a claim for privilege is an exception to the modern objectives of the administration of civil procedure. These objectives are the ascertainment of justice and truth.

Nevertheless, rules of privilege are rooted in both policy and necessity. They warrant the protection of interests and relationships, which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice. These interests should be fostered because of the civil litigation process itself. The nature of the doctrine of litigation

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[24] *Guelph (City) v. Super Blue Box Recycling Corp.* [2004] O.J. No. 4468 at paras. 17-18 (S.C.) [*Guelph*]; see also *Chmara v. Nguyen* [1993] M.J. No. 274 (Man. C.A.).

[25] *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.) at para. 25 [*Chrusz*].

[26] *Hickman v. Taylor* (1946), 329 U.S. 495.

[27] Robert Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence, Special Lectures of the Law Society of Upper Canada.* (Don Mills, Ont.: Richard De Boo Publishers, 1984) at 165.

privilege was set out in an article by R. J. Sharpe[28] prior to his judicial appointment, which was adopted in the judgement of Carthy, J.A., in *General Accident Assurance Co. v. Chrusz*:[29]

> 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.[30]

As the privilege not to answer certain questions at a trial is, in part, to prevent information from being disclosed, it has been logically extended to the discovery process of civil litigation. Hence, privileged documents or privileged information need not be produced or disclosed during discovery.

(E) ***Legal Privileges***

Generally speaking, legal privilege is a mechanism available to protect confidential communications or documents from disclosure. The two main types of legal privilege are solicitor-client privilege and litigation privilege.

Litigation privilege is the narrower of the two privileges. Its rationale is to protect information to facilitate the adversarial process of investigating and preparing a case for trial. Litigation privilege can be limited by other competing interests. In considering a claim of litigation privilege, courts must weigh the interest of privacy to facilitate adversarial preparation against the competing interest of disclosure to foster a fair trial.

Litigation privilege can only arise when communications or documents were made for the dominant purpose of reasonably contemplated litigation or existing litigation. The dominant-purpose standard had been adopted by appellate courts in Nova Scotia, New Brunswick, Ontario, Alberta, and British Columbia and has now received approval by the Supreme Court of Canada in *Blank*.

Litigation privilege in the civil litigation context has several features of importance:

(a) 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

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[28] *Ibid.*

[29] *Chrusz, supra* note 25; Sharpe, *supra* note 27.

[30] *Chrusz, ibid.* at para. 23.

the solicitor and third parties and even includes material of a non-communicative nature brought into existence for the dominant purpose of litigation;

(b) solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Once in existence, it remains forever. Litigation privilege, on the other hand, applies only in the context of litigation itself. It ends with the litigation;

(c) litigation privilege developed as an outgrowth of solicitor-client privilege 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;

(d) although litigation privilege may trace its origins to traditional solicitor-client privilege, the policy justifications for the two differ: solicitor-client privilege is based on the need for the protection of a relationship, whereas litigation privilege is based on the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. It protects a process;

(e) neither privilege in the civil context affords a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. 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[31]; and

(f) the rationale for solicitor-client privilege is very different from that which underlies litigation privilege.

What are the different rationales at work? The interest that underlies the protection of communications between a client and a solicitor from disclosure, is the interest of all citizens to have full and ready access to legal advice. It describes the privilege that exists between a client and his or her lawyer. In order for the legal system to function properly, clients must feel free and protected to be frank and candid with their lawyers about their affairs.[32] It is a jealously guarded privilege, which, once established, is considerably broad and all-encompassing.[33]

In *Descôteaux et al. v. Mierzwinski*,[34] a unanimous Court formulated a substantive rule to apply when communications between solicitor and client are likely to be disclosed without the client's consent. A judge must not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling

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[31] *R. v. Trang*, [2002] 6 W.W.R. 524 (Alta. Q.B.) at para. 65.

[32] *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 46, cited with approval in *Pritchard v. Ontario (Human Rights Commission,)* [2004] 1 S.C.R. 809.

[33] *Ibid* at 817.

[34] *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860.

legislation".[35] *Lavallee, Rackel & Heintz v. Canada (Attorney General)*,[36] further emphasized the fundamental nature of the substantive rule. It is, therefore, incumbent on a judge to apply the "absolutely necessary" test when deciding and applying for disclosure of such records.

This strict approach prevailed in *R. v. McClure*, where Major J. stated:

> 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 interest on a case-by-case basis.[37]

So powerful is the solicitor-client privilege that the question of disclosure of solicitor-client privileged communications does not involve a balancing of interests on a case-by-case basis. Indeed, absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case.[38]

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based on the need of the adversarial advocate for a protected area to facilitate investigation and preparation of a case for trial.[39] It has been defined as a practical means of assuring a zone of privacy to solicitors.[40] Litigation privilege is essentially a creature of adversarial proceedings.[41]

Litigation privilege has been referred to as the "lawyer's work-product" in the American jurisprudence. However, this description has not found widespread acceptance in Canada.[42]

Prevailing academic wisdom has held that the first privilege does not encompass the second.[43] They are separate and distinct. At first blush, these differences are clearly articulated and the need to distinguish between the two seems to have been judicially accepted. They are nevertheless interrelated.

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[35] *Ibid.*

[36] *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209; Sharpe, *supra* note 27 at 165.

[37] *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 35 [*McClure*].

[38] *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32.

[39] *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860.

[40] *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209.

[41] *McClure*, *supra* note 37.

[42] Sharpe, *supra* note 27 at 165; *In Re L (A Minor)*, [1997] A.C. 16 (H.L.).

[43] *Blank*, *supra* note 11.

(F) *Confusion Above, Pandemonium Below: Appeal Courts at Odds*

There has been disagreement from the outset whether there is actually any difference between solicitor-client privilege and litigation privilege. In *Hodgkinson v. Simms*[44] the British Columbia Court of Appeal held:

> It appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely:
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> (a) confidential communications with a client; and
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> (b) the contents of the solicitor's brief,
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> it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such enquiries and collect such material as he may require to properly 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.[45]

In contrast, the Ontario Court of Appeal, in *Chrusz*, held the opposite thesis in recognizing two separate privileges. Other appellate courts have found the same. For example, in 1996, the Alberta Court of Appeal held that "the solicitor-client privilege and litigation privilege are distinct, and should not be confused."[46]

In New Brunswick, the Court of Appeal held in *Lamey (Litigation Guardian of) v. Rice*[47] that communications between counsel and a third party are privileged under solicitor-client privilege rather than litigation privilege on the basis of agency. What makes this case interesting is that it did not mention *Chrusz*, which held that an adjuster was not an agent of the insurer's solicitor, and that accordingly, solicitor-client privilege would not protect his reports from disclosure. In *Chrusz*, the Ontario Court of Appeal held that if there were to be protection, it would have to be considered under litigation privilege rather than solicitor-client privilege. The New Brunswick Court of Appeal, in *Lamey*, held that the adjuster carrying out an investigation was acting as an agent of the client at the direction of the client's lawyer and as a result, produced documents to assist the lawyer in advising the client. The Court concluded that the file was therefore protected by solicitor-client privilege because of the agency relationship. This conclusion only adds to the analytical confusion of the issues.

The inconsistent approaches by the various courts of appeal in Canada and the resulting confusion have had a substantial impact on trial judges dealing with issues

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[44] *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C.C.A.) [*Hodgkinson*].

[45] *Ibid.* at para.24.

[46] *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1996), 39 Alta. L.R. (3d) 141 (C.A.), at para. 18 [*Moseley*].

[47] *Lamey (Litigation Guardian of) v. Rice*, [2000] N.B.J. No. 271 (C.A.).

of production. Lack of appellate review from the Supreme Court of Canada had only magnified the problem. Despite the allure that *Chrusz* may hold, the law in British Columbia is settled by the decision of *Hodgkinson*.[48] For example, in British Columbia, in *Do v. Esmaili*,[49] Wilson J. noted on the issue of legal privileges that he was bound by the prior decision of the British Columbia Court of Appeal:

> [11] Mr. Do relies on the notion that full and complete disclosure is the contemporary norm. He calls in aid a number of decisions of this Court, said to import principles in authorities from the province of Ontario. I think some caution must be exercised before resorting to Ontario procedure. One of the reasons for the principles found in those authorities appears to be that the Ontario rules and decisions applying them '... are based upon the philosophy of complete disclosure between the parties for the purposes of trial'. In this jurisdiction the debate has gone the other way. In *Hodgkinson v. Simms*, the Chief Justice, for himself and Taggart, J.A., wrote:
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> > '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 solicitors' privilege at all. There are strong and valid reasons for privilege which should not likely 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.'[50]

Hodgkinson has come under heavy criticism from the majority decision in *Chrusz*. Carthy J. said:

> 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.[51]

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[48] *Hodgkinson, supra* note 44; see also *Hoy v. Medtronic, Inc.* (2001), 94 B.C.L.R. (3d) 169 (S.C.), at para. 53.

[49] *Do v. Esmaili* (2002), 21 C.P.C. (5th) 97 (B.C. S.C.).

[50] *Ibid.* at para. 11, citing *Hodgkinson, supra* note 44 at para. 19.

[51] *Chrusz, supra* note 25 at para. 37.

The New Brunswick Court of Appeal, in *Edgar v. Auld*,[52] has taken note of both approaches and opted in favour of *Chrusz* rather than *Hodgkinson*. This support, however, is suspect as a result of the path chosen in *Lamey*.

It is in this murky judicial context that lines have been drawn throughout various jurisdictions in Canada between conservative and liberal authorities on the companion issues of disclosure of instructing letters from counsel to experts and disclosure of experts' draft reports and working papers.

2. Justice by Osmosis: Mutually Acceptable Influence in Adversarial Settings

The adversarial system is based on the assumption that if each side presents its case in the strongest light, the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his or her opinions, strategies, and conclusions to opposing counsel.

An invasion of the privacy of counsel's trial preparation might well lead to the postponement of research and other preparation until the eve of, or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the modern goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows the fruits of his work must be turned over to the other side, he may be tempted to forego conscientiously investigating his own case in the hope that he will obtain such information from the disclosure of the research, investigation, and thought processes compiled in the trial brief of opposing counsel.[53]

These are sound policy reasons promoting restricted production, but modern judicial activism has increasingly encroached on them. Traditionally, Canadian courts have acknowledged that litigation privilege is an attribute of the adversary mode at trial:

> 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 being prepared... 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 system.[54]

The Court did not explain how removing the availability of litigation privilege would result in a travesty of our system of civil justice.

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[52] *Edgar v. Auld* (2000), 225 N.B.R. (2d) 71 (C.A.).

[53] *Ottawa-Carleton (Regional Municipality) v. Consumer's Gas Co.* (1990), 74 O.R. (2d) 637 at 643.

[54] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex.C.R. 27 at para. 9.

However, in *Strass v. Goldsack*,[55] a closer analysis of the implications of such a situation for the adversary system was undertaken. The Appellate Division of the Alberta Supreme Court had to decide whether privilege would be allowed to the defendant in a motor vehicle accident action for a witness statement taken from the plaintiff by an adjuster engaged to investigate the accident by the defendant's insurer.

In a majority decision, the Court held that the statement was privileged on the ground that it was a communication made in anticipation of litigation. In response to the argument that a party ought to be allowed to see his own statement before trial and that otherwise, he might be unfairly taken by surprise, the answer was surprisingly blunt:

> But why not? It is to be given to him before examination for discovery or trial so that he may tailor his evidence to be consistent? If he has been consistent in his version of the accident, his statement cannot hurt him. If he has a new version from that which he gave to investigators immediately following the accident, why should not his new version be tested by the production of the statement, not before he has given evidence, but after, by cross-examination? The proceedings are adversary proceedings.[56]

Such was the traditional judicial view in Canada that by the rules of the litigation game, a party had to wait until the trial before he could see his own statement when it was given under the circumstances in question.

Principles of Common Law, however, are always in a state of flux and this area of the law has been no exception. Indeed, prompted by legislative reforms of civil procedure throughout Canada and by unrelenting liberal pressure, these policy reasons have been significantly permeated by the modern and ever growing influence of broad relevancy. Such is the nature of civil due process at Common Law where apparently competing values ultimately serve a common purpose, as was noted recently by Corbett J. of the Ontario Superior Court of Justice when discussing the privilege of solicitor-client:

> Further, the principles of solicitor/client privilege were developed in Britain long before current pre-trial disclosure obligations were developed. It is now necessary, in Ontario, to disclose all relevant documents, and not just those to be relied upon at trial. It is now necessary to answer all relevant questions at discovery, and not just provide a list of trial witnesses. Thus, when the rules around privilege were developed, a party would not be required to vet all of its documents for privilege and then attend an examination which could last for many days, or, as in this case, weeks, to answer probing questions about why it acted as it has. With such arduous disclosure requirements has come a difficult task of ensuring

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[55] *Strass v. Goldsack* (1976), 58 D.L.R. (3d) 397 (Alta. S.C., App. Div.).

[56] *Ibid.* at para. 101.

> that, while discharging the positive obligations to disclose, a party does not inadvertently reveal some aspect of legal advice it has received, thus opening the door to a demand for disclosure of a broad range of privileged communications.[57]

3. The Trail Blazers: Ontario Courts Probing

Largely because of the twin thrust of two Ontario cases, nowadays, the trend is in the direction of more complete disclosure. Conventional wisdom holds that there is no apparent reason to inhibit this trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client.

In *Chrusz*, the Court issued a comprehensive decision summarizing the principles applicable to solicitor-client and litigation privileges. The issue related to disclosure or privilege regarding a number of documents created in the course of an insurance adjuster investigating a hotel fire. The hotel owner and insured was ultimately charged with arson. During the course of litigation, the contentious issue of privilege arose in relation to the following communications:

(a) communications with the lead fire insurer and its lawyer;

(b) communications between the claims adjuster and both the insurer and the lawyer; and

(c) communications between the claims adjuster or the insurer and third party, a witness statement, and a videotape.

The Ontario Court of Appeal adopted, as other appellate courts had done throughout Canada, the dominant purpose test as opposed to the substantial purpose of the document, on the basis that it better complied with contemporary trends in discovery.

Carthy J.A. found that solicitor-client privilege covered all communications between the insurer and its lawyer, but not communications between the claims adjuster and the lawyer. Carthy J.A., contemplating the basis of the dominant purpose principle, favoured litigation privilege as covering the communications between the claims adjuster and either the insurer or its lawyer occurring after litigation. However, Carthy J.A. also held that communications that took place prior to the time that litigation was contemplated were not protected by litigation privilege. He further held that documents and a videotape taken from the hotel were not created for the purpose of litigation and therefore did not qualify for any form of privilege in the hands of any party. Finally, applying the same dominant purpose test to copies of documents that appear in the course of investigating work, Carthy J.A. found that if original documents were not privileged, the copy of the documents in the hands of a lawyer were also not privileged. There was, however, disagreement as to the test to be used in determining whether litigation privilege applies in any given case.

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[57] *Guelph*, *supra*, note 24 at para. 85.

(A) *The Carthy Approach*

On this specific topic of litigation privilege, two different positions were put forward by the Court of Appeal. The majority decision of the Court held that litigation privilege protects only against the adversary. Accordingly, litigation privilege is not necessarily waived by revealing privileged communications to an outsider. It follows that a witness statement was protected by litigation privilege in the hands of the lawyer and that privilege was not waived by the lawyer giving a copy of such to the witness. Because litigation privilege is against the adversary, there was nothing inconsistent in giving a copy of the statement to the witness while still maintaining privilege against the adversary. However, the privileged document in the hands of an outsider would only be protected by privilege if the principles of the common interest privilege apply.

(B) *Common Interest Privilege*

Common interest privilege arises when two or more parties are on the same side of anticipated litigation, whether or not both or all of the parties ultimately participate in the litigation. The purpose of the common interest privilege is to allow parties who have a common interest in the litigation to share the trial preparation efforts. Each party's copy of a document remains privileged until litigation is no longer contemplated or until litigation is concluded. Carthy J.A. found that the copy of the witness statement in the hands of the witness was not protected by common interest privilege. Although he found that the witness was aligned in interest to the insurer, the witness did not acquire a common interest privilege because he was merely a witness and there was no contemplation that he would be involved in the litigation.

(C) *The Doherty Approach*

The second approach was highlighted by Doherty J.A., dissenting in part. Doherty J.A., dissenting with respect to the witness statement, concluded that it was not privileged in the hands of the insurer and that the insurer should be required to produce the statement. The witness statement was therefore not protected by litigation privilege either in the hands of the insurer or its insured.

Doherty J.A. found that the application of a privilege requires a two-step analysis. At the first step, the party claiming the privilege must prove that the material in question meets the dominant purpose test. In this analytical grid, Doherty J.A. found that the witness statement met the dominant purpose test and therefore qualified for litigation privilege.

At the second step, Doherty J.A. held that the party seeking production bears the burden of proving that other interests should prevail over the privilege claimed. Doherty J.A. based this step on the fact that no privilege is absolute and that therefore, any privilege 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".[58] Since litigation privilege is a confidentiality-based claim, it should be weighed against other interests in the same way that courts weigh other confidentiality-based claims against individual or societal interests. Other interests might outweigh the right to confidentiality protected by litigation privilege, including policies underlying the disclosure interest such as adjudicative fairness and adjudicative reliability. Doherty J.A. then concluded that the witness statement was admissible since societal interests in adjudicative fairness and adjudicative reliability outweighed the confidentiality interests.

Finally, Doherty J.A. disagreed with Carthy J.A.'s blank statement that copies of non-privileged documents that are placed into a lawyer's brief in the course of preparing for litigation are never protected by litigation privilege. Doherty J.A. did not attempt to resolve the matter, but instead left it to be decided in a case that squarely raised the issue. On this narrow point of copies of documents, Doherty J.A. was supported by Rosenberg J.A. in that copies of non-privileged documents might be covered by litigation privilege. Like Doherty J.A., however, Rosenberg J.A. preferred to leave the question to be answered in circumstances where it arose on the facts.

(D) *The Carthy Approach Prevailing*

For the balance, however, Rosenberg J.A. largely concurred with Carthy J.A. Specifically, Rosenberg J.A. rejected the balancing approach proposed by Doherty J.A. and adopted Carthy J.A.'s approach to litigation privilege. The concern expressed by Rosenberg J.A. was that if a balancing approach were applied, it would lead to unnecessary uncertainty and proliferation of pre-trial motions. Nonetheless, Rosenberg J.A. agreed that litigation privilege is not absolute.

(E) *Chrusz Majority Views on Litigation Privilege*

In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. Of course, 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. As was well-noted by the majority decision rendered by Carthy, J.A:

> Our modern rules certainly have truncated what would previously have been protected from disclosure. Under rule 31.06(1), information cannot be refused on discovery on the ground that what is sought is evidence. Under rule 31.06(2), the names and addresses of witnesses must be disclosed...
>
> 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

[58] *Chrusz*, *supra* note 25 at para. 142.

> 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. ...
>
> 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.[59]

This statement reflects the main stream of current judicial views on the scope and effect of litigation privilege. This privilege is therefore limited.

While the Ontario Court of Appeal had to grasp the issue of legal privilege in the context of litigation, a lower Ontario Court tackled the issue of the foundation of expert reports and claims for privilege.

In *Browne (Litigation Guardian of) v. Lavery*,[60] the defendant produced a report from an expert that referred to a report prepared by another expert. The defendant claimed privilege for the other expert's report and undertook not to call him at trial. In the following skirmish at the examination for discovery, in an attempt to find an acceptable solution to the dispute, the defendant's solicitor allowed the plaintiff's solicitor to interview the other expert.

In the ensuing motion seeking production of the other expert's earlier report, Ferguson J. held that litigation privilege had been waived when the defendant's solicitor permitted plaintiff's counsel to interview the other expert. Alternatively, the Court held that in any event, the earlier expert's report was included within the scope of "findings".

In reaching his conclusions, Ferguson J. relied on the broad interpretation of the term "findings" given by the recent judicial trend, the Ontario Court of Appeal decision of *Chrusz*, and the case of *R. v. Stone*.[61] Disclosure according to this ruling is wide enough to include documents considered by an expert.

Although *Browne* has been alluring to a large judicial audience coast to coast, it has the inherent weakness of lacking appellate authority. Moreover, as of yet, there has not been a critical analysis for various benches of its analytical foundations, including the number of crucial assumptions made by Ferguson J. in relying on *Stone*. This latter case from the Supreme Court of Canada dealt with issues in the criminal context. A closer look at this aspect of the reasons of Ferguson J. could lead

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[59] *Chrusz*, *supra* note 25 at paras. 26-28.

[60] *Browne*, *supra* note 4.

[61] *R. v. Stone*, [1999] 2 S.C.R. 290.

to a reassessment of the propriety of his application of *Stone* to the civil litigation context.

There is also a more pressing issue concerning the propriety of *Browne*. Recently, the Court of Appeal of Ontario, in *Conceicao Farms Inc. v. Zeneca Corp.*, when commenting on the interaction between Rule 31.06(3) and litigation privilege, said the following, at paragraph 14:

> There is an area of debate concerning the scope of information that may be obtained pursuant to this rule. It clearly encompasses not only the expert's opinion, but the facts on which the opinion is based, the instructions upon which the expert proceeded, and the expert's name and address. How far beyond this the right to obtain foundational information... extends, need not be determined here. Suffice it to say that we are of the view that it does not yet extend as far as is tentatively suggested in *Browne (Litigation Guardian of) v. Lavery*... We simply proceed on the basis that the rule entitles the appellant to obtain on discovery the foundational information for doctor Grafius' final opinion. As will become clear, we need not decide in this case the precise extent of the information that is discoverable.[62]

On a motion heard initially by a judge alone of the Court of Appeal in Ontario, Gillese, J.A., had commented as follows:

> In my view, the reasoning in *R. v. Stone*, [1999] 2 S.C.R. 290 and *Chrusz* support a broad interpretation of rule 31.06(3) and a corresponding narrowing of litigation privilege in the area of expert reports.
>
> At paragraph 99 of *Stone*, Binnie J., in dissent but not on this point, states:
>
> > [O]nce a witness takes the stand, he/she can no longer be characterized as offering advice to a party. They are offering an opinion for the assistance to the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately.
>
> Although these comments are made in the context of a criminal proceeding, there is nothing to suggest that they are limited to such proceedings.[63]

The Court of Appeal thought otherwise. The Court held that litigation privilege attached to a document is not erased simply because some or all of the information in the document must be disclosed if asked for on discovery. The Court acknowledges that the examining party can obtain on discovery the foundational information contained in a memorandum prepared by the solicitor who intends to call an expert.

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[62] *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 272 D.L.R. (4th) 545 (Ont. C.A.) at para. 14, leave to appeal to the Supreme Court of Canada denied March 8, 2007 [*Conceicao, Ont. C.A.*].

[63] *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 82 O.R. (3d) 229 at paras 32 to 34 (C.A.), Gillese, J.A., in Chambers [*Conceiacao*].

However, the Court also noted that the rule does not give the examining party the right to production of the memorandum itself, but rather to obtain discovery of the foundational information for the findings, opinions, and conclusion of the expert contained in the memorandum. The court went on to note that the case did not suggest a need to modify the rule of litigation privilege where experts are concerned:

> There is no doubt that litigation privilege attached to the March 14, 2000, memorandum. It was prepared by counsel as part of defending the lawsuit. That was its substantial if not its only purpose. Moreover, as is made clear in the recently decided case of *Blank v. Canada (Minister of Justice)*..., there can be no doubt that this privilege continues because the litigation continues.
>
> Taking as a given that a document protected by litigation privilege and part of counsel's work product contains the foundation for an expert opinion, there is no need to remove the privilege for the document itself to do justice. The foundational information in the document is available under Rule 31.06(3), if it is sought on discovery. Removing the privilege for the document itself is not necessary to obtain that information, but does run the risk of requiring disclosure of properly privileged information that is often intertwined with discoverable information in the lawyer's work product[64]

The Court concluded that the memorandum itself, prepared by counsel as a result of his discussion with his expert, was part of the lawyer's work product and thus protected by litigation privilege and not subject to disclosure.

As to the timeliness of that motion, the court held that:

> The rule does not give them the right to production of the memorandum, but rather to obtain discovery of the foundational information for the findings, opinions, and conclusions of Dr. Grafius contained in the memorandum. That is a right they had right up to trial. There is no basis in the rule or in fairness to give them the same right, by means of the production of the memorandum, now that the trial has been concluded. For the trial process to function fairly and properly, parties must exercise their right to obtain discovery at the discovery stage, not seek to do so after trial.[65]

An interesting feature in this decision of the Court of Appeal (holding that the memorandum of the defendant's counsel need not be produced) is that it drew a distinction between the information that the party is entitled to get on an examination for discovery and the production of documents.

The Court agreed that the plaintiff would have been entitled to question the defendants on discovery about the foundational information underlying their expert's

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[64] *Conceicao, Ont. C.A. supra* note 62 at paras. 20-21.

[65] *Ibid.* at para. 19.

report. However, the Court noted that it was not deciding the precise extent of what is discoverable as part of Rule 31.06(3)'s "findings, opinions, and conclusions" of an expert. This issue has to be decided on another occasion.

As can be seen in recent years, courts are inclined to limit the scope of litigation privilege while expanding the scope of the discovery process based on the concept of "broad relevance". But where does that leave the issues of production of instructing letters from counsel and production of draft reports and related documents from experts?

4. Instructing Letters from Counsel and Expert Preliminary Reports: Confidentiality Cloaked in Candour – and Justice for All?

One of the important aspects of the cross-examination of an expert witness and preparation of one's own expert is the careful consideration of the facts underlying the expert's report. Such information is vital not only to expose the weak assumptions made by the expert, but also to determine if there are any facts that, had they been brought to the attention of the expert for his consideration, would have materially altered the conclusions reached in the report. This also includes any undue influence precipitated by instructing letters from counsel to the expert.

The information may be obtained through a review of the expert's draft reports and a careful comparison between these earlier drafts and the final report. This is a fertile field for skirmishes at discovery and major battlegrounds at trial on cross-examination. Although the standard of disclosure in relation to anticipated expert trial testimony is well defined at discovery, there is a lingering issue that remains to be explored: whether at the discovery stage an expert's written report itself, if prepared in anticipation of litigation, still remains technically privileged so that its production can only be insisted on at the eve of trial under relevant rules of procedure.[66]

Nowadays, the assessment of the competing interest of privilege versus disclosure favours full and timely disclosure, especially when the materials sought from an expert's file are protected by litigation privilege only. The scope of the interests protected by litigation privilege is much narrower than that protected by the solicitor-client privilege. Therefore, an expert whose files are demanded for production will generally be required to disclose those materials containing information that support the expressed conclusions and which are protected by litigation privilege only. In *Jesionowski v. Wa-Yas*[67], the Court said, at page 47:

> The need for a protected area to facilitate a lawyer's investigation and preparation of a case does not extend to the information provided to an expert if that expert is called to the stand. Another way of saying the same

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[66] See Garry Watson and Michael McGowan, *Ontario Civil Practice* 2005 (Toronto: Carswell, 2005), at 706.

[67] *Jesionowski v. Wa-Yas (The)* (1992), 55 F.T.R. 1(T.D.).

> thing is: while the operation of the adversarial trial process requires protection of counsel's work product, it does not require protection of an expert witness work product.[68]

This healthy tension between antithetical values of civil justice, both of which are accepted as fundamental to the civil litigation process, may be cloaked in the garbs of the quintessential pillar of systems of law based on the common law: due process. The assertion of litigation privilege is essential to the effective operation of the adversarial model of litigation.[69] Nowadays, however, this privilege is inextricably linked with the very system that desires the disclosure of documents.

5. Instructing Letters From Counsel

(A) *The Initial Restricted Production Theory: Assertion of Litigation Privilege*

The initial restricted theory has found proponents throughout Canada advocating privilege over instructing letters from counsel to expert. In *Calvaruso v. Nantais*[70] the defendants sought a copy of the plaintiff's correspondence to the plaintiff's experts.

The defendants made a wide sweeping argument that generally, litigation in Ontario had entered a new era of complete disclosure, so nothing should be held back or kept secret that could possibly assist another party in preparation or in cross-examination. Particularly suspicious was the fact that the opinion of the expert was expressed in 16 numbered points, thus suggesting that the expert was answering a series of questions put by the plaintiff's counsel which, if true, might mean the questions coloured the answers.

Brockenshire J. dismissed the motion stating:

> the principle is that there still exists solicitor-and-client or litigation-purpose privilege, as one of the essential underpinnings of our system of administration of justice, which should not be lightly interfered with.
>
> Here, the opinion letter does not say that it is in response to questions posed by the plaintiff's counsel, nor does it say that it is based in any way on information provided by such counsel. The affidavit in support does not indicate any reason for production of the instructing letter that would outweigh the privileges above mentioned. I found that there was no foundation in the material before me requiring production of the instructing correspondence.[71]

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[68] *Ibid.* at para. 8.

[69] *Moseley*, *supra* note 46 at paras. 20-21.

[70] *Calvaruso v. Nantais* (1992), 7 C.P.C. (3d) 254 (O.C.J., Gen. Div.).

[71] *Ibid.* at paras. 4-5.

Brockenshire J. did not rule out, however, the additional possibility that the trial judge could order production as a result of cross-examination of the expert at trial.

In disregarding this argument, the Court relied on an earlier case: *Bell Canada v. Olympia & York Development Ltd.*[72] where in 1989, at the trial of an action, the solicitors for the plaintiff called an expert to which they had supplied documentary evidence in advance. The second defendant sought to have production of that documentary evidence. Following refusal from the plaintiff, the second defendant moved for an order of production. The Court rejected that motion.

The *Calvaruso* principle has had a large following in Nova Scotia, New Brunswick, Ontario, and British Columbia.

In *Crocher v. MacDonald*[73], the plaintiff had applied for an order requiring a defendant doctor to give an opinion of the treatment given to the plaintiff by another defendant doctor, both of whom were involved in the medical procedure out of which that action arose. The plaintiff also sought an order requiring defence counsel to produce letters sent to its expert.

The Nova Scotia Supreme Court Trial Division dismissed the application and held that correspondence from counsel to medical experts was protected by solicitor-client privilege. This case is noteworthy because the Court confused litigation privilege with solicitor-client privilege and deemed the instructing letter to the medical expert as privileged.

In New Brunswick, *Calvaruso* was followed in *O'Neill v. Campbell and Campbell.*[74] The Court stated at page 2:

> I think this goes too far. A party's solicitor should be able to communicate with expert witnesses in the preparation of client's case without the requirement of disclosure of these communications upon request.
>
> Full disclosure is an accepted goal of present-day litigation. At the same time, a solicitor and a client must be able to conduct the preparation of their case with some degree of confidentiality. They cannot withhold material evidence and must disclose material facts, but they should be able to present their subjective positions to prospective witnesses, as a matter of preparation of their case, without disclosure of where they see their position to be.[75]

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[72] *Bell Canada v. Olympia & York Development Ltd.* (1989), 68 O.R. (2[d]) 103 (Ont. H.C.), Eberle, J [*Bell Canada*].

[73] *Crocher v. MacDonald* (1992), 116 N.S.R. (2[d]) 181 (T.D.)

[74] *O'Neill v. Campbell and Campbell* (1994), 159 N.B.R. (2d) 273 at para. 8 (Q.B.T.D), Creaghan, J.

[74] *Ibid.* at paras. 8-9.

In concluding, Creaghan J. found that as a matter of right, the opposed party is not entitled to production of instructing letters from a solicitor to an expert.

In *Edgar v. Auld*[76], the defendants brought a motion for the production of the plaintiff's counsel's correspondence to the plaintiff's treating physician to obtain reports. The motion judge dismissed the motion.

In *Cyr v. Richey*[77], the defendant Richey had brought a motion for an order requiring the plaintiff Cyr to submit to a medical examination by a neurologist, Dr. Robinson. Richey's solicitor had provided a copy of his letter to Dr. Robinson confirming his retainer to Cyr's solicitor. In the letter, he made comments about his concerns about whether the report provided by Dr. Thibodeau, Cyr's doctor, was biased, as Dr. Thibodeau was the brother of Cyr's solicitor. Cyr felt that Dr. Robinson was now bound to minimize Dr. Thibodeau's expertise and show bias in his own assessment of her injuries and the future consequences. She was ready to consent to a medical doctor chosen by Richey other than Dr. Robinson.

In allowing the motion, the Court noted that the comment made by Richey's solicitor regarding Dr. Thibodeau's report was improper and should not have been made. That, however, did not disqualify the medical specialist from conducting a medical examination of the plaintiff. But the Court did not leave the matter at that and made the following comment while following *O'Neill*, at paragraph 13:

> As a final comment, I cannot help but feel that the issue in this motion should have been a 'non issue' had the defendant not copied his letter to Dr. Robinson to the plaintiff's lawyer. Much as the plaintiff was entitled to a copy of the report and of all material used by the doctor in preparation of his report, he was not entitled to the communications between the solicitor and the medical expert prior to the examination.[78]

In Ontario, the production of an instructing letter from counsel to the treating physician in a slip-and-fall action was refused in *Mahon v. Standard Life Assurance Co.*[79] where the Court came to a similar conclusion.

In the British Columbia case of *Ocean Falls Corp. v. Worthington (Canada) Inc.*[80] the Court dismissed an application whereby the defendant had sought production of the correspondence between the plaintiff's solicitors and its consulting engineers. The Court dismissed that application on the basis of the reasoning

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[76] *Edgar v. Auld* (1999), 212 N.B.R. (2d) 293, affirmed by the Court of Appeal (2000), 225 N.B.R. (2d) 71 (C.A.).

[77] *Cyr v. Richey* (2004), 278 N.B.R. (2d) 158 (Q.B.).

[78] *Ibid.* at para 12.

[79] *Mahon v. Standard Life Assurance Co.*, [2000] O.J. No. 2042 (S.C., Master).

[80] *Ocean Falls Corp. v. Worthington (Canada) Inc.* (1985), 69 B.C.L.R. 124 (S.C.).

expressed earlier in *Strass* by concluding that those communications had been made in confidence and that there had been no waiver of privilege by the plaintiff.

(B) *The Second Coming of Candour – Broad Relevancy at Work: Assertion of Production as a Means of Civil Justice*

The assertion of production as a means of civil justice has also found followers. In *Greenwood Shopping Plaza Ltd. v. Buchanan (Neil J.) Ltd.*[81], the Nova Scotia Court stated:

> It seems to me only logical that if the party wished to rely upon the testimony of its expert and was prepared to waive the privilege that he must also have intended to waive the privilege that extends to his discussions with the expert which forms the basis of his report. Surely if the solicitor were called to testify as to an opinion given to his client he would have to reveal the facts related to him upon which the opinion was based. Similarly, in my opinion, an expert employed by the solicitor for the benefit of the party must, as an integral part of his evidence, be subject to cross examination on the factual basis for his opinions, and this must be known to the party at the time the decision is made to waive the privilege and present the evidence.[82]

Subsequently, a letter was produced showing that the plaintiff's counsel wrote to an accident reconstructionist after the reconstructionist provided his first draft of a report that was ordered. In *Flinn v. McFarland*[83], McAdam J. observed:

> At issue is the independence of the expert's report. The expert apparently prepared a draft report which he forwarded to counsel for the plaintiff for comments and upon receipt of comments prepared a final report which has been disclosed to the defendants. Clearly, the extent to which the final report of the expert may be the result of counsel's comments, is both relevant and entitled to be examined by counsel for the defendants. This, however, does not extend to any earlier drafts the expert may have prepared which he, himself, may have amended, altered, or revised in the course of considering the issues and his opinions. It is the fact the expert submitted a draft report to counsel for the plaintiff and then prepared a final report, that may or may not have been revised in accordance with suggestions by counsel for the plaintiff, that the defendants are entitled to pursue in examination the expert as to his opinions and the basis on which he reached his opinions, including to the extent the opinions offered are his or may be the consequence of suggestions by plaintiff's counsel.[84]

The Court specifically followed *Browne* even though it had involved the interpretation and application of Rule 31.05(3) of the *Ontario Rules of Civil*

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[81] *Greenwood Shopping Plaza Ltd. v. Buchanan (Neil J.) Ltd.* (1979), 31 N.S.R. (2d) 135 (C.A.).

[82] *Ibid.* at para. 59.

[83] *Flinn v. McFarland* (2002), 211 N.S.R. (2d) 201 (S.C.).

[84] *Ibid.* at para. 9.

Procedure in respect to disclosure required of a party intending to call an expert witness at trial. The Court noted, in relation to this, as follows:

> The Rule in Ontario is, in its wording, broader and more specific as to the production required of a party who has signalled an intention to call an expert at trial. Nevertheless having regard to the authorities which have considered the relevant Nova Scotia Rules, it is clear, the principles reviewed and upheld by Justice Ferguson are no less applicable in Nova Scotia.[85]

McAdam J. echoed the lament of Ferguson J. in the *Browne* case by agreeing that this area of the case law cried out for appellate review.

In the Ontario case of *Enterprise Excellence Corp. v. Royal Bank*[86], the plaintiffs brought an action against the bank for misappropriation of confidential information and they retained an accountant to prepare a damage report, estimating their damages. The plaintiffs' lawyer provided the expert with a draft of his written argument. At the examination for discovery, he claimed the draft was protected on the basis of litigation privilege. The defendant sought an order requesting the plaintiffs to produce this information provided to the accountant to assist the accountant in the preparation of the damage report, which was subsequently produced to Royal Bank.

The Court found that the plaintiffs had waived any privilege that attached to the report on damages prepared by the accountant, the factual content of their lawyer's written argument, and telephone conversations with the expert, as these materials were provided to him to assist in preparing his report on damages.

The Court first held that production of the report came within the scope of Rule 31.06(3). The issue became whether the draft document sent by the plaintiffs' lawyer to the expert was to be included in the "findings" referred to in subrule 31.06(3)(a). The Court held that the lawyer's written argument provided to the expert and the factual content of the telephone conversations with the expert were findings within the meaning of Rule 31.06(3). Furthermore, the Court held that, in the circumstances, litigation privilege that would protect these documents had been waived by implication and ordered production.

In *Turner (Litigation Guardian of) v. Dyck*[87], the Court stated that:

> The scope of 'findings, opinions, and conclusions' in rule 31.06 is broad and includes information and data obtained by the expert, contained in documents or obtained through interviews on the basis of which

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[85] *Ibid* at para. 11.

[86] *Enterprise Excellence Corp. v. Royal Bank* (2000), 9 C.P.C. (5th) 362 (S.C.).

[87] *Turner*, *supra* note 10.

> conclusions are drawn and opinions are formed. The information and data can include research, documents, calculations, and factual data and the words 'findings, opinions, and conclusions' are broad enough to include the field notes, raw data, and records made and used by the expert in preparing his or her report to the extent that factual underpinnings in support of the opinions or conclusions are not set out in the report.[88]

The Court then considered the extent of the duty to disclose associated with a report's conclusions. The Court said at paragraph 16:

> To the extent that the opinions and conclusions in the report are based upon information communicated by counsel to the experts, even though the result of research and the work product of counsel, the provision of such information to the experts and the reliance upon same by the experts in coming to their opinions and conclusions waives any privilege which may attach to such information...[89]

Finally, on May 6, 2004, Master Dash of the Ontario Superior Court in *Walker v. Baskin Robbins*[90] dealt with a motion from the defendant seeking production of the instructing letter from the plaintiff to the expert who prepared an income loss report.

The expert had specifically stated that in preparing his expert report, he had relied on information provided by the plaintiff's solicitor. The Master concluded, in relation to this assertion, that the information provided by the plaintiff had to mean the retainer letter from counsel:

> All information provided to and relied upon by an expert are part of the expert's 'findings' and must be disclosed pursuant to Rule 31.06(3): *Browne v. Lavery* (2002), 58 O.R. (3d) 40 (S.C.J.). This is a different situation from *Calvaruso v. Nantais* [1992] O.J. No. 435 (O.C.G.D.), where the solicitor's instructing letter was not ordered disclosed because the expert did not state that his report was based on information provided by counsel. In this case, Goldhar specifically did rely on the information provided by Miss Amendola. The instructing letter will be produced.[91]

Counsel should be very careful in what he includes in instructing letters to experts. Any discussion of tactics is best done verbally or in separate correspondence. Facts and assumptions that instructing counsel wishes to provide to the expert should be communicated clearly and concisely in separate correspondence. Accuracy in presenting facts will also be important as well as valid assumptions. Every letter to an expert should be written as though it will be an open letter to all, as opposed to confidential correspondence.

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[88] *Ibid.* at para.16.

[89] *Ibid.*

[90] *Walker v. Baskin Robbins*, [2004] O.J. No. 1930 [*Walker*].

[91] *Ibid.* at para. 7.

Counsel must take great care in preparing instructing letters to his expert since the letters must be disclosed and it is possible that the court may order production. It is therefore important for counsel to ensure that any information or documentation provided to an expert is scrupulously accurate and fair, that the tone of counsel's correspondence is fair, and that there is no implication that can be drawn from the letter that the expert is expected to do anything other than provide a fair and objective report. Every letter to an expert should be written as though it will eventually be produced and reviewed by the court. Any errors, inaccurate information, or poor assumptions will only provide a fertile ground for cross-examination of the expert.[92]

The expert's report and file are becoming subject to unrelenting pressure brought about by modern day disclosure requirements. Solicitors dealing with experts should assume that communications with their expert and any draft report could be subject to examination. Preventive measures should include that:

(a) Solicitor retainer letters to the expert should not suggest the opinion desired;

(b) Insuring that the expert receives an objective set of facts;

(c) Limiting communications between counsel and expert while the expert is reviewing the facts and formulating the substance of his or her opinion;

(d) Discussing the expert's views orally before he or she provides anything in writing;

(e) Limiting the number of drafts provided to counsel; and

(f) Keeping counsel's editing of the report to a minimum.[93]

7. Production Of Expert Preliminary Reports

The issue of disclosure of draft reports and other working papers of an expert may arise as part of the discovery process or at trial in the context of cross-examination. In Ontario, Rule 31.06(3) of the *Rules of Civil Procedure*[94] provides that an opposing party may obtain discovery with regard to the findings, opinions, and conclusions of an expert retained by a party being examined unless the party

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[92] George A McAllister, "Getting the Expert's Report and Preparing the Expert for Trial" (*Atlantic Provinces Trial Lawyers Association – Chronic Pain Cases: Winning Strategies in the Threshold Era*, 19 November 2004).

[93] Donald B. Houston and Jeanne L. Pratt, "Practice and Procedure in Commercial Litigation & Forensic Accounting: Litigating the Commercial Dispute", Expert Reports, The Grand Hotel, Toronto, 14-15 November 2003.

[94] *Rules of Civil Procedure*, *supra* note 20.

undertakes not to call the expert as a witness at trial. Furthermore, at trial, although litigation privilege protects communications between a solicitor and third party made for the dominate purpose of actual or contemplated litigation, the privilege has been deemed waived in certain cases the moment that an expert takes the stand. The immediate consequence of such a waiver is to open the expert to cross-examination on, and production of, preliminary drafts and working papers compiled in the course of formulating his opinion.

As with the other issue under discussion, there is conflicting authority as to whether an expert testifying at trial can be obliged to produce his draft reports.

(A) *The Initial Restricted Production Theory: Assertion of Litigation Privilege*

The initial restricted production theory held sway in the early years of modern-day litigation. Production of an expert's report did not act as a waiver of the privilege attaching to the expert's notes and records.[95] It was well-established that privilege over an expert's file could not be lost by calling the expert as a witness at trial. However, privilege could be considered waived regarding facts or assumptions provided to the expert by counsel, if such facts or assumptions formed the basis of the expert's opinion and were not otherwise provided as evidence.[96] Indeed, an expert witness consulted but not retained by one party could be called at trial by the opposite party, but could not, due to litigation privilege, disclose confidential information received from the first party's counsel.[97]

In *Bell Canada* the defendant sought production of everything that the solicitor who retained the expert had sent to the expert. The Court rejected the conclusions of *Vancouver Community College v. Phillips, Barratt*[98] as inconsistent with the principles of solicitor-client privilege and questioned the basis on which that case was decided:

> Even if one were to go as far as Mr. Justice Finch has done in describing the implication behind the presentation of a witness at trial, I am of the opinion that the conclusion he reaches is at least doubtful.
>
> It appears to me to be a rather long step between offering a witness as credible and a conclusion that dissolves the solicitor-and-client or litigation – purpose privilege, either or both of them.
>
> It seems to me that if his conclusion is valid, it would lead almost invariability to the conclusion that a party who becomes a witness could

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[95] *Bronsteter et al. v. Davies* (1986), 11 C.P.C. (2d) 289 (Ont. H.C.)

[96] *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 (Ont. Gen. Div.) [*Piché*].

[97] *Cousineau v. Saint Joseph's Health Centre* (1990), 49 C.P.C. (2d) 306 (Ont. H.C.).

[98] *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289 (S.C) [*Vancouver College*].

> well be in danger of cross examination on communications passing between him and his solicitor.[99]

To avoid the possibility of making all communications between a witness and the solicitor subject to cross-examination, the Court followed "traditional authorities", which held that communications between solicitor-client and between solicitor and third party are privileged.

In *Piché v. Lecours Lumber Co.*[100] the Court held that tendering an expert at trial does not operate as an automatic waiver of privilege over the entire expert's file, but only of the facts and assumptions provided to the expert by counsel if those facts and assumptions form the basis of the expert's opinion.

The following principles were set by *Piché* in regards to the extent of disclosure obligation in relation to an expert's file:

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

(b) Privilege can be waived in respect to those facts or premises in the expert's file, which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to that expert;

(c) Whether there is a privilege or not can be ascertained by one of two ways: either the judge can examine the documents or materials for which privilege is claimed, or another way is for counsel, through cross-examination of the expert, to determine whether all or part of the file is privileged; and

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

At first blush, it is obvious that the court attempted to find a middle ground between protecting the privilege attached to certain documents in an expert's file and allowing the court to assess all information and assumptions on which an expert's conclusions are based. Indeed, such disclosures are often necessary if the trier of fact is to be able to assess the weight of the expert's evidence with a reasonable degree of accuracy.

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[99] *Bell Canada, supra* note 72 at 106.

[100] *Piché, supra* note 96.

Piché shows some evidence of relaxation from the strict rule set out in *Bell Canada*. *Piché* was followed both in Alberta and Ontario: *City of Edmonton v. Lovat Tunnel Equipment Inc.*[101] and *Arbesman v. Meighen Demers.*[102]

In *Arbesman*, the expert's report referred to interviews that the expert had conducted with the plaintiffs. The defendants sought production of those documents and the plaintiffs provided the defendants with blacked-out documents. The defendants sought production of them in their unedited form. Both the Master and Rouleau J. on appeal held that since the expert did not rely on matters in those parts of the written memorandum and hand-written notes which had been blacked-out, those blacked-out passages did not contain findings within the meaning of Rule 31.06(3). Master Hawkins concluded that privilege in the blacked-out passages in the typewritten memorandum and the hand-written notes had not been waived and that the information in those passages was not a finding under the appropriate rule. The defendants were not obliged to produce those documents in their unedited form before trial. This conclusion is opposite to that in *Browne*, where Ferguson J. ordered production of information provided to the expert even if it was not relied on by the expert.

In New Brunswick, in *Fougère v. Acadia Drug (1969) Ltd.*,[103] the Court appeared to take a conservative approach to the issue. It noted the decision of Beckett J. in the case *Kelly v. Kelly*,[104] where Beckett J. said:

> I do not consider preliminary drafts of a report prepared by an expert witness for the purpose of litigation to be 'findings, opinions and conclusions of the expert'. An expert's report may go through many preliminary drafts, but it is only the final draft or final report which the opposing party may obtain on discovery.[105]

After considering related Ontario jurisprudence, the doctrine of solicitor-client privilege, and the American "work product" doctrine, Riordon J. concluded:

> In light of the protection traditionally given to the lawyer's work product, it is my opinion that the obligation to disclose 'findings, opinions and conclusions of the expert' under Rule 32.06(3) means supplying a copy of the final report of the expert.[106]

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[101] *City of Edmonton v. Lovat Tunnel Equipment Inc.* (2000) 79 Alta. L.R. (3d) 268.

[102] *Arbesman v. Meighen Demers*, [2003] O.J. No. 2984 (S.C.).

[103] *Fougère v. Acadia Drug (1969) Ltd.* (1993), 206 N.B.R. (2d) 1 (Q.B.), Riordon J.[*Fougère*].

[104] *Kelly v. Kelly* (1990), 42 C.P.C. (2d) 181(U.F.C.) [*Kelly*].

[105] *Fougère, supra* note 103 at para. 23.

[106] *Ibid* at para. 25.

In *Nowe v. Reeves*[107] the Nova Scotia court dealt with the issue of producing drafts of the expert's report in the context of trial. Although, litigation privilege can be claimed on final and draft reports before they are served, the real question is whether the act of serving a report or notice or calling an expert as witness at trial operates as a waiver of privilege. The Court noted the following in respect to this issue:

> There are two divergent schools of thought on the issue. One; a restrictive one in Ontario and perhaps a broader one in B.C. and I think it developed from the basic attitude in the rules, or basic rules over the years. Ontario follows the more restrictive English practice.[108]

Note that these comments regarding the Ontario practice were made before the case of *Browne*.

In lockstep with the conclusion in *Bell Canada*, the Nova Scotia Court in *Highland Fisheries Ltd. v. Lynk Electric Ltd.*[109] refused to order production of the expert's preliminary report. The issue in that case was whether an implied waiver of privilege applied only to the expert's report which was tendered and the facts on which that report was based. The Court held that in Nova Scotia, the waiver of privilege extends to the expert's report and the factual basis for the opinions expressed in that report only and not the preliminary report.

In the case of *Aviaco International Leasing Inc. v. Boeing Canada Inc.*[110] the Superior Court also had to deal with a motion requesting production of drafts of the plaintiffs' expert report. The plaintiffs contended that the defendants were not entitled to the drafts of the report but only to the report itself. They relied on a 1990 Ontario case[111] where the Court held that the drafts of an expert report were not producible because they did not constitute findings, opinions, and conclusions of the expert within the meaning of Rule 31.06(3) of the *Rules of Civil Procedure* in Ontario. The defendants countered by relying on *Browne*. This case illustrates the raging debate even among courts of the same jurisdiction. In reaching its conclusion, the Court held as follows:

> I do not agree with the conclusion reached by Beckett, U.F.C.J. In my view, draft reports represent, at the very least, preliminary findings, opinions, and conclusions of the expert and therefore fall within the scope of the rule. Such an interpretation of the rule would appear to accord with the general principle that the Rules of Civil Procedure are to be "liberally

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[107] *Nowe v. Reeves* (1996) 152 N.S.R. (2d) 206.

[108] *Ibid.* at para. 2.

[109] *Highland Fisheries Ltd. v. Lynk Electric Ltd.* (1989), 63 D.L.R. (4th) 493 (N.S.S.C.)

[110] *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, [2002] O.J. No. 3799 (S.C.) at para. 16 [*Aviaco*].

[111] *Kelly*, *supra* note 104.

> construed" – see Rule 1.04(1). It also seems to me, for the reasons expressed by Ferguson, J., in *Browne*, that the party ought to be able to explore with an expert whether he or she changed her views from draft to draft and, if so, why. It is all part of testing the expert's conclusions. It is also important that this material be produced in advance of the trial so that the trial is not interrupted while such material is reviewed. The question is therefore ordered to be answered.[112]

(B) *The Second Coming of Candour – Broad Relevancy at Work: Assertion of Production as a Means of Civil Justice*

Candour and production of draft reports have also found acceptance.

In *Vancouver College* the plaintiff's expert had been called to testify on his report and the defendant had moved for production of various documents in the expert's possession. The issue was to what extent litigation privilege attached to the drafts had been lost by calling the expert to testify.

The Court held that once an expert becomes a witness, the party calling the expert has impliedly waived any privilege with respect to any documents in the expert's possession that are relevant to the preparation or formulation of opinions. It concluded that in such a case, the expert could be required to produce all documents in his possession that may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. This would encompass any draft copies the expert may have in his possession. Indeed, in a subsequent ruling, the Court ordered production of several copies of the draft report contained in counsel's file, including annotated reports by the lawyer himself. The Court held that the waiver of the privilege extended not only to documents in the expert's possession, but also to papers under the power and control of the party and included documents in the possession of the party's lawyer.

According to this school of thought, once a witness takes the stand he is taken to have waived any privilege over his documents:

> So long as the expert remains in the role of a confidential advisor, there are sound reasons for maintaining privilege over documents in his possession. Once he becomes a witness, however, his role is substantially changed. His opinions and their foundation are no longer private advice for the party who retained him. ...
>
> It seems to me that in holding out the witness's opinion as trustworthy, the party calling him impliedly waives any privilege that seriously protected the expert's papers from production. He presents his evidence to the court and represents, at least at the outset, that the evidence will withstand even the most rigorous cross-examination. That constitutes an implied waiver over papers in a witness's possession which are relevant to the preparation or formulation of the opinions offered, as well as to his

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[112] *Aviaco*, *supra* note 110 at para. 16.

> consistency, reliability, qualifications and other matters touching his credibility.[113]

British Columbia courts have followed this approach. Subsequently, in *Delgamuukw v. British Columbia*,[114] the Court considered itself bound to follow *Vancouver College*. In the process, it made startling comments to the effect that it was no longer possible to assume that all expert witnesses are impartial and independent, and held that some are fully participating members of the litigation team while others were advocates for the side that employs them. The remedy was disclosure of experts' draft reports to enhance the likelihood of a successful search for truth. The Court concluded as follows:

> The present law requires an expert witness, who is called to testify at trial, to produce all documents which are or have been in his possession, including draft reports (even if they come from the file of the solicitor with annotations), and other communications which are or may be relevant to matters of substance in his evidence or to his credibility unless it would be unfair to require production. It is a presumption of law that solicitors' privilege is waived in respect of such matters of substance, etc., when the witness is called to give evidence at trial.[115]

Alberta courts have followed suit. In *Hanscom (Litigation Guardian of) v. Coyle*[116] the Master had to determine whether waiver of privilege for an expert's report amounted to an implied waiver of privilege over the expert's working papers. Plaintiff's counsel gave a copy of the expert's report to counsel for the third party, who then requested copies of the doctor's notes and records on which the report was based. The Master decided that voluntary production of an expert report amounted to an implied waiver of privilege over the expert's working papers and ordered production of the working papers on this basis.

In *Olsen (Stuart) Construction Inc. v. Sawridge Plaza Corp. et al.*[117] the Court held that although the parties had agreed that the preliminary report of an expert was covered by litigation privilege, when it was mentioned on the stand by the expert, any privilege protecting it from disclosure was waived.

The Alberta trend on this issue suggests that the courts would order production of experts' working files. Counsel working with experts should therefore be alerted to the likelihood of draft reports and working papers being producible upon motion.

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[113] *Vancouver College*, *supra* note 98 at pp. 296-297.

[114] *Delgamuukw v. British Columbia* (1988), 55 D.L.R. (4th) 73 (S.C.).

[115] *Ibid.* at 76.

[116] *Hanscom (Litigation Guardian of) v. Coyle* (1995), 167 A.R. 169 (Q.B.).

[117] *Olsen (Stuart) Construction Inc. v. Sawridge Plaza Corp. et al.* (1996), 195 A.R. 94 (Q.B.).

In Ontario, *Browne* followed the dictum of the Supreme Court of Canada in *Stone* and summarized the applicable principles flowing therefrom as follows:

> (a) A report prepared by an expert at the request of counsel for litigation purposes is privileged. This would be under the category of litigation privilege.
>
> (b) By announcing in an opening jury address the opinion of the expert contained in the report, counsel waives the privilege in the content of the entire report.
>
> (c) The waiver extends to information in the report, which would otherwise be subject to solicitor and client privilege.
>
> (c) Counsel cannot waive privilege in only part of the report.
>
> (e) Once an expert is called as a witness at trial, the opposing party is entitled to production of the foundation of the expert's opinion.

In *Stone*, the Supreme Court of Canada held that when the accused's counsel in opening address to a jury made reference to an expert's report, he waived, on behalf of the accused, any privilege in the entire report. The Court held that the solicitor could not pick and choose what went before the jury.

Browne has been followed in *Chapman Management and Consulting Services Ltd. v. Kernic Equipment Sales Ltd.*,[118] where the plaintiff applied for production of the working files of the defendant's expert witness. The Alberta Court of Queen's Bench ordered that the defendant produce all relevant documents in the possession of the expert or his firm, including all instructing letters and memoranda from the defendant's lawyer to the expert witness, the expert's draft reports and primary materials from which the expert's opinions were formed. The issue arose at trial during the cross-examination of the expert witness. It would have been helpful if the Court explained its reasoning for ordering production as it did, including why it ordered the production of all instructing letters from the defendant's solicitor to the expert witness. However, in a very short decision, McIntyre J. simply noted *Browne* and other cases in rendering its order. McIntyre J. also made the following comments:

> To the extent that Sopinka, Lederman, Bryant, (2[d] Ed.) (1999), *The Law of Evidence in Canada* relied upon by the defendant, restricts the plaintiff to cross-examination of the expert on the witness stand without examination of the expert's file, I consider this to be too narrow an approach.[119]

Browne was also followed as indicated earlier in *Flinn v. McFarland*, in Nova Scotia, and in Newfoundland, in *Williams v. Thomas Development Corp.*[120]

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[118] *Chapman Management and Consulting Services Ltd. v. Kernic Equipment Sales Ltd.*, [2004] A.J. No. 756, (Q.B.) McIntyre, J.

[119] *Ibid.* at para. 5.

[120] *Williams v. Thomas Development Corp.* (2003) 233 Nfld. & P.E.I.R. 88 (N.L. T.D.).

In *Williams*, the defendant paving company applied for disclosure of notes made by the plaintiff's expert. The defendant also sought discovery of a videotape commissioned by the plaintiff who had relied on an expert report. During the examination for discovery of the expert, he testified that he had notes critiquing a report prepared by the defendant's expert in his possession. The plaintiff had not objected to any questions referring to the notes, but he argued that they were protected by litigation privilege and that in any event, she did not intend to call the expert as a witness. The Court ordered production of the notes and commented that any privilege regarding them had been impliedly waived by the partial disclosure of the notes during the examination for discovery.

If *Browne* has been well accepted in Canadian case law,[121] doubt has recently been raised in *Conceicao Farms Inc. v. Zeneca Corp. (c.o.b. Zeneca Agro)*[122] by the Court of Appeal of Ontario.

In *Conceicao Farms* on 26 July 2006, an Ontario motion judge on appeal dealt with a matter where the appellant farmers moved for production of a memorandum prepared by Zeneca's prior counsel in relation to a conversation with an expert witness.[123]

Farmers had grown onions and used either Lorsban or Dyfonate pesticides to deal with onion maggots. In 1995, they had good results with Lorsban but suffered considerable damage using Dyfonate. Zeneca was the manufacturer of Dyfonate. Some farmers settled claims with Zeneca, but four chose to bring an action against Zeneca. The four farmers claimed that the Dyfonate they used in 1995 was faulty and failed to adequately protect their crops from damage by onion maggots.

At the 2004 trial, the farmers claimed that the damage to their crops occurred within 31 to 40 days of planting and using Dyfonate. Zeneca claimed a combination of earlier than usual planting and later than usual emergence of maggots lessened the ability of Dyfonate to kill the maggots at the crucial time. An expert testified for Zeneca, first stating the opinion that Dyfonate controlled maggots for 60 days, then changing this to 45 days. During cross-examination, an issue arose as to whether the expert had been retained by Zeneca's prior counsel. The expert could not recall. The farmers requested production of the expert's notes and records. Zeneca's current counsel responded in open court that there was no note showing the expert had been retained when he inherited the file in 2000. The farmers did not pursue their production request.

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[121] See: *Fisher v. Atack* [2004] O.J. No. 5002; *Walker*, *supra* note 90; *St. Elizabeth Home Society v. Hamilton (City)* [2004] O.J. No. 1418; *Allerex Laboratory Ltd. v. Dey Laboratories L.P.* [2003] O.J. No. 2909; *Hosh (Litigation Guardian of) v. Black* [2003] O.J. No. 2374; *Aviaco*, *supra* note 110.

[122] *Conceicao, Ont C.A.*, *supra* note 62.

[123] *Conceicao*, *supra* note 63.

The farmers' claims were dismissed in June 2004. The judge stated the action was dependent on factual findings regarding whether the loss of the crops were damages due to poor quality Dyfonate or environmental factors. The judge noted that the expert had supported Zeneca's position and that the farmers had presented no expert evidence to support their position.

The judge concluded unusual or unique environmental factors in 1995 caused the maggot damage. In preparing costs submissions, the farmers discovered an entry from Zeneca's prior counsel, in 2000, showing she had retained and had a lengthy conversation with the expert. The conversation had been recorded and transcribed into a memorandum.

The farmers asked Zeneca to produce the memorandum. Zeneca's counsel took up the matter with the court reporter, claiming he had stated there was a note on the file regarding the expert. The court reporter stood behind the transcript, and claimed Zeneca's counsel said there was no note. Zeneca's counsel refused to produce the memorandum, claiming it was privileged and noting it was not requested at trial.

The farmers brought a motion before the trial judge seeking production of the expert's entire file, asking the judge to re-open the trial, strike out the expert's evidence and grant judgment in their favour, or to declare a mistrial. The judge dismissed the motion on the basis that he would have come to the same conclusion even if he had ignored the expert's evidence. The farmers appealed both the dismissal of their action and the dismissal of their post-trial motion for production.

The Appeal Judge sitting alone, ordered Zeneca to produce the memorandum to the farmers within ten days. Because the expert gave evidence in court, his report was no longer considered privileged. The memorandum should have been produced prior to trial. The Court held it was fair to assume the memorandum contained foundational information for the expert's findings, opinions and conclusions. Production was ordered to enable the farmers to determine whether they were denied the right to test the expert's evidence at trial, and to ensure that the Judge's confidence in the expert's opinion was justified. However, the Court overruled that decision as bad law. It held that such request for disclosure was the domain of the examination for discovery and that it was inappropriate to allow it after trial. The Court also concluded that, at discovery, the memorandum itself was protected from compelled disclosure by litigation privilege. However, the content of the memorandum could be the appropriate topic of an examination for discovery in order to explore the foundational basis of the expert's opinion.

The Court noted that Rule 31.06(3) dealt with the disclosure of information, not the production of documents. It held that the memo was otherwise privileged by litigation privilege and that the rule did not require its disclosure. Having concluded that Rule 31.06(3) was unavailable to the plaintiff, the Court observed that it was not required to decide the scope of disclosure thereunder. However, it made several comments. The Court rejected the principle at one extreme, which would require disclosure of all communications between counsel and an expert before preparing a report, as this was litigation privilege. However, without limiting the scope of the

disclosure required, the Court held that in addition to the name and address of the expert, the rule requires disclosure of the solicitor's instructions to the expert and the facts on which the final opinion is based. The Court finally affirmed that there are limits to the disclosure reasonably required to allow a party to test the veracity of the opposing party's expert opinion. The Court's decision affirms that it is not "open season" on the communications between a solicitor and an expert. However, the parameters of disclosure remain a source of debate in the lower courts, which strongly invites appellant review.[124]

The other interesting feature in that decision is that although Ontario courts, as shown in *Bell Canada*, had for many years consciously chosen not to follow the strict approach of permitting access to the expert's file, as identified in *Vancouver College*, the Ontario Court of Appeal seems to have overruled *Bell Canada* and turned Ontario procedure in a new direction that is consistent with that in British Columbia. Dealings between an expert and counsel and between an expert and a party can shape and mould an expert's opinion. Evidence of those dealings which can be found in the expert's file ought to be producible in court. It is only then that the court can assess the soundness and impartiality of the opinion after it has been properly tested in a cross-examination that is fuelled by all of the ammunition that can be found in the expert's file. This also covers a memorandum prepared by counsel as a result of interaction with the expert if a party is so questioned about at the examination for discovery.

The broad approach, one that – in the words of the Supreme Court of Canada in *Stone* – would enable opposing counsel to have access to the "foundation" of the expert's opinion, requires disclosure of all foundational information for the expert's report, whether or not the final findings, opinions or conclusions expressly reflect that information.

The courts in New Brunswick were also attracted by this approach. In *O'Brien et al. v. Centre de Location Simplex Ltée et al.*[125] the Court took a very liberal approach to the issue. One of the issues before the Court was whether a party on examination for discovery must disclose any findings, opinions and conclusions of experts. The Court quoted with approval from Master Clark in *Cheaney v. Peel Memorial Hospital*[126] as follows:

> The test is this: if the finding is expressed in a sufficiently coherent manner that it can be used by counsel, then it is a 'finding' that ought to be disclosed. The same applies to 'opinions' and 'conclusions'. They may change, and change dramatically, but they still must be disclosed

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[124] Jay A. Stolberg, "Litigation Privilege vs. Disclosure" *Insurance Observer* (Winter 2007) online: Blaney McMurtry <http://www.blaney.com>.

[125] *O'Brien et al. v. Centre de Location Simplex Ltée et al.* (1993), 131 N.B.R. (2^d) 252 (leave to appeal dismissed) (Q.B.), Creaghan, J.

[126] *Cheaney v. Peel Memorial Hospital* (1990), 73 O.R. (2d) 794 (S.C.).

> whenever they are formed. And it is the duty of counsel, as an officer of the court, to disclose those coherent 'findings, opinions and conclusions' as they are disclosed to counsel. It is not proper practice to construct the relationship of expert to counsel that no 'findings, opinions or conclusions' are expressed to counsel until the final written report is produced before trial.
>
> The operation of rule 31.06(3) does not depend on the subjective judgment of counsel as to whether or not 'findings, opinions or conclusions' are final or preliminary, or written or oral. Rather, the operation of the rule depends on the objective judgment of counsel as to whether his or her expert has expressed a coherent 'finding, opinion or conclusion' that ought, in all fairness, to be disclosed.
>
> If rule 31.06(3) required that 'findings, opinions and conclusions' be in *writing* and be *final* before being disclosed, it would allow counsel to avoid all disclosure until forced by rule 53.03(1) to serve a report just before trial.[127]

This test was applied in *Pullman Power Products of Canada Limited v. Noell GmbH et al.*[128], where the Court ordered that the defendants be entitled to discover the findings, opinions and conclusions, whether preliminary or not, pursuant to Rule 32.06(3) of the *Rules of Court* and that they be produced by the plaintiff.

New Brunswick courts have been ambivalent. The most recent trend appears to favour a more liberal approach with courts ordering disclosure of all documentation that may have been utilized by an expert in making a finding, rendering an opinion or reaching a conclusion, whether preliminary or not.

In *Marchand v. Public Hospital Society of Chatham*[129] the Court made a number of significant remarks concerning the practice adopted by many counsel of having an expert submit an unsigned draft report that is revised in light of counsel's comments prior to the submission of the final report. The Court indicated that this practice might effect the perceptions of the trier of fact regarding the impartiality or lack thereof of the expert witness. It is more appropriate to simply ask an expert to submit an additional report if counsel thinks that the first report prepared leaves certain questions unanswered or unaddressed. By preparing in this manner, each step of the expert's analysis is made available to opposing counsel as a final report and it is clear that the opinions it contains are indeed the opinions of the expert and those of the retaining counsel. The practice of allowing the expression of an expert's opinion to be modified by the suggestions of counsel leads to the inevitable perception that opinions can be purchased.

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[127] *Ibid.* at paras. 23-35.

[128] *Pullman Power Products of Canada Limited v. Noell GmbH et al.* (1995), 169 N.B.R. (2^d) 233 (Q.B.), Russell J.

[129] *Marchand v. Public Hospital Society of Chatham*, [1996] O.J. No. 4420 (Ont. Gen. Div.) affirmed (2000), 51 O.R. (3^d) 97 (Ont. C.A.).

Canadian courts have gradually expanded production although the extent to which draft reports must be produced varies from jurisdiction to jurisdiction and has ebbed and flowed over the years. However, one may say with a fair degree of certainty that the emerging trend is towards production of such reports rather than a confirmation of privilege. It is therefore fair to suggest that the triumph of candour over confidentiality must constantly be minded by practitioners when consulting with an expert at any stage of the litigation process.

7. The Lay of the Land: Circa 2007

Third party communication by the solicitor of record is controversial. Is that third party an agent of the solicitor so that communications between them attract solicitor-client privilege or is it litigation privilege?

In *Chrusz*, the Ontario Court of Appeal held that protection from disclosure of an adjuster's report would not come through agency but rather through litigation privilege. The New Brunswick Court of Appeal concluded otherwise in *Lamey*. The adjuster could be deemed an agent of the client at the direction of the client's lawyer. The file was therefore protected by solicitor-client privilege because of the agent's relationship.

With respect, the view of Doherty, J.A., in *Chrusz* is preferable by denying agency as a tool of obtaining privilege. According to the learned judge:

> [120] ... 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...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.
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> [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.
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> [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.[130]

In setting out this functional approach to applying solicitor-client privilege to communications by a third party, Doherty J.A. was speaking on behalf of a unanimous Ontario Court of Appeal. A further comment by Doherty J.A., which, is entirely applicable to the New Brunswick Court of Appeal decision in *Lamey* highlights the difficulty in the reasoning:

> [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.[131]

There is obvious confusion at the top among various courts of appeal, so much so that the uneasiness of Ferguson J. in *Browne* in calling for appellate review is echoed throughout Canada.

The notion of zone of privacy has been acknowledged both in *Chrusz and Blank* (cited above) where the Court of Appeal of Ontario and the Supreme Court of Canada recognized that the origin of litigation privilege was different from that of solicitor-client privilege. Litigation privilege provides a zone of privacy within which a solicitor can prepare for trial without intrusion into his or her thoughts or work product. Litigation privilege is not afforded the same deference as solicitor-client privilege and it may have to yield to full and timely pre-trial production and disclosure.

In the civil context, litigation privilege remains a rule of evidence like many other matters of evidence, which regulate the method of conduct of litigation.[132] There is nothing sacrosanct about litigation privilege and indeed, in *Chrusz*, Carthy J.A., noted that the modern day reality is in the direction of complete discovery, which has necessarily eroded the extent of litigation privilege. The learned judge stated that in effect, litigation privilege is the area of privacy left to a solicitor after the current demands for discoverability have been met. Thus, the zone of privacy has been diminished in the face of broad disclosure requirements. In fact, this attitude is consistent with the modern trend of more expansive discovery and the law

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[130] *Chrusz, supra* note 25 at paras. 120-122.

[131] *Chrusz, supra* note 25 at para. 128.

[132] *Morrissey, supra* note 9

on that topic in Ontario is in accord with that of Nova Scotia, New Brunswick, British Columbia and Alberta holding that litigation privilege will only attach if the dominant purpose of the third party communication was to assist in possible forthcoming litigation.

Of course any privilege can be lost voluntarily or by implication. In *Chrusz*, the Ontario Court of Appeal acknowledged that in some circumstances, litigation privilege may be preserved even though the information is shared with a third party, provided that there is a common interest in the existing or anticipated litigation.

There is an ongoing debate as to the extent of waiver of litigation privilege for documents located in an expert's file when counsel intends to call that expert as a witness at trial. It is readily acknowledged that the facts and documents on which the expert relies should be disclosed. The controversy is whether everything else needs to be produced such as confidential communications that did not form a basis for the expert's opinion.

As was already noted, limits should be drawn. Some have suggested that the facts on which the expert's opinion is based and the validity of that opinion are proper subjects for cross-examination, but that the process by which the opinion was developed, the expert's communications with the client, and the instructions provided by the solicitor, should remain subject to litigation privilege. Thus, maintaining the privilege over expert's files to this extent in no way compromises the objective of having all relevant information available for trial.[133]

However, the swing towards greater disclosure taken by the Court of Appeal of Ontario in *Conceicao Farms* may have turned Ontario procedure, as noted before, in a direction more consistent with that of British Columbia. This is demonstrated in the decision of Gillese J.A. Although the case was appealed and overturned on other grounds, the Court that heard the appeal did not question or interfere with that portion of the judgment on the issue of whether access to expert file contents was justified.

As shown in *Vancouver College* in British Columbia and now in Ontario in *Conceicao Farms*, the logic of these cases will only interfere with dealings between counsel and expert, or between party and expert, that alter or shape the expert's opinion substantively.

The court in *Browne* noted that although the subject documentation in the *Stone* decision was the expert's report, the implications were broader in that it may open the door to requiring production of the entire file of an expert including communication with counsel. Simply put, production and disclosure are necessary because it is impossible to conclusively determine without just accepting the expert

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[133] Margaret L. Waddell, "Litigation Privilege and the Expert in the Aftermath of Chrusz" (2001) 20 Advocates' Soc. J. 10 at 14.

at his word, what was or was not relied on, or influenced the expert, in terms of his opinion. Without production, counsel is totally hampered in pursuing this issue. The court in *Browne* held that such full production in accordance with the Ontario Rules of Court would be consistent with the more expansive view of discovery as propounded in the *Chrusz* case. Although the Court advocated the complete and full disclosure of communications taking place between a counsel and an expert, the following conclusion is eloquent testimony of the degree of judicial uncertainty on this topic at page 63 in *Browne*:

> This area of the case law cries out for appellate review.
>
> There is much cynicism among the bench and bar concerning the objectivity and reliability of experts' opinions in today's litigation. I believe requiring full production concerning the origins of the opinion would deter inappropriate influence on an expert and help restore confidence in the process.[134]

CONCLUSION: A ROOM WITH A VIEW – WHAT LIES AHEAD

(A) *The Future of Canadian Civil Litigation*

The law on privilege and disclosure in Canadian civil litigation is in motion. Many academic writers have suggested that as a more sensible approach to the use of expert witnesses, the enforcement of full and timely disclosure of expert reports and limiting the use of experts in the courtrooms would facilitate the fact-finding process. This would be compatible with the cardinal principle of liberal interpretation that is at the heart of the rules of procedure in Canadian systems of civil justice. This principle calls for the just, least expensive and most expeditious determination of every proceeding on its merits.

Although there is an unending tension between the competing interests of privilege and disclosure, the judicial trend today is leaning in favour of full and timely disclosure especially when the materials sought from the expert's file are protected by litigation privilege only.

The adversary system depends on careful and thorough investigation and preparation by the parties through their counsel. The adversarial advocate cannot prepare without the protection afforded by a zone of privacy. Discovery and privilege must strike a delicate balance. Too little disclosure impairs orderly preparation. Counsel cannot come to trial prepared without adequate information about the case that the opposing side will present. On the other hand, although it can be argued that total disclosure would have significant adverse effects on the litigation process itself if every thought and observation had to be disclosed, it needs not be so.

The erosion of litigation privilege under the unrelenting pressure of modern-day disclosure made reassessment of that privilege necessary by the Supreme Court of

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[134] *Browne*, *supra* note 4 at para. 72.

Canada. The Ontario Court of Appeal, in *Chrusz*, had laid out two different approaches to this privilege. It was also open to the Supreme Court of Canada to accept the views in *Hodgkinson* to include litigation privilege in a single comprehensive solicitor-client privilege. This would be the better solution in a common law environment where broad relevancy and alternative dispute resolution are the engines that drive the fact-finding process.[135] In a way, the New Brunswick case of *Lamey* hinted in this direction.

The Court seized the occasion to examine the defining characteristics of litigation privilege and its life span. Writing for the majority of the Court, Fish J. underlined the distinction between solicitor-client or legal advice privilege and litigation privilege. Solicitor-client privilege attaches to and protects confidential communications between lawyers and their clients, even outside the litigation context. Litigation privilege attaches to information and materials gathered or created for the dominant purpose of litigation. Fish J. rejected the *Hodgkinson* approach that treats both types of privilege as two branches of the same tree. Doing so would otherwise obscure the true nature of both. While both serve the common cause of the secure and effective administration of justice according to law, each privilege is driven by different policy considerations and generate different legal consequences.

Endorsing the Ontario Court of Appeal in *Chrusz*, the Supreme Court held that the purpose of litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation. Once litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification.

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

The Court noted that the object of litigation privilege is to ensure the efficacy of the adversarial process; not to promote the solicitor-client relationship. To achieve this purpose, parties to litigation, represented or not, must therefore be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

While solicitor-client privilege may have evolved over the years into a rule of substantive law, 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.

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[135] See John L. McDougall, *et al.*, "Privilege Issues and the Barrister's Brief" (Lecture presented to the COMBAR North American Meeting, Hotel Arts, Barcelona, Spain, 4-5 June 2004).

The privilege may however retain its purpose – and, therefore, its effect after the end of litigation. The Court agreed with Pelletier J. of the Appeal Division of the Federal Court of Canada regarding the possibility of defining litigation more broadly than the particular proceeding which gave rise to the claim. As the Court said, 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.

In a watershed moment, the Court also recognized the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to be consistent with the notion that 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. Thus, the dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

The progressive weakness of litigation privilege was also noted; while solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, litigation privilege, on the contrary, has to weather the trend toward mutual and reciprocal disclosure, which is the hallmark of the judicial process. In this context, the Court held it would be incongruous to reverse that trend and revert to a substantial purpose test.

The Court left to another day a related issue: whether litigation privilege attaches to documents gathered or copied – but not created – for the purpose of litigation. After noting that the issue arose in *Hodgkinson* and resolved in a way rejected by the majority of the Ontario Court of Appeal in *Chrusz*, the Court opined that 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 litigation privilege. Having said this, the Court issued a caveat by saying that assigning such a broad scope to 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.

To summarize, *Blank* is of great interest in relation to five specific issues:

(a) It holds that litigation privilege is not a branch or a subset of solicitor-client privilege. The Court correctly equates solicitor-client privilege and legal advice privilege and keeps it separate from litigation privilege;

(b) The Court clarifies any remaining doubt about what it means to say a document was prepared for litigation by upholding the dominant purpose test for the document's preparation. On this specific point, the Court also wisely confirms the correctness of lower court decisions extending the privilege to self-represented litigants. Unlike legal advice privilege, litigation privilege may arise and operate even in the absence of a

solicitor-client relationship; it applies to all litigants, whether or not they are represented by counsel;

(c) The Court offered a tentative view on the issue of in-gathered documents: documents that are gathered or copied rather than created by a lawyer for the purpose of litigation. Although the Court expressly stated that this issue should be left to be resolved in a future case, it could not resist noting that 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 rational and purpose of litigation privilege;

(d) The Court rejected the technical approach to identifying when litigation has ended, so as to end litigation privilege. The Court acknowledges that closely related proceedings remaining ongoing would preserve the privilege thus given it an extended life. The Court referred to this as an enlarged definition of litigation, and explained that it includes both separate proceedings involving the same or related parties and causes of action, and proceedings raising issues common to the initial action and sharing its essential purpose. In the words of Fish, J.:

> 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' ... see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*
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> 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.[136]

As noted by Wendy Matheson, one of the solicitors who argued the *Blank* case:

> It now remains to be seen how this newly-articulated approach will be interpreted in practice. The key issue for future cases will be to determine the precise scope of the concept of 'related litigation'.[137]

It follows that 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

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[136] Dale E. Ives and Stephen G.A. Pitel, "Case Note: Filling in the blanks for litigation privilege: Blank v. Canada (Minister of Justice)" (2007) 11 E&P 49-56.

[137] Wendy Matheson, "The Supreme Court of Canada Rules on Litigation Privilege" (2006) The Advocates' E-Brief, Vol. 18, No. 1, at 15.

raise issues common to the initial action and share its essential purpose would qualify as well. The Court held that litigation privilege is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day. The extended definition of litigation applies no less to the government than to private litigants;

(e) Finally, the Court noted an exception to the availability of the declared litigation privilege. It will not protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. The Court offered no authority for this proposition nor did it make it clear how broad it intended this exception to be.

In effect, the Court enunciated a general exception to litigation privilege, but in doing so, it raised serious questions. Is the standard for looking behind litigation privilege blameworthy conduct, abuse of process, misconduct, actionable misconduct or some amalgam of these? What will constitute a *prima facie* showing of such misconduct? Would showing such misconduct depend on getting the documents first in most cases? This is an unfortunate weakening of the judgement and an invitation to make allegations of abuse of process or misconduct by litigants in circumstances where the real objective is simply to try to obtain disclosure from inside the opposing lawyer's office. Adopting this approach to its fullest extent could represent a significant and unwarranted expansion of the existing exception to solicitor-client privilege. A further extension of the exception to exclude communications in furtherance of a malicious prosecution or abuse of process would be more defensible given that these claims go to the very heart of the administration of justice.[138]

Blank also made it clear that there is overlap. Much of a litigation file is covered by solicitor-client privilege and should be protected indefinitely, regardless of whether litigation privilege over the file has come to an end:

> [49] ...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.
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> [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.[139]

This could have been the end of the discussion on litigation privilege but for the dissenting decision of Bastarache J. who, while concurring in the result, issued different reasons that echoed *Hodgkinson* in the nature of litigation privilege.

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[138] Dale E. Ives, *supra* note 136.

[139] *Blank*, *supra* note 11 at paras. 49-50.

According to Bastarache J., 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". It follows that a two-branch approach to solicitor-client privilege should subsist, even accepting that solicitor-client privilege and litigation privilege have distinct rationales.

At an overarching level, litigation privilege and solicitor-client 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 solicitor-client privilege does so by ensuring that individuals have the professional assistance required to interact effectively with the legal system.

For Bastarache J., reading litigation privilege into section 23 of the *Federal Access to Information Act* was the better approach because litigation privilege had always been considered a branch of solicitor-client privilege. In the end, Bastarache J. agreed with Fish J. that the Minister's claim of litigation privilege had failed because the privilege had expired.

The blameworthy conduct general exception to litigation privilege has quickly generated litigation. In *Smith v. London Life Insurance Company*[140] the plaintiff had sued the insurer in an earlier action seeking reinstatement of disability insurance benefits. While that action was being settled in favour of the plaintiff, the plaintiff brought another lawsuit against the insurer alleging breach of duty of good faith in terminating insurance benefits. The insurer defended the second action alleging in its pleading that its employees had acted in good faith.

The second action in *Smith* brought to the forefront the notion of blameworthy conduct and related litigation. In reversing an order made by a superior court justice directing the defendant, London Life, to produce its entire claims file arising from a prior action between the parties, including documents authored by its in-house counsel and other employees. The court discussed the difference between solicitor-client privilege and litigation privilege, as well as the circumstances in which documents subject to the latter will be ordered to be produced.

In the end, the Court ordered London Life to produce a more detailed affidavit of documents, listing each document with respect to which privilege was claimed. In addition, the Court virtually invited the plaintiff to bring a further motion to have a court review the documents to determine whether their production should be ordered because of blameworthy conduct on part of the insurer.

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[140] *Smith v. London Life Insurance Company* (2007) CanLII 745 (ON.S.C.D.C.).

Smith does not make clear just what has to be shown before a litigant can ask the court to inspect all of the opposing party's privileged documents to see if any of them should be ordered to be produced, despite being protected by litigation privilege. The Court noted, relying on *Blank*, that litigation privilege that arises in the context of earlier litigation continues to protect the documents in the second action where the subject matter was closely related to the facts in the first action. It also cited *Blank* in support of the proposition that documents protected by solicitor-client privilege, which had been earlier ordered to be produced on the basis of waiver of privilege, will remain clearly and forever privileged. The Court noted that the simple fact of pleading that the insurer had acted in good faith did not constitute a waiver of privilege.

The Court, however, returned to the *Blank* case to suggest that in some circumstances, litigation privilege would not protect a party's document and thus issued the order referred to above. Unfortunately, the Court did not articulate what evidence would suffice as a *prima facie* showing of actionable misconduct, nor did it explain just what it meant by actionable misconduct in relation to the proceedings. However, the Court noted that such *prima facie* showing of actionable misconduct was something more that a mere allegation in the pleading.[141]

(B) *The Twilight of litigation Privilege?*

The intimate relation between solicitor-client privilege and litigation privilege has been highlighted both in *Three Rivers* and *Blank*.

In *Three Rivers*, Lord Scott of Foscote said, when discussing the issue of what is known in England as the legal-advice privilege, otherwise known as solicitor-client privilege, that it is impossible to express a cornering view about the issues debated in that appeal without taking into account the policy reasons that lead to legal-advice privilege becoming established in Common Law in the first place and for its retention in the law today. The law Lord then set out to review some of the features of legal advice privilege in order to provide a context for the policy reasons underlying the privilege. In the course of his discussion, he alluded to the relationship between legal-advice privilege and litigation privilege in the following way:

> Legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the

[141] In "Divisional Court Overturns Order Requiring Production of Insurer's In-house Lawyer's File", *Cavanagh Williams Blawg on Privilege* (28 January 2007), online: Cavanagh Williams <http://www.cavanaghwilliams.com>, the authors noted several concerns with this decision in that there is no indication in the reasons that the plaintiff had ever challenged the sufficiency of the insurer's affidavit of documents. Furthermore, the authors noted that the court seems to have taken upon itself to make an order pursuant to subrule 30.06 b) for service of a further and better affidavit of document.

> advice would fall into both of the two categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted... On the other hand it has been held that litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the dominant purpose of being used in litigation. The connection between legal advice sought or given and the affording of privilege to the communication has thereby been cut.[142]

Alluding to the substantial changes in the civil procedure rules of England and the fact that nowadays, litigation has taken a decidedly non-adversarial attitude, the law Lord made the following comments, which may well, one day, impact on the assessment of litigation privilege in Canada:

> This House in *in re L* [1997] AC 16 restricted litigation privilege to communications or documents with the requisite connection to *adversarial* proceedings. Civil litigation conducted pursuant to the current Civil Procedure Rules is in many respects no longer adversarial. The decision in *in re L* warrants, in my opinion, a new look at the justification for litigation privilege. But that is for another day...[143]

The ultimate outcome of raging judicial debate on this topic will determine the magnitude of the zone of privacy protected by litigation privilege or if that privilege is still relevant. At issue is the effectiveness of our systems of civil litigation. Policy considerations in this context should be dictated by concerns of due process. But *"that is for another day"*.

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[142] *Three Rivers*, *supra* note 14 at para. 27.

[143] *Ibid.* at para. 29.