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Solicitor-Client Privilege and Litigation Privilege in Civil Litigation

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SOLICITOR-CLIENT PRIVILEGE AND LITIGATION PRIVILEGE IN CIVIL LITIGATION

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Toronto

This paper examines the nature and scope of solicitor-client privilege and litigation privilege. Contrary to a recent article suggesting that there are no real differences between them, it is argued that the two privileges are distinct in terms of both their underlying purposes and the requisite conditions to invoke them. Most importantly, confidentiality is a requirement of solicitor-client privilege but not of litigation privilege.

Moreover, extending solicitor-client privilege to communications from third parties (as proposed in the recent article) would be dangerous. It would stretch the scope of that privilege beyond its justification of necessity, and open the way for lawyers to develop and offer a "new product line": namely, confidentiality. Whatever third party communications a client desires to keep secret could conveniently be clothed with privilege simply by having lawyers act as a conduit for such communications and asking them for their legal opinion thereon (as it now appears the tobacco industry has been doing for some time with research data). A strong policy reason for confining solicitor-client privilege to direct communications between lawyer and client is to limit the potential abuse of the privilege. Further, since the assertion of privilege inevitably impedes the truth-finding process, the public interest is best served by confining the scope of solicitor-client privilege within narrow limits. For the same reason, the concept of "agents" must be accorded a narrow meaning in the context of solicitor-client privilege, so as not to render "agency" a back-door through which third party communications attract solicitor-client privilege.

Cet article examine la nature et la portée du secret professionnel avocat-client et en matière de litige. Un article récent suggère qu'aucune différence n'existe entre ces deux types de secret professionnel. Toutefois, cet article explique qu'il s'agit de deux types distincts quant à leurs fins et quant aux conditions requises pour les invoquer. Plus important encore, la confidentialité est une exigence du secret professionnel avocat-client mais non du secret professionnel concernant un litige.

De plus, étendre le secret professionnel avocat-client aux communications impliquant une tierce personne, tel que proposé dans un article récent, serait dangereux et en étendrait la portée au-delà de sa justification de nécessité. Ce serait ouvrir la porte au développement et à l'offre d'un nouveau «produit» par les avocats: la confidentialité. Si un client désire assurer la confidentialité d'une communication avec un tiers, il lui suffit de la faire passer par l'avocat et de demander à celui-ci une opinion à son sujet (une stratégie que l'industrie du tabac

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semble avoir suivie pour des données de recherches scientifiques). Limiter les abus potentiels du secret professionnel est un solide motif de politique pour restreindre le secret professionnel avocat-client aux communications directes entre ces deux derniers. Puisque l'affirmation du secret professionnel entrave inévitablement le processus de recherche de la vérité, l'intérêt public est mieux servi en limitant la portée du secret professionnel à l'intérieur de limites restreintes. Pour la même raison, le concept de mandataire doit recevoir une interprétation restrictive dans le cadre du secret professionnel avocat-client de façon ce que le mandat ne devienne pas une porte de derrière par laquelle les communications qui impliquent des tierces personnes soient incluses dans le secret professionnel avocat-client.

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Introduction

It is well established law that while *solicitor-client privilege* protects confidential communications passing between client and lawyer for the purpose of obtaining legal advice, it does not extend to nor protect communications between third parties and the lawyer (e.g. expert reports obtained by the lawyer to assist in providing legal advice to the client). By contrast, the related but distinct *litigation privilege* protects materials brought into existence for the dominant purpose of pending or anticipated litigation, and applies principally to communications received from third parties (e.g. expert reports).¹ This "two-pronged approach to privilege" is challenged by J. Douglas Wilson in an article recently published in this journal.² Wilson is concerned that the courts have failed to include communications between solicitor and client as part of solicitor-client privilege, and he wants this to be changed. Specifically, he

¹ See the analysis, below, Part IV: Solicitor-Client Privilege and Litigation Privilege Distinguished.

² J.D. Wilson, "Privilege in Experts' Working Papers" (1997) 76 Can. Bar Rev. 346 at 368.

argues that the leading case of *Wheeler v. Le Marchant*³ (which held that communications between lawyers and third parties are privileged only if they have “come into existence after litigation commenced or in contemplation”) was decided in error⁴ and hence “the courts and commentators have erred for over 100 years”.⁵ Wilson proposes that the result of *Wheeler* be rectified by enlarging the scope of solicitor-client privilege to cover third party communications whether or not the context is litigious.⁶

At first blush Wilson’s proposal may seem attractive. After all, if a corporate lawyer needs the input of an expert in order to advise the client, why should she be in any different position to her litigation colleague down the hall who retains an expert for the purpose of conducting the client’s litigation? The answer is that for sound policy reasons the common law has chosen not to venture on this course. This consideration does not inhibit Wilson, and he would have the courts take the major step he suggests, despite the absence of cogent reasons as to why they should.

Instead of exploring why the courts have refrained from extending privilege as he proposes, Wilson simply asserts that since we grant privilege to communications between solicitor and client in order to facilitate the giving of legal advice, then because the giving of advice may require communications with third persons, those communications should also be protected by the privilege. Rather than grappling with the policy implications of the radical change in the law he favours,⁷ Wilson relies upon the aberrant statements in the British Columbia case of *Hodgkinson v. Simms*,⁸ and two Supreme Court of

³ (1881), 17 Ch. D. 675 (C.A.) [hereinafter *Wheeler*] (in an action for specific performance of an agreement under which the defendants were to grant a lease of certain land to the plaintiff, the defendants objected to producing a report from an estate agent/surveyor which related to the property that was the subject of the action, but which had come about prior to the action being contemplated, to enable the solicitors to advise the defendants with regard to a different matter. The English Court of Appeal held that documents received by a lawyer from third parties are privileged “where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation”; but “communications between a solicitor and a third party in the course of his advising his client” are not as such protected).

⁴ Wilson, *supra* note 2 at 363-64: “the court in *Wheeler* wrongly assumed that a client would not fear disclosure of third person communications in the non-litigious context simply because litigation was not contemplated”.

⁵ *Ibid.* at 349.

⁶ *Ibid.* at 368. See also 350, where Wilson set out in three propositions what he considers the law *should be* pertaining to experts’ working papers.

⁷ Wilson finds the present law inconvenient in advising clients, particularly those who use survey research; he keeps referring to the fact that his proposed new regime should extend to this relatively rare example of third party communications by solicitors; see *e.g. supra* note 2 at 349, 357, 376 and 380.

⁸ (1988), 33 B.C.L.R. (2d) 129 (C.A.) [hereinafter *Hodgkinson*] (photocopies of unprivileged documents, collected with a lawyer’s expertise for the dominant purpose of litigation, are protected by an “all-embracing privilege” so that the client may speak in confidence to, and receive advice from, the solicitor).

Canada decisions⁹ (which reaffirmed the important role of the solicitor-client privilege, but had nothing to do with third party communications with lawyers) as justifying his position. However, the law of privilege is more subtle, more reasoned and more sensitive to the underlying policy concerns than Wilson is prepared to acknowledge.

Part I of this article summarizes Wilson's arguments. Part II analyses his proposal for the extension of privilege, as it must be, in terms of the public interest and we argue that there are strong policy reasons against the proposal. Part III argues that Wilson misinterprets the two Supreme Court decisions.

Part IV, by far the longest section of this article, reviews the law on solicitor-client privilege and litigation privilege. We disagree with Wilson's contention that litigation privilege is "just a convenient name for solicitor-client privilege when the lawyer's advice relates to litigation".¹⁰ In fact, the two privileges rest on different principles and this is now recognized in both academic writings and judicial decisions in common law jurisprudence around the world. Despite this general recognition, the subject has not been free from confusion and the distinction is not always well understood by practitioners; therefore we seek to provide a broader analysis of litigation privilege. We also raise the issue of whether the courts should more openly treat litigation privilege as being a qualified one as have the courts in the United States. Part V explores the somewhat murky area of third parties versus agents and we criticize a recent Ontario Divisional Court decision which, if followed, could "run a truck through" the carefully crafted current law by permitting clients to appoint third parties as their agents so as to attract solicitor-client privilege for third party communications.

I. *Wilson's Argument*

At the heart of Wilson's thesis is his questionable contention that there are "no real differences between litigation privilege and solicitor-client privilege".¹¹ He concedes there is a widely acknowledged distinction between the two privileges,¹² yet he dismisses the distinction as "unnecessary".¹³ Wilson argues that since the English Court of Appeal erred in *Wheeler*, the "two-pronged approach to privilege" set out in subsequent cases (most significantly, *Susan Hosiery Ltd. v. M.N.R.*¹⁴) should not be followed because of their reliance on

⁹ *Solosky and Descoteaux*, cited and discussed *infra* notes 19 and 20.

¹⁰ Wilson, *supra* note 2 at 359.

¹¹ *Ibid.* at 371.

¹² *Ibid.* at 367.

¹³ *Ibid.* at 368.

¹⁴ [1969] 2 Ex. C.R. 27 [hereinafter *Susan Hosiery*] (communications between a solicitor and an accountant acting as the appellant company's representative are privileged; there is a distinction between (1) confidential communications between a client and a legal adviser for the purpose of obtaining legal advice, and (2) materials prepared for the lawyer's brief for existing or contemplated litigation).

Wheeler.¹⁵ According to him, the argument that litigation privilege and solicitor-client privilege are grounded in different rationales is nothing more than *ex post facto* rationalization.¹⁶

Wilson suggests, moreover, that since litigation privilege is a “species” of the solicitor-client privilege, it should be “treated as an absolute privilege”,¹⁷ and that solicitor-client privilege should be extended to cover third-party communications regardless of any litigation context. According to Wilson, it is “evident” that this was the intent of the Supreme Court of Canada,¹⁸ expressed in the cases of *Solosky v. Canada*¹⁹ and *Descoteaux v. Mierzewski*.²⁰ In this connection, Wilson criticizes the United States analog of the litigation privilege, the “work product” doctrine enunciated by the Supreme Court of the United States in *Hickman v. Taylor*,²¹ as being a “truncated” privilege.²² Solicitor-client privilege, Wilson urges, is a “fundamental and absolute right of the client”, and it outweighs any public policy considerations such as “the fair disposition of litigation”.²³

II. Examining Wilson’s Proposal in Light of the Public Interest

(i) *The Impact of Privilege*

If Wilson’s proposal is adopted, the scope of solicitor-client privilege as we know it will be drastically expanded, and the scope of discovery significantly reduced. The result would be a radical re-calibration of the delicate balance

¹⁵ *Wilson*, *supra* note 2 at 368.

¹⁶ *Ibid.* at 372. On this point, see *infra* note 87 and accompanying text.

¹⁷ *Ibid.* at 371.

¹⁸ *Ibid.*

¹⁹ [1980] 1 S.C.R. 821 [hereinafter *Solosky*] (solicitor-client privilege is “no longer regarded merely as a rule of evidence”, it has been elevated to a “fundamental civil and legal right”; yet it did not override the need to censor prisoners’ mail, “the scale must ultimately come down in favour of the public interest”).

²⁰ [1982] 1 S.C.R. 860 [hereinafter *Descoteaux*] (the right to confidentiality is now recognized as having a “much broader scope” than as a rule of evidence; solicitor-client privilege applies to confidential communications made to the lawyer or his employees, whether of an administrative nature or relating to the actual legal problem, even before the retainer is perfected; but it does not extend to communications intended to further a criminal purpose).

²¹ 329 U.S. 495 (1946) [hereinafter *Hickman*] (witness statements secured in anticipation of litigation are not protected by solicitor-client privilege; nonetheless, they are subject to a qualified immunity from discovery which only a showing of “good cause” may override, i.e. the party seeking discovery has substantial need of the materials and is unable to obtain same without undue hardship). The work product doctrine, now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, protects “materials prepared in anticipation of litigation or for trial” including documents and other materials revealing a lawyer’s mental processes (i.e. impressions, conclusions, opinions, or legal theories), see E.S. Epstein *et al.*, *The Attorney-Client Privilege and the Work-Product Doctrine* (Chicago: ABA press, 1983) at 62.

²² *Wilson*, *supra* note 2 at 372.

²³ *Ibid.* at 370.

between privilege and discovery, yet the question of whether such a result would be in the public interest is barely touched on by Wilson. He asserts, simply, that “the fundamental right of an individual to a full and frank communication with his legal adviser outweighs such public policy considerations and justifies the absolutism of the privilege”.²⁴

What Wilson has overlooked is the impact of privilege. The effect of a rule of privilege, which permits a party to conceal relevant information from the other party and the court, is that it may shut out the truth. This hindrance on the search for the truth can be justified only on the grounds that more important interests need to be preserved. As it is explained in *McCormick on Evidence*:

Rules which serve to render accurate ascertainment of the truth more difficult, or in some instances impossible, may seem anomalous in a rational system of fact-finding. Nevertheless, rules of privilege are not without a rationale. Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice.²⁵

For present purposes, it is sufficient to note that solicitor-client privilege has as its theoretical basis²⁶ “the public interest in having citizens able to obtain legal

²⁴ *Ibid.*

²⁵ J.W. Strong, ed., *McCormick on Evidence*, 4th ed., vol. 1 (St. Paul: West, 1992) at 269.

²⁶ For a critique of solicitor-client privilege see *infra* note 54. For a detailed account of the theoretical basis of the privilege, see A. Paizes, “Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of Legal Professional Privilege” (1989) 106 *South African L.J.* 109, which includes an extensive review of the theoretical literature. Major writings referred to (with Paizes’ characterization of their essential views on privilege in parenthesis) include the following:

J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d ed. (Boston: Little, Brown, 1940) at §2292 (“it is nonetheless an obstacle to the investigation of the truth’ and ‘ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle’”);

J.A. Gardner, “A Re-evaluation of the Attorney-client Privilege” (1963) 8 *Villanova L.R.* 279 and 447 (“a champion of procedural justice, an agent of the due process of law ... a bastion of human dignity”);

D.W. Louisell, “Confidentiality, Conformity and Confusion: Privileges in Federal Court Today” (1956) 31 *Tulane L.R.* 101 (“an expression of the mores and ethos of Western society”);

E.M. Morgan, “Foreword” in *Model Code of Evidence* (Philadelphia: American Law Institute, 1942), “Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence” (1943) 10 *U. Chicago L.R.* 285, “Some Observations Concerning a Model Code of Evidence” (1940) 89 *U. Pa. L.R.* 145 (“an unconscionable barrier to the truth”);

M.E. Frankel, “The Search for Truth Continued: More Disclosure, Less Privilege” (1982) 54 *U. Colorado L.R.* 51 (“the product of a naively romantic understanding of the role of the lawyer”);

M.E. Frankel, *Partisan Justice* (New York: Hill and Wang, 1980) (“a mandate to legal practitioners to apply partisan justice”); and

“Developments in the Law — Privileged Communications” (1985) 98 *Harvard L.R.* 1450 (“a political device for according special protection to a favoured elite”).

advice, without fear that their confidences may thereafter be disclosed to their detriment".²⁷ Wilson is content to rest his case by reiterating this classic rationale (which properly justifies the privilege for communications between lawyer and client, but not third party communications), without further exploring the implications of the much expanded solicitor-client privilege he proposes. Wilson's complaint that there has been a "truncation of the fundamental right to solicitor-client privilege"²⁸ suffers, as a result, from an inadequate analysis of the public interest.

What would be the likely impact of accepting Wilson's proposal? If solicitor-client privilege is extended to third party communications whenever legal advice is being sought (i.e. even when litigation is not contemplated), many documents not currently subject to privilege would become so. For example, in the course of giving advice, or doing transactions for clients, lawyers frequently receive communications from third parties. These will range all the way from the survey report the solicitor received in *Wheeler* in order to carry out a real estate transaction, to the multitude of documents received by solicitors today from third parties (e.g. investment bankers, accountants, engineers, environmental experts, etc.) in carrying out a corporate acquisition or a securities transaction. The impact of Wilson's proposal on litigation arising from such transactions would be enormous and startling.

Equally (or more) disturbing is that the proposal opens the way for lawyers to develop and offer a "new product line": namely, confidentiality.²⁹ Whatever communications by third parties a client desires to keep secret may conveniently be clothed with privilege simply by having lawyers act as a conduit for such communication and asking them for their legal opinion thereon.³⁰ A strong policy reason for confining solicitor-client privilege to direct communications between lawyer and client is to limit the potential abuse of the privilege. As Professor Geoffrey Hazard has observed, solicitor-client privilege is often a device for covering-up "legally dubious or dirty business",³¹ and it now appears

²⁷ P.Y. Atkinson, "Production Obligations: the Narrowed Scope of the Work Product Privilege" (1994) vol. 13: issue 2 *Advocates' Soc. J.* 6 at 6. For more extensive statements of the rationale, see J.D. Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 *Modern L. Rev.* 601 at 605-607 and S.N. Lederman, "Discovery-Production of Documents-Claim of Privilege to Prevent Disclosure" (1976) 54 *Can. Bar Rev.* 422 at 423-24.

²⁸ Wilson, *supra* note 2 at 356.

²⁹ "New product line for lawyers" is a phrase coined by Charles Nesson, of the Harvard Law School, who made the criticism in connection with *Upjohn Co. v. United States*, 449 U.S. 383 (1981) [hereinafter *Upjohn*] (in-house and outside counsels were engaged by the corporation to conduct a world-wide investigation, of the extent of bribery in which the corporation had indulged, and the tax consequences of the bribes. The court held that the information generated by the investigation was covered by attorney-client privilege, on the ground that it had been obtained from corporate employees for the purpose of legal advice).

³⁰ Whether or not intended by Wilson, this consequence is almost certain to follow his proposal (e.g. with respect to the survey research on which Wilson put so much emphasis, see *supra* note 7); see *infra* note 32 as to the tobacco industries' practices re market research.

³¹ G.C. Hazard, Jr., "An Historical Perspective on the Attorney-Client Privilege" (1978) 66 *Calif. L. Rev.* 1061 at 1062.

that the tobacco industry systematically used the device of routing third party communications, including marketing and other research, through its lawyers in an attempt to attract privilege.³² Wilson's proposal would have the effect of not only encouraging the deliberate redirection of sensitive data through lawyers (to attract privilege), but also bestowing this misguided blessing of privilege upon all communications with third parties. The obstruction thus caused to the truth-finding process is self-evident and substantial.³³

Solicitor-client privilege is meant to protect only the *clients'* confidences, not those of *third parties*. As Wigmore pointed out,

Since the privilege is designed to secure subjective freedom of mind for the *client* in seeking legal advice, it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular *third person* for the benefit of the client [emphasis in original].³⁴

Wilson is in error, therefore, when he asserts that there "should be no difference between communications with the client and communications with necessary

³² See "Release of Tobacco Documents Ordered—Evidence Shows Companies Used Lawyers to Hide Data, State Judge Says", *The Wall Street Journal* (9 March 1998) A3, reporting that tobacco companies were ordered to produce 39,000 internal documents for which privilege had been claimed. Included were documents concerning research about nicotine addiction and brand preferences of children. Judge Kenneth Fitzpatrick of the Minnesota District Court said "the industry's lawyers misused the attorney-client privilege and deliberately misrepresented documents to hide evidence of crime and fraud from Minnesota's lawyers" in an action by the state to recover health care costs associated with smoking. One example cited by the judge was a study reviewing "apparently problematic research" conducted by "an outside marketing firm for a Canadian affiliate [of B.A.T. Industries PLC], Imperial Tobacco Co. The research, according to the review, contained 'multiple references to how very young smokers at first believe they cannot become addicted, only to discover later, to their regret, that they are'". See also *Minnesota v. Phillip Morris Inc.*, 1998 WL 257214 (Minn. Dist. Ct., March 7, 1998) and 1998 WL 154543 (Minn. Sup. Ct., March 27, 1998).

³³ A similar criticism has been made of *Upjohn*, *supra* note 29, in the United States (i.e. the Supreme Court decision has facilitated the practice of channeling communications through corporate counsel for the purpose of attracting solicitor-client privilege), see e.g. R.G. Nath, "Upjohn: a New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations" (1981) 30 Buffalo L. Rev. 11. See also *R. v. McCarthy Térvault* (1992), 12 C.P.C. (3d) 42 (Ont. Prov. Div.) (an application for solicitor-client privilege under s. 160 (8) of the *Provincial Offences Act* was sustained where the judge held that the evidence (i.e. the solicitor's affidavit) established that the purpose of an environmental audit meeting, attended by the solicitor, was to obtain legal advice). The Crown contended that the meeting was "conducted for internal corporate purposes rather than an assessment of [the company's] compliance with the law", and that the solicitor's evidence was merely a "recasting of the purpose of the meeting in order to shelter the company behind a solicitor-client privilege". Indeed, a notice circulated prior to the meeting described the lawyer's role as "serving as the recorder and keeper of the information developed", and made no reference to any intended provision of legal advice.

³⁴ J.H. Wigmore, *Evidence in Trials at Common Law*, McNaughton Rev., vol. 8 (Boston: Little, Brown, 1961) at 619.

third persons”.³⁵ While the purpose of solicitor-client privilege is to enable the client to speak candidly to a lawyer, third party communications “scarcely touch upon the state of mind of the client in consulting the lawyer”.³⁶ In short, both policy and analytical considerations oppose Wilson’s proposal.

(ii) *The Necessity of Balancing Competing Interests*

Wilson argues that it is unnecessary to consider other competing interests,³⁷ given the “broader concept of solicitor-client privilege”³⁸ recognized by the Supreme Court of Canada in *Solosky* and *Descoteaux*. The reply to this is that his reading of these two cases is open to serious question, as will be shown below. Moreover, even this “broader concept” by no means excludes a consideration of other aspects of the public interest. After all, solicitor-client privilege was *denied* to the claimants in both *Solosky* and *Descoteaux*, because it would be contrary to the public interest to extend the scope of privilege to cover the circumstances in those two cases. In *Solosky* (which concerned the right of an inmate to communicate in confidence with his solicitor), Dickson J. (as he then was) observed that:

the Court is placed in the position of having to *balance the public interest* in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, *the scale must ultimately come down in favour of the public interest* [emphasis added].³⁹

In *Descoteaux*, communications made by a legal aid applicant were denied protection of the solicitor-client privilege because false statements were communicated with a view to criminally obtain a benefit. The Supreme Court of Canada confirmed the long-recognized proposition of law that even confidential communications between solicitor and client would cease to be privileged, “if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime”.⁴⁰

Solicitor-client privilege, then, is not as “absolute” as one might suppose: the public interest has always been a factor in the equation (as is well illustrated by the contemporary law on waiver of privilege and recent rulings in the criminal law context).⁴¹ When it comes to litigation, the public interest has

³⁵ Wilson, *supra* note 2 at 357.

³⁶ N.J. Williams, “Four Questions of Privilege: the Litigation Aspect of Legal Professional Privilege” (1990) 9 Civil Justice Q. 139 at 143.

³⁷ Wilson, *supra* note 2 at 370.

³⁸ *Solosky*, *supra* note 19 at 836.

³⁹ *Ibid.* at 840.

⁴⁰ *Descoteaux*, *supra* note 20 at 881.

⁴¹ For major inroads on the supposed absolute nature of solicitor-client privilege see the modern (and fast developing) law on waiver of the privilege, holding that waiver may occur not only where a party puts in issue the legal advice she has received, but where the opposing party’s allegations make it fair to waive the initial party’s solicitor-client

several dimensions. Making all the material evidence available through the discovery process to the other side (and the court) is one aspect of the public interest, and the various heads of privilege reflect another.⁴² To properly balance these competing interests, as Mr. Justice Murphy observed in *Hickman*, is “a delicate and difficult task”.⁴³ Indeed, the history of the law in this area has been an illustration of this tug-of-war between the search for truth and the protection of the privilege, both of which occur within the context of the administration of justice.⁴⁴

III. *Wilson's Reading of Solosky and Descoteaux*

Throughout his essay,⁴⁵ Wilson criticizes the “truncation” of privilege as being inconsistent with the Supreme Court of Canada’s recognition of solicitor-client privilege as “a fundamental civil and legal right”.⁴⁶ This argument depends on Wilson’s view that litigation privilege is just a branch of solicitor-client

privilege. See the case law discussed in G.D. Watson & C. Perkins, *Holmsted and Watson: Ontario Civil Procedure*, looseleaf vol. 3 (Toronto: Carswell, 1998) at 30 § 38.

In the criminal law context, L’Heureux-Dubé J. observed in her concurring judgment in *R. v. Beharriell* (1995), 130 D.L.R. (4th) 422 at 439 and 451 (S.C.C.), that [a]t common law, the solicitor-client privilege as well as the informer privilege are fully recognized. These privileges are not absolute however; they must yield, in some circumstances, to the accused’s right to make full answer and defence. For example, in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at p. 388, 83 D.L.R. (4th) 193 at p. 260, [1991] 2 S.C.R. 577, McLachlin J., speaking for the majority of the court, held that informer privilege and solicitor-client privilege may yield in the context of a criminal trial if the accused’s innocence is at stake ... Even the solicitor-client privilege, which has been elevated to a “fundamental civil and legal right” ... will be overridden to allow the accused to make full answer and defence to criminal charges.

In *R. v. Pilgrim*, [1997] O.J. No. 2289 (Q.L.), Abbey J. adopted this principle, i.e. “solicitor-client privilege may be required to yield to an over-riding interest of an accused in ensuring an opportunity to make full answer and defence to a charge and in ensuring to himself a fair trial” (*ibid.* at 12 on Q.L.). Accordingly, documents and audio tapes concerning a solicitor-client interview, relevant to the defence, were ordered to be produced. See also *R. v. S.S.*, [1997] O.J. No. 140 (Q.L.) (production was ordered for files from the lawyers who represented a Crown witness in earlier family and criminal proceedings; other persons’ right to confidentiality must be balanced against the accused’s right to full answer and defence, which was implicated by information contained in the documents).

⁴² Williams, *supra* note 36 at 140.

⁴³ *Hickman*, *supra* note 21 at 497: “Examination into a person’s files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man’s work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task”.

⁴⁴ R.D. Manes, “Truth, Justice, and the Privileged Way: New Developments in the Legal Advice and Litigation Privilege” in *Civil Litigation Review* (Toronto: L.S.U.C., 1989) B-1.

⁴⁵ See e.g. Wilson, *supra* note 2 at 356, 365, 370-73.

⁴⁶ *Solosky*, *supra* note 19 at 839; cited by Wilson, *supra* note 2 at 360.

privilege: a wrong premise for the reasons discussed below. In addition, Wilson's criticism is problematic because of his mis-reading of *Solosky* and *Descoteaux*.

He claims, for instance, that “[n]o distinction is made in *Solosky* between the fundamental purpose or policies grounding solicitor-client privilege and litigation privilege”.⁴⁷ This is true; but it would certainly be wrong to conclude on this basis that the distinction should not be drawn. Indeed, it is a stretch to suggest that the Supreme Court of Canada decided a question not raised for decision and which it did not even contemplate. In *Solosky*, the issue before the Court concerned the right of an inmate to communicate in confidence with his solicitor. There was no discussion of third party communication or anticipation of litigation: the subject of litigation privilege simply did not arise. Likewise in *Descoteaux*, the Court's comment was directed to solicitor-client privilege. The case was concerned with confidential statements made by a legal aid applicant regarding his income.⁴⁸ In its formulation of the substantive rule, the Supreme Court of Canada made it clear that the rule pertains to “communications between solicitor and client”.⁴⁹ In both *Solosky* and *Descoteaux*, litigation privilege was not even brought up as a subject because it was irrelevant in the context of the two cases.

None of these considerations deter Wilson, however, from making broad generalizations about litigation privilege not warranted by *Solosky* and *Descoteaux*. The two cases, according to Wilson, “clarified the broad scope of protection to be given to solicitor-client privilege (*thus making ‘litigation privilege’ unnecessary*)” [emphasis added].⁵⁰ Furthermore, Wilson boldly declares that litigation privilege is “merely part of the single all-embracing solicitor-client privilege *according to the rationale in Solosky and Descoteaux* and set out clearly in *Hodgkinson*” [emphasis added].⁵¹ The reference to *Hodgkinson* (discussed below) is justified, but nowhere in the reasoning of *Solosky* or *Descoteaux* was there even an allusion to a “single all-embracing” privilege. Since the Court was not called upon to address the issue, its silence on the distinction between litigation privilege and solicitor-client privilege was no endorsement of any “single all-embracing” privilege.

Unless the well established distinction between litigation privilege and solicitor-client privilege is ignored, there is no basis for Wilson's assertion that a fundamental right has been truncated. What the Supreme Court of Canada elevated to a “fundamental civil and legal right” was solicitor-client privilege,

⁴⁷ Wilson, *supra* note 2 at 359.

⁴⁸ That a legal aid bureau is a lawyer's “agent” and not a “third party” is clear from the reasons in *Descoteaux*, adopted from *R. v. Littlechild* (1979), 51 C.C.C. (2d) 406 (Alta. C.A.): “conversations with a *solicitor's agents* held for the purpose of retaining him would also be privileged, even though the solicitor was not then, or ever, retained. In my view, the principle protects from disclosure a conversation between an applicant for legal aid and the non-lawyer official of the Legal Aid Society who interviews him to see if he is qualified” [emphasis added] (*Descoteaux*, *supra* note 20 at 880). See the further discussion, below, Part V: Agents and Third Parties Distinguished.

⁴⁹ *Descoteaux*, *supra* note 20 at 875.

⁵⁰ Wilson, *supra* note 2 at 369.

⁵¹ *Ibid.* at 370.

not litigation privilege.⁵² While the ambit of litigation privilege has narrowed,⁵³ this development is by no means inconsistent with the spirit of *Solosky* or *Descoteaux*. As already suggested, one must keep in mind the tug-of-war between the search for truth and the protection of privilege. Without getting into the motivation behind the creation of privileges,⁵⁴ we should note the warning of Lord Edmund-Davies of the House of Lords, that “we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression”.⁵⁵

IV. *Solicitor-Client Privilege and Litigation Privilege Distinguished*

(i) *The Limit of Solicitor-Client Privilege*

To understand the content and policy of solicitor-client privilege and litigation privilege, it is necessary to keep in mind the perennial conflict between the principle of open discovery and rules of privilege. The purpose of the

⁵² See e.g. *Descoteaux*, *supra* note 20 at 880 (citing *R. v. Littlechild* (1979), 51 C.C.C. (2d) 406 (Alta. C.A.)): “The privilege protecting from disclosure *communications between solicitor and client* is a fundamental right” [emphasis added].

⁵³ Atkinson, *supra* note 27 at 6: “... the work product privilege has been eroded as a result of the 1985 enactment of the Rules of Civil Procedure (the ‘new rules’) [specifically, Ontario Rule 31.06] together with the adoption, in Canada, of the dominant purpose rule articulated by the House of Lords in *Waugh v. British Railways Board*”. In *Waugh v. British Railways Board*, [1980] A.C. 521 (H.L.) [hereinafter *Waugh*], it was held that privilege for a routine incident report could not be justified unless litigation was the dominant purpose of its preparation. This matter is discussed further, below Part IV, under the heading: “Truncated” *Nature of Litigation Privilege*.

⁵⁴ Notwithstanding the lofty language concerning the sanctity of privilege, it is important to note who benefits directly and indirectly from it. In civil litigation the important privileges are solicitor-client privilege, litigation privilege, settlement negotiation privilege, and (to a lesser extent) Crown privilege. The solicitor-client, litigation and settlement negotiation privileges are framed in terms of being the *client’s* privilege, but they also have the effect of cloaking a large amount of *lawyer’s* work with the protection of privilege. Crown privilege, by definition, protects the Crown (i.e., the government). One does not have to be too much of a cynic to realize that those who benefit substantially from the important privileges in civil litigation are also those who are regularly involved in the law-making process: lawyers and the government. Compare “Developments in the Law—Privileged Communications” (1985) 98 Harvard L.R. 1450 (attorney-client privilege is a political device for according special protection to a favoured elite). In this context it is worth noting A.A.S. Zuckerman’s observation:

Those who place legal professional privilege on the exalted and unassailable pedestal of fundamental justice may be reminded that there are other professions that provide invaluable services, such as medical practitioners and accountants, who seem to render perfectly good service to both individuals and the public without the benefit of immunity from disclosing what passes between themselves and their clients (“Legal Professional Privilege - the Cost of Absolutism” (1996) 112 L.Q.R. 535 at 539). Fischel goes further. In “Lawyers and Confidentiality” (1998) 65 Univ of Chicago L. Rev. 1, Fischel denies the legitimacy of the privileges being discussed here. “[A] way to ask why encouraging communications with the legal profession is so important is to inquire who benefits from

solicitor-client privilege, as stated earlier, is to encourage candour in the client when communicating with a lawyer.⁵⁶ Without the guarantee of confidence, candour may be inhibited and the client may as a result be unable to obtain full and frank legal advice. On the other hand, this privilege must be kept within strict limits on account of its hindrance in the search for truth, which the discovery process is aimed to promote. The result, in the words of Jessel M.R. in *Wheeler*, is that the protection afforded by the privilege will not be extended “beyond what necessity warrants”.⁵⁷

This explains why the English Court of Appeal in *Wheeler* refused to extend privilege to communications between lawyer and third party which were not made in contemplation of litigation. Contrary to Wilson’s criticism,⁵⁸ *Wheeler* quite reasonably held that such an extension was not necessary “in order to enable persons freely to communicate with their solicitors and obtain their legal advice”.⁵⁹ Communications with third parties may, on occasions, be helpful to

these communications. Stated this way, the question answers itself: confidentiality benefits lawyers because it increases the demand for legal services. The legal profession, not clients or society as a whole, is the primary beneficiary of confidentiality rules” (*Ibid. at 3*). He concludes: “the attorney-client privilege, and the work product doctrine – benefit lawyers but are of dubious value to clients and society as a whole. Absent some more compelling justification for their existence than has been advanced to date, these doctrines should be abolished” (*Ibid. at 33*)

⁵⁵ *Waugh*, *supra* note 53 at 543.

⁵⁶ See *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 [hereinafter *Anderson*], where Jessel M.R. articulated the rationale of solicitor-client privilege as follows:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule (*ibid. at 649*).

In *Anderson*, the court held that a report prepared by an agent of the defendant bank, requested by the bank without specifying its intended submission to a legal adviser, was not privileged because the communication was not made for the purpose of obtaining legal advice.

⁵⁷ *Wheeler*, *supra* note 3 at 682. Compare *Hickman*, *supra* note 21 at 508, which stated unequivocally that solicitor-client privilege “does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client’s case; and it is equally unrelated to writings which reflect an attorney’s mental impressions, conclusions, opinions or legal theories”.

⁵⁸ *Wilson*, *supra* note 2 at 363-64.

⁵⁹ *Wheeler*, *supra* note 3 at 685.

facilitate the giving of legal advice, but they are far from being essential to the solicitor-client relationship. In this sense, it is “not necessary” to extend the privilege to third party communications, when litigation is not contemplated. Again, it must be remembered that an extension of privilege always carries a cost. Paradoxically, any extension of the scope of privilege beyond what necessity requires may undermine what the privilege is supposed to promote, namely, the administration of justice.⁶⁰

(ii) *The Rationale of Litigation Privilege*

If the need to procure legal advice does not, of necessity, entail the protection of communications from third parties, then why should such communications be privileged when litigation is involved? Indeed, why should litigation privilege (but not solicitor-client privilege) protect third party communications and other documents created *in anticipation of litigation*?

The reason is that the policy justification for litigation privilege differs from that which underlies solicitor-client privilege. Litigation privilege arises from the nature of trial in the common law procedural system: the adversary model.⁶¹ What renders this privilege “necessary” is the adversary character of trial in the common law system, under which it is essential that both parties prepare and pursue the evidence vigorously. In *Ottawa-Carleton (Regional Municipality) v. Consumers’ Gas Co.*,⁶² O’Leary J. relied on American sources based on *Hickman* and put the matter in the following terms:

The adversarial system is based on the assumption that if each side presents its case in the strongest light the Court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel’s trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counterproductive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his

⁶⁰ See the analysis, above, Part II: the Impact of Privilege.

⁶¹ N.J. Williams, “Discovery of Civil Litigation Trial Preparation in Canada” (1980) 58 Can. Bar Rev. 1 at 47. Despite Williams’ criticism of the *reasoning* in *Wheeler* (*ibid.* at 45), cited with approval by Wilson, *supra* note 2 at 364, Williams never disputed the soundness of the *result* in that case (i.e. confining privilege for third party communications to the litigious context). Moreover, Williams clearly rejected the view (held by Wilson) that the protection for third party communications could be justified by the client’s need to obtain legal advice. Williams noted that third party communications “hardly touch upon the state of mind of the client in consulting his solicitor” (Williams, *ibid.* at 39); accordingly, the protection for such communications “has nothing to do with the need to encourage the client to speak candidly to his lawyer, which is the rationale of the [solicitor-client privilege]” (*supra* note 36 at 143).

⁶² (1990), 74 O.R. (2d) 637 (Div. Ct.) [hereinafter *Ottawa-Carleton*] (where photocopies of public documents have been obtained for the dominant purpose of use in litigation, then the photocopies, but not the original documents, are privileged).

work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel. See Kevin M. Claremont, "Surveying Work Product" (1983) 68 Cornell L.R. 760, pp. 784-788.

I agree in particular with the author's words at p. 788:

'Serving justice by ordering discovery in one case may ultimately hinder it by discouraging attorney preparation in later cases'.⁶³

The important distinctions between solicitor-client privilege and litigation privilege, and their respective rationales, have been clearly articulated by Dean Robert Sharpe (now Mr. Justice Sharpe):

There are, I suggest, at least three important differences between the two. *First*, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. *Secondly*, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. *Thirdly, and most important*, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. ... Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate [emphasis added].⁶⁴

Given the distinct *raison d'être* of litigation privilege, it becomes self-evident why this privilege protects *only* those materials brought into existence *in anticipation of litigation*. It is unnecessary for litigation privilege to extend beyond the litigious context because the need to preserve the adversary process

⁶³ *Ibid.* at 643. Similar observations had been made by the court in *Hickman*, *supra* note 21 at 511 & 516:

Proper preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference ... Were such [work product of the lawyer] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten ... But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

See also Williams, *supra* note 61 at 46: "A party might be discouraged from making anything but the most cursory inquiries were he to be required to hand over unfavourable evidence to the adversary. Also, under such a system each party might be tempted to simply rely on the adversary to investigate the facts and then wait for discovery to get the results".

⁶⁴ R.J. Sharpe, "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) 163 at 164-65.

does not arise outside this context. To answer Wilson's objection,⁶⁵ it is *not* "logically inconsistent" to protect *only litigation-related* third party communications, because the purpose of this protection is found in the litigation process itself, not in the necessity of clients to obtain legal advice. Litigation privilege is based, as Sharpe observed, upon the "need for a zone of privacy to facilitate adversarial preparation".⁶⁶

That solicitor-client privilege and litigation privilege rest on different principles is well established in both academic writings⁶⁷ and judicial decisions.⁶⁸

⁶⁵ Wilson argues (*supra* note 2 at 363) that in order "to enable persons freely to communicate", privilege must cover third party communications in both litigious and non-litigious contexts, and that "it is logically inconsistent to treat them differently".

⁶⁶ Sharpe, *supra* note 64 at 165.

⁶⁷ E.g. J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992); F.D. Cass, P.Y. Atkinson & J.J. Longo, *Discovery: Law, Practice and Procedure in Ontario* (Scarborough: Carswell, 1993); R.J. Sharpe, "Discovery-Privilege and Preliminary Investigative Reports" (1981) 59 Can. Bar Rev. 830; Sharpe, *supra* note 64; Atkinson, *supra* note 27; Lederman, *supra* note 27; Williams, *supra* notes 36 and 61; J.A. Gardner, "Privilege and Discovery: Background and Development in English and American Law" (1965) 53 Geo. L. J. 585.

⁶⁸ A search on the CJ database of Quicklaw in June 1998 generated 187 cases with the phrase "litigation privilege". Many Canadian cases recognize litigation privilege as being distinct from solicitor-client privilege, of which the following are just a select few: *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (1997), 32 O.R. (3d) 575 (Gen. Div.) [hereinafter *T-D Bank*] (work product privilege applies only to files prepared in the context of contemplated or pending litigation; litigation privilege and solicitor-client privilege are "founded upon wholly different principles" and intended to achieve different ends); *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (F.C.A.) (the motions judge erred in restricting litigation privilege to "documents ... initiated for the dominant purpose of *advising* in the conduct of this litigation"; litigation privilege is to be distinguished from legal advice privilege, the former is not limited to advice and extends to communications in respect of any actual or contemplated litigation); *Chmara v. Nguyen* (1993), 85 Man. R. (2d) 227 (C.A.) (surveillance videotapes prepared for the dominant purpose of litigation are protected by litigation privilege; in contrast with solicitor-client privilege, litigation privilege "addresses a related but distinctly different concern, that of the privacy that is required by a lawyer in the preparation of a case in our adversarial system"); *International Minerals & Chemical Corp. (Canada) v. Commonwealth Insurance Co.* (1990), 89 Sask. R. 1 (Q.B.) (adjusters' reports prepared primarily to aid the conduct of litigation are protected by litigation privilege; solicitor-client privilege "differs from litigation privilege in several respects, one of which is that pending litigation is not a requirement", but the "simple expediency of channeling all communications through legal counsel does not of itself shield the communications from disclosure": internal memoranda which are not a record of direct solicitor-client communications must be produced); *Opron Const. Co. v. Alta.* (1989), 71 Alta. L.R. (2d) 28 (C.A.) (documents created with a dominant purpose for litigation are protected from discovery; litigation privilege is "completely separate from privilege for communications to or from a lawyer to get or receive legal advice", either privilege will suffice to withhold papers); *Boulianne v. Flynn*, [1970] 3 O.R. 84 (H.C.J.) (a medical report prepared for the purpose of litigation would not be privileged in a subsequent action arising out of a different accident; litigation privilege "rests not on a concern that the expert might otherwise fail to make full disclosure", but on "the desirability of a solicitor being uninhibited" in collecting expert opinions for trial whether or not such information turn out to be favourable to the client's case); *Susan Hosiery*, *supra* note 14 (communications between a solicitor and an accountant acting as the appellant company's

Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* state that

[a]lthough this extension [of litigation privilege] was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case. Accordingly, it is somewhat of a misnomer to characterize this aspect of privilege under the rubric, (solicitor-client privilege), which has peculiar reference to the professional relationship between the two individuals.⁶⁹

Whereas solicitor-client privilege aims to protect a *relationship* (i.e. the confidential relationship between lawyer and client), litigation privilege aims to facilitate a *process* (i.e. the adversary process).⁷⁰ The different rationales of these two heads of privilege are reflected in their respective scope. As it was set out in *Susan Hosiery*,⁷¹ solicitor-client privilege protects communications "of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice"; the scope of litigation privilege, on the other hand, covers "all papers and materials created or obtained specially for the lawyer's 'brief' for litigation, whether existing or contemplated".⁷²

Crucially, the requirement of confidentiality (which is essential to invoking solicitor-client privilege)⁷³ is not applicable to litigation privilege. Litigation privilege relates to "counsel's work in assembling documents, interviewing witnesses, consulting with experts, and developing the theory of the client's case",⁷⁴ as such it attaches to even non-confidential communications.⁷⁵ Materials "in-gathered" for the purpose of litigation may include photocopies of documents not originally created in confidence (e.g., public documents); likewise, witnesses frequently make statements without any consideration or expectation of

representative are privileged; there is a distinction between (1) confidential communications between a client and a legal adviser for the purpose of obtaining legal advice, and (2) materials prepared for the lawyer's brief for existing or contemplated litigation).

⁶⁹ Sopinka *et al.*, *supra* note 67 at 653. This view has recently been judicially reaffirmed in *T-D Bank*, *ibid.* at 588, quoted below (see text accompanying note 100).

⁷⁰ Sharpe, *supra* note 64 at 165.

⁷¹ *Supra* note 14 at 33.

⁷² *Ibid.*

⁷³ See e.g. *T-D Bank*, *supra* note 68 at 584: "the fatal flaw in the assertion of solicitor-client privilege is the absence of confidentiality ... in order to constitute a privileged communication, the parties must have intended that it be kept confidential".

⁷⁴ Atkinson, *supra* note 27 at 7. See also the discussion in N.J. Williams, "Four Questions of Privilege: the Litigation Aspect of Legal Professional Privilege" in I.R. Scott, ed., *International Perspectives on Civil Justice* (London: Sweet & Maxwell, 1990) 217 at 221-28.

⁷⁵ Sharpe, *supra* note 64 at 164.

confidentiality. Nonetheless, both in-gathered documents⁷⁶ and witness statements⁷⁷ prepared for anticipated litigation are protected by litigation privilege. Since neither in-gathered document nor witness statement meets the test of confidentiality⁷⁸ (a requisite condition for solicitor-client privilege), the fact that they fall within the ambit of litigation privilege attests to the different underpinnings of these two privileges.⁷⁹

The regime proposed by Wilson, which conflates solicitor-client privilege and litigation privilege to protect third party communications whether or not litigation is contemplated, would not only be contrary to most Canadian authorities, but it is also at odds with common law jurisprudence around the world. As noted earlier, in the United States communications with third parties and other materials prepared in anticipation of litigation are not covered by attorney-client privilege, but are protected under the rubric of “lawyer’s work product”.⁸⁰ In Britain, the leading text on evidence⁸¹ recognizes “litigation privilege” as a head of privilege separate from “legal advice privilege”. The law in Australia, likewise, distinguishes between two “limbs” of “legal professional privilege”, respectively protecting lawyer-client communications and third party communications.⁸²

⁷⁶ See e.g. *Ottawa-Carleton*, *supra* note 62, which held that photocopies of public documents obtained for the dominant purpose of litigation were privileged. See also *infra* note 96.

⁷⁷ See e.g. *Yri-York Ltd. v. Commercial Union Assurance Co.* (1987), 17 C.P.C. (2d) 181 (Ont. H.C.) (statements from witnesses obtained prior to a lawsuit, but in reasonable and *bona fide* anticipation of litigation, are held to be privileged). Witness statements are not protected by solicitor-client privilege, see *infra* note 80.

⁷⁸ See text *infra* note 101.

⁷⁹ A similar observation was made by Pincus J. in *Dingle v. Commonwealth Development Bank of Australia* (1989), 91 A.L.R. 239 (Fed. Ct.); cited in S.B. McNicol, *Law of Privilege* (Sydney: Law Book, 1992) at 49-50. Pincus J. suggested in *Dingle* that judicial attempts in Australia to justify “legal professional privilege”, by appealing to the confidentiality of solicitor-client communications, are simply “not defensible” so far as third party communications are concerned.

⁸⁰ See *Hickman*, *supra* note 21 at 508: “We also agree that the memoranda, [witness] statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis”. The work product doctrine, including the discoverability of witness statements, in the United States is now governed by the Federal Rules of Civil Procedure: a party cannot obtain a statement made by a witness other than that party except on the “good cause” showing required for discovering trial preparation materials generally. See F. James, G.C. Hazard & J. Leubsdorf, *Civil Procedure*, 4th ed. (Boston: Little, Brown, 1992) at 250, 258.

On the importance of distinguishing and keeping separate the solicitor-client privilege and the “exemption of a party from discovery of certain documents”, see 8 Wigmore, *Evidence* (McNaughton rev. 1961), *supra* note 34 at 620-28.

⁸¹ C. Tapper, *Cross and Tapper on Evidence*, 8th ed. (London: Butterworths, 1995) at 483. Tapper indicated that “while by no means identical, this head of [litigation] privilege resembles that isolated in the United States as ‘lawyers’ work product’”. Tapper also noted (*ibid.* at 470) that litigation privilege was distinguished from legal advice privilege in *Formica Ltd. v. Secretary of State acting by the Export Credits Guarantee Department*, [1995] 1 Lloyd’s Rep. 692 (Q.B.), and that LEXIS indicated 102 usages in a search in March 1995.

⁸² McNicol, *supra* note 79 at 44-46.

[I]t has been recognised in Australian cases for some time now, not only that the third party litigation head of privilege exists but also that the popular rationale of promoting candour and trust between lawyer and client is inadequate to explain this third party litigation head of privilege.⁸³

It is clear, then, that Wilson's proposal receives little support from the authorities. Moreover, and this is most telling, for all his rhetoric Wilson does not cite a single case (and we know of none, certainly no modern ones) which contradicts the *result* in *Wheeler* by extending privilege to third party communications beyond the litigious context.

(iii) Sources of Confusion

Despite the modern day consensus that the two privileges are distinct and have clearly separate rationales, this has not always been the case (as Wilson correctly observes) notwithstanding that the origin of the distinction goes back to 1881 in the decision of *Wheeler*. The English cases of the nineteenth century are "scarcely notable for their clarity of exposition"⁸⁴ and confusion among the courts and text writers continued well into the twentieth century.⁸⁵ Back in 1961, Wigmore observed that

In England the principle of privilege for confidential attorney-client communications has not been kept entirely separate from the exemption of a party from discovery of certain documents and prospective witnesses' statements. And in Canada some confusion persists.⁸⁶

Wilson's observation that the modern rationale for litigation privilege is an *ex post facto* rationale for the decision in *Wheeler* is an accurate one, though he makes far too much of it.⁸⁷ That confusion reigned for a long time is largely

⁸³ *Ibid.* at 49. The quoted passage appears in McNicol's book within the context of an apparent conundrum: "there is no doubt that difficulties exist in reconciling a third party litigation head of privilege (which has nothing to do with the state of mind of the client) with a privilege which encourages clients to confide fully and candidly in their legal advisers". The "difficulties" described by McNicol, however, may be avoided if the distinct rationales underlying the two "limbs" of privilege are recognized for what they are, without forcing their reconciliation.

⁸⁴ Williams, *supra* note 61 at 47.

⁸⁵ See the further discussion, below, under the heading: *Contemporary Confusion*.

⁸⁶ 8 Wigmore, *Evidence* (McNaughton rev. 1961), *supra* note 34 at 620-21.

⁸⁷ By implication of Wilson's own admission, the modern rationale of solicitor-client privilege is itself *ex post facto* rationalization of an earlier privilege which only exempted lawyers themselves from "testimonial compulsion" (*supra* note 2 at 358). Wilson has no trouble with that, and rightly so! The real test of any rationalization should not be whether it is *ex post facto*, but whether it is valid (likewise, the "neighbour principle" enunciated in *Donoghue v. Stevenson*, [1932] A.C. 562, could be regarded as *ex post facto* rationalization of earlier tort actions for negligent conduct, but few would dispute that it was, and still is, good law). *Wheeler* correctly decided the scope of solicitor-client privilege, even if the *reasoning* which led to this decision was lacking in clarity (see *supra* note 60). If Wilson desires to reverse the law of privilege over the past 100 years, surely it is not enough to just attack the *reasoning* of a single case. At the very least, one must show how the *result* in *Wheeler* and subsequent cases has been wrong. In this connection, post-*Wheeler* clarification of the rationale for litigation privilege is just as relevant. By choosing to characterize and dismiss subsequent literature as *ex post facto* rationalization, Wilson does scant justice to the light they shed on the subject.

attributable to the fact that clear and articulate statements of the rationale for litigation privilege are rare in Anglo-Canadian case law. While *Susan Hosier*⁸⁸ articulated the distinction between the two privileges, and the distinction is now well established in the Canadian case law,⁸⁹ Anglo-Canadian case law still lacks a seminal case similar to the United States decision in *Hickman*⁹⁰ which (a) draws a sharp line between the two privileges, (b) points out that there must be two separate privileges since the very basis of solicitor-client privilege is confidentiality whereas litigation privilege clearly extends (and must extend in order to do its job) to communications not founded in confidence, and (c) clearly provides that litigation privilege is based on protection of the “zone of privacy” necessitated by the adversary system of litigation.

To make his case, Wilson relies upon *Hodgkinson v. Simms*⁹¹ from the British Columbia Court of Appeal, an aberrant decision by modern standards, in which McEachern C.J.B.C. stated that there is really just

⁸⁸ *Supra* note 14 at 33.

⁸⁹ See *e.g.* the cases cited, *supra* note 68.

⁹⁰ *Supra* note 21.

⁹¹ *Hodgkinson*, *supra* note 8; cited by Wilson, *supra* note 2 at 365-66, 369-70.

Wilson also cites with approval (at 376-77) the case of *Bell Canada v. Olympia & York Developments Ltd.* (1989), 68 O.R. (2d) 103 (H.C.J.) (an expert retained by the plaintiff, and called as a witness at trial, was not ordered to disclose information supplied to him by the solicitor acting for the plaintiff). This decision has been criticized in R.M. Bell, “Drafts of Experts’ Reports: How Far does the Obligation to Produce Extend?” (1992) 13 *Advocates’ Q.* 353 for failing to distinguish adequately between solicitor-client privilege and litigation privilege:

The decision of Eberle J. is rooted in the desire of ensuring that a party has a sufficiently large sphere of privacy so as to be able to obtain legal advice without the concern that such matters will have to be disclosed. This however is the purpose of solicitor-client privilege, not the litigation privilege which is aimed at protecting orderly trial preparation. That purpose is served by protecting from disclosure the reports of experts whom a party does not intend to call at trial. There is no disincentive to prepare one’s case thoroughly, because negative reports obtained in the course of that preparation can, in effect, be ‘buried’ (*ibid.* at 361).

The opposing line of authorities is therefore to be preferred: *i.e.* *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 291 (S.C.) (documents in the possession of an expert witness who is called to testify, which may be relevant to that witness’ evidence or credibility, should be produced unless it would be unfair or inconsistent to require such production) and *Delgamuukw v. British Columbia* (1988), 55 D.L.R. (4th) 73 (B.C.S.C.) (privileged information relating to the evidence or credibility of an expert testifying at trial should be disclosed: there is a presumption of law that litigation privilege is waived when the witness is called to give evidence; still, every effort should be made to protect litigation privilege which is consistent with the preservation of the integrity of the trial process).

It is worth noting that the actual *result* of *Bell Canada*, despite the confused *reasoning* in that case, is justified by Ontario Rule 31.06 (3), to the extent that documents sought by the defendant included drafts of reports made by *experts other than* the one called at trial. To this extent, the *outcome* in *Bell Canada* is not irreconcilable with *Vancouver Community College*, which related to drafts of the *testifying expert’s own* report. Litigation privilege would not prevent production of such drafts if one accepts the view that the privilege ends when the expert witness takes the stand at trial.

one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.⁹²

It is submitted that this view seriously confounds the distinct rationales of litigation privilege and solicitor-client privilege. For reasons given earlier, the policy justifications for these two privileges are different. Wigmore rightly remarked that “[c]onfusion can be avoided only if the two principles are kept within their proper dimensions”.⁹³ McEachern C.J.B.C. failed to see the “need to recognize a separate category of immunity against production”⁹⁴ because he assumed that confidentiality was the basis of litigation privilege. It is submitted, however, that confidentiality is not relevant unless the communication for which privilege is claimed passed between lawyer and client.⁹⁵ It is noteworthy that the result in *Hodgkinson* (i.e. privilege attached to documents copied and “in-gathered” for the purpose of litigation) *did not* turn in any way on what was said about the “all-embracing privilege”; i.e. as other cases have shown,⁹⁶ the same result is entailed by an application of the litigation privilege.

It is worth reiterating Wigmore’s caution:

There are two principles relating to the scope of discovery which have tended to confuse analysis of the attorney-client privilege ... Thus, for example, two documents in the hands of an attorney may be beyond reach of the opposing party — one because it is a confidential communication to the attorney by the client or his agent, and the other because it is a communication to the attorney by a prospective third-party witness. The reason for immunity in the former instance is the present [attorney-client] privilege; the reason in the latter is the totally unrelated rule exempting certain matters from discovery.⁹⁷

As already indicated, the confusion of Wilson and McEachern C.J.B.C. may be traced back to earlier sources and the confusing language of early English cases,

⁹² *Hodgkinson*, *supra* note 8 at 136.

⁹³ 8 Wigmore, *Evidence* (McNaughton rev. 1961), *supra* note 34 at 628.

⁹⁴ *Hodgkinson*, *supra* note 8 at 134.

⁹⁵ See Williams, *supra* note 74 at 231; see also text above accompanying note 74.

⁹⁶ *E.g. Ottawa-Carleton*, *supra* note 62. Although *Hodgkinson* was cited in *Ottawa-Carleton*, the latter made no reference to any “all-embracing privilege”; instead, it focused correctly on the need “to preserve the integrity of the adversarial system” as being the justification of the privilege.

The British Columbia Court of Appeal revisited the issue of privileged in-gathered documents in *Hunt v. T & N plc* (1993), 15 C.P.C. (3d) 134 (B.C.C.A.) (plaintiff’s copies of documents which originated with the defendant, obtained by the plaintiff’s lawyers for the purpose of asbestos litigation, were held to be privileged; production of the documents would have disclosed the plaintiff’s selection strategy). Hinkson J.A., delivering a unanimous judgment, suggested that the majority decision in *Hodgkinson* was based on the concern that revealing “the contents of the solicitor’s brief would permit the opponents to look into counsel’s mind”. Hinkson J.A. also cited *Ottawa-Carleton* with approval and relied on its reasoning (i.e. counsel must be free to investigate without risking disclosure) in the *Hunt* ruling.

⁹⁷ 8 Wigmore, *Evidence* (McNaughton rev. 1961), *supra* note 34 at 620, 628.

some of which were cited in *Hodgkinson*⁹⁸ and left their mark in the reasoning of McEachern C.J.B.C. With respect, his view is now antiquated,⁹⁹ and clearly rejected by Winkler J. in a recent statement of the law:

[T]he lawyer's work-product privilege, as a branch of litigation privilege, is founded upon wholly different principles than solicitor-client privilege, and is intended to achieve a different end. To extend the work-product privilege to files created solely for the purpose of giving advice would be to seriously misapprehend the purpose of the privilege.¹⁰⁰

(iv) *Contemporary Confusion*

Confusion continues even today, resulting from misguided attempts to import the requirement of confidentiality into litigation privilege, and also from the use of confusing terminology and the lack of a consistent scheme in categorizing the two privileges.

A major contributor to this contemporary confusion was the 1975 case of *Strass v. Goldsack*.¹⁰¹ At issue in *Strass* was whether privilege attached to a particular type of witness statement, i.e. a statement given by one party to the other (one made by the plaintiff to the defendant's insurance adjuster). The Alberta Supreme Court (Appellate Division) decided that no privilege attached to such a statement. While this holding is sensible in itself,¹⁰² the court's reasoning is problematic. The majority took as their starting point that, after the

⁹⁸ *E.g. Lyell v. Kennedy* (1884), 27 Ch. D. 1 (C.A.) (copies of public records and inscriptions on tombstones, etc. which the defendant's solicitor had obtained for the purpose of the defence were held to be privileged; a collection of records might be the result of professional knowledge, research and skill, production would show what the solicitor thought of the client's case). The decision itself is consistent with our suggested purpose of litigation privilege, but the language in *Lyell* is confusing because of its reference to the rationale of solicitor-client privilege.

⁹⁹ Even if it is true that the lawyer's brief (defined by Wilson, *supra* note 2 at 365, as "notes, thoughts and preparation") has *traditionally* been protected by solicitor-client privilege (*ibid.* at 366), notice ought to be taken of the *more recent* developments. The law has clarified itself. Just as solicitor-client privilege becomes what it is "in stages", originating in a mere exemption of lawyers from testimonial compulsion (*Solosky, supra* note 19 at 834), so it is *over time* that litigation privilege becomes distinguished from its progenitor (solicitor-client privilege) by its markedly different rationale. See *supra* note 87; see also the modern academic and judicial authorities cited *supra* notes 67 and 68.

¹⁰⁰ *T-D Bank, supra* note 68 at 588.

¹⁰¹ [1975] 6 W.W.R. 155 (Alta. S.C.App.Div.) [hereinafter *Strass*] (privilege was denied to a statement obtained from the plaintiff, by the defendant's insurer for the purpose of anticipated litigation, because Wigmore's criteria for confidential communication had not been met).

¹⁰² There is nothing objectionable in the *result* of *Strass* (i.e. requiring the disclosure of what in fairness ought to be produced). In the United States, for example, although a showing of "good cause" is required before statements made by *non-party* witnesses can be obtained by a *party*, the Federal Rules of Civil Procedure specifically provide (in Rule 26 (b)(3)) that "a party may obtain *without the required showing* [of 'good cause'] a statement concerning the action or its subject matter *previously made by that party*" [emphasis added].

decision of the Supreme Court of Canada in *Slavutych v. Baker*,¹⁰³ communications could now be privileged only if the four conditions of confidentiality laid down by Wigmore are present,¹⁰⁴ and this applied to litigation privilege. Since the statement in issue was not intended to be confidential it did not meet this test. However, McDonald J. went on to suggest that "statements given by stranger-witnesses ... are communications to which a privilege should attach".¹⁰⁵ According to McDonald J., such statements would pass Wigmore's confidentiality test and they should be privileged in order that candid information may be obtained from stranger-witnesses.¹⁰⁶

As Professor Lederman (now Mr. Justice Lederman) pointed out,¹⁰⁷ the Alberta court's approach and McDonald J.'s suggestion that witness statements are privileged as confidential communications so as to encourage full and frank disclosure by witnesses, are misconceived. McDonald J.'s comments implied that the privilege belongs to the witness, and lost sight of the fact that it is the party collecting the evidence who asserts privilege. Appropriately, Lederman criticized the majority opinion as having confused the policy bases of solicitor-client privilege (confidentiality within a relationship) and litigation privilege (the adversary process):

[Wigmore] did not design his conditions with "anticipation-of-litigation" communications or "work-product" material in mind ... The fundamental flaw in D.C. McDonald J.'s reasoning, therefore, is his conclusion that Canadian courts should now apply Wigmore's four criteria to every communication over which a privilege is sought, to determine whether a court should accede to it.¹⁰⁸

Generally, Ontario courts have quite sensibly held that where a party has given a statement to an opposing party, the party is entitled to production of his or her own statement, though the reasoning used in the cases is not consistent; e.g. some cases hold the statement is not covered by litigation privilege, while others hold the statement is covered but that fairness requires a copy be provided to the party who made the statement. See the case law collected in G.D. Watson & C. Perkins, *Holmsted and Watson: Ontario Civil Procedure*, looseleaf vol. 3 (Toronto: Carswell, 1998) at 30 § 30[2].

¹⁰³ [1975] 4 W.W.R. 620 (S.C.C.) [hereinafter *Slavutych*] (confidential statement made by a university professor to a tenure committee, concerning another colleague, was held to be inadmissible in subsequent dismissal proceeding against the professor himself, i.e. the one who made the statement. The court relied on the equitable principle of breach of confidence in its ruling, but Spence J. also observed in *obiter dicta* that the professor's statement could have been excluded on the basis of relational privilege, since Wigmore's criteria for confidential communication were satisfied).

¹⁰⁴ The Wigmore criteria are: (1) the communications must originate in a *confidence* that they will not be disclosed; (2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; (4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. See 8 Wigmore, *Evidence* (McNaughton rev. 1961), *supra* note 34 at 527; quoted by both Clement J.A. and McDonald J., *supra* note 101 at 159 & 166.

¹⁰⁵ *Strass*, *supra* note 101 at 171.

¹⁰⁶ *Ibid.*

¹⁰⁷ S.N. Lederman, "Discovery-Production of Documents-Claim of Privilege to Prevent Disclosure" (1976) 54 Can. Bar Rev. 422 at 433-34.

¹⁰⁸ *Ibid.* at 431, 432.

In dissent in *Strass*, McGillivray C.J.A. held that confidentiality is irrelevant to litigation privilege and put the matter succinctly: “[t]he fact that the person giving the statement has no reason to think it confidential, has, in my view, precisely nothing to do with the matter”.¹⁰⁹

It is significant that Wigmore’s privilege test was developed for *confidential communications*.¹¹⁰ Litigation privilege, being necessitated by the adversary nature of trial, is not a “Wigmorian privilege”; i.e. it protects materials which may not be communications (a lawyer’s mental impressions, opinions, etc.) and communications which may not be confidential. The American practice (i.e. strictly separating the work product doctrine from a Wigmorean analysis of privilege)¹¹¹ is therefore sensible, for only then is it possible to speak of confidentiality as being the unifying thread of “privilege”.

Unfortunately, the only Canadian text devoted to the subject of solicitor-client privilege, Manes & Silver,¹¹² adopts the fallacy which beset the majority in *Strass* (i.e. misapplying the requirement of confidentiality to litigation privilege). These authors state that the requirement of confidentiality is applicable to litigation privilege.¹¹³ While they observe that most “witnesses probably do not think about confidentiality when giving a statement”, and that the “privileged status of witness statements poses a prominent challenge to the required intention of confidentiality”,¹¹⁴ they nonetheless conclude that the privilege can be explained in terms of the “solicitor’s/client’s expectation of confidentiality when obtaining the statements in contemplation of litigation”.¹¹⁵ Manes & Silver argue that “confidentiality is the thread which binds the law of privilege, and so it is with [communications made in contemplation of litigation]”.¹¹⁶ As already indicated, in our view, these authors’ approach reflects an erroneous and unnecessary attempt to tie litigation privilege to confidentiality.¹¹⁷

¹⁰⁹ *Strass*, *supra* note 101 at 177. McGillivray C.J.A. went on as follows: “While the basis of the solicitor-and-client privilege may initially have been constricted to matters confidentially communicated by the client to his solicitor, it is clear that the common law has gone far beyond this, and as of this date statements from witnesses obtained in anticipation of litigation, and for the benefit of the advice of counsel, are not the subject of production, and this, in my submission, whether the statements were obtained from the witnesses confidentially or not” (*ibid.* at 178). See also N.J. Williams, “Four Questions of Privilege: the Litigation Aspect of Legal Professional Privilege” in I.R. Scott, ed., *International Perspectives on Civil Justice* (London: Sweet & Maxwell, 1990) 217 at 228-31.

¹¹⁰ 8 Wigmore, *Evidence* (McNaughton rev. 1961), *supra* note 34 at 527.

¹¹¹ See the Wigmore quotes in text above accompanying notes 86 & 97.

¹¹² R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993).

¹¹³ Manes & Silver take this position despite their own criticism that McDonald J.’s attempt to “[graft] upon a stranger-witness the intention of confidentiality” was “artificial” (*ibid.* at 102-103). These authors may not be aware of Lederman’s critique of *Strass* as it is not mentioned in their book; rather the authors state that “*Strass* clearly stands for the proposition that the intention of confidentiality is required” (*ibid.* at 102).

¹¹⁴ *Ibid.* at 102.

¹¹⁵ *Ibid.* at 103.

¹¹⁶ *Ibid.* at 100.

¹¹⁷ Manes & Silver, *ibid.* at 9, state that confusion has been caused by many cases (specific references being made to a number of English cases) which fail to make a clear

Manes & Silver further confuse matters by coining a term for third party communications made in contemplation of litigation: “derivative communications”. They argue that “where the courts have held such communications to be privileged, it is because they are *derived* from the solicitor-client relationship and the rationale for extending privilege to the relationship”.¹¹⁸ This notion of “derivative communications” is unhelpful and confuses analysis by assuming that litigation privilege is based on the rationale of solicitor-client privilege (i.e. confidentiality). Manes & Silver miss the mark in asserting that “if such [third party] communications are made in contemplation of litigation, the law treats the communication as if it were made directly between solicitor and client”.¹¹⁹ As we will see, the law in fact subjects litigation privilege to a much greater degree of “truncation” than solicitor-client privilege.¹²⁰

Given the important distinction between litigation privilege and solicitor-client privilege, it is imperative that our use of terminology recognize them as being independent. It is, as Sopinka, Lederman and Bryant indicate, a misnomer to characterize litigation privilege under the rubric of solicitor-client privilege.¹²¹ Similarly, much confusion surrounds the inconsistent usage of the term “legal professional privilege”. In *Cross and Tapper on Evidence*¹²² this term is used as an umbrella term comprising “legal advice privilege” and “litigation privilege”.¹²³ Confusion builds when both Sharpe¹²⁴ and Cass *et al.*¹²⁵ treat “legal professional privilege” as a synonym for “litigation privilege”. Meanwhile, Manes & Silver define “legal professional privilege” as a sub-category (along with “contemplated litigation privilege”) of an overarching “solicitor-client privilege”.¹²⁶ We suggest, in the interest of clarity, that the unmanageable terminology of “legal professional privilege” be abandoned. It suffices to speak of two privileges, i.e. solicitor-client privilege and litigation privilege, so long as the latter is not subsumed under the former.

distinction between litigation privilege and the privilege involving direct solicitor-client communications. We suggest that these authors have themselves contributed to the confusion by their insistence that confidentiality is a cardinal principle even for litigation privilege.

¹¹⁸ *Ibid.* at 4.

¹¹⁹ *Ibid.* at 89.

¹²⁰ See the further discussion, below, under the heading: “*Truncated*” *Nature of Litigation Privilege*.

¹²¹ Sopinka *et al.*, *supra* note 67 at 653.

¹²² *Supra* note 81.

¹²³ This classification is similar to that in McNicol, *supra* note 79.

¹²⁴ R.J. Sharpe, “Discovery-Privilege and Preliminary Investigative Reports” (1981) 59 Can. Bar Rev. 830 at 833.

¹²⁵ F.D. Cass, P.Y. Atkinson & J.J. Longo, *Discovery: Law, Practice and Procedure in Ontario* (Scarborough: Carswell, 1993) at 401.

¹²⁶ Manes & Silver, *supra* note 112 at 7.

(v.) *Consequences of Confusing the Role of Confidentiality*

As indicated earlier, confidentiality is the essence of solicitor-client privilege, though it is not required of litigation privilege. This is so because the two privileges rest on different rationales. Confusing the role of confidentiality with respect to each privilege may lead to the following consequences: (a) the requirement of confidentiality may be neglected in the assertion of solicitor-client privilege, or (b) the requirement may be imported to litigation privilege. The former is inherent in Wilson's statement that "[i]f the client and his counsel could safely rely on solicitor-client privilege to protect communications with third persons and any other work of the lawyer in the non-litigious context, it is evident that no other rationale for privilege is required in the litigious context".¹²⁷ The truth is, solicitor-client privilege *cannot* be relied on to protect any *non-confidential* communications,¹²⁸ whether it is between lawyer-client or between lawyer-third party, and whether the context is litigious or non-litigious.

On the other hand, the consequence of importing the requirement of confidentiality to litigation privilege is equally undesirable. Under such a scheme, communications not originating in confidence (e.g. witness statements and copies of unprivileged original documents "in-gathered" for the purpose of litigation) would no longer be privileged. Yet there is no justification to so diminish the protection for materials prepared in anticipation of litigation,¹²⁹ currently covered by litigation privilege. The litigation lawyer's brief

symbolises the time and effort and the professional knowledge and skill which the lawyer has invested on behalf of the client in finding the evidence and investigating the case. Under an adversary system, it is the prerogative of the party to determine how the yield from that investment is to be dealt with, whether it is to be disclosed to the other side or to the court, and when.¹³⁰

The policy objectives behind litigation privilege, identified in *Hickman*,¹³¹ must not be forgotten. As Sharpe put it, "[t]he adversary system depends upon careful and thorough investigation and preparation by the parties through their counsel. The adversarial advocate cannot prepare without the protection afforded by a zone of privacy. Discovery and privilege must strike a delicate balance".¹³²

¹²⁷ Wilson, *supra* note 2 at 372.

¹²⁸ Notably, Dickson J. (as he then was) stated in *Solosky*, *supra* note 19 at 835, that "where the communication is not intended to be confidential, privilege will not attach".

¹²⁹ McEachern C.J.B.C. agreed (*Hodgkinson*, *supra* note 8 at 143) that seeking the production of documents so as to "look into counsel's mind to learn what he knows, and what he does not know, and the direction in which he is proceeding in the preparation of his client's case ... would be a mischief that should be avoided" [emphasis added]. Presumably, the "all-embracing privilege" he proposed would guard against this mischief too. McEachern C.J.B.C. did not, however, articulate any test for this privilege. If confidentiality is the test to be met, it is hard to see how the "mischief" can be avoided.

¹³⁰ Williams, *supra* note 36 at 144.

¹³¹ *Hickman*, *supra* note 21 at 510: "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel".

¹³² Sharpe, *supra* note 64 at 167.

Striking this “delicate balance” would, however, become a hopeless task if one plunges into the conceptual confusion just described.

(vi.) “Truncated” Nature of Litigation Privilege

Wilson quite accurately observes that, in comparison with solicitor-client privilege, litigation privilege is “truncated”.¹³³ This is so in several ways.

First, and most importantly, the general principle is that relevant facts contained in a document protected by *litigation privilege* (although not the document itself) are subject to disclosure on examination for discovery, i.e. a party examined for discovery may not refuse to disclose material facts on the ground that the only source of her knowledge of such facts is a document covered by litigation privilege.¹³⁴ By contrast, the content of *solicitor-client* communications (e.g. the substance of legal advice received from a lawyer) is not required to be divulged as a rule.¹³⁵

Second, in the case of litigation privilege the courts and rules committees have felt a greater freedom to qualify or “truncate” the privilege for the purpose of maintaining what is perceived to be a reasonable balance between pretrial disclosure and privilege, or on the grounds of fairness. For example, the names and addresses of witnesses are now discoverable under Ontario Rule 31.06 (2); and a party examined for discovery may not refuse to answer any questions on the ground that the information sought is “evidence” (Ontario Rule 31.06 (1)).¹³⁶ In addition, the Ontario case law now holds that a party may be required to provide a summary of the evidence that a witness is expected to give.¹³⁷ Likewise, Ontario Rule 31.06 (3) requires the disclosure at examination for discovery of expert *opinions* unless a party undertakes not to call the expert as a witness at trial (the production of *reports* of trial experts is governed by Ontario Rule 53.03 (1)). Also Ontario Rules 33.04 and 33.06 (re court ordered medical examinations) require the production of medical reports formerly covered by the litigation privilege.

¹³³ Wilson, *supra* note 2 at 356.

¹³⁴ See e.g. *April Investments Limited v. Menat Constructions Limited* (1975), 11 O.R. (2d) 364 (H.C.); *Rubinoff v. Newton*, [1967] 1 O.R. 402 (H.C.); *Murray v. Woodstock General Hospital Trust* (1988), 66 O.R. (2d) 129 (Div. Ct.) (while surveillance movies and reports are themselves covered by the litigation privilege, in fairness the plaintiff is entitled to considerable disclosure of the details of the surveillance). The approach in the latter case (requiring disclosure of the details of surveillance) has been rejected in some other provinces: see e.g. *Chmara v. Nguyen* (1993), 85 Man. R. (2d) 227 (C.A.); *Breau v. Naddy* (1995), 133 Nfld. & P.E.I.R. 196 (P.E.I. T.D.).

¹³⁵ But disclosure may be required where solicitor-client privilege is held to have been waived; see *supra* note 41.

¹³⁶ Whether the former restrictions on the disclosure of evidence and the identity of witnesses, now abrogated by Ontario Rules 31.06 (1) and (2), were the result of privilege (see Williams, *supra* note 61) is now a somewhat moot point. On the whole question of the impact of the Rules of Civil Procedure on privilege for trial preparation materials, see Sharpe, *supra* note 64.

This erosion of litigation privilege has been accompanied by the Canadian adoption of the dominant purpose rule, enunciated by the House of Lords in *Waugh v. British Railways Board*,¹³⁸ imposing a more onerous test to be met before communications will attract litigation privilege. Prior to *Waugh*, documents created for multiple purposes (e.g. accident reports prepared for bureaucratic purposes as well as for the instruction of counsel) were privileged so long as anticipation of litigation was a *substantial purpose* of creating the documents.¹³⁹ *Waugh* decided, however, to raise the threshold requirement for privilege to attach. In *Waugh*, the defendant railway board asserted privilege in a multi-purpose bureaucratic report, prepared shortly after a locomotive collision in which the plaintiff's husband (an employee of the board) was killed. The House of Lords held that for privilege to apply, it was not enough that anticipated litigation was a "substantial purpose" of preparing the report. While *Waugh* refused to follow the Australian High Court in requiring that litigation be the "sole purpose" of creating the document,¹⁴⁰ it did require anticipation of litigation to be the "dominant purpose":

It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence, but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be over-riden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? ... It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply.¹⁴¹

¹³⁷ See e.g. *Dionisopoulos v. Provias* (1990), 71 O.R. (2d) 547 (H.C.) (on examination for discovery, a party must provide the names and addresses of persons who might have knowledge of the matters in issue and, if requested, a summary of their evidence).

¹³⁸ *Waugh*, *supra* note 53.

¹³⁹ This principle was applied, for example, in *Vernon v. Board of Education for the Borough of North York* (1975), 9 O.R. (2d) 613 (H.C.J.). In that case, the plaintiff fell at a public school and sued for damages, alleging negligence and breach of duty to maintain the premises. The vice-principal had made an incident report to the school board, and sent a copy to the defendant board's insurer as required by its insurance policy. The court decided that the report was privileged, notwithstanding the fact that such reports were routinely required whenever accidents occurred, and used by the school board for various purposes. Citing *Blackstone v. Mutual Life Insurance Co. of New York*, [1944] O.R. 328 (C.A.), the court considered it sufficient that anticipated litigation was "the substantial, or one of the substantial, purposes" of preparing the document in question.

¹⁴⁰ *Grant v. Downs* (1976), 135 C.L.R. 674 (H.C. of Aust.) (privilege was denied to certain reports made to the Department of Public Health following the death of a patient at a psychiatric centre. Although "one of the material purposes" of preparing the documents was to submit them to legal advisers, the court held that in order to attract privilege, those documents must have been brought into existence for "the sole purpose of submission to legal advisers for advice or for use in legal proceedings").

¹⁴¹ *Waugh*, *supra* note 53 at 531-33. Manes & Silver, *supra* note 112 at 93, suggest that the dominant purpose test consists of three elements:

First, [the document sought to be privileged] must have been *produced* with contemplated litigation in mind. The document cannot have existed before and been

Since the *Waugh* ruling, Canadian courts have adopted both the dominant purpose test and its underlying rationale. As a result, accident reports which “over a decade ago would not have been disclosed are now routinely ordered to be produced unless the dominant purpose rule with respect to such documents can be satisfied”.¹⁴²

The combined operation of the dominant purpose test and the “truncation” of litigation privilege described earlier has circumscribed the privilege within a narrower scope. Moreover, this curtailment has proceeded without any clearly articulated principle, other than fairness or the often vaguely expressed purpose of maintaining a reasonable balance between pretrial disclosure and privilege. By contrast the analogous United States “work product doctrine” has been viewed and expressed from its inception, not as a privilege at all,¹⁴³ but as a *qualified immunity from discovery*. On close analysis the United States doctrine is not concerned with *whether* certain information is discoverable, but with *how* it is to be obtained. The court in *Hickman* was concerned that discovery might be abused as a means of conducting trials “on wits borrowed from the adversary”, and that parties would not prepare vigorously for fear of having to turn their preparation over to the opponent, with the result that the adversary system would break down. In *Hickman* disclosure of witness statements was refused since there was no “showing of necessity” in that case for the information sought; the party seeking disclosure was free to depose the witnesses under United States practice, and that is what the court required the party to do. The court stated, however, that

[w]here relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had ... And production might be justified where the witnesses are no longer available or can be reached only with difficulty.¹⁴⁴

Under the United States doctrine upon such a showing of good cause production may be ordered of virtually any information other than the mental impressions (strategic thinking) of the opposing lawyer.¹⁴⁵

merely obtained by the party to give to the solicitor. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation — in other words for the dominant purpose of litigation. Third, the prospect of litigation must be *reasonable* — meaning that there is a reasonable contemplation of litigation.

¹⁴² Atkinson, *supra* note 27 at 7.

¹⁴³ Lederman, *supra* note 107 at 424, observes that while litigation privilege is “long steeped in Anglo-Canadian jurisprudence, it is only in 1947, in the case of *Hickman v. Taylor*, *supra* note 21, that the Americans firmly developed something comparable to [it], which they termed the ‘work-product’ doctrine”.

¹⁴⁴ *Hickman*, *supra* note 21 at 511.

¹⁴⁵ As indicated *supra* note 21, the *Hickman* ruling has been codified by Rule 26 (b)(3) of the U.S. Federal Rules of Civil Procedure, which provides that

a party may obtain discovery of documents and tangible things otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking

This raises the question of whether Canadian courts should follow the United States lead and openly exercise a discretion to overrule a claim of litigation privilege whenever “good cause” exists. The case law in Ontario, in at least one context, has actually moved beyond the United States position by requiring that a summary of witness evidence be provided to the opposite party on examination for discovery, *even without* the showing of good cause.¹⁴⁶ For reasons of economy (i.e. to avoid the expense associated with examining non-parties) the Ontario Rules of Civil Procedure require, as one of the prerequisites to obtaining leave to examine a non-party, that a party seek to obtain from its opponent the evidence of relevant non-parties.¹⁴⁷ Consequently, while the expectation of due diligence operates to protect witness statements from discovery in the United States, the same consideration may not support the protection of witness statements in Ontario. Indeed, if an Ontario court were to rule on the facts of *Hickman* today, the claim of privilege in regard to witness statements would likely be denied.

While the truncation of litigation privilege has already gone far, it may be that litigation privilege should, in other contexts, be qualified when “good cause” (as it is known in the United States) exists, i.e. where a “party is unable without undue hardship to obtain the substantial equivalent of the materials by other means”. In this respect, the Nova Scotia case of *Davies v. Harrington*¹⁴⁸

discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation [emphasis added].

Lawyers’ mental impressions, therefore, receive special protection under the Federal Rules. Accordingly, any trial preparation materials ordered to be produced would be “redacted” so as not to reveal the lawyer’s strategic thinking. See James, Hazard & Leubsdorf, *supra* note 80 at 258. See generally C.A. Wright, A.R. Miller & R.L. Marcus, *Federal Practice and Procedure*, 2d ed., vol. 8 (St. Paul: West, 1994).

Discovery of experts’ findings and opinions is governed in the United States by Federal Rule 26 (b)(4), according to which a party may depose trial experts after receiving their reports. The rule also permits the discovery of “facts known or opinions held by an expert who has been retained ... and who is not expected to be called as a witness at trial”, upon a showing of “exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means”. Contrary to this American approach, the Ontario Rules provide for neither the deposition of experts nor the exceptional discovery of experts who are not expected to testify at trials.

¹⁴⁶ See *supra* note 137.

¹⁴⁷ Contrary to the approach in the United States of permitting unlimited examination for discovery of non-parties, Ontario Rule 31.10 prohibits the courts from granting leave to examine non-parties unless it is satisfied, among other things, that “the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person he or she seeks to examine”.

¹⁴⁸ (1980), 115 D.L.R. (3d) 347 (N.S.C.A.) [hereinafter *Davies*] (an engineer’s report prepared for the plaintiff in determining the origin of a fire, which could no longer be replicated by the defendant in an action commenced after the rebuilding of the damaged premises, was held not privileged).

is illustrative. In *Davies*, a fire caused extensive damage to the plaintiff's premises. The insurer of the property retained an engineer to investigate the cause of the fire, and a report was prepared shortly afterwards. The premises was subsequently rebuilt. When a subrogated action was commenced against the defendant (alleging negligent operation of a truck which collided with a power pole, causing the fire in question) nearly a year after the incident, "no remnants of the fire damage could be seen" any longer.¹⁴⁹ The Nova Scotia Court of Appeal held that the engineer's report was not privileged from production, because it was not prepared for the dominant purpose of litigation. As Sharpe observes, this application of the dominant purpose test is open to question, since the evidence suggests that "apart from the prospect of a lawsuit, there was no other reason for obtaining the report".¹⁵⁰ Nonetheless, as Sharpe points out,

[t]he advantage of production to foster a fair trial is obvious. As the building had been reconstructed prior to the commencement of the action, the defendant had no way of obtaining information he would need to make out a defence. If refused production, he would have to wait until trial, when developing an exculpatory explanation for the fire would be difficult if not impossible.¹⁵¹

The *Davies* ruling, and numerous other cases,¹⁵² illustrate how the dominant purpose test can be and is being manipulated to effectively "qualify" litigation

¹⁴⁹ *Ibid.* at 349.

¹⁵⁰ Sharpe, *supra* note 124 at 831.

¹⁵¹ *Ibid.* at 838.

¹⁵² See the case law collected in G.D. Watson & C. Perkins, *Holmsted and Watson: Ontario Civil Procedure*, looseleaf vol. 3 (Toronto: Carswell, 1998) at 30 § 31[2], illustrating that the application of the "dominant purpose test" in the area of accident reports and adjusters' / investigators' reports can be quite unpredictable, with some courts finding that the test is met whenever litigation is contemplated (or even likely to ensue), and other courts holding that the contemplation of litigation (or its likelihood) is insufficient to satisfy the dominant purpose test. Some examples of cases manipulating the test, as in *Davies*, to ensure disclosure are: *Breau v. Naddy* (1995), 133 Nfld. & P.E.I.R. 196 (P.E.I. T.D.) (an adjuster's reports made before counsel was retained were not privileged; they were made for the purpose of claiming insurance benefits, not to defend the action); *Parker v. London Life Insurance Co.* (1992), [1993] I.L.R. 1-2911 (B.C. Master) (where an insurer had investigative reports and surveillance tapes made in order to determine an insured's eligibility for benefits, the court held that notwithstanding litigation was a reasonable prospect, the reports and tapes had been made in the ordinary course of business and were thus not privileged); *Adams Motors (Wetaskiwin) Ltd. v. Transamerica Life Insurance Co. of Canada* (1992), 5 C.P.C. (3d) 170 (Alta. Q.B.) (where documents were generated for the initial purpose of deciding whether to accept or reject a claim and to investigate all aspects of the claim, the court held that no privilege attached; it could not be said that the documents were acquired or generated only for the purpose of instructing counsel and preparing for litigation); *MacDonald v. Wellington Insurance Co.* (1992), 12 C.P.C. (3d) 269 (N.S. T.D.) (where the heading on a report claimed it was confidential but its author was not aware that it was to be referred to a solicitor, the court ordered production of the report; the dominant purpose for which the report was prepared was to determine the cause of the fire and whether to pay the claim; a heading claiming confidentiality is not determinative of privilege).

For a case very similar to *Davies*, and specifically referring to the difficulty of replicating the information in the report being sought, see *Butterfield v. Dickson* (1994), 28 C.P.C. (3d) 242 (N.W.T. S.C.) (where two insurance adjuster's reports on a boating

privilege, where successful assertion of the privilege would lead to a result perceived to be unjust.

Hence it can be argued that in practice if not in theory the “good cause” exception to litigation privilege does already exist. This being so, a strong case can be made that the courts should exercise their discretionary power more openly. Instead of “regulating” litigation privilege through manipulating the language of “dominant purpose” and “anticipation of litigation”, it is preferable that the “good cause” exception be articulated (i.e. where “a party is unable without undue hardship to obtain the substantial equivalent of the materials by other means”) and the interests meant to be protected (i.e. truth-finding and trial fairness) be made explicit. Incidentally, this is roughly what the (now almost forgotten) *Report on Evidence* by the Law Reform Commission of Canada recommended.¹⁵³

V. Agents and Third Parties Distinguished

A related problem, which also bears on the scope of privilege, has been caused by the fuzzy distinction between “agents” and “third parties”. The fuzziness is unfortunate, as the distinction leads to crucial differences in results. If X (a third person) communicates with a lawyer as *the client’s agent*, the communication is one between the client and the solicitor, and the communication is covered by solicitor-client privilege if made in confidence for the purpose of obtaining legal advice for the client. By contrast, if X’s communication is that of a mere *third party*, rather than an agent of the client, solicitor-client privilege will never apply (though litigation privilege will apply if the dominant purpose of the communication is for actual or contemplated litigation).

The root of the problem, again, goes back to the early English case law. Wigmore observed that in *Anderson*¹⁵⁴ and *Wheeler*,¹⁵⁵ “the line between a mere witness and an agent of the solicitor appeared to be ignored”.¹⁵⁶ More recently, Wilson inherits this confusion when he argues, on the strength of

accident had been prepared before counsel was retained and a third after, the court held they were not privileged; they had not been produced because litigation was the dominant purpose; the co-extensive aim had been investigation; also, as a result of the investigation, the boat was no longer in its former condition and other parties were to have access to the reports so as to assess the effect of any changes).

¹⁵³ Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Minister of Supply and Services Canada, 1977) at 31, where s. 42 (2) of the proposed Evidence Code reads:

A person has a privilege against disclosure of information obtained or work produced in contemplation of litigation by him or his lawyer or a person employed to assist the lawyer, unless, in the case of information, *it is not reasonably available from another source* and its probative value substantially outweighs the disadvantages that would be caused by its disclosure [emphasis added].

¹⁵⁴ *Supra* note 56.

¹⁵⁵ *Supra* note 3.

¹⁵⁶ 8 Wigmore, *Evidence* (McNaughton rev. 1961), *supra* note 34 at 621.

Anderson, that the rationale of solicitor-client privilege had been the basis for extending privilege to third party communications.¹⁵⁷ Wilson emphasizes the fact that “the solicitor may employ his clerks or other agents to collect information for him, and upon the same principle it is equally protected” [emphasis in original].¹⁵⁸ The statement just quoted, however, *does not* support Wilson’s contention that *third party* communications are privileged on the same grounds as solicitor-client communications: all that it confirms is that communications by *agents* are equally protected as solicitor-client privilege.

In law, communications with “agents” are treated differently from those with “third parties”, as Sopinka, Lederman and Bryant explain:

The lawyer in the ordinary course of his practice utilizes employees such as articling students, law clerks and secretaries. Communication to such agents for the purpose of facilitating the obtaining of legal advice is equally protected [by solicitor-client privilege] ... If, however, the communication is made to a person who must himself consider and act upon it, no privilege arises even though the result of the decision may necessarily be the retention of a solicitor ... Because these communications through agents are not normally made in a litigious atmosphere, *this situation must be distinguished from the case where a third party is retained to obtain facts or to make a report to assist the client or his solicitor in litigation* [emphasis added].¹⁵⁹

This distinction is also recognized by *Cross and Tapper on Evidence*:

It should be noted that both client and legal adviser can act through an agent, and it is often a difficult question whether the communication was between client and legal adviser through an agent in which case legal advice privilege is apposite and litigation need not be contemplated, or whether the intermediary is not to be regarded as the alter ego of client or legal adviser, in which case the availability of the privilege depends upon the contemplation of litigation.¹⁶⁰

In other words, solicitor-client privilege can be extended through the principle of agency to cover communications involving an “intermediary”, where that “intermediary” is acting as an “agent”. This extension is inapplicable, however, to “third party” communications, which are protected by litigation privilege only. The difficult issue is, of course, how to distinguish between an “agent” and a “third party”.

From our earlier analysis (specifically, the policy arguments against the extension of solicitor-client privilege to third party communications), it follows that the notion of agency should be construed narrowly in the context of privilege. There are unproblematic circumstances to which the principle of

¹⁵⁷ Wilson, *supra* note 2 at 362.

¹⁵⁸ *Ibid.*

¹⁵⁹ Sopinka *et al.*, *supra* note 67 at 650. See also Manes & Silver, *supra* note 112 at 73: “Different treatment is given to communications from agents versus those from third parties. Agents act in place of the solicitor/client or under the solicitor’s/client’s directions. Third parties act for themselves. Where the communication between the solicitor and client is made by or through an agent of the solicitor and/or an agent of the client, the communication remains privileged as a direct communication, as long as it relates to the receiving or giving of professional legal advice”.

¹⁶⁰ Tapper, *supra* note 81 at 485.

agency clearly applies (e.g. law clerks and secretaries employed by a lawyer). Nonetheless, a broad definition of *client's* agents (as opposed to *lawyer's* agents) may easily be turned into a device for asserting a privilege not otherwise available, by any clients or courts willing to adorn "third party" communications with the badge of "agency". Having regard to the impact of privilege (i.e. the "sacrifice of availability of evidence relevant to the administration of justice"), a sensible approach to drawing the line between "agents" and "third parties" would be one which confines agency within the narrowest scope.¹⁶¹

Unless such an approach is consistently adopted, agency is prone to being abused as a short-cut to attract privilege (since "anticipation of litigation" is not a requirement for solicitor-client privilege based on agency). This potential hazard is highlighted by the recent case of *General Accident Assurance Co. v. Chrusz*.¹⁶² The plaintiff insurer in that case claimed privilege over communications between the claims adjuster it hired to investigate a suspected arson and the lawyer it retained. Despite the initial suspicion of arson, \$100,000 was paid on the defendant's claim for loss within two months of the fire. Another three months later, the plaintiff agreed to pay a further \$505,000. Six months after the fire, following receipt of a statement from a former employee of the defendant, the insurer commenced litigation to recover the proceeds advanced. At first instance Kurisko J. held that the adjuster's reports were third party communications which would attract privilege (i.e. litigation privilege) only if made for the dominant purpose of litigation. When initially made the reports were so privileged. However, Kurisko J. decided that any anticipation of litigation ceased when the insurer abandoned its position that the fire was caused by arson and paid the claim; consequently the reports ceased to be privileged on the theory that litigation privilege ceases when the litigation ends. The present

¹⁶¹ Canadian cases holding accountants to be their client's "agents" in various contexts, and their communications with solicitors privileged on that basis, have not always adhered to this "strict approach". While it is understandable that accountant-solicitor communications may be necessitated by the client's lack of proficiency in accounting or tax matters, and accountants may quite legitimately be acting as "agents" in transmitting technical data to solicitors on behalf of the client for legal advice, some of the cases have arguably gone beyond this reasonable scope in their findings of agency. For example, in *Susan Hosiery*, *supra* note 14, the accountant who was held to be an "agent" was likely not merely a conduit for information passing between the client and solicitors, but was also actively engaged in setting up the tax arrangement and exercising his professional expertise. It is submitted that the accountant's role in *Susan Hosiery* might more appropriately be construed as that of a "third party", rather than an "agent". In considering this issue we need to keep in mind that Canadian law has not conferred a separate privilege on accountant-client communications. For other cases holding that communications through agents are privileged, see *Sopinka et al.*, *supra* note 67 at 650.

¹⁶² (1998), 37 O.R. (3d) 790 (Div. Ct.), rev'g (1997), 12 C.P.C. (4th) 150 (Ont. Gen. Div.) [hereinafter *General Accident*] (the Divisional Court held that communications between a lawyer and a claims adjuster, acting as the plaintiff insurer's agent, were protected by solicitor-client privilege; thus reversing Kurisko J.'s decision that the claims adjuster was an independent contractor and that no litigation privilege attached, because the third party communications were not made for the dominant purpose of litigation).

proceedings (commenced after the statement from the defendant's employee was received) were new litigation; since the earlier communications from the adjuster were not made in anticipation of this new litigation, they were not privileged. In its decision the Divisional Court reversed Kurisko J.'s judgment and held, alarmingly, that the communications were privileged because the adjuster was "an agent of the insurer in the obtaining of legal advice".¹⁶³ In our view the Divisional Court's finding of agency is decidedly wrong and most regrettable. Insurance adjusters' reports, being third party communications, have hitherto been subject only to *litigation privilege* and only if prepared for the dominant purpose of litigation. Without even considering the implications, the Divisional Court in *General Accident* flung the door open for third party communications to benefit from the protection of *solicitor-client privilege*, by the simple act of the *client* appointing the third party as an agent.¹⁶⁴

The Divisional Court's ruling may well have been prompted by its dissatisfaction with the outcome of Kurisko J.'s decision, which denied privilege to documents almost certainly created with a view to litigation regarding this very fire loss. The proper solution, however, would have been to challenge Kurisko J.'s reasoning (i.e. by concluding that the possibility of litigation *had not* ended with the plaintiff's payment on the defendant's claim for loss).¹⁶⁵ To rectify the result at first instance by holding instead that the adjuster was an agent, as the Divisional Court did, was unjustified and could have disastrous consequences. Not only will this misguided ruling cause confusion among the courts and text writers, but taken at face value, *General Accident* might provide

¹⁶³ *General Accident* (1998), *ibid.* at 795.

¹⁶⁴ In fact, Kurisko J. in his judgment at first instance, *General Accident* (1997), *supra* note 162 at 179, warned against this potential abuse: "Designating an independent contractor as agent of an insurer for the purpose of obtaining the protection of legal professional privilege would enable an insurer to gather information in secrecy. This is the scenario for trial by ambush".

¹⁶⁵ Alternatively, Kurisko J.'s decision might have been correct. He stated in his judgment (*ibid.* at 180) that the current action "is based on fraudulent Proof of Loss. The Statement of Claim does not even mention arson". Although Kurisko J. did not set out the details of the plaintiff's allegations in this decision, the particulars were described in his subsequent judgment on the plaintiff's motion to delay production, [1997] O.J. No. 4655 (Gen. Div.) (Q.L.):

For example, it is alleged that Chrusz and the Chrusz Employees moved undamaged property after the fire, represented that such property had been damaged in the fire, prepared false inventories of damaged property, inflated hourly rates for cleaning up, inflated the replacement cost of property damaged in the fire, inflated the number of hours worked by employees. It is alleged Chrusz included each of these items in the Proof of Loss (*ibid.* at para 30).

Given that arson is unrelated to the alleged fraud, and that arson was (presumably) the basis of litigation anticipated by the plaintiff insurer when the adjuster's reports were prepared, it does not seem unreasonable to deny the plaintiff's claim of privilege on the ground that the adjuster's reports had not been prepared for the current litigation.

another avenue for an unnecessary and unwise expansion of solicitor-client privilege (i.e. by clients simply designating all third parties as agents).¹⁶⁶

Conclusion

Underlying our critique of Wilson and the Divisional Court decision in *General Accident* has been the same concern: that both will lead to an undue expansion of solicitor-client privilege. Wilson's proposal does this by an outright re-definition of the scope of solicitor-client privilege, i.e. by broadening its scope to include communications from third parties to lawyers, currently protected only by litigation privilege in the litigious context. The *General Accident* (Divisional Court) ruling represents a different means of achieving the same result (extending solicitor-client privilege to third party communications), i.e. by manipulating the definition of "agents".

Wilson's proposal for changes is motivated by his desire to correct what he considers to be a "truncation of the fundamental right to solicitor-client privilege". This perception, however, has been the combined result of his failure to analyze the public interest, misinterpretation of *Solosky* and *Descoteaux*, and misunderstanding of the distinct purposes for solicitor-client privilege and litigation privilege. Because of Wilson's misdiagnosis, he prescribes the wrong cure. Wilson's call for re-defining the scope of solicitor-client privilege is not only unwarranted, but also perilous. It defies common law authorities and invites confusion as to the role of confidentiality. If taken as prescribed, Wilson's medicine may prove to be fatal; this is so especially since our law of privilege has no need for such strong medication to begin with. This criticism also applies to the Divisional Court judgment in *General Accident*. Insofar as it opens up the possibility, through the dubious appointment of "agents", of conferring solicitor-client privilege on third party communications, *General Accident* has set a dangerous precedent.

Our discussion underscores the importance, in the interests of truth-finding and of limiting potential abuse, to strictly confine the scope of privilege within the bounds of necessity. Related to this, and equally important, is the need to clearly delineate the distinction between solicitor-client privilege and litigation privilege. As we have seen, the *consequences* of conflating the two (e.g. confusing the requirement of confidentiality) are most undesirable. By tracing the sources of confusion surrounding these two privileges, and criticizing contemporary writings (judicial and academic) which have contributed to this confusion, we hope to clear the path for future discourse on this subject. Clarity of expression, likewise, favours a more explicit judicial acknowledgement that litigation privilege is a "qualified privilege". In our view, the "good cause"

¹⁶⁶ However, it should be noted that the Divisional Court judgment in *General Accident*, for all its shortcomings, never disputed the distinction between solicitor-client privilege and litigation privilege, clearly recognized in the lower court ruling: see e.g. *General Accident* (1997), *supra* note 162 at 171. The decision cannot, therefore, be cited as supporting the changes in law proposed by Wilson.

exception to litigation privilege should be recognized by the Canadian courts more openly, since they do already exercise discretion to “qualify” litigation privilege, albeit indirectly through manipulation of the “dominant purpose test”. No doubt the law in this area will continue to develop; as it does so, competing aspects of the public interest will continue to assert themselves. Within the context of striking a reasonable balance between disclosure and privilege, the guiding principle must be, as Lord Edmund-Davies suggests, that “[j]ustice is better served by candour than by suppression”.¹⁶⁷

ADDENDUM

We have had the benefit of reading a draft of Mr. Wilson’s rejoinder to our article. The rejoinder is not merely, as its title suggests, “in favour of solicitor-client privilege”. As we indicated in our article, what Wilson favours is an *unprecedented expansion* of the privilege.

Following this exchange the competing positions are now more or less clear. Wilson would like to see solicitor-client privilege extended to communications between solicitors and third parties in non-litigious contexts. We disagree — for the reasons put forward in our article.

We initially wrote in response to Wilson’s article because we felt that in the course of making his argument he left a misleading impression: that there was significant legal authority to support his position; for example, (1) that in *Solosky*¹⁶⁸ and *Descoteaux*¹⁶⁹ the Supreme Court of Canada was actually supporting the position put forward by Wilson, (2) that on balance the case law has made the distinction between solicitor-client privilege and litigation privilege unnecessary, etc. In short we were concerned that the courts might conclude, based on Wilson’s analysis, that *legal authority* actually justified the extension he argues for. We hope that, if nothing else, our article dispels this view. On this issue of what the authorities say, it is worth repeating what we said in our article (to which Wilson offers no response):

Moreover, and this is most telling, for all his rhetoric Wilson does not cite a single case (and we know of none, certainly no modern ones) which contradicts the *result* in *Wheeler* by extending privilege to third party communications beyond the litigious context.

So the question then becomes one of policy — where should the courts go on this issue? We fully agree that if a strong case can be made for changing the present law, then it should be changed. (The debate between us may have been more interesting and illuminating had it been restricted to a straight policy debate and less concerned with what the case law suggests.) However, on this question of the appropriate policy we believe Wilson has not made out a case. Undoubtedly Wilson believes strongly that his proposed change is desirable,

¹⁶⁷ *Waugh*, *supra* note 53 at 543.

¹⁶⁸ *Supra* note 19.

¹⁶⁹ *Supra* note 20.

but belief (even strongly held) is not a sound basis for profound changes in the law. As we have already explained, in policy terms our major concern is that such a privilege would too easily give lawyers the “new product line” of confidentiality. Wilson suggests, in his response, that the courts could deal “appropriately with abuses, including claims for solicitor-client privilege not given for *bona fide* legal advice”. We are not so optimistic. We agree that privilege should be denied where the real purpose is not to seek legal advice, but to cloak the third party communication with privilege. However, we doubt courts can easily make such a determination. By what criteria are they to conclude there is a lack of *bona fides*? Generally courts do not feel comfortable prying into the circumstances or the content of communications for which solicitor-client privilege is claimed. Given this fact, how does the court undertake an enquiry as to whether the legal advice given on survey research (using Wilson’s example) commissioned by the client is “*bona fide* legal advice”? If tobacco companies were to have the results of research on how to market cigarettes to children sent directly to their lawyers with a request that the lawyers advise as to whether it would be legal for them to market in this way, how can it be said this is not the obtaining of “*bona fide* legal advice”? We believe it would be quite wrong to allow privilege to attach to such research findings, but Wilson’s proposal could lead to this very result. It would take us to a slippery slope which we should continue to avoid.

We could respond in detail to Mr. Wilson’s reply, since we take issue with many of his comments and observations. However, so as not to strain the readers’ patience, we rest on our original submissions and make only the following comments.

Despite the rhetoric of the three Australian cases cited by Wilson in his rejoinder,¹⁷⁰ none of them support an extension of privilege to *communications from third parties* where *litigation is not anticipated*. Our dispute with Wilson is not over the theoretical justification of solicitor-client privilege, the issue is whether the scope of this privilege ought to be enlarged to cover third party communications regardless of any litigation context. The common law in its wisdom has decided against such an extension, and policy considerations support that decision.

Wilson repeats the contention that “the clear implication” of *Solosky* is that “there is one privilege, whether in a litigious context or not”.¹⁷¹ This statement is, in our view, simply wrong. Wilson relies upon a passage from *Solosky* which traces the development of solicitor-client privilege, and the ultimate extension

¹⁷⁰ J.D. Wilson, “It’s Elementary My Dear Watson: A Reply in Favour of Solicitor-Client Privilege” 549, 552. Wilson’s draft ascribes two quotations to *O’Reilly v. State Bank of Victoria Commissioners* (1983), 152 C.L.R. 1 (Wilson, *ibid.* at notes 14 and 24), in fact, the cited passages came from *Baker v. Campbell* (1983), 153 C.L.R. 52 (H.C. of Aust.). The other two Australian cases cited by Wilson are *Attorney-General (NT) v. Maurice* (1986), 161 C.L.R. 475 (H.C. of Aust.) and *Waterford v. The Commonwealth of Australia* (1987), 163 C.L.R. 54 (H.C. of Aust.).

¹⁷¹ Wilson, *ibid.* at 553.

of the privilege to “any consultation for legal advice, whether litigious or not”.¹⁷² It is undisputed that *solicitor-client privilege* applies, regardless of any litigation context, to every *direct communication between client and solicitor* made in confidence for the purpose of legal advice. The *Solosky* quotation acknowledges this fact, but it provides no support whatever for the contention that “there is one privilege”. Wilson’s proposal of a single all-embracing privilege covering *third party communications* was *not addressed* by the Supreme Court of Canada in either *Solosky* or *Descoteaux*. Such communications are today protected (if made with the dominant purpose of litigation) only by the separate *litigation privilege*, not solicitor-client privilege. In neither *Solosky* nor *Descoteaux* was the court concerned with communications from third parties,¹⁷³ consequently litigation privilege never became an issue. Clearly, the court could not have changed the law of privilege pertaining to third party communications when the issue did not even arise!

Finally, Wilson erroneously characterizes our position as one “recommending further truncation of privilege” and “promoting the American model in which privilege in litigation is illusory”.¹⁷⁴ In our article, we argue that the court’s application of the dominant purpose test *does already* “qualify litigation privilege, where successful assertion of the privilege would lead to a result perceived to be unjust”. We are not, therefore, advocating “further truncation”, our pleading is merely that the discretion already being exercised by the courts should be expressed more openly. One way to accomplish this is to adopt the “good cause” exception articulated in the United States. Contrary to Wilson, this practice does not “fritter away” any privilege otherwise available; rather, it provides a more disciplined approach which rationalizes the “truncation” we have seen thus far.

¹⁷² *Solosky*, *supra* note 19 at 834.

¹⁷³ *None* of the passages from *Solosky* cited by Wilson, *supra* note 170 at 553, suggested the extension of solicitor-client privilege to third party communications; they do not, therefore, support Wilson’s notion of an “all-embracing solicitor-client privilege” in any way.

¹⁷⁴ Wilson, *supra* note 170 at 558.