

PRIVILEGE IN EXPERTS' WORKING PAPERS

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Expert reports and affidavits are important in assisting lawyers in litigation and in non-litigious contexts. In preparation, the expert creates working papers including communications with lawyers and others, preliminary test results and drafts. The lawyer and client expect the expert to examine all sides of the problem in a full, frank and objective manner. The client expects that the expert's report and working papers will be absolutely protected from disclosure by "solicitor-client privilege", unless the privilege is waived.

However, under the law as currently interpreted in Canada, working papers created for legal advice not related to litigation are not privileged. When related to litigation, some courts have held these documents are protected by a "litigation privilege" which is not absolute and can be displaced by other interests in the adversary system, for example, it is waived when the expert is called as a witness.

As a result, recommendations are made in the paper as to the destruction of non-essential working papers and reports. However, this practical precaution defeats the purpose of privilege, to promote full and frank communications with lawyers, and is destructive to the adversary system. The law in many jurisdictions is in error as it does not give full effect to solicitor-client privilege.

Litigation privilege should just be a branch of solicitor-client privilege in the litigation context.

This paper traces the problems in the current law back to 1881 and outlines subsequent errors leading to the current confused state of the law.

The Supreme Court of Canada made strong statements in 1980 and 1982 that solicitor-client privilege is to be treated as a broad fundamental civil and legal right. Since the courts and commentators have in many cases failed to use this guide to deal with the accumulated errors over the last century, it may fall to the Supreme Court to set them straight.

Les rapports d'expertise et les affidavits sont importants pour assister les avocats, aussi bien dans le contexte d'un litige que hors de ce contexte. Dans sa préparation, l'expert crée des documents de travail, ce qui comprend des communications avec les avocats et d'autres personnes, des résultats préliminaires de test et des ébauches. L'avocat et le client attendent de l'expert qu'il examine tous les aspects du problème de manière complète, franche et objective. Le client s'attend aussi à ce que le rapport et les documents de travail de l'expert soient absolument protégés contre toute divulgation par le «secret professionnel de l'avocat», sauf s'il renonce à ce secret.

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Toutefois, selon le droit tel qu'il est présentement interprété au Canada, les documents de travail préparés pour un avis juridique qui n'est pas relié à un litige ne font pas l'objet du secret professionnel. Quand ils concernent un litige, certains tribunaux ont décidé que ces documents sont protégés par un «secret professionnel de litige», qui n'est pas absolu et qui peut être écarté par d'autres intérêts dans le système d'adversaires; par exemple, il sera écarté lorsque l'expert sera assigné comme témoin.

En conséquence, l'auteur recommande dans cet article de détruire les rapports et documents de travail qui ne sont pas essentiels. Mais cette précaution d'ordre pratique va à l'encontre du but du secret professionnel, qui est de promouvoir la communication complète et franche avec les avocats, et elle est destructrice du système d'adversaires. Dans plusieurs provinces, le droit fait fausse route, car il ne permet pas au secret professionnel de l'avocat de produire tous ses effets.

Le «secret professionnel de litige» devrait uniquement être une catégorie du secret professionnel de l'avocat dans le contexte d'un litige.

Cet article retrace les origines des problèmes du droit actuel jusqu'à 1881, et il mentionne les erreurs subséquentes qui ont conduit à l'état actuel de confusion du droit.

En 1980 et 1982, la Cour suprême du Canada a affirmé avec vigueur que le privilège de l'avocat doit être traité comme un droit légal et un droit fondamental. Comme les tribunaux et les auteurs ont souvent fait défaut de se guider sur cette affirmation pour traiter des erreurs qui se font accumulées depuis un siècle, il se peut bien qu'il revienne un jour à la Cour suprême de les régler.

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OVERVIEW

Introduction

While this paper focuses to some extent on survey experts' working papers, the principles of privilege are applicable to all experts.

Although the extensive use of survey evidence and survey experts in litigation is a relatively new phenomenon, courts now not only accept properly

conducted survey evidence, but at times require it.¹ It appears that the trend is toward an expansion of the use of other forms of social science research.²

Prior to commissioning a full survey, counsel should in many cases commission preliminary tests such as pilot studies to determine whether a meaningful universe can be defined, whether unambiguous questions can be asked, whether the methodology can be unbiased, whether the results will be useful and warrant a full survey and to refine the concept of the research and the methodology of the survey accordingly. Such preliminary studies can be extremely helpful in that they can be conducted at substantially less cost than trial surveys. These studies can aid counsel in assessing the case before commencing the action and during the process, preparing for discovery, settlement discussions and laying the groundwork for the trial survey.³

Commonly, survey or other experts create working papers, pilot studies and draft reports during the course of their engagement, some of which are examined for comment by counsel. Ideally there is an educational dialogue between lawyer and expert in which the lawyer communicates the factual and legal issues to the expert, and the expert communicates information in the expert's field to the lawyer. It is inevitable that as the expert examines all sides of the problem, his initial understanding will in some ways change, without affecting his objectivity as an independent professional.

As useful as these may be for the preparation by counsel, if placed in the hands of opposing counsel, experts' working papers could cause unnecessary or damaging complications in discovery or cross-examination of the expert at trial. Clients should be in a position to have such papers held in confidence unless the privilege is waived.

Since some courts have held that the privilege normally attached to experts' working papers is waived by calling the expert as a witness at trial, and other courts have gone the other way, there remains uncertainty in the law of privilege. Accordingly, the benefit of conducting preliminary tests or retaining working papers must always be balanced against any potential damage if changes in any significant aspect of the survey are disclosed in discovery or on cross-examination at trial. This uncertainty will inevitably lead to a diminution of the full examination that might otherwise be conducted by an expert.

In the detailed discussion, the nature and history of the privilege are examined with a view to suggesting where, in the author's view, the courts and commentators have erred for over 100 years, leading to the current confused state of the law.

¹ See, for example, *Sun Life Assurance v. Sunlife Juice* (1988), 65 O.R. (2d) 496 at 500; *Cartier Inc. v. Cartier Optical* (1988), 20 C.P.R. (3d) 68 (F.C.T.D.); *Carling v. Molson* (1984), 1 C.P.R. (3d) 191 (F.C.T.D.).

² N. Vidmar, "How Many Words for a Camel? A Perspective on Judicial Evaluation of Social Science Evidence" in Canadian Institute for the Administration of Justice, *Filtering and Analyzing Evidence in an Age of Diversity* (Montreal: Thémis, 1993).

³ J.D. Wilson, "Survey Evidence in Trademark Proceedings" (1994) 13 *Canadian Journal of Marketing Research* 55 at 61.

These errors have combined to lead to the errors and confusion which directly affect experts. The law should clearly reflect that:

- (1) Expert reports and working papers should be absolutely privileged under the solicitor-client privilege when prepared for legal advice not involving litigation;
- (2) They should be protected in the same way when litigation is involved and not subject to disclosure to assist some other public interest; and
- (3) Working papers should remain absolutely privileged even when the expert is called as a witness, subject to the usual rules of waiver which require production of documents and information directly or fairly referred to in the expert's report.

I. *Experts' Working Papers*

(1) *The Need for Experts*

There are at least three distinct contexts in which experts are needed. The role of the expert in each case is to act as an independent, objective, professional adviser:

1. The non-legal context, such as marketing research prepared by the expert directly for the client;
2. The solicitor-client non-litigious context, in which the expert advises the lawyer to assist him or her in providing legal advice to the client, such as clearing advertising which could be misleading; and
3. The solicitor-client litigious context in which again the expert advises the lawyer on matters such as surveys in contemplation of litigation or for use at trial, and advice on opposing parties' surveys.

(2) *Working Papers Defined*

In each context, there are a number of documents that can be defined as experts' "working papers", copies of which may be in the possession of the expert, the lawyer and/or the client:

1. Expert's communications with the lawyers;
2. Expert's communications with the clients;
3. Expert's communications with the other experts associated with the case;
4. Expert's communications with persons associated with the conduct of the survey, including results received from them;
5. Preparatory materials for preliminary tests, the conduct of the survey or the expert's report;

6. Notes and records of observations or findings from preliminary tests or the final survey; and
7. Draft reports or affidavits including opinions and conclusions.

II. *Competing Viewpoints*

A client which commissions an expert on the advice of a lawyer should be in a legal position to instruct the lawyer to examine all aspects of the matter in issue and to receive legal guidance based on a full examination of all potentially helpful or harmful facts, including those derived from the expert, untrammelled by any apprehension that the full and frank examination of all such facts might somehow become available to opponents so as to be used against the client.⁴ The privilege should be absolute.

The contrary view is that privilege permits a party in litigation to shield from disclosure material which could be used to surprise his opponent at trial or, if unfavourable, will be buried from sight and that the scope of privilege should be shrunk to avoid surprise tactics or suppression of relevant information.⁵

III. *The Issues*

The issues, then, are: (1) Whether experts' working papers and reports should be given the full protection of solicitor-client privilege; (2) Whether a party should be able to circumvent the solicitor-client privilege in order to attack the substance of an expert's report or the credibility of the expert by seeking inconsistencies in his working papers; and (3) What steps should be taken to protect the expert from unnecessary or damaging cross-examination in view of the current uncertain state of the law.

IV. *Summary of the Current Legal Position*

(1) *At Discovery*

Subject to the exceptions referred to below, no party is obliged to disclose privileged communications on discovery, including experts' reports.⁶ A party must disclose facts or documents that were learned outside of the solicitor-client

⁴ *Solosky v. Canada*, [1980] 1 S.C.R. 821 at 834.

⁵ Sharpe, "Claiming Privilege in the Discovery Process" (1984) L.S.U.C. Special Lectures 163 at 164.

⁶ *Greenfield v. Thunder Bay* (1980), 27 O.R. (2d) 257 (H.C.).

relationship,⁷ and facts upon which a party is relying.⁸ This rule has been extended in most jurisdictions to include not only facts, but also evidence.⁹

If the "dominant" (overriding but not sole) purpose or in some jurisdictions the "substantial" (very significant of several) purposes of an expert's report is litigation or anticipated litigation, it is privileged. Otherwise, it must be produced, if relevant, even when it is not being relied upon by the party which commissioned it.¹⁰

The rules in Ontario, for example, provide that a party may, on discovery, obtain disclosure of experts' names, findings, opinions and conclusions except those experts who will not be called at trial.¹¹ It is not settled whether this includes preliminary findings, opinions and conclusions, if not yet final at the time of discovery.¹² The final report must be produced shortly before trial.¹³ Privileged documents or information cannot be used at trial without leave unless they are provided to the opponent before trial.¹⁴

As another example, in British Columbia, a party must disclose the names of witnesses, including experts.¹⁵ An opposing party's expert may be examined for discovery if the opposing party "is unable to obtain facts and opinions on the same subject by other means."¹⁶ Surely this rule should be construed very strictly to prevent the opposing party from using the work product of the other party. An expert's written statement setting out the facts, assumptions and opinions of the expert must be furnished to all other parties at least 60 days before the statement is tendered in evidence,¹⁷ or the expert testifies.¹⁸

The Federal Court rules provide that an expert's name is not to be disclosed.¹⁹ Questions calling for an opinion are not permitted.²⁰ Expert reports or affidavits must be produced 30 days before trial.²¹

⁷ *Susan Hosiery v. M.N.R.*, [1969] 2 Ex. C.R. 27 at 35; O.S.C. and *Greymac* (1983), 41 O.R. (2d) 328 at 337.

⁸ *Allen v. Oulahan* (1992), 10 O.R. (3d) 613 (Gen. Div.); *S. & K. Processors v. Campbell* (1983), 35 C.P.C. 146 at 150; *Ohl v. Cannito*, [1972] 2 O.R. 763 (H.C.); *Rubinoff v. Newton*, [1967] 1 O.R. 402 (H.C.).

⁹ Ontario, Rules of Civil Procedure, r. 31.06(1)(a) and Federal Court Rules, r. 459(2)(a). The British Columbia Rules provide no such restriction.

¹⁰ *Waugh v. British Railways*, [1980] A.C. 521 (H.L.).

¹¹ Ontario, Rules of Civil Procedure, r. 31.06(3).

¹² *Cheaney v. Peel* (1990), 73 O.R. (2d) 794 at 798; *Kelly v. Kelly* (1990), 42 C.P.C. (2d) 181.

¹³ Ontario, Rules of Civil Procedure, r. 53.03.

¹⁴ Ontario, Rules of Civil Procedure r. 30.09 and r. 31.07.

¹⁵ British Columbia, Rules of Court, r. 29(22).

¹⁶ British Columbia, Rules of Court, r. 28(2).

¹⁷ British Columbia, Rules of Court, r. 40A(2).

¹⁸ British Columbia, Rules of Court, r. 40A(3).

¹⁹ Federal Court Rules, r. 458.

²⁰ *Corning v. Canada Wire* (1983), 74 C.P.R. (2d) 105 (F.C.T.D.); *Rivtow v. B.C. Marine*, [1977] 1 F.C. 735 at 736 (F.C.A.).

²¹ Federal Court Rules, r. 482.

(2) *At Trial*

In Ontario and Nova Scotia, the courts have held that an expert witness who testifies at trial cannot be asked to produce his working papers (except, of course, those documents already produced under the rules for discovery referred to above).

In British Columbia on the other hand, such working papers have been ordered produced, including such documents in the possession of counsel or the client. The Federal Court has adopted a similar approach.

(3) *After Trial*

It has been held that third person communications (such as experts' reports and working papers) are no longer subject to privilege after the litigation for which they are prepared has been completed.²²

(4) *In Non-Legal or Non-Litigious Contexts*

In the non-legal context, obviously the dominant or substantial purpose of any expert report or working papers is not for litigation and such documents are produceable if relevant in a legal action.

In the solicitor-client non-litigious context, privilege is not extended to experts' reports and working papers. There is old English authority holding that communications with third persons, such as experts, in a non-litigious context are not protected by privilege.²³ It will be argued that this authority was wrongly decided since it did not give effect to the broad scope of and fundamental right to solicitor-client privilege.

V. *Practical Advice for Experts*

In view of the uncertain state of the law at present:

1. When undertaking expert research where the dominant purpose is not for litigation, or potential litigation, whether or not the report is for the advice of a lawyer, an expert should advise his client that his report and any working papers preserved may be produceable if relevant in a subsequent unforeseen legal proceeding. The report and working papers ought not to be preserved if they could be damaging in a subsequent proceeding unless there is an overriding need for preservation. (Note, however, that the client

²² *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.).

²³ *Wheeler v. Le Marchant* (1881), 17 Ch.D. 675.

will be required to disclose the substance of the report, to the best of his recollection, in a subsequent action, if relevant.)

2. When expert research is undertaken for litigation or contemplated litigation, the report should be prepared for the specific litigation and not primarily for other purposes, such as marketing, and incidentally for litigation. The intended purpose must be understood by all persons involved and well documented, having in mind a potentially strict application of the dominant purpose test. A paper trail outlining the dominant purpose should precede the commissioning and drafting of a preliminary or final report.
3. When undertaking survey research for the purpose of litigation, an expert who may be called as a witness at trial may wish to advise his client that documents in the possession of the expert, the lawyer and the client may be producible. Accordingly:
 - (1) Draft reports which include opinions and conclusions will not be preserved.
 - (2) Preliminary reports, preparation and findings will not be preserved unless essential. Alternatively, a different expert should be used.
 - (3) Preparatory materials that are not necessary for establishing facts which support conclusions or opinions in the final report or affidavit will not be preserved.
 - (4) Communications with lawyers, the client and persons associated with the conduct of surveys or tests by the expert will only be preserved to the extent necessary to support the final report.²⁴
 - (5) Only those notes and records of observations and findings which are required to support the final report will be preserved.
 - (6) The expert will not review sensitive working papers in counsel's brief.
 - (7) Finally, after the litigation for which the report or affidavit and working papers were prepared is completed, no document which could adversely affect the client in subsequent litigation will be preserved.

²⁴ R. Bell, "Drafts of Experts' Reports: How Far Does the Obligation to Produce Extend?" (1992) 13 *Advocates' Q.* 353, has suggested at 368:

Counsel should discuss in some detail, the anticipated contents, organization and style of the report before the first draft is written. The need for substantial revisions by the expert or by counsel which may reflect adversely on the credibility of the expert will, hopefully, be avoided. The practice of some counsel of drafting all or portions of the expert's report is likely to be curtailed so as to avoid placing the expert in a potentially embarrassing position in the witness box.

It is suggested, however, that the input of counsel can be very helpful in ensuring a fair, concise yet complete and objective presentation of the expert's opinions and supporting facts to the court and ought not to be curtailed.

The practice of destroying these kinds of documents has been predicted in one of Canada's leading texts on evidence. In *Sopinka on Evidence*, it is stated:²⁵

As to the expert's credibility, caution should be exercised before that becomes the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports. In any event, it might just lead to a general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem.

Before destroying any document, consideration should be given to the questions whether:

- (1) the document will be directly or by fair implication referred to in the report. If so, the document must be preserved. This would include, for example, data upon which a report is based.
- (2) the destruction of the document would adversely affect the issue of the expert's objectivity and credibility. If so, the document should be preserved. It is not uncommon among experts in the United States to make it their standard practice to destroy all documents that are not referred to directly or fairly by implication in the final report, thus avoiding subsequent accusations of selectively destroying certain documents.

VI. *The Need for Clarity in the Law*

The current uncertain state of the law leads inevitably to the suggestion that the list of documents referred to above should, in prudence, be destroyed. It has led to the suggestion by at least one commentator that counsel abdicate to some extent their role in the preparation of the case.²⁶ These suggestions are in direct contrast to the concept of obtaining legal guidance based on a full examination of all potentially helpful or harmful facts, untrammelled by apprehension that such full and frank examination might somehow become available to third persons, a concept which the Supreme Court of Canada has found to be a "fundamental civil and legal right".²⁷ As stated by Sharpe:

There is, it can be argued, a strong interest in providing the expert with a zone of privacy so that he can consider candidly and dispassionately the strengths and weaknesses of the case. If all reports, both good and bad, must be produced on discovery, there would be a disincentive to pay an expert to prepare a candid and possibly negative report which would have to be disclosed to the other side. Such a rule might encourage unduly partisan reports, and discourage careful dispassionate formulation of opinion in technical areas. This would not be conducive to adversarial preparation.²⁸

²⁵ J. Sopinka, *The Law of Evidence in Canada* (Butterworths, 1992) at 671.

²⁶ Bell, *supra* footnote 24.

²⁷ *Solosky*, *supra* footnote 4 at 839.

²⁸ Sharpe, *supra* footnote 5 at 172.

It appears, however, that until such time as the Supreme Court takes an opportunity to clarify the law, this fundamental right remains, in a practical way, truncated.

The truncation appears to be based primarily on an increasing desire for greater openness and disclosure in the adversarial system of legal proceedings and a move away from the "sporting ambush model" of discovery to the "full disclosure" model,²⁹ or what has been called a "Triumph of Candour Over Confidentiality".³⁰ The demand for broader disclosure may be fueled in part by the increasing reliance on expert evidence in the litigation process. For example, Professor Schiff has noted that there are frailties in much social science research, including testimony and professional journals, and judges must now learn the social scientist's basic vocabulary and concepts for assessing the validity and reliability of their work.³¹ The trend favouring disclosure may reflect a need to understand this expert evidence and the processes underpinning it, and a perception that experts have been taking on an increasingly adversarial role rather than being independent, impartial and objective in court.³²

In order to achieve these goals of greater openness, which means the truncation of the fundamental right to solicitor-client privilege, it has been necessary to identify some alternate (lesser) form of privilege. Many commentators and courts have therefore drawn a distinction between "solicitor-client privilege" and "litigation privilege", which is said to be based on different principles relating to conduct of the adversarial system (permitting counsel to control fact presentation, evidence and the manner of proof) and thus more easily subject to truncation.³³

²⁹ Dr. C.E. Reasons, "Solicitor's Brief Privilege and the Computer: Some Preliminary Observations" (1992) 14 *Advocates' Q.* 1 at 9.

³⁰ E. Dolden, "Waiver of Privilege: The Triumph of Candour Over Confidentiality" (1989) 47 *The Advocate* 535.

³¹ S. Schiff, "Evidence Rules in the Blast of the Hurricane" (1993) 27 *L. Soc. Gaz.* 217.

³² *Delgamuukw v. The Queen* (1988), 55 D.L.R. (4th) 73 at 74; T. Woods, "Expert Opinion Evidence and the Shrinking Ambit of Solicitor's Brief Privilege" (1989) 47 *The Advocate* 241.

³³ *Susan Hosiery v. M.N.R.*, [1969] 2 Ex. C.R. 27; Meaney, *supra* footnote 22 at 72; R. Sharpe, "Discovery — Privilege and Preliminary Investigative Reports" (1981) 59 *Can. Bar Rev.* 830; Sharpe (1984), *supra* footnote 5; N. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980) 58 *Can. Bar Rev.* 1; S.N. Lederman, "Discovery — Production of Documents — Claim of Privilege to Prevent Disclosure" (1976) 54 *Can. Bar Rev.* 422; Sopinka (1992), *supra* footnote 25 at 653; S.A. Schiff, *Evidence in the Litigation Process*, 4th ed. (Toronto: Carswell, 1993) at 1457; G. Watson, "Privilege and Confidential Information in Litigation; Solicitor-Client Privilege in Litigation" *CBAO Continuing Legal Education Seminar* (1991) at 3; Bell, *supra* footnote 24 at 354; N. Williams, "Four Questions of Privilege: The Litigation Aspect of Legal Professional Privilege" (1990) 9 *Civil Justice Q.* 139.

VII. *Questions to be Answered*

The courts have not taken the opportunity to rationalize the existence of various heads of privilege in different contexts.³⁴

The need for clarification of the law by the Supreme Court of Canada has been hinted at in *Cross on Evidence*. After referring to the broad movement "to elevate privilege into something more nearly resembling a basic constitutional principle" and referring to *Solosky* and *Descôteaux*, it is stated that "further development seems inevitable".³⁵ There are at least three questions affecting experts:

1. A client has a fundamental right to communicate openly and fully with a lawyer and to provide all helpful or damaging information to the lawyer in a legal but *non-litigious context* and to protection from disclosure.

The first question that needs to be answered is: If it is necessary to obtain information or opinions from third persons (including experts) in order to obtain a lawyer's advice in a *non-litigious context*, why should a client receive no protection from disclosure of *communications with those third persons*?

There should be no difference between communications with the client and communications with necessary third persons — the client, lawyer and *third persons* should feel equally free to explore all possible facts, evidence and opinions relevant to the legal advice, within the solicitor-client privilege. For example, a survey experts' report made to a lawyer advising a client on a misleading advertising matter that is not the subject of litigation should be privileged.

2. A client also has a fundamental right to consult openly and fully with a lawyer in a *litigious context*, and to protection from disclosure.

The second question to be answered is the same as the first except in the context of litigation: If it is necessary to obtain information or opinions from third persons (including experts) in order to obtain a lawyer's advice, in a *litigious context*, that is, in order to conduct the litigation, why should a client receive less than full solicitor-client privilege and protection from disclosure of *communications with those third persons*?

The answer should be the same because litigation privilege is merely one branch of solicitor-client privilege and not some different or lesser privilege. For example, an expert's report made for the purpose of a legal action, but not produced to the other party should remain privileged forever until the client waives the privilege, and should not be lost when the action ends. As

³⁴ Williams (1980), *supra* footnote 33 at 54.

³⁵ A. Cross, *Cross on Evidence*, 7th Ed. (London: Butterworths, 1994) at 435.

another example, an experts' working papers should receive no lesser protection from disclosure than the working papers of the client himself.

3. Waiver of the solicitor-client privilege for direct communications between solicitor and client in a litigious context is properly limited to information or documents *actually waived and those fairly or directly related* to the information or documents actually waived.³⁶

The third question to be answered is: If a waiver occurs in the litigation context for communications with third persons, why should there be less protection from disclosure than for direct communications with the client?

It is again suggested that there should be no difference because litigation privilege is merely one branch of solicitor-client privilege. For example, if a client waives privilege in a document prepared for counsel in a litigious context, he does not waive the privilege in the working papers in preparation of that document. If the document is presented at trial, in fairness, the documents and information fairly or directly relied upon to make the document should be disclosed. However, the privilege in unrelated working papers bearing on other, perhaps preliminary, drafts or on the client's credibility is not waived. The same result should flow whether or not the client or an expert is called as a witness at trial. The privilege in the expert's unrelated working papers, preliminary tests, draft reports and documents relating to credibility ought not to be waived when the expert testifies.

In the detailed discussion which follows, the legal bases for dealing with these three questions will be explored, including the nature of the solicitor-client privilege and litigation privilege and their effect on the waiver of privilege, especially as it affects experts' working papers.

DETAILED DISCUSSION

VIII. *The Nature of Privilege*

(1) *The History of Privilege*

The law of privilege has received a fundamental update in the Supreme Court of Canada in *Solosky*³⁷ (1980) and *Descôteaux*³⁸ (1982), and any discussion of privilege must start with these cases, and the history leading up to them. Solicitor-client privilege was initially restricted in operation to an exemption from testimonial compulsion of a lawyer. "Thereafter, in stages, privilege was extended to include communications exchanged during other

³⁶ Sopinka *supra* footnote 25 at 666.

³⁷ *Supra* footnote 4.

³⁸ *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, Lamer J.

litigation, those made in contemplation of litigation, and finally, *any consultation for legal advice, whether litigious or not.*"³⁹

The litigation privilege "was developed as an extension of the privilege for communications between a client and his attorney".⁴⁰ It will be argued that litigation privilege is just a convenient name for solicitor-client privilege when the lawyer's advice relates to litigation.

(2) *The Purpose of Privilege*

No distinction is made in *Solosky* between the fundamental purpose or policies grounding solicitor-client privilege and litigation privilege. The court held that privilege is dependent upon a client having legal guidance "*untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal adviser might somehow become available to third persons so as to be used against him.*"⁴¹ It is in the interests of justice that persons retain men skilled in jurisprudence and *judicial proceedings*. Without privilege everyone would be deprived of all professional assistance, "*or would only dare to tell his counsellor half his case*".⁴²

The Court held that, since it is *absolutely necessary* that a man, in order to prosecute or to defend a claim, should have lawyers, it is equally necessary in order to conduct the litigation, that he "*should be able to make a clean breast of it*" to the lawyer and that the communications be kept secret, unless with his consent.⁴³

This rationale of the basic purpose of solicitor-client privilege "has been widely accepted since the mid-18th century."⁴⁴

(3) *Solicitor-Client Privilege*

(a) *Definition*

Solicitor-client privilege was stated in *Solosky* and *Descôteaux* to arise: "where legal advice of any kind is sought from a professional legal adviser in

³⁹ *Solosky*, *supra* footnote 4 at 834 (emphasis is added throughout this paper).

⁴⁰ Williams *supra* footnote 33 at 37 (A discussion of the history of privilege is set out at 37-43; see also J.H. Wigmore, *Evidence in Trials at Common Law*, rev. by J.T. McNaughton (Boston: Little, Brown, 1961) at 542 et seq.; R.A. Kasting, "Recent Developments in the Canadian Law of Solicitor-Client Privilege" (1978) 24 McGill L.J. 115 at 116; Lederman, *supra* footnote 33.

⁴¹ *Solosky*, *supra* footnote 4 at 834, citing *Re Director of Investigation and Shell*, [1975] F.C. 184; See also *Descôteaux*, *supra* footnote 38 at 880-81; *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 at 136 (C.A.); Williams (1980), *supra* footnote 33 at 38; Wigmore, *supra* footnote 40 at 543, 545.

⁴² *Ibid.*, citing *Greenough v. Gaskell* (1833), 39 E.R. 618.

⁴³ *Ibid.* at 835, citing *Anderson v. Bank of B.C.* (1876), 2 Ch. 644.

⁴⁴ Some commentators remain sceptical, however. See Schiff, *supra* footnote 33 at 1458.

his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived."⁴⁵

Solicitor-client privilege also extends to confidential communications made by the agent of a client and the agent of his solicitor to obtain legal advice.⁴⁶

The privilege does not apply to communications in which legal advice is neither sought nor offered or not intended to be confidential.⁴⁷

Neither the solicitor nor the client can be compelled to disclose the content of such communications.⁴⁸

The common law rule of solicitor-client privilege has been given effect in both the Canadian and Ontario Evidence Acts.⁴⁹

(b) *A Broad Fundamental Civil and Legal Right, Both Evidentiary and Substantive*

Solicitor-client privilege has been recognized by the Supreme Court of Canada as being no longer merely a rule of evidence, but based on a broader concept.⁵⁰

In *Solosky*, the court stated that "*the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client.*"⁵¹

While at least one author — now a Justice of the Supreme Court of Canada — questioned whether *Solosky* went far enough to establish a substantive rule,⁵² no doubt was left in *Descôteaux*. The court confirmed the statements in *Solosky* and stated: "that a person has a *right to communicate with a legal adviser in all confidence, a right... which follows a citizen throughout his dealings with others.*"⁵³

⁴⁵ *Solosky*, *supra* footnote 4 at 835 and *Descôteaux*, *supra* footnote 38 at 872, both citing *Wigmore*, *supra* footnote 40 at 554, para. 2292.

⁴⁶ *Descôteaux*, *supra* footnote 38 at 873, 878-79; Re *Alcan-Colony v. MNR* (1971), 18 D.L.R. (3d) 32 at 35 (Ont. H.C.).

⁴⁷ *Solosky*, *supra* footnote 4 at 835.

⁴⁸ *Ibid.* at 835.

⁴⁹ *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 30(10) and *Ontario Evidence Act*, R.S.O. 1990, c. E.23, s.35(5).

⁵⁰ *Solosky*, *supra* footnote 4 at 836.

⁵¹ *Ibid.* at 839; followed in *Geffen v. Goodman* (1991), 81 D.L.R. (4th) 211 (S.C.C.); see also Cross, *supra* footnote 35 at 434, which states: "A movement seems to be developing to elevate the privilege into something more nearly resembling a basic constitutional principle, expressed in the rhetoric of rights." There is certainly no suggestion that solicitor-client privilege is in any way "limited" as suggested by Lederman, *supra* footnote 33 at 430 in 1976.

⁵² B.M. McLachlin, "Solosky and Prisoner Mail — Opening: A New View of Solicitor-Client Privilege?" [1981] Supreme Court L.R. 387 at 392.

⁵³ *Descôteaux*, *supra* footnote 38 at 870, 871.

The Court confirmed that the privilege has a much broader scope than a *rule of evidence*. It is a substantive rule, stated as follows:⁵⁴

1. The confidentiality of communications between solicitor and client may be raised where they are likely to be disclosed without the client's consent.
2. *Conflicts with other rights should be resolved in favour of protecting the confidentiality.*
3. When the law gives someone authority that might interfere with confidentiality, the means of exercising that authority should be limited *to the extent absolutely necessary to achieve the ends of the enabling legislation.*
4. Acts and enabling legislation referred to in paragraphs 2 and 3 must be *interpreted restrictively.*⁵⁵

The Court warned that privilege is "*as fundamental as the right to counsel itself*", that the Courts should be astute to protect both and "*that the privilege ought not to be 'frittered away'*".⁵⁶

(c) *Types of Communications Protected*

(i) *General*

The types of communications protected by privilege go beyond the direct communications between lawyer and client. As stated in *Descôteaux*, it includes communications with employees including "*matters of an administrative or financial nature that is, all information which a person must provide in order to obtain legal advice and within the framework of the solicitor-client relationship.*"⁵⁷

(ii) *Non-Litigious Purpose*

Communications with solicitors are protected by solicitor-client privilege whether or not the legal advice relates to litigation.⁵⁸

(iii) *Third Persons (including Experts) — Wheeler v. Le Marchant*

The question whether communications between a solicitor and necessary third persons is protected by the privilege of the client has vexed the law for over

⁵⁴ *Ibid.* at 873.

⁵⁵ *Ibid.* at 875.

⁵⁶ *Ibid.* at 880-81.

⁵⁷ *Ibid.* at 892.

⁵⁸ *Ibid.* at 879-880.

100 years. The early English courts extended the privilege beyond communications with clients to third person communications in the litigious context and based the rationale on the basic purpose for solicitor-client communications. It is suggested that the court erred in 1881 when it refused to extend solicitor-client privilege for third person communications to the non-litigious context. In view of the recent clarification of the broad scope of the solicitor-client privilege by the Supreme Court of Canada, the error of 1881 should now be rectified. The details follow.

In *Anderson v. Bank of British Columbia* in 1876, the Court extended privilege to documents obtained from third persons for the purpose of litigation.⁵⁹ It confirmed that it is “*absolutely necessary that a man ... be able to make a clean breast of it*” to his solicitor and that the communications he so makes to him should be kept secret.

The Court held that when “*the solicitor requires further information ... from a third person, that is confidential, obtained ... for the purpose of the litigation, and protected upon the same ground*”.

Further, the solicitor may *employ his clerks or other agents to collect information for him*, and upon the same principle it is *equally protected*.

Also, he *may request the client to obtain information himself*, and that is in a sense obtained by the agent of the solicitor, and is privileged.

Clearly, the rationale of the Court was grounded on solicitor-client privilege.⁶⁰

The 1881 English Court of Appeal case of *Wheeler v. Le Marchant*⁶¹ retreated from the broad scope of protection afforded in *Anderson* in holding that communications with third persons (in that case, a surveyor hired by the solicitor in order to give legal advice) are not privileged unless made in relation to existing or contemplated litigation. The Court overturned a strong judgment of Bacon, V.C. that was grounded on solicitor-client privilege. He had held that it applied “*whether he is, or is likely to be, engaged in litigation or not*”⁶²

In allowing the appeal, Jessel, M. R. stated:

It does not appear to me to be necessary, either as a result of the principle which regulates this privilege or for the convenience of mankind, so to extend the rule. In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to *obtain advice*, even when needed for the protection

⁵⁹ (1876), 2 Ch.D. 644 (C.A.) at 649-50.

⁶⁰ Some commentators suggest the rationale for this finding was based on litigation privilege. See for example, Sopinka *supra* footnote 25 at 653, which also refers however to *Hodgkinson*, *supra* footnote 41 and the fact that the Court “views it as part of an all embracing privilege and states that it is not helpful to attempt a distinction between solicitor-client privilege and the lawyer’s work product.”

⁶¹ *Supra* footnote 23; followed in *Blackstone v. Mutual Life*, [1944] O.R. 328 (C.A.).

⁶² *Ibid.* at 678.

of his life, or of his honour, or of his fortune. ... (such as) a medical man ... a priest ... (or) a friend.⁶³

It is apparent that Jessel, M. R. was looking at other forms of confidential relationships and did not focus on the purpose of solicitor-client privilege in a non-litigious context or on the broad and fundamental scope of it, as we now know to be appropriate from contemporary reasoning in *Solosky*.

Brett, L.J. simply stated that it is beyond the principles laid down.⁶⁴

Cotton, L. J. held:

The question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the *brief in the action*, and ought to be protected. But here we are asked to extend the principle of a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these.⁶⁵

Cotton, L.J. did not explain why the solicitor's "brief in the action" required privilege "to enable persons freely to communicate" whereas the solicitor's file in a non-action did not. However, it is logically inconsistent to treat them differently. A client should be entitled to expect the same full and frank disclosure and collection of relevant evidence by the solicitor in both contexts. One of the objects of a person receiving legal advice is to minimize the risk of being involved in litigation. Why should such a person be in a worse position than one who forgoes legal advice until he has blundered into litigation? As Sopinka stated in the 1974 text,

As long as the communication is spawned out of a professional-legal relationship, it should be immaterial whether litigation is looming on the horizon or not.⁶⁶

Canadian courts have not always followed *Wheeler*.⁶⁷ Williams states that "there has been a shift toward recognizing the notion of confidence as the proper rationale."⁶⁸

It appears that the court in *Wheeler* wrongly assumed that a client would not fear disclosure of third person communications in the non-litigious context

⁶³ *Ibid.* at 681.

⁶⁴ *Ibid.* at 683.

⁶⁵ *Ibid.* at 684.

⁶⁶ J. Sopinka, *The Law of Evidence in Civil Cases* (London: Butterworths, 1974) at 171. Inexplicably, this opinion has been dropped from the 1992 text.

⁶⁷ *Bell v. TTC*, [1936] O.W.N. 73, aff'd 183; *Downham v. Gray Coach*, [1949] O.W.N. 133.

⁶⁸ Williams *supra* footnote 33 at 48.

simply because litigation was not contemplated. The circularity in this assumption is discussed in Williams in his 1980 article. He points out that "The proposition that necessity does not warrant the recognition of a privilege assumes a client who has not had to consider the prospect of disclosure of the information which the solicitor will obtain. Yet by the court's own ruling the client will be compelled to disclose that information if, contrary to what was expected at the time, litigation eventuates. It is not realistic, therefore, to postulate a client for whom there was never a prospect of disclosure."⁶⁹

and later in his 1990 article:

... A question on which a person gets legal advice from a lawyer, although not connected with any particular litigation, is by nature a potential subject for litigation.⁷⁰

Wigmore supports this argument:

Still less can it be denied that the avowed ideal of the law, and the prudent custom of the profession, is to diminish litigation by so ordering the affairs of clients that litigation is not needed to correct their plight. It is a truism that much of litigation is caused by the very failure of clients to seek legal advice until a resort to the courts cannot be avoided. Thus the relation of client and legal adviser, and the freedom of entering into it, are of at least equal importance for matters that are still in the non-litigious stage, and the promotion of the relation in that stage tends to prevent its necessity in the further and less desirable stage.⁷¹

A client cannot provide *full* and frank disclosure to his lawyer if he or she cannot (without fear of disclosure to others) obtain information from third persons, including experts. As a practical example, we can see above the lengths to which experts should go to destroy the papers evidencing such full and frank disclosure to counsel.

In the broad context of solicitor-client privilege, as it is now construed by the Supreme Court of Canada, *Wheeler* must be wrong and should not be followed in Canadian courts. In *Solosky* and *Descôteaux*, the court has

⁶⁹ *Ibid.* at 44-45; Williams appears to reconsider his position on this point in his 1990 article, *supra* footnote 33 at 143:

What is the necessity that warrants protection for communications from third parties that relate to litigation? The protection has nothing to do with the need to encourage the client to speak candidly to his lawyer, which is the rationale of the first component of legal professional privilege. Communications between a third party and the lawyer or the client scarcely touch upon the state of mind of the client in consulting the lawyer. As third party communications are not privileged unless they are litigation-related, the explanation must lie in the nature of trial in the common law system.

(See also Williams *supra* footnote 33 at 39). The problem, again, goes back to the erroneous *Wheeler* decision.

⁷⁰ Williams *supra* footnote 33 at 141.

⁷¹ Wigmore, *supra* footnote 40 at 566. The inconsistencies in the rationale of *Wheeler* and other English cases are discussed further in Wigmore at 621.

reminded us that today Canadian courts are moving towards a broader concept of solicitor-client privilege⁷² and that it ought not to be "frittered away".⁷³

(iv) *Lawyer's Brief*

It has been argued that a lawyer's brief (notes, thoughts and preparation) in connection with legal advice are not strictly "communications" with the client, and therefore are not subject to the solicitor-client privilege but only in the context of litigation and only to the lesser litigation privilege.⁷⁴

However, such a narrow interpretation of solicitor-client privilege is inconsistent with the broad scope of protection given to "the unique relationship of solicitor and client" in *Solosky*.⁷⁵ It is also inconsistent with the British Columbia Court of Appeal in *Hodgkinson* which held:

I do not find it helpful to approach this question of privilege just from the perspective of "communications". Privilege attaches in proper cases to conventional communications where information is transferred from a client to his solicitor and vice versa by letter or conversation, but other documents such as cheques, invoices, legal bills and many other commercial or non-commercial documents may also be privileged even though they convey information or ideas indirectly.⁷⁶

⁷² *Solosky*, *supra* footnote 4 at 836.

⁷³ *Descôteaux*, *supra* footnote 38 at 881. See also *Hodgkinson*, *supra* footnote 41. Note: There is a reference in *Descôteaux* at 876 as follows:

The rule of evidence does not in any way prevent a third party witness (I am referring here to someone other than an agent of the client or the lawyer) from introducing in evidence confidential communication made by a client to his lawyer. It is important to note, however, that before allowing such evidence to be introduced and in determining to what extent to allow it, the judge must satisfy himself, through the application of the substantive rule (No. 3), that what is being sought to be proved by the communications is important to the outcome of the case and that there is no reasonable alternative form of evidence that could be used for that purpose.

Substantive rule 3 is:

When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view not to interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

It is suggested that this means third party witnesses authorized to obtain solicitor-client communications as a result of some "enabling legislation" are limited to disclose only what is "absolutely necessary". This passage therefore is not referring to third party witnesses such as experts hired by a solicitor.

⁷⁴ Sharpe *supra* footnote 5 at 167.

⁷⁵ *Solosky*, *supra* footnote 4 at 839.

⁷⁶ *Hodgkinson*, *supra* footnote 41 at 133.

In fact, the “lawyer’s work product has traditionally been protected by solicitor-client privilege.”⁷⁷

Protection of the lawyer’s brief by solicitor-client privilege is supported by looking at the solicitor-client relationship from a “purposive” viewpoint.⁷⁸ Since the purpose of providing the solicitor-client privilege is to permit a client to be able to receive legal guidance based on a full examination of all potentially helpful or harmful facts, untrammelled by apprehension of disclosure,⁷⁹ it is evident that the lawyer’s brief should be privileged in order to achieve that purpose. Since the purpose of a lawyer’s brief is the same whether or not the legal guidance is in connection with litigation, the privilege in both scenarios is solicitor-client privilege. There is no reason in principle why the privilege should not be available in the non-litigious context.

The foregoing conclusions make it unnecessary to deal with the further argument by some commentators that historically the lawyer’s brief has been protected only by the (lesser) litigation privilege.⁸⁰ In fact, however, the lawyer’s brief has historically been protected grounded on solicitor-client privilege. In *Lyell v. Kennedy (No. 2)* in 1883, the House of Lords grounded the privilege for the lawyer’s brief, whether or not connected with litigation, on the policy for solicitor-client privilege, that is:

...the policy of the law...that in order to *encourage free intercourse* between [the client] and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him.⁸¹

This view was given further support recently in *Hodgkinson*:

Similarly, I do not find it helpful to attempt a distinction between solicitor privilege and the “lawyer’s work product” that was recognized by the United States Supreme Court in the leading case of *Hickman v. Taylor*, 329 U.S. 495, (1946), and which distinction some commentators attempt to extract from some of the cases: Neil J. Williams, “Civil Litigation Trial Preparation in Canada” (1980) 58 Can. Bar Rev. 1 at 50. “Lawyer’s work product” is a convenient term to describe the kinds of material that, subject to controlling authorities such as *Voth, infra*, are protected by privilege, but I see no need to recognize a separate category of immunity against production.⁸²

⁷⁷ Williams *supra* footnote 33 at 50.

⁷⁸ It is suggested that the scope and meaning of solicitor-client privilege “should be given a purposive construction rather than a purely literal one”, as has been the approach in the construction of legislation (eg. *Carter v. Bradbeer*, [1975] 3 All E.R. 158 at 161 (H.L.); E.A. Driedger, *Driedger on the Construction of Statutes*, 3d ed., (Toronto: Butterworths, 1994) at 35-43) and in the construction of patents (eg. *Camic v. Hill*, [1981] F.S.R. 60 (H.L.), which has been followed in Canada).

⁷⁹ *Solosky, supra* footnote 4 at 834.

⁸⁰ Sharpe *supra* footnote 5 at 167.

⁸¹ (1883), 9 App. Cas. 81 at 86, 90 (H.L.).

⁸² *Hodgkinson, supra* footnote 41 at 133-34; See also Williams *supra* footnote 33 at 50 “Lawyer’s work product has traditionally been protected by solicitor-client privilege.”

In essence, the rationale for protecting the lawyer's brief under the broad solicitor-client privilege is the same as that for protecting third person communications. Both are necessary aspects of the purpose for the solicitor-client privilege, to permit a client to receive legal guidance based on a *full* examination of all potentially beneficial or harmful facts, untrammelled by apprehension of disclosure. This includes facts, thoughts or conclusions gathered from others, as well as thoughts or conclusions drawn by the lawyer in his brief.⁸³

(v) *Commentary — The First Question Answered*

The first question raised above was:

If it is necessary to obtain information or opinions from third persons (including experts) in order to obtain a lawyer's advice in a *non-litigious context*, why should a client receive no protection from disclosure of *communications with those third persons*?

The answer should be that a client should not receive any lesser protection for third person communications which should be protected by solicitor-client privilege in the non-litigious context. The lawyer's brief should be protected in the same way.

(4) *Litigation Privilege*

(a) *The Two-Pronged Approach to Privilege
Set out in Susan Hosiery*

Some of the current debate over privilege of experts' working papers centers around the asserted distinction set out, for example, in *Susan Hosiery v. M.N.R.*⁸⁴ in 1969, between solicitor-client and litigation privilege. The latter is defined as the protection of documents or information that have come into existence in contemplation of or after litigation commenced and where they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence.⁸⁵

This two-pronged approach to privilege has received widespread acknowledgment by commentators in many of the articles and texts⁸⁶ and with some courts. Most refer back to the *Susan Hosiery* case in support of the two-pronged approach.

⁸³ *Solosky, supra* footnote 4 at 834.

⁸⁴ *Supra* footnote 33 at 33.

⁸⁵ Sharpe *supra* footnote 5 at 164.

⁸⁶ See for example footnote 33.

President Jackett in the Exchequer Court in *Susan Hosiery*⁸⁷ stated that “there are really two quite different principles usually referred to as solicitor and client privilege, viz:

- (a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser’s working papers, directly related thereto) are privileged; and
- (b) all papers and materials created or obtained specially for the lawyer’s “brief” for litigation, whether existing or contemplated, are privileged.”

He stated that the *solicitor-client communications* are privileged because clients must be able to *communicate freely without inhibiting influence*.

He stated that the “*lawyer’s brief*” rule, was so that, under our adversary system of litigation, a *lawyer’s preparation of his client’s case must not be inhibited* by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared.

The court relied heavily upon, and quoted extensively from, *Wheeler*. The “lawyer’s brief” was deemed to include third person communications.⁸⁸

(b) *The Two-Pronged Approach was Unnecessary — Wheeler and Susan Hosiery Should Not be Followed*

It is suggested that the reason it became necessary to formulate the two-pronged approach is founded in the erroneous *Wheeler* decision in 1881, referred to above (and related decisions). According to *Wheeler*, third person communications in the non-litigious context were not subject to solicitor-client privilege. Although it is suggested that decision was wrong, it has often been followed. But the courts had correctly held that when it came to identical third person communications in the litigious context privilege should be extended. Since *Wheeler* ruled out solicitor-client privilege as the source of that protection, another name and rationale had to be used — hence “litigation privilege” (among other names), and the asserted rationale relating to the role of privilege in the adversarial system, discussed below.

If *Wheeler* and related decisions were wrong, the two-pronged approach set out in *Susan Hosiery* is unnecessary. Third person communications with a solicitor in his professional capacity and the lawyer’s brief are subject to solicitor-client privilege whether or not the context is or may become litigious. Litigation privilege is then simply a branch of solicitor-client privilege that protects the client engaged in litigation.

⁸⁷ *Susan*, *supra* footnote 33 at 33-34.

⁸⁸ *Ibid.* at 31-32.

It must be remembered that *Susan Hosiery* was decided well before *Solosky* and *Descôteaux*, both of which clarified the broad scope of protection to be given to solicitor-client privilege (thus making "litigation privilege" unnecessary.) The rationale in *Susan Hosiery* has been disputed in *Hodgkinson*, decided after those Supreme Court rulings. The British Columbia Court of Appeal held that, while it is highly desirable to maintain the sanctity of the *solicitor's brief* it is not based on the rationale found in *Susan Hosiery* but rather on the basis that persons involved in litigation ought to be able "to consult a solicitor ... and to enable the legal adviser of the party employing him to make a sufficient investigation, and so obtain the fullest means of ascertaining what advice he shall give as to the course to be adopted, without affording the opportunity to an opponent of prying into those communications, those searches, those responses".⁸⁹ The Court held:

Thus it appears to me that while this privilege is usually subdivided for the purpose of explanation into two species, namely, (a) confidential communications with a client, and (b) the contents of the solicitor's brief, it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.⁹⁰

In fact, the historical development of the litigation privilege was grounded on the need to ensure confidence, i.e. the rationale for solicitor-client privilege:

This emphasis on the identity of the third party communicant with the solicitor indicates the influence in the formative period of the *privilege for litigation-related communications* of the notion that the justification for the privilege was the need to ensure that the client could consult with the lawyer in *complete confidence*.⁹¹

This view of the litigation privilege as a part of the solicitor-client privilege is reflected in the 1974 edition of Sopinka on Evidence as follows:

The concept of *solicitor-client privilege* in Anglo-Canadian law has not been limited solely to those communications passing between an individual and his lawyer. The umbrella of protection has been extended to cover other communications made by *third parties*, which may be used by the solicitor in preparing his case for trial. Written opinions of *experts* who have been asked to conduct tests or to formulate a judgment on certain facts or statements taken from witnesses, or reports prepared by investigators, all of which assist the solicitor in preparing and presentation of his case, fall within the ambit of the protection.⁹²

(c) *Litigation Privilege is Not Just One Factor in the Adversarial System*

It has been asserted that litigation privilege is geared directly to the adversarial process of litigation and the need for a protected area to

⁸⁹ *Hodgkinson*, *supra* footnote 41 at 135.

⁹⁰ *Ibid.* at 136.

⁹¹ *Williams supra* footnote 33 at 40.

⁹² *Sopinka supra* footnote 66 at 169 but cf. 1992 edition at 653.

facilitate investigation and preparation of a case for trial by the adversarial advocate.⁹³

It is then argued that since litigation privilege is a relative and qualified privilege, and merely one of several competing interests aimed to protect the adversary process, one other being the need for disclosure to foster fair trial, these balancing interests can be used to truncate the litigation privilege.⁹⁴

However, this approach to litigation privilege overlooks the fact that it is merely part of the single all-embracing solicitor-client privilege according to the rationale in *Solosky* and *Descôteaux* and set out clearly in *Hodgkinson*. As such, it is a fundamental and absolute right of the client, not just one of many competing interests aimed to protect the adversary process and not to be truncated in favour of another such interest.

The courts and commentators seem to agree that significant disclosure is useful to foster “the fair disposition of litigation”.⁹⁵ It is suggested, however, 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.⁹⁶ As stated in *Descôteaux*, any conflict should be resolved in favour of protecting the confidentiality,⁹⁷ and in *Hodgkinson*:

While I have no hesitation associating myself with the fullest possible disclosure, it seems to me with respect that the cases cited are not authority for the proposition that privilege must give way to disclosure. ... While I favour full disclosure in proper circumstances, it will be rare, if ever, that the need for disclosure will displace privilege.⁹⁸

Other strong arguments have been raised against the asserted policy advantages of wide open disclosure in the adversary system:

1. In Williams’ 1980 article he stated that, the more information a party can get from the adversary the less will he need to exert himself independently. Thus, the character of the adversary model undergoes change as the protection from disclosure shrinks. Each shift toward allowing the parties greater access means a reduction in emphasis on party self-reliance and initiative, a major attribute of the system.⁹⁹

⁹³ Sharpe *supra* footnote 5 at 165, *Susan*, *supra* footnote 33 at 33-34; *Jesionowski v. Gorecki*, (1993) 55 F.T.R. 1 at 15 (T.D.).

⁹⁴ Sharpe *supra* footnote 5 at 165; Sharpe *supra* footnote 33 at 836; Schiff text, *supra* footnote 44 at 1457; Williams *supra* footnote 33 at 140-42.

⁹⁵ McLachlin, *supra* footnote 52 at 396.

⁹⁶ McLachlin, *supra* footnote 52 at 394, 395 acknowledged that the evidentiary rule of solicitor-client privilege is absolute. Whether experts working papers must be disclosed at trial raises a question of the scope of the evidentiary rule only and thus it is absolute.

⁹⁷ *Descôteaux*, *supra* footnote 38 at 875, rule 2.

⁹⁸ *Hodgkinson*, *supra* footnote 42 at 135.

⁹⁹ Williams *supra* footnote 33 at 56-57.

2. In McLachlin's 1981 article she acknowledged the strong argument that unless the client knows that his communications to his lawyer are absolutely privileged under all circumstances, he or she will be disinclined to make full and frank disclosure and the *purpose* of the rule will be defeated.¹⁰⁰
3. In Williams' 1990 article he referred to *Susan Hosiery* and stated that to require a party to hand over to the opponent any evidence harmful to the party's case uncovered during the preparation for trial might discourage anything but the most cursory inquiries of the facts, and to rely on discovery to get the results of the adversary's investigations.¹⁰¹

In summary, litigation privilege should be treated as an absolute privilege, as a species of the solicitor-client privilege. The logical extension of the arguments favouring full disclosure in the adversarial system would defeat the purpose of the privilege and lead to a breakdown of the adversarial system.

(d) *There are no Real Differences Between Litigation Privilege and Solicitor-Client Privilege*

There are no real differences between litigation privilege and solicitor-client privilege as has been argued by Sharpe¹⁰² and others. They argue that:

1. Solicitor-client privilege does not apply to communications between a solicitor and third persons in a non-litigious context or material of a non-communicative nature whereas in a litigious context, litigation privilege does.¹⁰³

However, in general, based on the intent expressed by the Supreme Court of Canada in *Solosky* and *Descôteaux* to provide broad protection for the solicitor-client relationship it is evident that all communications or other material deemed useful by the lawyer to properly advise his client should be protected in both the litigation context and in a non-litigious matter.¹⁰⁴ In particular, as argued above, solicitor-client privilege protects all third person communications and material of a non-communicative nature, including those in the lawyer's brief.

2. "...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."¹⁰⁵

¹⁰⁰ McLachlin, *supra* footnote 52 at 395-96.

¹⁰¹ Williams *supra* footnote 33 at 146.

¹⁰² Sharpe *supra* footnote 5 at 164.

¹⁰³ *Ibid.* at 164; Williams *supra* footnote 33 at 39.

¹⁰⁴ *Descôteaux*, *supra* footnote 38 at 880-81.

¹⁰⁵ Sharpe *supra* footnote 5 at 164.

Ironically, however, this argument actually supports the finding in *Hodgkinson* that solicitor-client privilege is really one all-embracing privilege. After all, every time someone seeks the advice of a lawyer:

Litigation may not be what the client intends or expects, but since it is legal advice that he seeks the risk that litigation will eventuate is inevitable.¹⁰⁶

3. The rationale for solicitor-client privilege is based on the interest of all citizens to have full access to legal advice whereas the rationale for litigation privilege is to facilitate a lawyer's preparation in the adversarial litigation process.¹⁰⁷

However, this "bootstrap" argument does not accord with the historical analysis and description of the rationale for the privilege set out in *Solosky*¹⁰⁸ or *Williams*¹⁰⁹ and others referred to above. The privilege was extended in stages to ultimately include legal advice *whether litigious or not*. The fundamental purpose for all privilege was the protection of having the guidance of those skilled in the law untrammelled by any apprehension of disclosure."¹¹⁰ Thus, the argument that litigation privilege has another grounding appears to be *ex post facto* rationalization.

If 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.¹¹¹

Further, if the litigation privilege has a different grounding and is some lesser form of privilege and only one factor in the adversarial process, thus permitting disclosure, this would ultimately lead to a breakdown of the adversarial system, as suggested above. That is, it would lead to less than full disclosure to counsel and less than full preparation by counsel.

(e) *The "Work Product" Test used in the United States is Undesirable in Canada*

Under the "work product" test adopted by the United States Supreme Court in *Hickman v. Taylor*¹¹² in 1946, litigation privilege is not only truncated, but

¹⁰⁶ *Williams supra* footnote 33 at 39.

¹⁰⁷ *Sharpe supra* footnote 5 at 164-65, *Williams supra* footnote 33 at 40-41.

¹⁰⁸ *Solosky, supra* footnote 4 at 834.

¹⁰⁹ *Williams supra* footnote 33 at 37-39.

¹¹⁰ *Solosky, supra* footnote 4 at 834.

¹¹¹ Thus, the argument in *Williams supra* footnote 33 at 45-47 becomes unnecessary.

¹¹² 329 U.S. 495.

also limited to include only the lawyer's "work product", that is, *counsel's* observations, thoughts and opinions. Some commentators have argued this test would be useful in Canada.¹¹³

However, that test developed in the United States because the Supreme Court failed to give effect to the full scope of litigation privilege as a branch of solicitor-client privilege,¹¹⁴ a position contrary to the approach of the Supreme Court of Canada in *Solosky* and *Descôteaux*.¹¹⁵ The United States approach to litigation privilege has resulted in a quagmire of litigation¹¹⁶ and an undesirable atmosphere of incomplete disclosure by clients to counsel in litigation that ought not to be contemplated in Canada.

The deficiencies of the two-pronged approach to privilege and particularly the work product test are exemplified by Williams' discussion of the issue: "Is a document once privileged always privileged?"¹¹⁷ Based on the assumption that a lawyer's work product is protected *only* by the truncated litigation privilege, the logical conclusion is that those documents are not privileged in subsequent litigation.¹¹⁸ That result was deemed undesirable by the United States Supreme Court in the 1983 decision of *F.T.C. v. Grolier*, whose views are described by Williams:

The need to protect a lawyer's work product is at its greatest when the litigation with regard to which the work product was prepared was still in progress, but it does not follow that the need for protection disappears once that litigation (and any related litigation) is over. The protection of the lawyer's work product rests on the need to preserve the lawyer's thought with regard to work done for litigation, and the invasion of these thoughts, and the resulting demoralising effect on the legal profession, are as great when the invasion takes place later rather than sooner. Disclosure of work product can cause real harm to the interests of the lawyer and the client even after the litigation has ended. ... *Counsel for such a client would feel some inhibition in creating written work product that could later be used against the client in later unrelated but similar litigation. Counsel for less litigious clients might also be affected: fear of even one future suit might instil an undesirable caution. These were precisely the dangers of inefficiency, unfairness, sharp practices and demoralisation that the Supreme Court warned against in Hickman v. Taylor. ... The risk of being required to disclose documents in subsequent related litigation might well inhibit a lawyer in preparing for trial.*¹¹⁹

¹¹³ Sharpe *supra* footnote 5 at 166-68; Williams *supra* footnote 33 at 57.

¹¹⁴ See also Sopinka *supra* footnote 25 at 655.

¹¹⁵ See the comments above on lawyer's brief and in particular the comments on *Hickman* in *Hodgkinson*.

¹¹⁶ Sharpe *supra* footnote 5 at 177.

¹¹⁷ Williams *supra* footnote 33 at 160-66.

¹¹⁸ This extends to third party communications, for example, in *Meaney*, *supra* footnote 22 at 72.

¹¹⁹ Williams *supra* footnote 33 at 164-66, referring to *F.T.C. v. Grolier*, 462 U.S. 19 (1983).

If it were acknowledged that the real purpose for privilege of the lawyer's work product (and other materials within the litigation privilege) is the protection from disclosure of the full and frank examination of facts for legal advice, that is, solicitor-client privilege, (albeit in a litigious context), and that they should all be protected by that privilege, the difficulties referred to by the United States Supreme Court would end. It is clear that solicitor-client communications, whether made in relation to litigation or not, are protected by the rule "once privileged, always privileged."¹²⁰

(f) *Commentary — The Second Question Answered*

The second question raised above was:

If it is necessary to obtain information or opinions from third persons (including experts) in order to obtain a lawyer's advice in a *litigious context*, that is, in order to conduct the litigation, why should a client receive less than full solicitor-client privilege and protection from disclosure of *communications with those third persons*?

The answer should be that there is no less protection. Communication with third persons made in the context of litigation should be fully protected by solicitor-client privilege, and the branch called litigation privilege is an absolute privilege and not subject to truncation.

One consequence of this would be to end the anomalous finding that the privilege for third person communications and the lawyer's brief made in preparation for litigation ends with the litigation for which the reports were made.¹²¹ Experts' reports, for example, would be treated like all communications protected by solicitor-client privilege. Once privileged, always privileged.¹²² Other consequences will be dealt with in the section below concerning waiver of privilege in experts' working papers at trial.

IX. *Waiver of Privilege*

"Once privileged, always privileged." As a general rule, once a confidential communication between solicitor and client attracts privilege, the privilege remains until waived and continues to exist for future litigation.¹²³

¹²⁰ *Ibid.* at 160.

¹²¹ Sopinka *supra* footnote 25 at 659; *Meaney*, *supra* footnote 22.

¹²² *Descôteaux*, *supra* footnote 38 at 871: "(privilege) follows a citizen throughout his dealings with others".

¹²³ *Ibid.*; see also *Bullock v. Correy*, [1978] 3 Q.B. 365; *Calcraft v. Guest*, [1989] 1 Q.B. 759; *Small v. Nemez*, [1963] 1 O.R. 91 (H.C.); *Watson*, *supra* footnote 33 at 9; Sopinka *supra* footnote 25 at 658.

(1) *Before Trial*

Privilege will be waived if legal advice received is directly raised in a pleading¹²⁴ or if an allegation of reliance on a legal opinion is pleaded¹²⁵ or if the communication is otherwise legitimately brought in issue in the action.¹²⁶ Privilege also will be waived through the voluntary disclosure or consent to disclosure of any material part of a communication. For example, if a communication is disclosed in another jurisdiction, the privilege in the communication is waived as well as any documents relating to the acts contained in the communication.¹²⁷ There is, however, no waiver if the client merely testifies as to the facts which form the basis of the document, as opposed to the document itself.¹²⁸

It is not necessary to show intention to waive the privilege.¹²⁹ Disclosure of a part of a privileged document is general waiver of the whole document, even if not intended, unless it can be fairly split into two entirely different subject matters.¹³⁰ In Canada, it has been suggested that this test is inappropriate because it encourages counsel to misleadingly divide privileged materials into "separate" documents. This criticism has led to suggestions that the governing test ought to be based upon whether partial disclosure is misleading in all the circumstances.¹³¹

Waiver is to be examined on a document by document basis¹³² and may be partial or total.¹³³ A client may waive privilege in respect of some documents out of a large number and assert privilege for the remaining documents.

In fairness, there may also be a waiver by implication of the documents that are withheld. Wigmore describes this as necessary because "A privileged person would seldom be found to waive if his intention not to abandon could alone control the situation." The Court must look to the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.¹³⁴

¹²⁴ *Nowak v. Sanyan* (1979), 23 O.R. (2d) 797 (H.C.).

¹²⁵ *Lloyd's Bank v. Canada Life* (1991), 47 C.P.C. (2d) 157 (Ont. H.C.).

¹²⁶ *Alberta Wheat Pool v. Estrin* (1986), 14 C.P.C. (2d) 242 (Alta. Q.B.); Sopinka *supra* footnote 25 at 667-68.

¹²⁷ Sopinka, *supra* footnote 25 at 665.

¹²⁸ *Ibid.* at 666.

¹²⁹ *Ibid.* at 635-36.

¹³⁰ *Great Atlantic v. Home Insurance*, [1981] 2 All E.R. 485 (Eng.C.A.)

¹³¹ *Lowry v. Canadian Mountain Holidays* (1985), 59 B.C.L.R. 137.

¹³² *Solosky*, *supra* footnote 4 at 837.

¹³³ *Bell v. Smith*, [1968] S.C.R. 664.

¹³⁴ *Supra* footnote 40, s. 2327 at 635-38; See also Sopinka *supra* footnote 25 at 666-68; Watson, *supra* footnote 33 at 18.

At the discovery stage, the production of an expert's report does not waive privilege in the communications between the expert and counsel, unless specifically referred to in the report,¹³⁵ nor does it waive privilege in the expert's draft reports, notes, correspondence or memoranda.¹³⁶

Finally, as referred to above, the rules of court require production of privileged information to be relied on by a party in certain circumstances.

(2) *At Trial*

If a client testifies and gives evidence of a professional, confidential communication (as opposed to the facts in issue), he or she will have waived the privilege relating to the particular subject matter, and production of all documents relating to the acts contained in the communication will be ordered.¹³⁷

Privilege is not waived when the party refreshes his memory from notes made by him or her for counsel in preparation for trial.¹³⁸

A key issue for survey experts is the extent to which the privilege attaching to their working papers will be waived by calling the expert at trial. As stated above, Canadian courts go different ways on this point:

(a) *Ontario Courts*

In Ontario the production of draft reports has not been ordered. For example, in *Bell Canada v. Olympia & York*,¹³⁹ in 1989, the defendant moved for production of all *documents and information supplied by the plaintiff's counsel to an expert* when the expert was called as a witness at trial. In ruling that the documents should not be produced, Eberle J. held that the privilege is that of the client, as an extension of the traditional solicitor-client privilege and not an independent privilege. Otherwise, a party who becomes a witness could be in danger of cross-examination on communications passing between him or her and his solicitor, including cross-examination on the basis of credibility.¹⁴⁰ He relied strongly on the basic purpose for solicitor-client privilege, "the right to advice ... unfettered by the possibility that (the client) may be required to disclose to his adversary the information he obtains regardless of its accuracy, authenticity or credibility." He expressly found that the *Vancouver Community College* case (below), which expresses a contrary view in British Columbia, was wrongly decided and inconsistent with solicitor-client privilege.¹⁴¹ The Court

¹³⁵ *Calvaruso v. Nantais* (1992), 7 C.P.C. (3d) 254 (Ont. Gen. Div.).

¹³⁶ *Kelly v. Kelly* (1990), 42 C.P.C. (2d) 1181 (Ont. U.F.Ct.).

¹³⁷ Sopinka *supra* footnote 25 at 665; Wigmore, *supra* footnote 40 at 638.

¹³⁸ Sopinka *supra* footnote 25 at 666.

¹³⁹ (1989), 68 O.R. (2d) 103 (H.C.J.); see also Sopinka *supra* footnote 25 at 670.

¹⁴⁰ *Ibid.* at 106.

¹⁴¹ *Ibid.* at 107.

also found that the material sought to be procured was irrelevant since only the facts upon which the report was based were relevant, that is, facts observed by or assumptions made by the expert.¹⁴² Finally he held that it is more important that a client be able to discuss through his experts in open and frank terms with legal advisers all aspects of the client's rights than to test the credibility of an expert to the limit:

The client's right to free and untrammelled legal advice and discussion of his interests with his solicitors has long been viewed as one of the essential underpinnings of our system of administration of justice and as an essential feature of a party's right to independent legal advice and assistance in legal matters in court.¹⁴³

The rationale in *Bell Canada* is entirely consistent with the approach to solicitor-client privilege in *Solosky* and *Descôteaux* in that it focuses on the client's fundamental right to solicitor-client privilege and its purpose and confirms that communications by counsel with experts are not subject to some (lesser) independent (litigation) privilege.

Bell Canada has been subsequently applied in a number of Ontario cases.¹⁴⁴

The reasoning in *Bell Canada* has also been applied in Nova Scotia. Prior to trial, the plaintiff in *Highland v. Lynk*¹⁴⁵ sought production of a preliminary report prepared by the defendant's experts. In refusing such production, the Court applied *Bell Canada* and held that the implicit waiver of privilege which occurs upon the filing of an expert's report is limited to the contents of the report and the factual underpinnings for the opinions expressed in the report.

(b) *British Columbia Courts*

A contrary line of cases has evolved in British Columbia. The leading case is *Vancouver Community College v. Phillips, Barratt* in 1987.¹⁴⁶ An expert was called to testify on a report he or she had produced, and the defendant moved for production of various documents in the expert's possession.

Finch, J. relied heavily on the *Susan Hosiery* case in finding there is a different principle applicable to litigation privilege from solicitor-client privilege¹⁴⁷ and held that by calling the expert, the party had waived privilege in documents in the possession of the witness (not the party) which may be relevant to the preparation or formulation of the opinions, *i.e.* matters of

¹⁴² *Ibid.* at 107-108.

¹⁴³ *Ibid.* at 108.

¹⁴⁴ *Walters v. Walters*, November 1, 1990, Action No. 4723/89, Ont. Gen. Div., unreported; *Calvaruso v. Nantais* (1992), 7 C.P.C. (3d) 254; *Kelly v. Kelly* (1990), 42 C.P.C. (2d) 1181 (Ont. U.F.Ct.).

¹⁴⁵ (1989), 63 D.L.R. (4th) 493 (N.S.S.C.).

¹⁴⁶ (1987), 20 B.C.L.R. (2d) 291 (S.C.).

¹⁴⁷ *Ibid.* at 292.

substance in his evidence including draft reports, working papers and written communications with counsel, and the expert's consistency, reliability, qualifications and other matters touching his credibility, unless to do so would be unfair and inconsistent.¹⁴⁸

However, there was no waiver in papers that are wholly irrelevant to the substance of the opinion or credibility, such as personal affairs or work for others, or his advice on how to cross-examine the other side's witnesses.¹⁴⁹

In a subsequent ruling in the same case, Finch J. ordered production of several drafts of the expert's report which were no longer in the possession of the expert, but were contained in the lawyer's file and which contained lawyer's notes or client's notes. The Court held that waiver of the privilege extended not only to documents in the expert's possession, but also to documents under the power and control of the party and its counsel with information that *may* have been communicated to the expert.¹⁵⁰

It appears that in making these far reaching rulings concerning experts' working papers, the court, in drawing the distinction between solicitor-client privilege and litigation privilege found that the latter was entitled to a lesser degree of protection in view of the desirability of full disclosure and assurance of witness credibility in the adversarial process.¹⁵¹ It is suggested that since it truncates the fundamental right of solicitor-client privilege, it should not be followed.

Sopinka J. had this to say about *Vancouver Community College*:

No doubt the witness should be subject to cross-examination on the factual basis of the opinion. But since an expert usually gives an opinion on the basis of hypothetical facts and is not generally offering the facts as proof thereof, there would seem to be little reason for compelling disclosure of the source of those facts if that source is otherwise a privileged communication or document. As to the expert's credibility, caution should be exercised before that becomes the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports. In any event, it might just lead to a general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem.¹⁵²

(c) *The Federal Court*

Vancouver Community College has been adopted by the Federal Court in *Jesionowski v. Gorecki*.¹⁵³ Reed, J. held that privilege in an expert report is lost when it is included in a list of documents on discovery.¹⁵⁴ She also held that the

¹⁴⁸ *Ibid.* at 297-98.

¹⁴⁹ *Ibid.* at 297.

¹⁵⁰ (1987), 28 C.L.R. 277 (B.C.S.C.).

¹⁵¹ Bell, *supra* footnote 24 at 361; Woods, *supra* footnote 32 at 241.

¹⁵² Sopinka *supra* footnote 25 at 671.

¹⁵³ *Supra* footnote 93.

¹⁵⁴ *Ibid.* at 16.

litigation privilege normally attached to communications with experts is lost once the expert takes the stand at trial, although the reasoning is obiter since the preliminary drafts and working papers of the expert were not sought to be produced.¹⁵⁵ She outlined the difference between litigation and solicitor-client privilege, stating that the privilege asserted in the *Vancouver Community College*, *Bell Canada* and *Highland Fisheries* cases was litigation privilege¹⁵⁶ and that since the principle underpinning litigation privilege is distinct from that of solicitor-client privilege, the rationale in the *Bell Canada* case for not following *Vancouver Community College* was questionable.¹⁵⁷ The search for truth with respect to the evidence given by expert witnesses, Reed J. reasoned, outweighs any interest that might be served in protecting the preliminary drafts or working papers of an expert.¹⁵⁸ At least one commentator has expressed a similar analysis and opinion to that in *Jesionowski*.¹⁵⁹

In reaching her conclusions, Reed, J. relied heavily on the analysis of litigation privilege in *Sharpe*¹⁶⁰ which is dealt with in detail above and for the reasons referred to above, it is suggested that the case should not be followed.

It should be noted that none of these decisions has gone to a Court of Appeal.

(d) *Commentary — The Third Question Answered*

(i) *Where the Law on Expert Witness Trial Testimony Should Go*

The third question raised above is:

If a waiver occurs in the litigation context for *communications with third persons*, why should there be less protection from disclosure than for direct communications with the client?

The answer should be that there is no lesser protection from disclosure if the waiver occurs in connection with third party communications in the context of litigation. *Hodgkinson* and *Bell Canada* are correct and there is no difference between solicitor-client and litigation privilege.

It follows that the position in *Vancouver Community College*, *Sharpe* and the cases and authors following them should not be followed to the extent that they suggest that litigation privilege is just another interest that

¹⁵⁵ *Ibid.* at 15.

¹⁵⁶ *Ibid.* at 13.

¹⁵⁷ *Ibid.* at 14.

¹⁵⁸ *Ibid.* at 15.

¹⁵⁹ Bell, *supra* footnote 24.

¹⁶⁰ *Jesionowski*, *supra* at 14-15.

can be truncated after balancing it against all other interests in the adversarial process.¹⁶¹

Based on those basic principles of waiver of solicitor-client privilege, if an expert report is introduced through an expert at trial, the client should have waived documents directly or in fairness implicitly referred to in the report and the remainder of the report, if only a part is produced. This may include notes and records of observations or findings both by the expert and by his associates which are, in fairness, implicitly part of the report. The waiver should not extend to the following documents unless they are referred to directly or by fair implication:

1. Communications with counsel, the client or persons associated with the conduct of the survey;
2. Preparatory materials or notes and records of observations or findings from preliminary tests;
3. Materials for the conduct of the survey or the expert's report;
4. Notes and records of observations or findings for the final report;
5. Draft reports; and
6. Documents relating to credibility.¹⁶²

Of course, the privilege in a number of these documents would have to be waived by the client, in any event, if the expert's report is to receive any weight from the court.¹⁶³ By providing some of these documents, a party may assist his case by confirming the independence and objectivity of the expert.

However, by limiting the truncation of privilege in this way, the client will be in the position to follow through with obtaining the guidance he or she needs "untrammelled by any apprehension that the full and frank" gathering of facts by the expert on his behalf "might somehow become available to third persons so as to be used against him."¹⁶⁴

(ii) *Where the Law has Been Going since the Vancouver and Bell cases*

The British Columbia courts appear to be backing off slightly from the findings in *Vancouver Community College*.

¹⁶¹ *Descôteaux*, *supra* footnote 38 at 875, item 2; see, to the contrary, *Bell*, *supra* footnote 24 at 361.

¹⁶² See the comment on credibility in *Sopinka* *supra* footnote 25 at 671; see also the suggestions in *Bell*, *supra* footnote 24 at 362; compare *Kyuquot v. B.C. Forest*, [1986] B.C. J. No. 61 Jan. 24, 1986 (B.C.C.A.).

¹⁶³ *Wilson*, *supra* footnote 2 at 56-60.

¹⁶⁴ *Solosky*, *supra* footnote 4 at 834.

The approach taken in *Vancouver Community College* in requiring production of documents which may be relevant has been criticized as dangerously far-reaching. Woods expresses the potential danger of encroaching onto the realm of solicitor-client privilege.¹⁶⁵

Certainly, a great deal of skirmishing over the relevance of the material produced to the substance of an expert's opinion and the credibility of the expert may be expected. As well, a free-ranging examination of the expert-related contents of a solicitor's brief will inevitably yield strategic and tactical information that, on any analysis, should be protected by privilege. It is for reasons such as these that counsel having sympathy with the objective of stripping expert witnesses of their partisan role may still find the direction suggested by the *Vancouver Community College* rulings and decision somewhat disquieting. The practical problems counsel may face in retaining and instructing expert witnesses following the rulings and decision are significant indeed.

The subsequent British Columbia case of *Delgamuukw*,¹⁶⁶ signals, however, an attempt by the British Columbia judiciary to narrow somewhat the potentially wide ambit of *Vancouver Community College*. There, the court restricted the category of produceable documents to those which are relevant to matters of substance or credibility; cautioned that credibility must be given a limited construction because practically anything might relate to credibility; cautioned against "free-roaming" cross-examination; and refused disclosure of the names of members of the litigation team, instructions, memos and statements of trial strategy ("work product of counsel") unrelated to credibility or the substance of the report. The court tempered the test by holding that the onus favours upholding properly advanced claims to privilege over demands for disclosure.¹⁶⁷ Nevertheless, the court did order production of letters of instruction, communications between the witness and the party or counsel, memoranda, drafts, suggestions from others, written material that might have been considered by the witness, names of other experts the witness met, and a critique of the expert's report by others. It is suggested that the British Columbia courts are still going too far.

In the true Canadian penchant for compromise, the Ontario courts appear to be backing off somewhat from the findings in *Bell Canada*. In *Piché v. Lecours*,¹⁶⁸ Loukedelis, J. examined both *Vancouver Community College* and *Bell Canada* and derived a number of principles which combine the two:

- (1) Principles of waiver relating to a privilege claim for documents in an expert's file cannot be said to have been waived simply by calling that witness to give evidence.
- (2) The privilege can be waived in respect of those *facts or premises* in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to that expert.

¹⁶⁵ *Supra* footnote 32 at 241.

¹⁶⁶ *Supra* footnote 32.

¹⁶⁷ See Woods, *supra* footnote 32, for a fuller discussion of the *Delgamuukw* case and its relationship to *Vancouver Community College*.

¹⁶⁸ (1993), 13 O.R. (3d) 193 (Gen.Div.).

- (3) Whether there is a privilege or not can be ascertained by one of two ways. As in *Ocean Falls, supra* the judge can examine the documents or materials for which privilege is claimed. Another way is for counsel, through cross-examination of the expert, to determine whether all or part of the file is privileged.
- (4) As a general rule, if facts are supplied that are not found in other evidence or if certain assumptions are asked to be made in the instructing document, privilege claimed for those facts or assumptions should be considered waived.¹⁶⁹

The court compromised too much. As to items (2) and (4), the court refers to facts and premises or assumptions, which are not the subject of privilege. The only test is relevance. Assuming however, that the court intends in item (3) to require production of all documents and materials in which these facts, premises and assumptions are referred to, the court goes too far. Such documents and materials are subject to privilege, which should be waived only if they are referred to directly or by fair implication in the expert's report. That limitation is not evident in the reasons. Beyond that, such documents should be produced only if the client decides to waive privilege in the interests of lending credibility to his expert.

Conclusion

It is clear that an expert's report, if prepared in confidence under the guidance of a solicitor is protected by privilege until the client decides to waive that privilege by filing the report and/or calling the expert as a witness at trial, or under current law, until the litigation for which it is prepared ends.

It is also clear that the Supreme Court of Canada has raised solicitor-client privilege to the level of a fundamental civil and legal right as well as an absolute privilege as a rule of evidence.

It is not clear under current law whether litigation privilege, which covers experts' working papers prepared for litigation, either anticipated or pending, is just a branch of solicitor-client privilege or an independent form of privilege having truncated protection to be balanced against other interests in the adversary process, such as the interest in full disclosure. Whether or not experts' working papers must be produced when the expert testifies appears to depend on the jurisdiction in which the proceedings are taking place. Until a higher court deals with the issues, there will be no certainty as to which way a court will go in any jurisdiction.

Under the current state of the law, practical steps are necessary in connection with the preservation or non-preservation of working papers which are not essential in supporting the weight, reliability or validity of an experts' reports. This necessity is underscored by the fact that some courts have gone so far as to require production of working papers not only in the possession of the expert, but also in the possession of the client and counsel. Other practical steps may

¹⁶⁹ *Ibid.* at 201.

include limiting the disclosure to the expert of documents, information or witnesses not absolutely required for the preparation of his report.

We are in the midst of changes in evidence law generally, in which the Supreme Court of Canada has recently recast some pre-existing rules and judges have announced that they are prepared to look to the underlying principle and policy behind the rules. The current shift in evidence law has been described as a hurricane.¹⁷⁰

For experts, the eye of the hurricane has touched down on the privilege in their working papers. Will the storm favour a fundamental right to protection or throw the papers to the winds of disclosure?

¹⁷⁰ Schiff, *supra* footnote 31 at 217-19.