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THE STATUS AND CONTENT OF SOLICITOR-CLIENT PRIVILEGE IN CANADA: QUESTIONS STILL UNANSWERED

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I. THE INITIAL STATUS OF SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege had its origins in our legal system as a rule of evidence. A witness could refuse to answer questions that would reveal privileged information between lawyer and client. In *Solosky v. The Queen*,[1] Justice Dickson (as he then was) of the Supreme Court of Canada traced the history of the privilege to the reign of Elizabeth I in England. At that time, the privilege "stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion."[2] The rationale for the privilege was expressed in the 19th Century by Brougham L.C. in the case of *Greenough v. Gaskell:*

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.[3]

As we shall see, this policy perspective has underpinned much of the development of the rules of solicitor-client privilege.

II. THE ACTUAL STATUS OF SOLICITOR-CLIENT PRIVILEGE

It soon became apparent that the rule was too narrow to effectively protect and enforce the privilege. For example, privileged material or information could be seized under a search warrant and

* Judge of the Federal Court of Appeal of Canada. The author wishes to thank his law clerk, Howard Kislowicz, for his able assistance in researching and preparing this paper.
1 [1980] 1 S.C.R. 821 [*Solosky*].
2 *Ibid.* at 834.
3 (1833) 39 E.R. 618 at 620, cited in *Solosky, ibid.*

examined by law enforcement agents. Derivative evidence from such examination could be used in aid of prosecution. The privilege therefore evolved from a rule of evidence to become a substantive right. As Justice Dickson noted in 1979:

> Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits.[4]

He went on to note: "One may depart from the current concept of privilege and approach the case on the broader basis that… the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client."[5] Indeed, in the subsequent case of *Descôteaux v. Mierzwinski*, Chief Justice Lamer of the Supreme Court of Canada expanded upon these comments in stating:

> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that is "founded upon the unique relationship of solicitor and client" (Solosky, supra). It is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others. Like other personal, extra-patrimonial rights, it gives rise to preventive or curative remedies provided for by law, depending on the nature of the aggression threatening it or of which it was the object. Thus a lawyer who communicates a confidential communication to others without his client's authorization could be sued by his client for damages; or a third party who had accidentally seen the contents of a lawyer's file could be prohibited by injunction from disclosing them.[6]

Still more recently, the Supreme Court of Canada ruled that the protection of solicitor client privilege is a principle of fundamental justice,[7] and as such warrants the protection of sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*.[8]

In truth, the word "privilege" is a misnomer since the right against disclosure has become enforceable at an early stage. For example: on a search warrant or in the course of an inspection, if the right is invoked, the material will be secured until a judicial determination is made as to the existence or not of the right in relation to the secured material.

III. THE CONTENT OF SOLICITOR-CLIENT PRIVILEGE

Initially, the focus was on a lawyer-client relationship. The privilege applied to protect legal advice sought and obtained from a lawyer. In *Solosky*, the Supreme Court of Canada adopted the following general statement from Wigmore:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.[9]

Over time, the privilege was extended to professionals, such as psychiatrists that the lawyer would consult.

For example, in *Perron c. R.*,[10] the Québec Court of Appeal was faced with a situation where defence counsel had engaged the services of a psychiatrist in order to prepare a defence. The

4 *Solosky, ibid.* at 836.
5 *Ibid.* at 839.
6 *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 871.
7 *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209 Paragraph 36 [*Lavallee*].
8 Part I of *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
9 8 Wigmore, *Evidence* (McNaughton rev. 1961) para. 2292, cited in *Solosky, supra* note 1 at 835.
10 (1990) 75 C.R. (3d) 382 [*Perron*].

Court reasoned in that case that solicitor-client privilege extended to the communications made between the accused and the psychiatrist, even though defence counsel was not present at the meeting between the accused and the psychiatrist. The Court explained that when defence counsel engaged the psychiatrist, he was acting within the scope of his duties, and that it was in his client's best interests for counsel to have access to the psychiatrist's expertise in formulating a defence. Canadian courts have considered other examples of persons outside the legal profession whose evidence might be subject to solicitor-client privilege in the proper circumstances. Non-lawyers to whom solicitor-client privilege has applied include private investigators,[11] accountants,[12] adjusters,[13] and physicians acting as medical experts.[14]

Over time, Canadian courts began to recognize a distinct type of privilege called "litigation privilege," similar to the American "attorney work-product doctrine."[15] Litigation privilege emerged as a second component of the solicitor-client privilege, and extended to a different class of materials that might not otherwise have been found to be subject to the legal advice privilege: materials prepared by third parties, or notes kept by the lawyer recording his or her thoughts on a given case.

IV. LITIGATION PRIVILEGE AND LEGAL ADVICE PRIVILEGE COMPARED

The Supreme Court of Canada has recently taken the view that litigation privilege and legal advice privilege are "distinct conceptual animals and not… two branches of the same tree."[16] This mixed metaphor compels a comparison between the two similar but divergent privileges.

Underlying rationale

The Supreme Court of Canada pointed out that legal advice privilege and litigation privilege are distinct, but "serve a common cause: The secure and effective administration of justice according to law."[17] Significantly, however, litigation privilege is based on a different underlying rationale than legal advice privilege. As the Supreme Court of Canada noted in *Blank v. Canada (Minister of Justice)*,[18] the object of litigation privilege "is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship."[19] One Canadian appellate judge (prior to being appointed to the bench) put it another way:

> Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client [legal advice] privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client.)[20]

The ambit of each privilege reflects this difference in underlying rationale. As will be seen below, legal advice privilege has come to be seen as almost absolute,[21] while litigation privilege is relative.[22]

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11 See *R. v. Samra* (1998), 41 O.R. (3d) 434 at 453.
12 *Cineplex Odeon Corp. v. Canada (Minister of National Revenue, Taxation - M.N.R.)*, [1994] O.J. No. 628 Paragraph 13 (Q.L.); *R. v. Canadian Territorial Helicopters Inc.*, 2004 MBQB 140.
13 See *Lamey (Litigation Guardian of) v. Rice* (2000), 190 D.L.R. (4th) 486. But see *Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321.
14 *Crocker v. MacDonald*, [1992] N.S.J. No. 410 (Q.L.).
15 See, for example, *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (F.C.A.); *Dupont Canada Inc. v. Emballage St-Jean Ltée*, [1999] F.C.J. No. 1429 per Hugessen J., affirmed (2000) 266 N.R. 366 (F.C.A.); *Belgravia Investments Ltd. v. Canada* (2002), 220 F.T.R. 246; *Richter Gedeon Vegyészeti Gyar RT v. Merck & Co.* (1996), 113 F.T.R. 1; *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 362; *Jesionowski v. Gorecki* (1992), 55 F.T.R. 1; *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11; *Chmara v. Nguyen* (1993), 85 Man. R. (2d) 227 (Man. C.A.); *Opron Const. Co. v. Alta*. (1989), 71 Alta. L.R. (2d) 28 (Alta. C.A.); Global Petroleum v. CBI Industries Inc. et al. (1998), 172 N.S.R. (2d) 326 (N.S. C.A.).
16 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 7.
17 *Ibid.* Paragraph 31.
18 *Ibid.*
19 *Ibid.* Paragraph 27.
20 R.J. Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, [1984] *Special Lect. L.S.U.C.* 163, at pp. 164-65, cited in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 Paragraph 28.
21 See *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 Paragraph 17, *Canada (Attorney General) v. Canada (Information Commissioner)*, 2005 FCA 199.
22 This situation has not arisen without critique. One commentator has advanced a detailed argument to treat materials subject to litigation privilege in the same manner as materials subject to legal advice privilege: *see* J. Douglas Wilson, "Privilege in Experts' Working Papers", (1997) 76 Can. Bar. Rev. 346.

Ambit

The Supreme Court of Canada has held that

> solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.[23]

The strength of legal advice privilege in Canada is exemplified in the case of *Maranda v. Richer.*[24] In that case, the Supreme Court of Canada held that the amount of fees paid by an accused to his defence counsel is subject to legal advice privilege. The Crown had argued successfully before the Québec Court of Appeal that the amount of fees paid by the accused was a "pure fact," and therefore not a "communication" that would be subject to legal advice privilege. Through a search warrant, it sought production of only these amounts, and not any advice that went along with the fees collected. The Supreme Court of Canada rejected this distinction, holding that "the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by legal advice privilege."[25]

Indeed, one of the most delicate situations involving the application of solicitor-client privilege is when law enforcement officials seek a warrant to search law offices. Basing itself on the principle of minimal impairment of the right of privilege, the Supreme Court of Canada articulated the following general principles to govern law office searches:

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.

2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.

3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so [as] to afford maximum protection of solicitor-client confidentiality.

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

23 *R. v. McClure*, [2001] 1 S.C.R. 445 Paragraph 35.
24 [2003] 3 S.C.R. 193 [*Maranda*].
25 *Ibid* Paragraph 33.

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.[26]

Similar concerns have arisen more recently with respect to the execution of *Anton Piller* orders. *In Celanese Canada Inc. v. Murray Demolition Corp.*,[27] the Supreme Court of Canada was faced with a situation that highlights the practical difficulties encountered with the seizure of electronic information - in that case, 1400 electronic documents - that may contain information subject to solicitor-client privilege. The case shows the need for the importation of strict conditions in the court order so as to prevent the violation of solicitor client privilege at the stage of the execution of the order. Special instructions are required in the order, such as:

- The creation of identified blocks segregated into an electronic folder;
- Supervision of the process by an independent solicitor to ensure the integrity of the search;
- A term setting out the procedure for dealing with solicitor-client privilege;
- Execution of the search during normal business hours in the presence of the defendant or a responsible employee;
- Maintenance of a detailed list of all of the evidence seized;
- Filing with the court of the independent solicitor's report on execution the search.

It should be noted that prejudice is presumed from an opponent's access to relevant solicitor-client confidences. The presumption is rebuttable, however, with the burden lying on the party who obtained wrongful access to the privileged information. The viewing of material subject to solicitor-client privilege by opposing counsel not only interferes with the rights of an opposing party, it can also have dire consequences for the party who had access to the information. In *Celanese*, the Court ordered the withdrawal of the law firm whose lawyer viewed the privileged material. This not only affected the law firm's business, but also the client's right to counsel of its choice. The Court held, however, that in the circumstances this right must yield to the countervailing right of solicitor-client privilege.

The limits of solicitor-client privilege have also been challenged in the context of the *Access to Information Act*. In a recent case, the Federal Court of Canada raised the following questions:

1. Does solicitor-client privilege attach to an entire document or only to those portions of the document which provide legal advice?

2. If a document covered by solicitor-client privilege contains within it a listing of other documents, which may or may not be covered by privilege, should these be severed from the privileged document?

26 *Lavallee, supra* note 7 Paragraph 49.
27 [2006] 2 S.C.R. 189.

3. What is the effect of the release of information to satisfy the Crown's constitutional obligations for disclosure in criminal prosecutions as opposed to voluntary waiver?

4. Does partial disclosure under the Access to Information Act of a document for which solicitor-client privilege is claimed amount to waiver of privilege for the entire document?[28]

These questions raise complex issues, not least challenging of which is the reconciliation of the near-absolute nature of solicitor client privilege with the government's obligation to sever and disclose information which is not covered by privilege. This tension may be observed in the legislation itself. Under section 23 of the *Access to Information Act*, "The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege."[29] However, when the government actor asserts privilege over a particular record, section 25 of the *Act*, compels the government actor to "disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material."[30] Moreover, section 25 is specifically designated as a paramount section of the *Act*. In deciding on the relationship between these two sections, the Federal Court of Canada articulated the principle:

> severance within a document under section 25 is only to be affected where it is reasonable to do so. Reasonableness requires that the severed information be capable of standing independently and that severance must not result in the release of meaningless words and phrases out of context or provide clues to the content of the exempted portions. Severance must be done bearing in mind the importance of impairing solicitor-client privilege as little as possible.[31]

On appeal, the Federal Court of Appeal held that the Federal Court judge misapprehended the extent of the government's duty to sever and disclose information, and that

> [s]ection 25 of the Act does not require the severance from a record of material which forms part of a solicitor-client communication… It is not Parliament's intention to require the severance of material that forms part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.[32]

The person seeking access sought to rely on the following statement by the Supreme Court of Canada in support of his request for disclosure of information internal to privileged communications:

> The language of s. 23 is, moreover, permissive. It provides that the Minister *may* invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*.[33]

Evans J.A., writing for the Court, noted that these words did not support the disclosure sought for two reasons: first, the Supreme Court decision dealt with litigation privilege, not legal advice privilege; second, the permissive language in section 23 "reflects the fact that solicitor-client privilege may be waived by or on behalf of the client" and it could be assumed from the government's invocation of solicitor-client privilege that it had decided that waiver was not in the public's interest.[34]

28 *Blank v. Canada (Minister of Justice)*, 2005 FC 1551 Paragraph 21.
29 *Access to Information Act*, R.S.C. 1985 c. A-1, s. 23.
30 *Access to Information Act*, R.S.C. 1985 c. A-1, s. 25.
31 *Blank v. Canada (Minister of Justice)*, 2005 FC 1551 Paragraph 36.
32 *Canada (Minister of Justice) v. Blank*, 2007 FCA 87 Paragraphs 7, 13.
33 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 Paragraph 52.
34 *Canada (Minister of Justice) v. Blank*, 2007 FCA 87 Paragraph 7, 13.

Another issue that arises in the access to information context is the confidentiality of records created by the government in its processing of an access request that involves privileged material. When an access request is made, the government agency that is subject to the request will generally establish a written record of communications with other government agencies in order to come to a decision regarding the disclosure of the requested materials. These records will often make direct reference to the privileged material. They may also form the basis for the government's claim that a document is privileged. It has been argued (in a case pending before the Federal Court of Appeal at the time of writing) that, by analogy, the practice referred to as "pleading in reliance" on legal advice should apply. In such cases reliance on solicitor-client privileged advice in support of a course of action may amount to an implied waiver of that privilege. The Federal Court of Appeal held that "relying on the fact of taking legal advice necessarily puts in issue the communications between the Minister's officials and her legal advisors in such a way that it would be unfair to shield those communications from disclosure."[35] Accordingly, so the argument goes, records established by the government in processing an access to information request should be disclosed. The analogy, however, is strained. The underlying issue in the access context is the disclosure of documents. The disclosure of communications or advice related to those documents would have the effect of disclosing the contents of the very documents at issue in the case. It is therefore appropriate for these communications and advice to remain confidential pending the determination of the matter. Further, holding otherwise might have the undesirable consequence of encouraging the government to proceed without creating written records, thereby making the solicitor-client privilege difficult, if not impossible, to defend.

The ambit of litigation privilege has not been tested as often in the Canadian appellate courts. However, it is clear that the concerns raised by litigation privilege are not as fundamental as those raised by legal advice privilege. To reflect the differing policy considerations, litigation privilege is limited in an important way: not every document created in the events leading up to a litigated matter will be covered by litigation privilege. As Létourneau J.A. of the Federal Court of Appeal noted, litigation privilege "came to protect materials brought into existence for the dominant purpose of pending or anticipated litigation."[36] (emphasis added) In other words, if the dominant purpose for the creation of the material was something other than pending or anticipated litigation, the privilege will not apply.

Exceptions

In the context of this robust approach to solicitor-client privilege, the Supreme Court of Canada has recognized limits and exceptions to solicitor-client privilege. Not all communications made to a lawyer will be covered by legal advice privilege. In order to attract the protection of the privilege, a communication must be made to a lawyer or his/her associates in their professional capacity, *i.e.* with the intention of seeking legal advice.[37] Moreover, the client must intend for the communication to be confidential when the communication is made.[38] Additionally, acts carried out by the client can constitute waiver of the privilege. Thus, the Québec Court of Appeal held that a legal opinion drafted by a lawyer lost its privileged status when it was passed on not only to the client, but, with the client's consent, also to the client's trustee in bankruptcy.[39]

Even when communications are made to a lawyer for the purpose of obtaining legal advice and the communications are intended to be confidential, certain exceptions to legal advice privilege have been recognized. These exceptions include what may be termed the "unlawful purpose" exception, the "innocence at stake" exception, and the "public safety" exception.

The unlawful purpose exception came to bear in *Descôteaux v. Mierzwinski*. The Court was faced with a situation wherein an applicant for legal aid was suspected of misrepresenting his income on his application form in order to qualify for the receipt of this

35 *Canada (Minister of Health) v. Apotex Inc.*, 2004 FCA 280 Paragraph 2.
36 *Blank v. Canada (Minister of Justice)*, 2004 FCA 287, dissenting on a different point, aff'd on this point *Blank v. Canada (Minister of Justice)*, 2006 SCC 39.
37 *Descôteaux v. Mierzwinski, supra* note 6 at 872-873; *Solosky, supra* note 1 at 835.
38 *Solosky, supra* note 1 at 835.
39 *Pfeiffer v. Javicoli*, [1994] R.J.Q. 1.

government service. If true, this allegation would have constituted an indictable offence. Law enforcement officials sought access to the forms filled out by the applicant in order to prosecute the alleged offence. The Supreme Court of Canada held that the communications made by the applicant in filling out the form were made with a view to obtaining legal advice and with the expectation of confidentiality. As the false under-reporting of income was criminal in itself, however, it fell within the exception of communications that are "in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime."[40] As such, the portions of the application form in which the applicant reported his income were excepted from solicitor-client privilege, while the other information contained in the form remained privileged.

In *R. v. McClure*,[41] the Supreme Court dealt with the "innocence at stake" exception. In that case, Mr. McClure stood accused of certain sexual offences allegedly committed against students of a school in which he worked as a librarian. After reading of McClure's arrest in the newspaper, a person identified in the case as J.C. made statements to the police in which he alleged that he was a victim of sexual touching at the hands of McClure. These allegations were added to the indictment against McClure. J.C. also initiated a civil suit against McClure. In the context of his criminal defence, McClure sought production of the civil litigation file kept by J.C.'s counsel, arguing that the communications made by J.C. to his lawyer could go towards establishing McClure's innocence. In refusing to compel the civil litigation file's production, the Supreme Court of Canada formulated a two-stage test for determining if the innocence at stake exception applies. Before the two-stage analysis is considered, the accused "must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way."[42] Once the accused overcomes this initial hurdle, the two-stage test proceeds. At the first stage, the party seeking production bears an initial burden of providing an evidentiary basis for its request. The trial judge must ask: "Is there some evidentiary basis for the claim that a solicitor-client communication exists that could raise a reasonable doubt about the guilt of the accused?"[43] If the trial judge is satisfied that such an evidentiary basis exists, he or she should examine the record without yet producing it to the accused. Upon examining the record, the trial judge should produce it to the accused if satisfied that something in the communication would be likely to raise a reasonable doubt about the accused's guilt.[44] The difficulties in meeting these requirements again illustrate the strength of solicitor-client privilege in Canadian law. In the *McClure* case, the accused's request was denied because he failed to provide any evidentiary basis for the claim that the information in J.C.'s litigation record could raise a reasonable doubt as to his guilt.

In *Smith v. Jones*,[45] the Supreme Court of Canada considered the public safety exception to solicitor-client privilege. In that case, an accused had been charged with aggravated sexual assault on a prostitute. Defence counsel referred the accused to a psychiatrist in preparing for his defence. Counsel informed the accused that the communications made to the psychiatrist would be privileged. At the interview with the psychiatrist, the accused described a detailed plan to kidnap, rape and kill prostitutes. The psychiatrist informed defence counsel that, in his opinion, the accused was dangerous and would likely commit future offences if he did not receive treatment. The accused later pled guilt to the included offence of aggravated assault. When the psychiatrist contacted defence counsel to inquire as to the status of proceedings, he was informed that his concerns about the dangerousness of the accused would not be addressed at the accused's sentencing hearing. The psychiatrist applied to the court for a declaration that he was entitled to disclose the information in his possession in the interests of public safety. The Supreme Court held that the psychiatrist should be permitted to disclose the statements made by the accused and the psychiatrist's opinion about them to the police and the Crown. The Supreme Court further directed that the elements of the psychiatrist's affidavit which fell within the public safety exception to solicitor-client privilege should not be subject to a publication ban. In making its order, the Supreme Court articulated a three-step approach to determining when the public safety exception applies: "First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent?"[46]

40 *Descôteaux v. Mierzwinski, supra* note 6 at 893
41 *Supra* note 23.
42 *R. v. McClure, supra* note 23 48.
43 *Ibid*. Paragraph 52.
44 *Ibid*. Paragraph 58.
45 [1999] 1 S.C.R. 455.
46 *Ibid*. Paragraph 77.

These exceptions to the rule of legal advice privilege apply equally in the case of litigation privilege. As litigation privilege has been consistently seen as relating less to a fundamental right than solicitor-client privilege, there is no reason to expect that litigation privilege should not give way in the same circumstances.[47]

Time limits

Unlike legal advice privilege, which attaches to communications unless and until the privilege is waived by the client, litigation privilege "expires with the litigation of which it was born."[48] The Supreme Court of Canada explained the reason for this temporary existence as follows:

> The purpose of the litigation privilege… is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its justification.[49]

Writing in dissent at the Federal Court of Appeal in the *Blank* case, Létourneau J.A. raised concerns with this temporal limitation as it concerned the government as a litigant:

> The government is entitled to develop, in the public interest which, contrary to private companies, it must defend, a legal policy and strategy towards the conduct of these litigations. Automatic and uncontrolled access to the government lawyer's brief, once the first litigation is over, may impede the possibility of effectively adopting and implementing such policy or strategy. It would give opponents or adversaries access to the government agency's mind and legal strategy, the very thing that the litigation privilege is directed at preventing. It would defeat, in subsequent litigation involving the same or substantially the same cause of action, the objective pursued by the litigation privilege.[50]

It must be recalled that these comments arose in the context of a request made by Mr. Blank pursuant to the *Access to Information Act*.[51] Létourneau J.A.'s concern was motivated by the potential impediments a limited concept of litigation privilege would place on the government developing an effective and comprehensive litigation strategy, which would apply across governmental agencies.

The majority of the Federal Court of Appeal and the Supreme Court of Canada took the view that these concerns could be answered by adopting a broad definition of the term "litigation". This broad definition would include "separate proceedings that involve the same or related parties and arise from the same or a related cause of action… Proceedings that raise issues common to the initial action and share its essential purpose would… qualify as well."[52] The effect of this broad definition is to force a return to first principles when deciding whether a particular document is covered by litigation privilege. One must refer to the litigant and lawyer's need for a zone of privacy in order for the adversarial system to function effectively. The more closely related the issues in two sets of proceedings, the stronger the case that litigation privilege should subsist for the life of both sets of proceedings. According to the Supreme Court of Canada, if a manufacturer was dealing with separate but related claims of product liability, litigation privilege would survive as long as the group of claims remained unresolved. On the other hand, the concern that a party might discover the general litigation strategy of its former adversary is not sufficient to ground a claim of litigation privilege.[53]

Legal Advice Privilege: Identifying the Client

Because legal advice privilege attaches to communications between lawyer and client, identifying the communications to which the privilege attaches in the case of a corporate client might

47 See *Ibid*. Paragraph 44.
48 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 Paragraph 8.
49 *Ibid*. Paragraph 34.
50 *Blank v. Canada (Minister of Justice)*, 2004 FCA 287 Paragraph 42.
51 R.S.C. 1985, c. A-1.
52 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 Paragraph 39.
53 *Ibid*. Paragraph 40-42.

not be a simple exercise. In the American experience, the question as to which individuals can communicate on behalf of a corporate client and expect their communications to be privileged has given rise to some controversy.[54] Canadian courts have not seen this issue as problematic, and have generally given "broad protection for confidential communications emanating from an employee, regardless of the level of his or her position in the corporate hierarchy."[55] In this regard, one Canadian court has gone so far as to consider privileged the confidential communications between a corporation's legal counsel and the employees of a subsidiary company.[56]

Common concerns: Loss of privilege

Though legal advice and litigation privilege are different in many respects, both raise similar concerns in the way in which the privilege which attaches to communications can be lost. Authors John Sopinka, Sidney H. Lederman and Alan W. Bryant identify five potential ways in which privilege can be lost: through voluntary waiver, waiver by implication, legislation, inadvertent disclosure or intercepted communications, and by reference to public policy. The authors note that, given the constitutional status now enjoyed by solicitor-client privilege, legislation purporting to curtail the privilege will be unlikely to emerge, and will be constitutionally suspect if it does.

With respect to voluntary waiver, it has been held in Canada that waiver occurs where the holder of the privilege voluntarily discloses or consents to the disclosure of any material part of a communication.[57] Voluntary waiver also applies to documents which have been disclosed in another jurisdiction.[58] In consenting to waiver, a party can selectively waive the privilege in some of the documents in a particular file while maintaining the privilege in the other documents so long as the waiver is not misleading.[59] Generally, disclosure to outsiders constitutes waiver of the privilege.[60] However, an exception is made when the "outsider" shares a common interest in the existing or anticipated litigation with the holder of the privilege.[61] Though Canadian courts have not ruled on the issue, English courts have held that where privilege is waived in respect of a communication, it is waived in respect of all documents relating to the acts contained in the communication.[62] It has also been held in England that where a party makes privileged documents available to the police to assist in a criminal investigation, such disclosure is not considered to be a waiver of the privilege in the documents with respect to the civil action for which the documents were created.[63]

Courts may find an implied waiver of privilege when such is required by fairness. For example, when a party relies on legal advice it received in order to justify its actions, waiver will be implied.[64] Similarly, the Supreme Court held that where an accused's counsel made reference to an expert's report in opening statements to the jury, he had waived privilege in the entire document on the accused's behalf.[65] Where, however, the existence or adequacy of legal advice is not in issue, the privilege is not waived by a reference to the legal advice.[66]

The traditional common law rule with respect to inadvertent disclosure was established in the English case of *Calcraft v. Guest*.[67] The rule states that once a communication has been shared with a third party, either by inadvertence or the stealth of the third party, privilege no longer attaches and the evidence is admissible, even compellable. However, in *Ashburton (Lord) v. Pape*,[68] it was held that an injunction could be obtained to prevent the admission of evidence obtained through dishonesty. Canadian courts have taken the view that the judge should have discretion to decide whether privilege

54 *See* for example *Upjohn v. United States*, 449 U.S. 383 (1981).
55 John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 744.
56 *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)* (1988), 28 C.P.C. (2d) 101 (Ont. H.C.J.).
57 *Marlborough Hotel Co. v. Parkmaster (Canada) Ltd.* (1959), 28 W.W.R. 49 (Man. C.A.)
58 *Western Assurance Co. v. Canada Life Assurance Co*. (1987), 63 O.R. (2d) 276.
59 *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co*. (1995), 27 O.R. (3d) 291 (Gen. Div.); *Bone v. Person* (2000), 185 D.L.R. (4th) 335.
60 *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 284 (C.A.).
61 *Supercom of California Ltd. v. Sovereign General Insurance Co*. (1998), 37 O.R. (3d) 597 (Gen. Div.); *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
62 *Donald (George) Ltd. v. Blackburn, Robson, Coates & Co. (a firm)*, [1972] 3 All E.R. 959 (Q.B.).
63 *British Coal Corp. v. Dennis Rye Ltd.* (No. 2), [1988] All E.R. 816 (C.A.).
64 *R. v. Campbell*, [1999] 1 S.C.R. 565.
65 *R. v. Stone*, [1999] 2 S.C.R. 290.
66 *Lac La Ronge Indian Band c. Canada* (1996), 6 C.P.C. (4th) 110 (Sask. Q.B.).
67 [1898] 1 Q.B. 759 (C.A.).
68 [1913] 2 Ch. 469 (C.A.).

has been lost in inadvertently disclosed documents, and should be able to take into account whether the error is excusable, whether an immediate attempt has been made to retrieve the information, and whether preservation of the privilege will cause unfairness to the opponent.[69] Where information is obtained by trickery, it could be argued in criminal cases that the interception of solicitor-client privileged information is an unreasonable search and seizure and thus unconstitutional. Further, the *Criminal Code*[70] provides at subsection 189(6) that information intercepted under judicial authorization is not admissible where it is privileged.

The public policy exceptions to privilege have been discussed above. Under these exceptions, privilege can be lost in situations where a client seeks legal advice for an unlawful purpose,[71] where public safety is at stake,[72] and where the innocence of an accused is at stake.[73] Furthermore, in *Re Robertson Stromberg*,[74] it was held that lawyers who are pursued by their law society may not benefit from solicitor-client privilege, as the public interest in the ethical practice of law outweighs any solicitor-client privilege. In such a case, the law society would not be able to disclose the information or use it for any purpose other than its investigation and proceedings.

V. QUESTIONS STILL UNANSWERED

While the Supreme Court of Canada's decision in *Blank* provided elaboration on the concept of litigation privilege, it left significant questions unanswered. First, what is to be done with those documents gathered or assembled - though not created - for the purpose of litigation? The court specifically chose not to address this issue as it was not explicitly raised and argued. However, the Court did provide some guidance on the issue in stating 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 rationale and purpose of the litigation privilege."[75] Indeed, it may be difficult to draw a distinction between a report drawn up by a private investigator and a document discovered by the same investigator. On the other hand, is there a distinction to be drawn between a report of an insurance claims adjuster created at the instance of a lawyer, and a series of similar reports relating to different cases copied by the lawyer in preparation for settlement negotiations? Time will tell.

Second, it is too early to tell how the broad definition of "litigation" advocated by the Supreme Court of Canada will be applied in future cases.[76] Given that litigation privilege applies to ongoing or reasonably apprehended litigation, does the new broader definition of litigation expand the types of cases that would be considered reasonably apprehended? This question too will likely arise in the future.

Third, new situations will inevitably arise that will test the limits of litigation privilege. In the United States, for example, several cases have come before courts where a law firm has asserted litigation privilege over reports prepared by litigation communications specialists. Lawyers consult these specialists for advice on how to handle media questions and on preparing a communications strategy. Some commentators insist that communication with the media has become an imperative for counsel, and that these specialists provide expertise necessary to the conduct of a full and effective litigation or settlement strategy.[77] These commentators note that American courts have divided on this issue. It remains to be seen how the question would be handled in Canada.

Fourth, questions still remain in the context of the *Access to Information Act*. Access requests could alter the usual balancing of interests in that the right of access to information is open to all Canadians,[78] not just adversarial parties. In the criminal law context, particularly sensitive concerns

69 *See* for example *Royal Bank of Canada v. Lee* (1992), 3 Alta. L.R. (3d) 187; *Airst v. Airst* (1998), 37 O.R. (3d) 654 (Gen. Div.).
70 R.S.C. 1985, c. C-46.
71 *Descôteaux v. Mierzwinski, supra* note 6.
72 *Smith v. Jones, supra* note 45.
73 *R. v. McClure, supra* note 23.
74 (1994), 124 Sask R. 259 (Q.B.) aff'd (1995) 122 D.L.R. (4th) 433 (C.A.)
75 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 Paragraph 64.
76 *See* Dale E. Ives & Stephen G.A. Pitel, "Filling in the blanks for litigation privilege: *Blank v. Canada (Minister of Justice)*" (2007) 11 International Journal of Evidence & Proof 49 at 54.
77 Steven B. Hantler, Victor E. Schwartz & Phil S. Goldberg, "Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media" (2004) 13 CommLaw Conspectus 7.
78 *See Access to Information Act*, R.S.C. 1985 c. A-1, s. 4.

exist when and if the public has a right to access the Crown's brief. Létourneau J.A. listed "Public safety, the privacy interests of victims or witnesses, protection of sources and police informants, protection of Charter rights and freedoms, protection of the integrity of the administration of the criminal justice system"[79] as values that may need to be balanced with the public's right to disclosure of government information. He further noted two examples of cases in which deleterious effects flowed from such disclosure:

> disclosure of the Crown brief in a case of alleged sexual assault resulted in the statement of a child complainant being circulated at the complainant's school, and disclosure of statements of potential Crown witnesses in penitentiary investigations ended up posted on bulletin boards to be perused by the general inmate population.[80]

Finally, the Supreme Court's decision in *Blank* has been criticized for stating that "litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct."[81] According to Professors Ives and Pitel of the University of Western Ontario, adopting the full force of this statement would end up expanding the "unlawful purpose" exception to solicitor-client privilege in an undesirable way. These commentators advocate a more measured exception, focusing specifically on issues that go to the heart of the administration of justice, such as abuse of process or malicious prosecution, while eschewing the broader language employed by the Court referring to "similarly blameworthy conduct."[82] Interestingly, another commonwealth commentator has made a suggestion in the opposite direction. For Prof. Mahoney, the prime policy objectives ought to be the search for truth and the orderly resolution of disputes. He argues that these would best be served by a rule that would "[p]ermit forced disclosure of important evidence when another party demonstrates that, through no negligence on his or her part, there are not reasonable alternative means by which the evidence may be obtained."[83] Given the recent case law in Canada, however, this position does not seem to be in danger of becoming law in the foreseeable future.

VI. CONCLUSION

Litigation privilege and legal advice privilege were initially covered by the same concept, which emerged as a rule of evidence. Over time, different justifications emerged for the two types of privilege, and, accordingly each has developed its own limits. It is now proper to speak of the privileges as conceptually distinct, though both are concerned with the administration of justice. It is helpful to think of legal advice privilege as a principle of fundamental justice and a fundamental right relating to the particular relationship between a lawyer and his or her client. Litigation privilege may be thought of as a necessary ballast of an adversarial system, which preserves an incentive structure favouring complete investigation on all sides of a dispute. Questions remain, however, about how expansively courts will treat the concept of litigation privilege.

79 *Blank v. Canada (Minister of Justice)*, 2004 FCA 287 Paragraph 47.
80 *Ibid.*
81 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 Paragraph 44.
82 Ives & Pitel, *supra* note 76 at 55.
83 Richard Mahoney, "Reforming Litigation Privilege", (2001) 30 C.L. World Rev. 66 at 93.