THE SUPREME COURT OF CANADA ON SOLICITOR-CLIENT PRIVILEGE: WHAT EVERY PRACTITIONER NEEDS TO KNOW

Association of Corporate Counsel
Emerging Global Trends for Corporate Counsel
June 19th, 2014

Mahmud Jamal*

TABLE OF CONTENTS

* Of the Ontario Bar and Partner, Osler, Hoskin & Harcourt LLP, Toronto; e-mail: mjamal@osler.com. This is a general overview of the subject matter and should not be regarded as providing legal advice or a legal opinion. An earlier version of this paper has been presented to legal education seminars for the Canadian Bar Association.

A. INTRODUCTION

1. This paper aims to provide a brief overview of recent developments in the law of solicitor-client and litigation privilege, focusing principally on decisions from the Supreme Court of Canada. It seeks to set out the recent law from the Court in a nutshell.

2. Solicitor-client privilege has been part of the common law since the 1500s, yet it has taken on a new life and importance within the last decade. In the last seven years the Supreme Court has elevated the privilege to the level of a constitutional right protected under the *Canadian Charter of Rights and Freedoms*. This sets Canadian law apart from many other jurisdictions, including the United States, where the privilege does not currently enjoy constitutional protection. Privilege has been a top priority for the Supreme Court of Canada, which largely chooses its own docket: the Court decided more cases touching on solicitor-client privilege in the 12 years from 1999-2014 than in the previous 125 years from 1875 (when the Court was created) to 1999. And, to remove any residual doubt, the Court recently declared that "[t]he protection of solicitor-client confidences is a matter of high importance" – of such high importance, in fact, that the Court disqualified a Canadian law firm and its instructing U.S. counsel from acting in a case where they came into possession of privileged material of their adversary.[1] The law of privilege is thus of immense practical concern and vital to lawyers in all parts of the profession.

* * *

B. SOLICITOR-CLIENT PRIVILEGE

(a) Purpose and Rationale

3. The purpose of solicitor-client privilege is to facilitate full and frank communication between client and lawyer in the seeking and giving of legal advice, thereby promoting access to justice. The Court has said that the "privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable."[2] "Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system […] may properly function."[3] The privilege "stretches beyond the parties and is integral to the workings of the legal system itself. The solicitor-client relationship is a part of that system, not ancillary to it."[4]

4. The Court has explained the rationale for solicitor-client privilege as follows:

> The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who

---

1 *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, ¶54, Binnie J.

2 *R. v. Campbell*, [1999] 1 S.C.R. 565, ¶49, Binnie J.

3 *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, ¶14, Major J.

4 *R. v. McClure*, [2001] 1 S.C.R. 445, ¶31, Major J.

> need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.[5]

5. Importantly, privileged material is protected from disclosure and inadmissible in court even though it may be probative and trustworthy concerning an issue in dispute. In effect, truth-finding is subordinated to the public policies favouring protection of the privilege. "The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege."[6] Privileges are "appropriate derogations from the scope of the protection offered by s. 2(*b*) of the *Charter*. The common law privileges, like solicitor-client privilege, generally represent situations where the public interest in confidentiality outweighs the interests served by disclosure."[7]

(b) Test

6. There are three preconditions to establishing solicitor-client privilege: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties."[8] The privilege covers any consultation for legal advice, whether litigious or not.[9] "It exists whether or not there is the immediacy of a trial or of a client seeking advice."[10]

(i) "*Communication between solicitor and client*"

7. It is sometimes said that solicitor-client privilege protects communications, but not the underlying facts that might arise out of those communications. The distinction between facts and communications is made in order to avoid rendering facts that have an independent existence

---

5 *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, ¶26, Fish J. See also *Smith v. Jones*, [1999] 1 S.C.R. 455, ¶46, Cory J.; *McClure*, above, note 4, ¶33.

6 *Smith v. Jones*, above, note 5, ¶51; *R. v. Gruenke*, [1991] 3 S.C.R. 263, p. 286, Lamer C.J.; *M.(A.). v. Ryan*, [1997] 1 S.C.R. 157, ¶19, McLachlin J. (as she then was); John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (2nd ed., 1999), §14.1, p. 713 ("the exclusionary rule of privilege […] is based on social values, external to the trial process. Although such evidence is relevant, probative and trustworthy, and would thus advance the just resolution of disputes, it is excluded because of overriding social interests") (footnotes omitted).

7 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, ¶39, McLachlin C.J. and Abella J.

8 *Pritchard*, above, note 3, ¶15; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, p. 837, Dickson J. (as he then was).

9 *Pritchard*, *id.*, ¶15; *Solosky*, *id.*, p. 834.

10 *McClure*, above, note 4, ¶41.

inadmissible in evidence, and to recognize that not everything that happens in the solicitor-client relationship is necessarily privileged.[11] However, the distinction between facts and communications is "often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated."[12] "Certain facts, if disclosed, can sometimes speak volumes about a communication."[13]

8. Thus, in the criminal context the Court has ruled that a lawyer's bill of account is privileged. "The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. The fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements." As such, the "fact consisting of the amount of fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege."[14] However, merely revealing that an accused has not paid his or her fees does not normally touch on the ***rationale*** for solicitor-client privilege in the criminal context."[15] The situation may be otherwise where non-payment of fees is linked to the merits of a matter and disclosure of non-payment will cause prejudice to the accused.[16]

(ii) "*Which entails the seeking or giving of legal advice*"

9. The privilege extends to any communication that "falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing." It extends to all communications "within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established."[17]

10. The privilege protects "all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context."[18] Thus, matters of an administrative nature, such as the client's financial means or the actual nature of the legal problem, are privileged. All information which a person must provide to obtain legal advice, and which is given in confidence, is protected.[19]

---

[11] *Maranda v. Richer*, [2003] 3 S.C.R. 209, ¶30, LeBel J.

[12] Sopinka, *The Law of Evidence in Canada*, above, note 6, p. 734, §14.53, cited in *Maranda*, note 11, ¶31, LeBel J., and ¶48, Deschamps J.

[13] *Maranda*, above, note 11, ¶48, Deschamps J.

[14] *Id.*, ¶¶32-33, LeBel J.

[15] *R. v. Cunningham*, [2010] 1 S.C.R. 331, ¶27, Rothstein J. (emphasis in original)

[16] *Id.*, ¶¶30-31.

[17] *Pritchard*, above, note 3, ¶16.

[18] *Samson Indian Band v. Canada*, [1995] 2 F.C. 762, ¶8 (C.A.).

[19] *Maranda*, above, note 11, ¶22, citing *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, pp. 892-3, Lamer J. (as he then was).

11. A consequence of the Court's broad approach to privilege is that "not all solicitor confidences are of the same order of importance."[20] Solicitor-client privilege is an "umbrella that covers confidences of differing centrality and importance."[21]

(iii) "*Which is intended to be confidential by the parties*"

12. For complicated or prolonged mandates, both civil and criminal, there is a rebuttable presumption of fact that "all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature." It would be enough for the party invoking the privilege to show that "a general mandate had been given to the lawyer for the purpose of obtaining a range of services generally expected of a lawyer in his or her professional capacity."[22] Any other rule would require the client and lawyer "to dissect all facets of their relationship in order to characterize them and consequently invoke immunity from disclosing some elements, but not others." Such an approach would multiply the risks of disclosing confidential information and further weaken the privilege.[23]

(c) <u>Evolution and Constitutionalization of the Privilege</u>

13. Over the course of its long history solicitor-client privilege has evolved from an evidentiary rule, to a substantive right, to a constitutional right protected by the *Canadian Charter of Rights and Freedoms*.

(i) *Evidentiary rule*

14. Before 1979, the privilege was considered to be merely a rule of evidence that acted "as a shield to prevent privileged materials from being tendered in evidence in a court room." In 1979, this view changed with the Supreme Court's decision in *Solosky*, which noted that lower courts had recently "taken the traditional doctrine of privilege and placed it on a new plane."[24] The Court said that the privilege had become a "fundamental civil and legal right" and recognized a "right to privacy in solicitor-client correspondence."[25]

(ii) *Substantive right*

15. In 1982, in *Descôteaux v. Mierzwinski* the Court confirmed that the privilege had evolved into a substantive right – "the fundamental right of a lawyer's client to have his communications kept confidential."[26] This substantive right extended beyond the courtroom to be a "right which

---

[20] *Celanese*, above, note 1, ¶4, Binnie J.

[21] *Id.*, ¶34.

[22] *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456, ¶42, LeBel J.

[23] *Id.*, ¶41.

[24] *Solosky*, above, note 8, pp. 837-8, Dickson J.; see also *McClure*, above, note 4, ¶22.

[25] *Solosky*, above, note 8, pp. 839-40. For a discussion of the academic debate concerning the historical origins of the privilege, see *McClure*, above, note 4, ¶¶18-21.

[26] *Descôteaux*, above, note 19, p. 888.

follows a citizen throughout his dealings with others."[27] Lamer J. for the Court formulated the substantive rule of privilege as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under para. 2 and enabling legislation referred to in para. 3 must be interpreted restrictively.[28]

(iii) *Constitutional right*

16. Starting in 1999 the Court proceeded to "constitutionalize" solicitor-client privilege, first as a principle of fundamental justice protected under s. 7 of the *Charter*, and then as part of the right to privacy under s. 8 of the *Charter*.

17. In *Smith v. Jones* (1999), which recognized a limited public safety exception to solicitor-client privilege, Major J. in dissent stated: "[i]n the criminal context principles embodied in the rules of privilege have gained constitutional protection by virtue of the enshrinement of the right to full answer and defence, the right to counsel, the right against self-incrimination and the presumption of innocence in ss. 7, 10(*b*), 11(*c*) and 11(*d*) of the *Canadian Charter of Rights and Freedoms*."[29] Cory J. for the majority also hinted at the constitutional status of the privilege, stating that it is a "principle of fundamental importance to the administration of justice."[30]

18. The privilege crossed the Rubicon into constitutional territory in *R. v. McClure* (2001), where the Court held that in limited circumstances an individual's privilege should yield to an

---

[27] *Id.*, p. 871.

[28] *Id.*, p. 875.

[29] *Smith v. Jones*, above, note 5, ¶7.

[30] *Id.*, ¶50.

accused's right to make full answer and defence to a criminal charge. Major J. for Court formally declared the privilege to be a principle of fundamental justice under s. 7 of the *Charter*.[31] The Court adopted a two-stage "innocence at stake" test, allowing the privilege to be infringed "only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction."[32]

19. The following year, in *Lavallee* (2002) Arbour J. held that the privilege is protected under s. 8 of the *Charter* as part of a client's fundamental right to privacy.[33] In this case the Court relied on the constitutional character of the privilege to strike down legislation (s. 488.1 of the *Criminal Code*, which provided a procedure for determining a claim for privilege over documents seized from a lawyer's office under a search warrant) because it allowed for the loss of privilege without the client's knowledge or consent. Arbour J. found that a client has a reasonable expectation of privacy in privileged communications under s. 8 of the *Charter*:

> A client has a reasonable expectation of privacy in all documents in the possession of his or her lawyer, which constitute information that the lawyer is ethically required to keep confidential, and an expectation of privacy of the highest order when such documents are protected by the solicitor-client privilege.[34]

20. Arbour J. also held that privileged information is "out of reach for the state" as a matter of fundamental justice under s. 7 of the *Charter*:

> It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.[35]

21. Finally, Arbour J. summarized the current status and role of solicitor-client privilege as follows:

> Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian

---

[31] *McClure*, above, note 4, ¶¶41-2.

[32] *Id.*, ¶47. But see, more recently, *R. v. National Post*, [2010] 1 S.C.R. 477, ¶39, Binnie J. *semble* suggesting that the privilege is not constitutionally protected, even though it is "supported and impressed with the values underlying s. 7 of the Charter."

[33] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White v. Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209. Arbour J. spoke for the Court on this point.

[34] *Id.*, ¶35.

[35] *Id.*, ¶24.

> law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.[36]

22. Does the constitutionalization of the privilege in criminal cases have any relevance for civil cases, where the *Charter* will not apply directly in the absence of government action? While the Court has not stated its position definitively, at least Deschamps J. has suggested that "[s]olicitor-client privilege has been recognized by this Court as a principle of fundamental justice, ***which applies equally to both civil law and criminal law***."[37] The Court as a whole has lent support for this view by citing its criminal cases liberally in the civil context, and indeed recently in a civil case the Court declared that "[t]he protection of solicitor-client confidences is a matter of high importance."[38] Lower courts have also accepted that "[p]rinciples relating to solicitor-client privilege, established by the Supreme Court of Canada in criminal cases, apply with equal force and significance in the civil realm."[39] Further, even if the *Charter* does not apply directly in the civil context without state action, nevertheless the common law must be developed in accordance with *Charter* values, including those *Charter* values embodying the privilege.[40]

(d) <u>Exceptions to the Privilege</u>

23. The privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where they are not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct.[41]

---

36 *Id.*, ¶49.

37 *Maranda*, above, note 11, ¶57 (concurring with the majority in the result) (emphasis added).

38 *Celanese*, above, note 1, ¶54.

39 *National Bank Financial Ltd. v. Potter*, [2005] N.S.J. No. 186, ¶70 (N.S.S.C.), Scanlan J., appeal dismissed [2006] N.S.J. No. 236 (C.A.); *Nova Growth Corp. v. Kepinski*, [2002] O.J. No. 2522, ¶6 (Div. Ct.), Flinn J.; *Philip Services Corp. (Receiver of) v. Ontario Securities Commission* (2005), 77 O.R. (3d) 209, ¶51 (Div. Ct.), Lane J. ("[w]hile the present case does not involve a *Charter* challenge, the message from the Supreme Court jurisprudence is clear: restrictions on solicitor-client privilege to attain other important societal objectives are to be closely scrutinized and restricted to what is absolutely necessary for the competing objective so as to achieve the minimal necessary impairment of solicitor-client privilege").

40 *Smith v. Jones*, above, note 6, ¶28, Major J. (dissenting in the result); *Pepsi-Cola Beverages (West) Ltd.*, [1986] 2 S.C.R. 573, ¶¶18-20, McLachlin C.J. and LeBel J.; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, ¶¶96-98, Cory J.; P.W. Hogg, *Constitutional Law of Canada*, loose-leaf ed., vol. 2, p. 34-24; see also Mahmud Jamal and Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003), 20 S.C.L.R. (2d) 213, pp. 234-6.

41 *Pritchard*, above, note 3, ¶16.

(i) *Limited, specific exceptions, not case-by-case balancing*

24. The Court has stated that "[d]espite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances." Nevertheless, the privilege "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will yield only in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis."[42] The Court has described the privilege as "near-absolute."[43]

(ii) *Absolute necessity test*

25. The privilege will be set aside only where "absolutely necessary." The Court has said that "[a]bsolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case."[44] As a result, it is unlikely that the privilege would be set aside to allow opposing counsel access to the privileged material in order to argue whether or not privilege was properly claimed. As the Court recently stated: "it is difficult to envisage circumstances where the absolute necessity test could be met if the sole purpose of disclosure is to facilitate argument […] on the question of whether privilege is properly claimed."[45] A prosecutor should certainly not be allowed access to privileged material in order to argue the privilege claim.[46] Concerns about judicial workload or other administrative considerations are also unlikely to meet the absolute necessity standard: "[c]onvenience is not a reason to release information subject to a claim of solicitor-client privilege."[47]

26. "Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively […] Solicitor-client privilege cannot be abrogated by inference."[48] "[S]olicitor-client privilege must only be impaired if necessary and, even then, minimally."[49] "[S]olicitor-client privilege must remain as close to absolute as possible if it is to retain relevance." Accordingly, the Court has adopted stringent norms to ensure its protection. "Such protection is ensured by labelling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary."[50] Minimal impairment is the standard by which the Court

---

42 *McClure*, above, note 4, ¶¶33-34, Major J.; *Lavallee*, above, note 33, ¶36, Arbour J.; *Criminal Lawyers' Association*, above, note 7, ¶75.

43 *Blank*, above, note 5, ¶23, Fish J.

44 *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, ¶20, Rothstein J.

45 *Id.*, ¶21.

46 *Lavallee*, above, note 33, ¶30.

47 *Goodis*, above, note 44, ¶22.

48 *Pritchard*, above, note 3, ¶33; see also *Canada Privacy Commissioner v. Blood Tribe*, [2008] 2 S.C.R. 574, ¶11, Binnie J. ("legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents" (emphasis in original).

49 *Lavallee*, above, note 33, ¶20.

50 *Id.*, ¶36.

will measure the reasonableness of state encroachments on solicitor-client privilege.[51] Moreover, regulators cannot review privileged documents for the purposes of assessing a privilege claim.[52]

(iii) *Examples*

27. "The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction."[53] Examples of rare instances where the privilege might be set aside include: in the interests of public safety, where there are real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm;[54] to protect national security;[55] where an accused's innocence is at stake and access is necessary to allow the accused to make full answer and defence, or where "core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction";[56] and to determine the validity of a trust agreement after the death of the settlor.[57]

(iv) *Crime exception*

28. Another recognized exception is for criminal communications. The privilege will not protect communications that are "criminal in themselves" or "that are intended to obtain legal advice to facilitate the commission of a crime."[58] This is sometimes known as the "future crimes

---

51 *Id.*, ¶37.

52 *Blood Tribe*, above, note 48, ¶21 ("Client confidence is the underlying basis for the privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The objection is all the more serious where (as here) there is the possibility of the privileged information being made public or used against the person entitled to the privilege").

53 *Pritchard*, above, note 3, ¶17.

54 *Smith v. Jones*, above, note 5, ¶85; any disclosure "should be limited so that it includes only the information necessary to protect public safety."

55 *Id.*, ¶53.

56 *McClure*, above, note 4, ¶47; see also ¶40 ("Rules and privileges will yield to the *Charter* guarantee of a fair trial where they stand in the way of an innocent person establishing his or her innocence […] Our system will not tolerate conviction of the innocent"); *R. v. Brown*, [2002] 2 S.C.R. 185; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, p. 607, McLachlin J. (as she then was) for the majority ("solicitor-client privilege may yield to the accused's right to defend himself on a criminal charge"); *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, p. 340, Sopinka J. ("The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege"); and *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, ¶69, L'Heureux-Dubé J. On the full answer and defence exception to solicitor-client privilege, see also *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13, pp. 43-45 (Ont. C.A.), Martin J.A.; and David Layton, "Third Party Production, Legal-Professional Privilege and Full Answer and Defence" (2000), 5 Can. Crim. L.R. 277.

57 *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, p. 387, Wilson J.

58 *Smith v. Jones*, above, note 5, ¶55; *Descôteaux*, above, note 16, p. 893 (fraudulent legal aid application not privileged).

and fraud exception." The theory behind this exception is that "[a] communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment.'"[59]

29. "[I]t is immaterial whether the lawyer is an unwitting dupe or knowing participant" in the criminal scheme.[60] However, this exception applies only where "the client is ***knowingly*** pursuing a criminal purpose."[61] Good faith consultations with lawyers by their clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held to be improper.[62] This limitation is justified on public policy grounds, because counselling against unfounded claims or illegal projects is an important part of a lawyer's function.[63]

30. The Court has applied the crime exception to refuse privilege where a lawyer filed false statutory declarations with the Law Society with the criminal purpose of obstructing justice.[64]

(v) *Tort exception?*

31. While there has been some suggestion that the future crime exception should also apply to a "future tort", such that the privilege would be lost where the client seeks legal advice for an activity that the client knows is a tort,[65] the Supreme Court has yet to recognize such an exception.

(e) Waiver of Privilege

(i) *Privilege belongs to the client*

32. "Privilege does not come into being by an assertion of a privilege claim; it exists independently."[66] The privilege belongs to the client, not the lawyer. The lawyer "merely acts as

---

[59] *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, p. 167, Stephen J., cited in *Solosky*, above, note 7, pp. 835-6 and *Campbell*, above, note 2, ¶55.

[60] *Id.*

[61] *Campbell*, above, note 2, ¶57 (Binnie J.'s emphasis).

[62] *Id.*, ¶60.

[63] *Id.*, ¶58.

[64] *R. v. Wijesinha*, [1995] 3 S.C.R. 422, ¶65, Cory J.

[65] Above, note 2, citing "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 Harv. L. Rev. 730 at pp. 730-31. See also Sopinka, *The Law of Evidence in Canada*, above, note 6, §14.58, p. 737, stating that "[t]here is no reason why this exception [furtherance of unlawful conduct] to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortious conduct which may or may not become the subject of criminal proceedings" (emphasis added) (footnotes omitted). For an expansive view of the "unlawful conduct" exception to the privilege, see *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143, ¶16 (S.C.), K.J. Smith J. ("'unlawful conduct' had a broader meaning than simply conduct that is prohibited by criminal law. It includes breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty. Breaches of contract and civil duties are 'unlawful' because, although they are not prohibited by any enactment, they cause injury to the legal rights of other citizens and give rise to legal remedies. They are therefore contrary to law").

[66] *Lavallee*, above, note 33, ¶39.

a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client."[67]

(ii) *Waiver requires the client's informed consent*

33. The privilege "can only be asserted or waived by the client through his or her ***informed consent***."[68] "Any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice."[69] In the criminal context and possibly also in the regulatory context, legislation that allows for the potential breach of a solicitor-client's privilege without the client's knowledge, let alone consent, will likely infringe s. 8 of the *Charter*.[70] Since the right of the state to access privileged information is conditional on the informed consent of the privilege holder, all efforts to notify that person, or an appropriate surrogate such as the relevant Law Society, must be in place in order for the measures to conform with s. 8 of the *Charter*.[71]

(iii) *Waiver by implication*

34. Despite the rule limiting waiver to where a client gives informed consent, the Court has nevertheless accepted that a party will be taken to have waived solicitor-client privilege where it brings suit or raises an affirmative defence that makes its intent and knowledge of the law relevant**,** or injects into the suit the question of its state of mind.[72]

35. Importantly, the Court has held that "[i]t is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communication of which it forms a part."[73] Thus, a bank that puts a customer into receivership and then defends a suit brought by the customer, claiming that the bank relied on the receiver's advice in putting the customer into receivership, thereby waives privilege over legal advice it may have obtained from its counsel on that issue, even if the bank does not refer specifically to the legal advice it received.[74] Likewise, police officers who defend a claim of police illegality by claiming that they relied on legal advice from the Department of Justice thereby waive privilege

---

67 *Id.*, ¶24.

68 *Id.*, ¶39 (emphasis added); *McClure*, above, note 4, ¶37.

69 *Lavallee*, above, note 33, ¶24.

70 *Id.*, ¶39.

71 *Id.*, ¶42.

72 *Campbell*, above, note 2, ¶69.

73 *Id.*, ¶70.

74 *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A.), p. 513, Hutcheon J.A., cited approvingly in *Campbell*, above, note 2, ¶69.

over that advice.[75] Privilege over an expert report is waived where counsel refers to the contents of the report in an opening statement in court.[76]

36. Such cases appear to rely on a principle of waiver by implication. Even if the client does not expressly intend to waive privilege, it is taken to have done so by its conduct. This includes conduct that makes it inconsistent for the party to maintain the privilege. These implied waiver cases are typically explained on principles of "fairness": it is viewed as being unfair to permit one party to take certain positions and then to invoke privilege when the other party seeks information in order to respond.[77]

37. However, the mere presence of a third party during privileged discussions will not necessarily waive the privilege. Where the third party's presence is necessary, and is involved in circumstances that suggest an intention to maintain confidentiality, waiver will not be implied.[78]

(iv) *Inadvertent disclosure*

38. The need for informed consent to waive privilege clearly does away with the harsh common law position that accidental disclosure permanently destroyed the privilege.[79] Canadian courts have gradually accepted that inadvertent disclosure does not waive privilege.[80] This position is now beyond argument given the Supreme Court's declaration in *Lavallee* that **"**[u]njustified, or ***even accidental*** infringements of the privilege erode the public's confidence in the criminal justice system."[81]

(v) *Lawyers' duties on receiving inadvertently released privileged material*

39. A party who inadvertently comes into possession of privileged material of an adversary should not only promptly return the inadvertently disclosed privileged material, but also advise the adversary of the extent to which those materials have been reviewed.[82] Otherwise, "prejudice will be presumed to flow from an opponent's access to relevant solicitor-client confidences",[83]

---

75 *Campbell*, above, note 2, ¶¶67-73.

76 *R. v. Stone*, [1999] 2 S.C.R. 290, ¶¶97-99, Binnie J., dissenting on other grounds.

77 Sopinka, *The Law of Evidence in Canada*, above, note 6, §§14.100-14.112, pp. 758-763.

78 *Foster Wheeler*, above, note 22, ¶¶48-49 (presence of a professional facilitator at a meeting where privileged issues discussed did not waive privilege where the facilitator's presence was necessary and the meeting was held with a view to maintaining confidentiality).

79 *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.) (while originals of inadvertently disclosed privileged documents may remain privileged, copies made from the originals are not privileged and may be introduced into evidence); see Sopinka, *The Law of Evidence in Canada*, above, note 6, §§14.115-14.116, p. 764.

80 See, *e.g.*, *Elliott v. Toronto (City)* (2001), 54 O.R. (3d) 472, ¶10 (Sup. Ct.), Ground J.; Sopinka, *The Law of Evidence in Canada*, above, note 6, §§14.121-14.122, pp. 766-7.

81 *Lavallee*, above, note 33, ¶49 (emphasis added). See also *Campbell*, above, note 2, ¶53, disapproving of *Re Girouard and the Queen* (1982), 68 C.C.C. (2d) 261 (S.C.B.C.) holding that privilege was waived where a privileged conversation was accidentally overheard.

82 *Celanese*, above, note 1, ¶62, Binnie J.

83 *Id.*, ¶3.

and a court may consider remedies up to and including the removal of counsel. Possession of the opposing party's solicitor-client confidences "affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors."[84]

40. As a practical matter, "[i]n modern commercial litigation, mountains of paper are sometimes exchanged. Mistakes will be made. There is no such thing, in such circumstances, as automatic disqualification."[85] Parties are permitted to rebut the inference of prejudice flowing from the disclosure of privileged information, but "the rebuttal evidence should require the party who obtained access to disclose to the court what has been learned and the measures taken to avoid presumed resulting prejudice."[86]

41. Where possible, courts will take care to review the inadvertently disclosed privileged documents to assess the risk of prejudice and "to assess whether the apparently inadvertent disclosure was a tactical gambit." In these cases, "counsel avoid disqualification by demonstrating both that they were blameless in receiving the material, and that they did the 'right thing' upon recognition that the material was potentially privileged."[87] "[A] violation that is not the result of 'egregious' misconduct may nonetheless give rise to disqualification."[88] Courts will consider a number of factors in determining whether solicitors should be removed: "(i) how the documents came into the possession of the plaintiff or its counsel; (ii) what the plaintiff and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege; (iii) the extent of review made of the privileged material; (iv) the contents of the solicitor-client communications and the degree to which they are prejudicial; (v) the stage of the litigation; (vi) the potential effectiveness of a firewall or other precautionary steps to avoid mischief. Other factors may, of course, present themselves in different cases."[89]

(f) <u>In-house Counsel and Privilege</u>

(i) *Equality with outside counsel*

42. In-house counsel enjoy the same privilege in solicitor-client communications with their clients as outside counsel.[90] The Court has stated that "[i]f an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is 'in-house' does not remove the privilege, or change its nature."[91] The only difference is that in-house counsel "act for one client only, and not for several clients." The Court has affirmed Lord Denning's famous

---

84 *Id.*, ¶34.

85 *Id.*, ¶56.

86 *Id.*, ¶4.

87 *Id.*, ¶57.

88 *Id.*, ¶58.

89 *Id.*, ¶59.

90 *Pritchard*, above, note 3; *Campbell*, above, note 2.

91 *Pritchard*, above, note 3, ¶21.

statement of this principle of equality between in-house and outside counsel with respect to the privilege:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.[92]

(ii) ***Corporate in-house counsel***

43. The Court has warned that where "corporate lawyers […] give advice in an executive or non-legal capacity […] such advice is not protected by the privilege."[93] "No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer."[94] To assess whether advice is privileged there must be a close attention to context. As the Court has explained:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered[.][95]

---

92 *Campbell*, above, note 2, ¶50, citing *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] 2 All E.R. 353 (C.A.), p. 376, Lord Denning, M.R.

93 *Pritchard*, above, note 3, ¶19.

94 *Campbell*, above, note 2, ¶50.

95 *Pritchard*, above, note 3, ¶20.

(iii) *Government in-house counsel*

44. The same principles apply to in-house government lawyers. The privilege will arise "when in-house government lawyers provide legal advice to their client, a government agency."[96] Thus, the privilege "will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law."[97]

45. However, "where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege."[98] As the Court explained in *Campbell*:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.[99]

46. Given the size of government it may sometimes be difficult to identify the client. "The identification of 'the client' is a question of fact."[100] Government lawyers should be careful in sharing privileged information with persons in other government departments, as this may result in waiver of privilege based on the "usual rules governing disclosure to third parties by a client of communications from its solicitor."[101]

(g) Auditors and "Limited Waiver" of Privilege

47. If a corporation discloses privileged information to its outside auditor for the purpose of an audit, does this constitute a waiver of solicitor-client privilege? While the Supreme Court has yet to address this issue directly, in a recent case two justices seemed to accept that a concept of limited waiver of privilege may exist under Canadian law.[102]

---

96 *Id.*, ¶19; *Campbell*, above, note 2, ¶49.

97 *Pritchard*, above, note 3, ¶21.

98 *Id.*, ¶19.

99 *Campbell*, above, note 2, ¶50.

100 *Id.*, ¶67.

101 *Id.*, ¶67.

102 *Blank*, above, note 5, ¶68, Bastarache J., Charron J. concurring, citing *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 F.C. 367 (T.D.).

48. In Canada, the weight of authority suggests that disclosure of privileged material to an auditor involves only a "limited waiver" of the privilege for the purpose of the audit and not for any other purpose. The leading case is *Interprovincial Pipe Line Inc. v. M.N.R.*,[103] where the Federal Court held that the Canada Revenue Agency was not entitled to compel an auditor to produce a legal opinion that had been provided to the auditor by a corporation in the context of an audit. The Court noted that legislation governing corporations clearly gives an auditor the authority to demand access to all corporate records – including privileged records – for the purpose of an audit.[104] A company that complies with such a demand does so involuntarily and without any intention to waive privilege as regards third parties. There is, in effect, a "limited waiver" for the purposes of the audit. The Court found that a rule resulting in a complete waiver would be against public policy. The Court however suggested that in future cases it would be prudent for clients to document their intentions when producing privileged information to auditors, by way of a "limited waiver" letter as part of the terms of the audit engagement:

> If the doctrine of limited waiver is to be relied on in future in similar circumstances, it would appear to me to be the prudent course of action to set forth in writing the client's intent regarding limited waiver in any disclosure to its auditors of solicitor-client privileged information and in the formal arrangement between the client and its auditors. Further, it would appear to me to be the height of unreasonable expectation to expect auditors, in the course of a highly complex audit and examination, to refrain from making notes of complex legal advice on complex transactions provided, as was here apparently the case, in response to a demand of the auditors, a stipulation with which the auditors here obviously did not comply. Some more formal arrangement regarding the disposition of such notes as between the client and the auditors, once those notes have served their purpose for the auditor, would appear to be desirable.[105]

49. The first appellate case to endorse the limited waiver doctrine in the context of audits is the Ontario Divisional Court's recent decision in *Philip Services Corp. v. Ontario Securities Commission*,[106] which cited the *Interprovincial Pipe Line* case approvingly.[107] The Court ruled

---

[103] [1996] 1 F.C. 367 (T.D.), Gibson J.

[104] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, s. 170(1); see to the same effect Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 153(5).

[105] Above, note 102, ¶21.

[106] (2005), 77 O.R. (3d) 209 (Div. Ct.), ¶¶45-58, Lane J.; cited approvingly *Minister of National Revenue v. Welton Parent*, [2006] F.C.J. No. 117, ¶105 (F.C.), Gauthier J. (as she then was); *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812, ¶35 (Div. Ct.); *MIL (Investments) S.A. v. Canada*, [2006] T.C.J. No. 140, ¶28 (T.C.C.), Woods T.C.J.

[107] Lower courts have cited the *Interprovincial Pipe Line* case approvingly and endorsed the limited waiver doctrine: see, for example, *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, [1998] 10 W.W.R. 633, ¶¶28-30 (Q.B.)(disclosure of legal opinions to corporate financial advisor in context of court supervised plan of arrangement limited waiver only); *Minister of National Revenue v. Welton Parent*, [2006] F.C.J. No. 117 (F.C.), ¶105, Gauthier J. (as she then was).

that the limited waiver doctrine will apply even if the client fails to document its intention to limit the waiver, given "the great importance of the solicitor-client privilege to the proper functioning of the legal system."[108] Nevertheless, it remains prudent to document the limited waiver as recommended by the Federal Court.[109]

(h) Common Interest Transactional Privilege

50. The Supreme Court has recognized common interest privilege,[110] which permits a party to share its privileged information with another party under certain circumstances without waiver or loss of privilege. In *Pritchard*, the Court described the common interest privilege as follows:

> The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A., at p. 245:
>
> "The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication. . . ."
>
> The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include

---

[108] Above, note 106, ¶47.

[109] The Privy Council has endorsed a concept of limited waiver of privilege by finding that disclosure of privileged material by a firm of solicitors to their governing Law Society in response to a complaint against the firm did not waive privilege broadly: see *B. v. Auckland District Law Society*, [2003] 2 A.C. 736 (P.C. (N.Z.)), discussed in Neil Guthrie, "Recent Developments in the Law of Privilege" (2006), 31 Advocates' Quarterly 23, pp. 40-41. This approach seems to be at odds with the Supreme Court of Canada's decision in *R. v. Wijesinha*, [1995] 3 S.C.R. 422, ¶65, finding that where a lawyer makes statutory declarations to the Law Society in the context of an investigation into the lawyer's conduct, "[i]t is difficult to imagine that solicitor-client privilege could attach to the declarations in those circumstances". United States law does not recognize any limited waiver doctrine for auditors – disclosure to auditors waives privilege: see, *e.g.*, *Gutter v. E.I. DuPont De Nemours and Co.*, 1998 WL 2017926, at 3 (S.D. Fla. May 18, 1998)("[d]isclosure to outside accountants waives the attorney-client privilege"); W. Stephen Cannon, "Pragmatic Practices for Protecting Privilege", October 23, 2006, Association of Corporation Counsel, October 23, 2006, pp. 15-17.

[110] Sometimes known as the "common interest transactional privilege" to distinguish it from the "common interest litigation privilege" or "joint defence privilege."

> trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.[111]

51. The Court has yet to elaborate further on the types of contractual or agency relations that enjoy the protection of common interest privilege. However, a number of lower courts have done so, ruling that common interest privilege protects privileged information shared among parties to a commercial transaction. For example:

(a) In *Fraser Milner Casgrain LLP v. Minister of National Revenue*,[112] the B.C. Supreme Court refused to allow the Minister of National Revenue to use his powers under the *Income Tax Act* to access documents protected by common interest privilege. The Court ruled that documents prepared by a lawyer's agent, in this case an accounting firm, were privileged and could be disclosed to other parties to a commercial transaction without loss of privilege.

(b) In *Archean Industries Ltd. v. Minister of National Revenue*,[113] the Alberta Court of Queen's Bench ruled that the Minister of National Revenue could not obtain through a requirement under the *Income Tax Act* documents protected by common interest privilege, in this case a legal opinion provided to various parties to a commercial transaction. The Court held that "parties to a commercial transaction have a common interest in seeing the deal done", and allowed for the sharing of legal advice without loss of privilege. The Court held that the opinions were shared for the purpose of a commercial transaction and "not with the intent to waive privilege."[114]

(c) In *Pitney Bowes of Canada v. Canada*,[115] the Federal Court, Trial Division refused to allow the CRA to use its powers under the *Income Tax Act* to access documents protected by common interest privilege. The Court allowed parties to a commercial transaction to share legal opinions without loss or waiver of privilege, because such sharing "facilitated completion of the transaction because parties were informed of the respective legal positions of the others."[116]

(d) In *St. Joseph Corp. v. Canada (Public Works and Government Services)*,[117] the Federal Court, Trial Division ruled that privileged information could be shared among the parties to a commercial transaction without loss of privilege. The Court ruled that "the legal opinions were created and exchanged in the course of a commercial transaction, not in the face of pending or actual litigation. The parties had a joint interest in ensuring completion of the transaction. There

---

111 *Pritchard*, above, note 3, ¶¶23-24.

112 (2002), 6 B.C.L.R. (4th) 135 (B.C.S.C.), Lowry J.

113 (1997), 98 D.T.C. 6456 (Alta. Q.B.).

114 *Id.*, ¶30.

115 (2003), 225 D.L.R. (4th) 747 (Fed. T.D.), O'Reilly J.

116 *Id.*, ¶22. The Court affirmed that common interest privilege applies to commercial transactions, but in *obiter* cautioned that not every commercial transaction qualifies for common interest treatment, suggesting that potential parties to a merger are in many ways adverse in interest (¶¶16-20).

117 (2002), 17 C.P.R. (4th) 523 (F.C.T.D.), Heneghan J.

is no evidence that either party intended or anticipated the legal opinion would be disclosed to strangers to the transaction." The Court also ruled that "There is a legitimate interest in protecting legal advice provided to parties to a commercial transaction."[118]

(e) In *Almecon Industries Ltd. v. Anchortek*,[119] the Federal Court, Trial Division ruled that common interest privilege can exist even if parties are not represented by the same counsel. The Court also ruled that the possibility that parties might at some point become adverse in interest is not sufficient to deny the existence of a common interest privilege.

(f) In *Anderson Exploration Ltd. v. Pan-Alberta Gas*,[120] the Alberta Court of Queen's Bench found that privileged documents (including a legal memo) disclosed by one corporation (NOVA) to another corporation (TCPL) in the context of a plan of arrangement were protected by common interest privilege, as the disclosure was for the purpose of completing the transaction, and not with the intent to waive privilege. The Court noted that the existence of a confidentiality agreement indicated that there was no intent to waive privilege. The legal memo in issue was a memo from NOVA's General Counsel to NOVA's board relating to a litigation issue, and was marked "Prepared in Contemplation of Litigation" (and hence was apparently not a legal opinion prepared about the arrangement transaction itself).[121] The Court noted that there is an important public policy in allowing companies to disclose information in the context of merger transactions, in order to protect the shareholders of both corporations. The Court stated that this policy "ought to be sedulously fostered."[122] The Court stated that:

> […] the consequences to the business community of this type of disclosure being found to constitute waiver of privilege would be profound. It is hard to imagine how the requirements of full and true disclosure imposed by security legislation in Canada could be satisfied if the consequences of such disclosure in merger negotiations are a loss of privilege over highly sensitive and proprietary information. Such an outcome would have a chilling effect on disclosure and would cripple negotiations.[123]

The Court also found that the claim of privilege was strengthened because this case involved a plan of arrangement requiring court approval, and hence there was a common interest in anticipated litigation.[124] The Court went on to find that disclosure of privileged material by NOVA to its financial advisors to provide a "fairness" opinion did not result in waiver of

---

118 *Id.*, ¶¶80-81.

119 [1999] 1 F.C. 507, ¶9 (F.C.T.D.), Reed J.

120 [1998] A.J. No. 575 (Q.B.).

121 *Id.*, ¶3.

122 *Id.*, ¶24.

123 *Id.*, ¶25.

124 *Id.*, ¶26.

privilege as securities law required such an opinion, analogizing disclosure for the purpose of obtaining this opinion to the *Interprovincial Pipeline* case.[125]

C. LITIGATION PRIVILEGE

52. Litigation privilege (or the "attorney work product" doctrine as it is known in the U.S.) seeks to ensure the efficacy of the adversarial litigation process. The leading Canadian authority is *Blank v. Canada*,[126] the first Supreme Court case to comprehensively review the rationale, scope and duration of litigation privilege.

(a) Purpose and Rationale

53. While solicitor-client privilege protects communications between solicitor and client, this is not the focus or rationale of litigation privilege. As Fish J. explained in *Blank*:

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.[127]

(b) Test

54. The Court has adopted a "dominant purpose" test for litigation privilege, over the less onerous "substantial purpose" test and the more onerous "sole purpose" test. The dominant purpose test had previously been adopted by the House of Lords and by provincial appeal courts in Nova Scotia, British Columbia, New Brunswick, Alberta, Ontario and Manitoba.[128] The Supreme Court held that the dominant purpose test is more consistent with the modern trend towards increased disclosure in civil litigation, for which litigation privilege provides an exception. As Fish J. stated in *Blank*:

> I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege.

---

[125] *Id.*, ¶28.

[126] Above, note 5.

[127] *Id.*, ¶27.

[128] *Id.*, ¶59.

> The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. […] While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.[129]

(c) Documents Gathered And Copied, But Not Created, For The Purpose Of Litigation

55. Are documents privileged merely because they reside in the lawyer's litigation files? Does litigation privilege attach to documents gathered or copied – but not created – for the purpose of litigation? Appellate courts are divided. The B.C. Court of Appeal has ruled that copies of public documents gathered by a solicitor are privileged,[130] whereas the Ontario Court of Appeal has taken the contrary position.[131] While the Supreme Court in *Blank* did not resolve this conflict it hinted that it preferred the B.C. approach, while warning that not everything remitted to a lawyer will automatically be protected:

> The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.[132]

(d) How Litigation Privilege Differs From Solicitor-Client Privilege

56. The Court in *Blank* explained the principal ways that litigation privilege differs from solicitor-client privilege. The Court stated that "we are dealing here with distinct conceptual animals and not with two branches of the same tree."[133] "[T]reating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both."[134]

---

129 *Id.*, ¶¶60-61.

130 *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, p. 142 (C.A.), McEachern C.J.B.C.

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

132 Above, note 5, ¶64.

133 *Id.*, ¶7.

134 *Id.*, ¶31.

"[L]itigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences."[135]

(i) *Confidentiality not required for litigation privilege*

57. Solicitor-client privilege "applies only to confidential communications between the client and solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature."[136] "Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless."[137]

(ii) *Litigation context required for litigation privilege*

58. Solicitor-client privilege "exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself."[138]

(iii) *Litigation privilege facilitates a process, not a relationship*

59. Litigation privilege "aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)."[139]

60. Indeed, a solicitor-client relationship is not required for litigation privilege to apply. "Unlike the solicitor-client privilege, the litigation privilege arises and operates ***even in the absence of a solicitor-client relationship***, and it applies indiscriminately to all litigants, whether or not they are represented by counsel […] A self-represented litigant is no less in need of, and therefore entitled to, a 'zone' or 'chamber' of privacy."[140]

(iv) *Litigation privilege ends with the litigation*

61. The "principle 'once privileged, always privileged', so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration."[141] Thus, unlike the near-

---

135 *Id.*, ¶33.

136 *Blank*, above, note 5, ¶28, citing R.J. Sharpe (as he then was), "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, [1984] *Special Lect. L.S.U.C.* 163, pp. 164-5.

137 *Id.*, ¶32.

138 *Id.*, ¶28, citing Sharpe, above, note 136.

139 *Id.*

140 *Id.*, ¶32, Fish J.'s emphasis.

141 *Id*, ¶37.

absolute protection of solicitor-client privilege, litigation privilege is "of temporary duration. It expires with the litigation of which it was born."[142] Since the purpose of litigation privilege is to create a zone of privacy for pending or apprehended litigation, "[o]nce the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification."[143]

(v) ***Litigation privilege and solicitor-client privilege can overlap and ultimately serve a common cause***

62. While litigation privilege and solicitor-client privilege are distinct conceptual animals, "[t]hey often co-exist."[144] "In practice, a lawyer's brief normally includes material 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."[145]

63. Thus, materials that may no longer be protected by litigation privilege may nevertheless still be protected by solicitor-client privilege. "[A]nything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged."[146]

64. Furthermore, "[t]hough conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in operation."[147]

(e) **<u>Litigation Privilege Survives In Related Litigation</u>**

65. As noted, litigation privilege ends with the litigation of which it was born. However, "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."[148]

66. The related proceedings must be "closely related."[149] "[T]he 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."[150] "A mere

---

[142] *Id.*, ¶8.

[143] *Id.*, ¶34.

[144] *Id.*, ¶1.

[145] *Id.*, ¶49.

[146] *Id.*, ¶50.

[147] *Id.*, ¶31.

[148] *Id.*, ¶34.

[149] *Id.*, ¶36.

[150] *Id*, ¶38.

hypothetical possibility that related proceedings may in the future be instituted does not suffice."[151]

67. "At a minimum […] 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 […] qualify as well." "[A]ll subsequent litigation will remain subject to a claim of privilege if it involves the same or related parties and the same or related source. It will fall within the protective orbit of the ***same litigation defined broadly***."[152]

68. "[T]he boundaries of this extended meaning of 'litigation' are limited by the purpose for which litigation privilege is granted, namely, […] 'the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate."[153] In short, "[t]he duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process."[154]

69. The Court in *Blank* illustrated how the extended meaning of litigation applies. In *Blank*, an individual had filed a request under the federal *Access to Information Act* relating to an environmental prosecution against him and a company of which he was a director. Initially the various charges were either dropped or quashed. The Crown then laid new charges by way of indictment, but then stayed them prior to trial. The individual and company then sued the federal government for fraud, conspiracy, perjury and abuse of its prosecutorial powers. The Supreme Court refused to allow the federal government to invoke litigation privilege to shield the documents from disclosure because it found that the litigation privilege had expired. Fish J. explained:

> The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.[155] […]
>
> In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the *Access Act*, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is

---

[151] *Id.*, ¶53.

[152] *Id.*, ¶48, Fish J.'s emphasis.

[153] *Id.*, ¶¶39-40, citing Sharpe, above, note 136.

[154] *Id.*, ¶41.

[155] *Id.*, ¶9.

> the alleged pollution and breach of reporting requirements by the respondent and his company.
>
> The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.[156]

70. The Court in *Blank* gave the following examples of how the privilege would apply to related litigation:

> In the 1980s, for example, the federal government confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.
>
> In such a situation, the advocate's "protected area" would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the *Access Act*. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.[157]

(f) <u>Exception For Actionable Misconduct In Earlier Litigation</u>

71. The Court in *Blank* also accepted that materials otherwise subject to litigation privilege may be disclosed in later litigation upon a *prima facie* demonstration of actionable misconduct by the other party in relation to the proceedings for which litigation privilege is claimed. Fish J. stated:

---

[156] *Id.*, ¶¶42-43.

[157] *Id.*, ¶¶40-41.

> The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.
>
> Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.[158]

(g) <u>Common Interest (Joint Defence) Litigation Privilege</u>

72. The Supreme Court has indirectly recognized common interest litigation privilege. In *Pritchard*,[159] the Court cited Lord Denning's seminal judgment in *Buttes Gas & Oil Co. v. Hammer (No. 3)*,[160] which described the common interest litigation privilege in the these terms:

> There is a privilege which may be called a 'common interest' privilege. This is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> In all such cases I think the courts should, for the purposes of discovery, treat all persons interested as if they were partners in a single firm or departments in a single company. Each can avail

---

158 *Id.*, ¶¶44-45.

159 *Pritchard*, above, note 3, ¶24.

160 [1980] 3 All E.R. 475, p. 483 (C.A.).

himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each can make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.[161]

* * *

[161] *Id.*, pp. 483-4.