Case Comments
Commentaires d'arrêt

More on Solicitor/Client Privilege:
The Tug of War Continues.

Ronald D. Manes*

The history of solicitor-client privilege reflects a tug-of-war between the protection of the confidentiality and sanctity of the solicitor and client relationship on one side, and the quest for the truth on the other. The primary battleground is third-party communications, and the extent to which the law should protect such communications from disclosure.

The acerbic yet powerful exchange of views on solicitor-client privilege in recent Canadian Bar Review articles dramatizes the conflict between the two camps. While the authors on each side of the debate suggest fundamental changes to our thinking on the meaning and extent of solicitor-client privilege, they each suffer from terminal absolutism. Watson and Au have a negative attitude towards privilege, favouring those who support its severe curtailment, and argue that “the assertion of privilege inevitably impedes the truth-finding process”. They argue that solicitor-client privilege


The writer is grateful for the able and extensive assistance of Caryl L. Silver of Toronto.


2 For instance, Watson and Au at note 54 state: “notwithstanding the lofty language concerning the sanctity of privilege, it is important to note who benefits directly and indirectly from it ... One does not have to be too much of a cynic to realize that those who benefit substantially from the important privileges in civil litigation are also those who are regularly involved in the law-making process: lawyers and the government.” Continuing, Watson and Au incorporate Fischel’s view that “the attorney-client privilege, and the work product doctrine — benefit lawyers but are of dubious value to clients and society as a whole. Absent some more compelling justification for their existence than has been advanced to date, these doctrines should be abolished.”

3 Watson and Au at 315.

4 Watson and Au use “solicitor-client privilege” as a synonym for what is generally referred to as legal professional privilege. For more on Watson and Au’s approach to terminology, see infra note 10. Legal Professional Privilege is the privilege which attaches to all direct communications between a lawyer and client, their respective employees and agents, in connection with the provision of legal advice.

The immediate objective of legal professional privilege is to ensure that clients have access to and obtain accurate legal advice by enabling them to confide freely and fully with
and litigation privilege are fundamentally distinct, and after completely separating them, they advance arguments to ensure that each privilege is marginalized. In contrast, Wilson maintains that solicitor-client privilege and litigation privilege are one and the same, an absolute privilege where any truncation of that privilege is anathema. Wilson argues that the privilege should be extended to cover all third-party communications, whether related to contemplated litigation or not.

5 Litigation Privilege attaches to communications between the lawyer or client and third parties, and communications generated by the lawyer or client, when litigation is contemplated or underway and where such communications are made with the dominant purpose of submission to counsel for use in litigation. Communications generated or collected by the lawyer comprise the “Lawyer’s Brief”, and include copies and compilations of otherwise unprivileged documents where they reflect the lawyer’s professional knowledge, judgment and skill with respect to the litigation. The litigation privilege which attaches to the Lawyer’s Brief is analogous to what U.S. jurisprudence terms the “Work Product Rule”; see Hickman v. Taylor, 329 U.S. 495 (C.A. 3rd Cir., 1947).

Elsewhere, the writer has used the term “derivative communications” to describe any communications which arise indirectly from the solicitor-client relationship.

The immediate objective of litigation privilege, including the lawyer’s brief rule, is to facilitate the adversarial system by enabling each lawyer to fully investigate, develop and prepare his or her client’s case in privacy. As stated in Ottawa-Carleton Consumers’ Gas Co. (1990), 74 O.R. (2d) 637 at 643 (Div. Ct.) per O’Leary J:

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

6 Wilson at 370.

Presently, third-party communications are only privileged pursuant to litigation privilege. Communications with an agent are privileged pursuant to legal professional privilege, as they are deemed to be direct communications between the solicitor and client.
The writer maintains that there is a single solicitor-client privilege, but accepts that it is comprised of two prongs: legal professional privilege and litigation privilege. While the writer opposes the severe curtailment of solicitor-client privilege advocated by Watson and Au, the writer equally rejects Wilson’s appeal to extend solicitor-client privilege to non-litigious third-party communications. The writer maintains that, where litigation privilege is concerned, the principles regarding third-party communications are well-established in Canadian case law and the Rules of Civil Procedure. In practice, it is the judicial approach to the facts of a case which determines the outcome of a dispute involving litigation privilege. The writer also maintains that where legal professional privilege is concerned, the distinction between agents and third parties is not sufficiently clear in Canadian law, and that the few reported cases on this issue were decided more on the evidence supporting the privilege claim than on clearly articulated principles.

The State of the Debate

Watson and Au would have us distinguish solicitor-client privilege, i.e. legal professional privilege, from an entirely separate and distinct litigation privilege. In their view, completely different considerations sustain each privilege. Accordingly, they reject any nomenclature which suggests a connection between the two. Watson and Au consider Hodgkinson v. Simms, a 1988 decision of the British Columbia Court of Appeal, “an aberrant decision by modern standards” due to its finding that solicitor-client privilege is:

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.

---

8 The two-prong approach to privilege was clearly set out in Susan Hosiery Ltd. v. M.N.R., [1969] D.T.C. 5278 at 5281 (Ex. Ct.) (hereinafter, Susan Hosiery). Watson and Au embrace Susan Hosiery’s two-prong approach (at 318 and 331). Wilson states that Susan Hosiery was wrongly decided and of little precedential value (Wilson, “Rejoinder” at 556).

9 Watson and Au state at 339 (footnotes omitted): “Manes & Silver ... confuse matters by coining a term for third party communications made in contemplation of litigation: ‘derivative communications’... This notion of ‘derivative communications’ is unhelpful and confuses analysis by assuming that litigation privilege is based on the rationale for solicitor-client privilege (i.e. confidentiality) ... Similarly, much confusion surrounds the inconsistent usage of the term ‘legal professional privilege’. In Cross and Tapper on Evidence this term is used as an umbrella term comprising ‘legal advice privilege’ and ‘litigation privilege’. Confusion builds when both Sharpe and Cass et al. treat ‘legal professional privilege’ as a synonym for ‘litigation privilege’. Meanwhile, Manes & Silver define ‘legal professional privilege’ as a sub-category (along with ‘contemplated litigation privilege’) of an overarching ‘solicitor-client privilege’. We suggest, in the interest of clarity, that the unmanageable terminology of ‘legal professional privilege’ be abandoned. It suffices to speak of two privileges, i.e. solicitor-client privilege and litigation privilege, so long as the latter is not subsumed under the former.”


11 Watson and Au at 334.
all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.\textsuperscript{12}

Watson and Au accuse Wilson of leaving “misleading” impressions in suggesting that two cases in the Supreme Court of Canada, \textit{Solosky v. The Queen}\textsuperscript{13} and \textit{Descôtesaux v. Mierzwinski},\textsuperscript{14} support Wilson’s holistic view of privilege. Watson and Au argue that that precise issue was not, nor has it ever been, before the Supreme Court of Canada.\textsuperscript{15}

Watson and Au argue that confidentiality is not a requirement of litigation privilege, and criticize the 1975 decision in \textit{Strass v. Goldsack},\textsuperscript{16} where the majority observed that communications by third parties are confidential and should be privileged.\textsuperscript{17}

Watson and Au characterize as “decidedly wrong and most regrettable”\textsuperscript{18} the Ontario Divisional Court’s recent finding in \textit{General Accident Assurance Co. v. Chrusz},\textsuperscript{19} where the court concluded that an independent insurance adjuster was an agent of the insurer for the purpose of obtaining legal advice, and therefore the adjuster’s reports were protected by solicitor-client privilege.\textsuperscript{20}

Watson and Au view the reasoning in \textit{Hodgkinson}, \textit{Strass} and \textit{Chrusz} as impeding the truth-finding process, permitting lawyers “to develop and offer a ‘new product line’: namely, confidentiality” by clothing all third-party communications with privilege. They adopt the position that solicitor-client privilege “is often a device for covering-up ‘legally dubious or dirty business’”,\textsuperscript{21} and note the views of numerous American critics of solicitor-client privilege.\textsuperscript{22}

\textsuperscript{12} \textit{Hodgkinson}, supra note 11 at 136, per McEachern C.J.B.C. (emphasis added).
\textsuperscript{13} [1980] 1 S.C.R. 821 (hereinafter, \textit{Solosky}).
\textsuperscript{14} [1982] 1 S.C.R. 860 at 875 (hereinafter, \textit{Descôtesaux}).
\textsuperscript{15} Watson and Au at 325, 351.
\textsuperscript{17} Watson and Au consider it erroneous that Manes and Silver, \textit{Solicitor-Client Privilege in Canadian Law} (Toronto: Butterworths, 1993) adopt the approach of \textit{Strass}, since linking confidentiality to litigation privilege suggests that it derives from solicitor-client privilege: Watson and Au at 338.
\textsuperscript{18} Watson and Au at 346 and 349.
\textsuperscript{19} (1998), 37 O.R. (3d) 790 (Div. Ct), rvs’g in part (1997), 34 O.R. (3d) 354 (Gen. Div.), reversed in part on appeal, September 19, 1999, Court of Appeal, Docket C29463, per Carly, Doherty and Rosenberg JJA. The decision of the Court of Appeal was delivered following the initial publication of this paper: R. Manes, \textit{Judging the Privilege}, a paper presented at the Superior Court Judges Education Seminar (Ontario), Spring 1999. While specific references to the \textit{Chrusz} case have been edited to take account of the Court of Appeal’s decision, the reader is encouraged to refer to \textit{Chrusz} for an analysis of the current state of the law regarding litigation privilege and its judicial treatment.
\textsuperscript{20} In \textit{Chrusz}, the Court of Appeal reversed the decision of the Divisional Court on this issue. The Court of Appeal concluded that the evidence did not establish that the adjuster was integral to the solicitor/client relationship and therefore was not an agent for the purposes of adjudicating the privilege claim. See full discussion under the sub-title \textit{Third Parties and Legal Professional Privilege}.
\textsuperscript{21} G.C. Hazard, cited in Watson and Au at 321.
\textsuperscript{22} See, for instance, Watson and Au at note 54.
They dismiss as “rhetoric”[23] Australian case law supporting the primacy of the privilege,[24] and adopt views expressed elsewhere which would strictly limit the privilege, embracing the full breadth of Lord Edmund-Davies’ exhortation in Waugh v. British Railways:

... we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than suppression.[25]

Conversely, Wilson argues for one all-encompassing privilege with one overarching principle - access to legal advice - without regard to whether a litigious or non-litigious context exists. He accordingly opposes any distinction being drawn between legal professional privilege and litigation privilege. Wilson considers anything which impedes the giving or receiving of legal advice as an erosion of the relationship between solicitor and client, undermining the solicitor’s ability to provide advice and the client’s opportunity to understand the law. He believes that the quest for truth must not outweigh the fundamentality of solicitor-client privilege, and argues that the policy considerations which underlie restrictions to the privilege should always yield to its primacy.[26] Wilson accuses Watson and Au of making short-shrift of solicitor-client privilege, stating that they “simply assert”[27] that the privilege “may shut-out the truth.”[28] He embraces Supreme Court statements in Solosky and Descôteaux as supporting his expansive view of solicitor-client privilege,[29] and cites commentary and Australian authorities[30] to support his thesis from both a theoretical and legal point of view.

Wilson advocates extending solicitor-client privilege to all communications with third parties which are connected to the lawyer’s provision of legal advice, even those in a non-litigious context.[31] He is critical of the current state of the law: that non-litigious third-party communications are not privileged, that

---

23 Watson and Au at 352.
26 Wilson at 370.
27 Wilson Rebuttal at 550.
28 Wilson Rebuttal at 550, citing Watson and Au at 320.
29 Wilson at 360.
31 Watson and Au present Wilson’s argument at 317: “At first blush Wilson’s proposal may seem attractive. After all, if a corporate lawyer needs the input of an expert in order to advise the client, why should she be in any different position to her litigation colleague down the hall?”
litigation privilege terminates when the underlying litigation ceases, and that the Rules and common law notably truncate litigation privilege. In his closing argument, Wilson embraces the entreaty of Vice-Chancellor Knight Bruce:

Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely ... the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, [is] too great a price to pay for truth itself.\(^{32}\)

Together, the Watson and Au and Wilson articles frame the debate on three contentious topics regarding solicitor-client privilege: (1) the relationship between legal professional privilege and litigation privilege, (2) whether confidentiality is a prerequisite for litigation privilege; and (3) to whom should legal professional privilege extend beyond the solicitor-client relationship. The writer's comments on those topics follow.

**One Privilege or Two?**

Throughout their paper, Watson and Au argue that litigation privilege is distinct from legal professional privilege, and that the underlying policy justifications for each differ.\(^{33}\) They state that litigation privilege and legal professional privilege must be recognized "as being independent",\(^{34}\) and that there is "modern day consensus that the two privileges are distinct and have clearly separate rationales."\(^{35}\) Following Sharpe, they argue that whereas legal professional privilege seeks to protect a relationship, being the relationship between client and counsel, litigation privilege seeks to protect a process, being the adversarial process.\(^{36}\) Watson and Au further argue that because litigation privilege is only related to the workings of the adversarial system, it is more easily truncated in favour of the quest for the truth.\(^{37}\)

---

33 Watson and Au at 328 and 335. Interestingly, when introducing legal professional privilege and litigation privilege, they state that the latter is "related but distinct" from the former, without elaborating further on the relationship: Watson and Au at 316 (emphasis added).
34 Watson and Au at 339.
35 Watson and Au at 333. Although the writer does not accept the degree to which Watson and Au separate legal professional privilege and litigation privilege, he concurs in their rejection of Wilson's statement at 359 that litigation privilege "is just a convenient name for solicitor-client privilege when the lawyer's advice relates to litigation": Watson and Au at 318.
37 Watson and Au at 341-46. Watson and Au appear to disregard the fact that even communications protected by litigation privilege are relevant to the provision of legal advice. In practice, any lawyer who collects witness statements or compiles information does so primarily to advance his or her client's case, but also uses that information to advise the client as to advisability and cost of proceeding, probabilities of success, the range of possible settlement, *etc.*
The basis for Watson and Au’s distinction is the requirement of confidentiality: they maintain that legal professional privilege, being premised on Wigmore’s four criteria for privilege, requires confidentiality while litigation privilege, a non-Wigmorian privilege, does not. However, their schism fails because confidentiality is present in both legal professional privilege and litigation privilege, albeit in different forms. Because one is designed to protect and sedulously foster the solicitor-client relationship, while the other protects the adversarial process, confidentiality takes different guises with respect to each. Specifically, the Wigmorian concept of confidentiality is not applicable to litigation privilege, including the lawyer’s brief rule and its U.S. analogue, the work product doctrine. However, as discussed in the next section of this paper, confidentiality is present in litigation privilege, its source being the solicitor and client themselves. Confidentiality indeed remains “the unifying thread of ‘privilege’.”

This writer acknowledges that it is analytically appropriate to separate legal professional privilege and litigation privilege according to relationship and process respectively, as each have different immediate objectives. But even if the two privileges may be dissociated from one another analytically, they cannot be divorced from the solicitor-client relationship that gives rise to them.

The writer maintains that legal professional privilege and litigation privilege share the ultimate objective and rationale of facilitating the orderly interaction of persons in Canadian society by making the rule of law

---

38 As stated by S.N. Lederman and adopted by Watson and Au at 337. Wigmore’s criteria were not developed with litigation privilege in mind.

39 Watson and Au state at 338 (notes omitted): “It is significant that Wigmore’s privilege test was developed for confidential communications. Litigation privilege, being necessitated by the adversary nature of trial, is not a ‘Wigmorian privilege’; i.e. it protects materials which may not be communications (a lawyer’s mental impressions, opinions, etc.) and communications which may not be confidential. The American practice (i.e. strictly separating the work product doctrine from a Wigmorian analysis of privilege) is therefore sensible, for only then is it possible to speak of confidentiality as being the unifying thread of ‘privilege’.” This passage appears to recognize the presence of confidentiality in litigation privilege, although they do not elaborate on this further.

40 Watson and Au at 338.

41 As discussed above in notes 5 and 6. Indeed, as stated in Hodgkinson, supra note 11 at 136 per McEachern C.J.B.C.: “while the 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...”.

42 Indeed, it would be moot to debate the differences between the two prongs were it not for the fact that they arise out of a solicitor-client relationship. Legal professional privilege and litigation privilege exist only because we recognize the solicitor-client relationship as a relationship that ought to be sedulously fostered. Except for informer privilege, the solicitor-client relationship is the only relationship that is awarded the benefit of privilege, much to the dismay of certain critics (e.g. those cited in Watson and Au at note 54).
accessible, i.e. understandable and of use, to those it governs. This ultimate objective is achieved by solicitor-client privilege permitting lawyers to advise their clients, and to assist them in resolving disputes in the adversarial process. This ultimate objective, combined with the common requirement of confidentiality, renders it inaccurate to suggest that legal professional privilege and litigation privilege are independent or distinct. Rather, they are boughs of the same branch — indeed, they are but two prongs of solicitor-client privilege.

It is well-accepted that solicitor-client privilege evolved from an evidentiary rule exempting lawyers from testimonial compulsion into progressively more encompassing forms of litigation privilege. Litigation privilege, in turn, gave rise to legal professional privilege. As noted by Dickson J. in Solosky, solicitor-client privilege has been extended over time “to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not.”

The Supreme Court of Canada has recently elevated solicitor-client privilege to a “fundamental civil and legal right” with a concomitant “need for minimum derogation therefrom”. Thus, solicitor-client privilege now constitutes a substantive right of substantial scope. In Descôteaux, Lamer J. affirmed the substantial breadth of solicitor-client privilege:

... all information which a person must provide in order to obtain legal advice, and which is given in confidence for that purpose enjoys the privileges attached to

---

43 See L.L. Fuller, *The Morality of Law* rev. ed. (New Haven: Yale U.P., 1969) at 5-6 where the author describes the “morality of duty” as the basic rule and requirements of social living, without which an ordered society is impossible.

44 However, Sopinka et al., *The Law of Evidence of Canada* (Toronto: Butterworths, 1992) at 653, cited in Watson and Au at 331, state that litigation privilege “spawned out of the traditional solicitor-client privilege”.

45 *Solosky*, supra note 14 at 834 per Dickson J. (emphasis added).

46 *Ibid.* at 839 per Dickson J. In *Descôteaux*, supra note 15 at 880, Lamer J. stated that solicitor-client privilege is “as fundamental as the right to counsel itself.”

47 *Solosky*, supra note 14 at 840 per Dickson J.

48 Lamer J. formulated the rule in *Descôteaux*, supra note 15 at 875 as follows (emphasis added):

“(1) The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client’s consent.

(2) Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person’s right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

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

(4) Acts providing otherwise in situations under para (2) and enabling legislation referred to in para (3) must be interpreted restrictively.”
confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship.\footnote{Descôteaux, supra note 15 at 875 (emphasis added).}

What constitutes a communication “made within the framework of the solicitor-client relationship”? Any communication which is \textit{bona fide} necessary for a lawyer to provide legal advice and guidance to his or her client, whether litigation is looming or not. The variety of situations in which solicitor-client privilege arises, and its imperative to our legal system, was recently described by Cory J. in \textit{Jones v. Smith}:

The privilege is essential if sound legal advice is to be given in every field. It has deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients would never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. \textit{It is an element that is both integral and extremely important to the functioning of the legal system.}\footnote{Jones v. Smith, [1999] S.C.J. No. 15 at para 46 (emphasis added) (hereinafter, Jones v. Smith).}

 Jointly and severally, the trilogy of Supreme Court cases on solicitor-client privilege makes it clear that the privilege attaches to:

\textit{all communications made within the framework of the solicitor-client relationship ... whether litigious or not ... [and] whether ... with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges ... It is an element that is both integral and extremely important to the functioning of the legal system.}\footnote{Respectively extracted from Descôteaux, supra note 15 at 875 per Lamer J., Solosky, supra note 14 at 834 per Dickson J. and Jones v. Smith, supra note 51 at para 46 per Cory J.}

It is myopic to suggest that these pronouncements of the Supreme Court of Canada do not reveal an assumption that legal professional privilege and litigation privilege are but components of solicitor-client privilege, and that the privilege may attach to any communication which is derived from the solicitor-client relationship. Although it is acknowledged that this nation’s highest court has not explicitly addressed the relationship between legal professional privilege and litigation privilege,\footnote{As emphasized by Watson and Au at 325. Watson and Au state that Solosky and Descôteaux “had nothing to do with third party communications” (at 318), that what the Supreme Court “elevated to a “fundamental and civil right” was solicitor-client privilege, not litigation privilege” (at 325-26), and that “the subject of litigation privilege simply did not arise” in Solosky (at 325). However, it would be more accurate to say that the subject of litigation privilege did not \textit{directly} arise, as it certainly arose by implication of the above-mentioned italicized statement. Watson and Au fail to recognize that litigation privilege was fully in the thoughts of the court within the trilogy of cases: see text accompanying note 52 supra.} the privilege trilogy is indicative of the court’s strong views on the nature and extent of the privilege, its fundamentality to the
administration of justice and importance for clients in seeking legal advice, inside and outside of litigation. The trilogy must surely communicate to even the harshest critic of solicitor-client privilege that, in this country, it is an overarching right which will only be overturned in the most extraordinary cases, and even then only "to the extent absolutely necessary". It is from this perspective that one must approach the two prongs of solicitor-client privilege, not with the view that solicitor-client privilege is an enemy of the truth.

Still, although solicitor-client privilege is "the highest privilege recognized by the courts", it is not absolute. Rather, it yields to the public interest where competing concerns or societal values so require, but only to the extent necessary. For instance, in Jones v. Smith the Supreme Court held that solicitor-client privilege may be subordinated where there is a clear, serious and imminent threat to public safety. Similarly, the public interest in safety and security specifically at penal institutions trumped solicitor-client privilege in Solosky. Solicitor-client privilege also yields to the right of accused persons to defend themselves. Although further exceptions to the primacy of solicitor-client privilege may arise, they are rare and illustrate the fact that privilege will only be abrogated in narrow circumstances and in the face of competing societal values, and only then to the extent reasonably necessary.

The most on-going regulation of solicitor-client privilege stems from the competing value of the search for truth in the administration of justice. By imposing restrictions and preconditions on claims of litigation privilege, courts have determined that the value of preventing trial by ambush must limit the extent of the solicitor-client privilege in that context. Accordingly, litigation privilege may only be invoked where a communication arises for the dominant purpose of submission to counsel for use in pending or reasonably anticipated litigation. Litigation privilege is also temporally limited: when the underlying litigation is over, the privilege ceases. These limits on the ability to claim privilege increase the amount of pre-trial disclosure, and are consistent with the policy objectives of the current Rules of Civil Procedure.

53 See supra note 49.
54 Jones v. Smith, supra note 51 at para 44, per Cory J.
56 Jones v. Smith, supra note 51 at para 53.
57 The Ontario Court of Appeal, in Chrusz, definitively adopted the dominant purpose test set out in Waugh, supra note 26. The party claiming the privilege must establish the requisite purpose behind the communication.
58 Tubbessing v. Bell Canada (1995), 22 O.R. (3d) 714 (Master). Again, the party claiming the privilege must establish that a reasonable prospect of litigation existed when the communication was made. A lawyer need not have been retained at the time the communication is made for litigation privilege to attach.
Confidentiality and Litigation Privilege

As noted above, Watson and Au roundly criticize suggestions that confidentiality is a requirement for litigation privilege, just as it is for legal professional privilege. They argue that witness statements, for instance, may not be given with the requisite desire for confidentiality on the part of the witness. With respect, it is submitted that Watson and Au have approached the analysis from the wrong viewpoint, and hence fail to credit the source of confidentiality - the solicitor and client - in the context of anticipated or pending litigation.

Third-party communications are generally confidential, since they derive from the solicitor and client relationship. The protection of the third-party communications is necessary for the protection of the confidentiality of the solicitor-client relationship. As is the case with the lawyer’s brief, confidentiality arises not from the source of the communication, but rather from the thought process, planning, strategy and solicitor-client communications that give rise to the communication. The process of collecting information from third parties is intended by the client and solicitor to be confidential, notwithstanding that it may involve the receipt and distillation of otherwise non-confidential information. Questions posed by a lawyer, client or their agent to a witness or expert are confidential in nature and are intended to be so; the third party’s responses must also remain confidential for this intention to be given effect. In addition, the manner of questioning, including the order of questions and the precise language used, may reveal the lawyer and client’s analysis, planning and strategy much the same as the selection of documents may betray their thought process. Just as confidentiality is essential to the solicitor-client

---

60 Watson and Au at 335-38.
61 Watson and Au at 332.
62 Third-party communications will not be confidential where the solicitor and/or client do not intend the communication to be confidential, or where confidentiality is otherwise waived.
63 See supra note 6.
64 Watson and Au at 323 cite N.J. Williams’ comment that third-party communications scarcely touch upon the client’s state of mind in consulting a lawyer. The writer states that there are many facets of the solicitor-client relationship which a client does not turn her mind to; what the client does turn her mind to, or presume, is confidentiality in all aspects of the client’s dealings with the lawyer — the confidentiality that imbues the solicitor-client relationship.
65 Despite the disclosure requirements of the Rules of Civil Procedure and case law, discussed infra, an entire verbatim witness statement is protected by litigation privilege. Quaere if privilege would attach where there is no risk of revealing thought processes or strategy, e.g. where an investigator simply asks witnesses to “write down everything that happened”, without posing more specific questions.
relationship in a non-litigious context, it remains essential to the solicitor-client relationship in a litigious context.  

The *Rules of Civil Procedure* implicitly recognize that third-party statements are confidential by mandating disclosure of only (a) names and addresses of "persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action" and (b) "the findings, opinions and conclusions" of only those experts the party intends to call. Case law requires that a summary of evidence of persons who might have knowledge of the matters in issue be disclosed if requested. Third-party communications otherwise remain confidential to the solicitor-client relationship, and are not discoverable. From a practical point of view, a court may presume that where litigation is contemplated, communications between a third party and a solicitor and/or client are intended by the latter to be confidential, so long as the court is vigilant regarding any evidence indicating an absence of confidentiality.

In *Strass v. Goldsack*, Alberta's Appellate Division determined that a written statement the plaintiff provided to an adjuster working for the third party insurer of a defendant was not subject to litigation privilege. Although Watson and Au rightly concede that the result in *Strass* is "sensible in itself", they criticize the court's reasoning as "problematic". In particular, they reject D.C. McDonald J.'s observation that statements given by what he terms "stranger-witnesses", i.e. third parties, are confidential and "are communications to which a privilege should attach". Instead, Watson and Au reiterate their theme that confidentiality is not a factor in litigation privilege, reinforcing their thesis that it is a distinct privilege.

The writer accepts D.C. McDonald J.'s aforementioned observation that confidential statements from third parties are privileged, although he rejects

---

67 As stated in the High Court of Australia in *Baker*, supra note 25 at 129 per Dawson J. (emphasis added) and subsequently adopted by the South African Appellate Division in *S. v. Safasta & others* (1988) (1) S.A. 868 at 886(E) per Botha J.A.:

The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation.

"The privilege" Dawson J. was referring to is legal professional privilege. It is notable that the second sentence of this quote also reflects the singularity of solicitor-client privilege.

68 Rule 31.06(2) of the *Rules of Civil Procedure*.
69 Rule 31.06(3) of the *Rules of Civil Procedure*.
71 *Supra* note 17.
72 Watson and Au at 336.
73 *Strass*, *supra* note 17 at 171 per D.C. McDonald J.
74 Watson and Au at 337.
D.C. McDonald J.'s reliance on Wigmore. The writer also agrees that the decision in *Strass* was sensible, since as the impugned communication was made by a party to the litigation, the adjuster could not reasonably possess the requisite intention of confidentiality. Confidentiality remains a threshold issue in assessing whether privilege arises in third-party communications. At a minimum, the solicitor and/or client must intend for the statement to remain confidential for privilege to attach: if there is no such intention on their part, as was the case in *Strass*, the witness statement should be disclosed.

Although an intention of confidentiality may contemporaneously exist on the part of the third-party originator of the communication, this is not the point from which the question of confidentiality should be viewed: it is the confidentiality of the solicitor and/or client who obtain the third-party communication which is relevant, and it is this confidence which litigation privilege seeks to protect. The third party's intention with respect to confidentiality is irrelevant. McGillivray C.J.A, dissenting in *Strass*, appreciated this point when he stated:

... at what point does the matter of confidentiality become of consequence? Surely it is not whether the witness, be he an opposing party or not, in giving a statement, or, indeed, an investigator in taking a statement, as between the investigator and the witness thought it was confidential. The confidentiality arises from the fact that the statement is, in fact, obtained on behalf of a client for the advice of a solicitor in connection with litigation anticipated or pending.

*The fact that a person giving the statement has no reason to think it confidential, has, in my view, precisely nothing to do with the matter.*

---

75 D.C. McDonald J. enumerated several reasons that might give rise to an intention of confidentiality on the part of a third party (e.g. due to embarrassment or potential liability) which would satisfy Wigmore's first criterion for privilege that a communication originate in confidence that it not be disclosed (*supra* note 17 at 171). The writer concurs with Watson and Au, and in turn with S.N. Lederman (cited in Watson and Au at 337) that it was unnecessary for the majority in *Strass*, including D.C. McDonald J., to resort to Wigmore for its analysis. The writer states that Wigmore's criteria were developed in order to evaluate novel claims of privilege as they are made. Since the relationship of solicitor and client has already been recognized as one meriting privilege (and indeed since Wigmore took as his starting point the protection afforded to that relationship), it is unnecessary to review Wigmore's criteria in cases involving legal professional privilege (or, indeed, litigation privilege: see text accompanying note 40 *supra*).

76 The holding in *Strass* does not contradict the decision in *Hunt v. T & N plc*, *supra* note 67. In that case, although the plaintiff obtained documents from defendants, it was held that production of those documents would have revealed the plaintiff's selection strategy. Accordingly, the claim of privilege was upheld.

77 This analysis was accepted by Doherty J.A. (dissenting in part) in *Chrusz*, *supra* at 21 of his reasons. Carthy J.A., writing for the majority, resolved the issue on the basis that the third party witness in that case was "closely enough aligned" with the party claiming privilege over the statement such that delivery of a copy of the statement to the witness did not constitute a waiver of the privilege. (See *Chrusz supra* per Carthy J.A. at 18 of his reasons.)

78 *Strass, supra* note 17 at 177 (emphasis added).
McGillivray C.J.A. also correctly recognized the role of legal advice within litigation privilege, which Watson and Au appear to disregard. Watson and Au’s rigid model for litigation privilege does not accord with everyday litigation practice: any lawyer who collects witness statements or compiles information does so primarily to advance his or her client’s case, but also uses that information to advise the client as to advisability and cost of proceeding, probabilities of success, the range of possible settlement, etc. It is more accurate and realistic to view litigation privilege as having the primary, immediate objective of facilitating the adversarial system, and a secondary objective of providing the client with legal advice regarding their participation in the adversarial system.

In Chrusz, supra, Doherty J.A. (dissenting in part) recognized the role of confidentiality in assessing litigation privilege:

“Nor, in my view, is litigation privilege defeated by virtue of Mr. Pilotte’s indifference as to whether the statement was disclosed to others at the time he made it. I agree with the analysis of Mr. Manes that in the context of litigation privilege, one is concerned with the confidentiality interest of the client and not third parties: R. Manes, Judging the Privilege, a paper presented at the Superior Court Judges Education Seminar (Ontario), Spring 1999 at 14-19; see also Manes and Silver, Solicitor-Client Privilege in Canada Law, supra at 100-103; S. Lederman, Commentary: Discovery-Production of Documents-Claim of Privilege to Prevent Disclosure (1976) 54 Can. Bar Rev. 422; Strauss v. Goldsack (1976), 58 D.L.R. (3d) 397 at 402-403, per McGillivray C.J.A. (dissenting). General Accident, through Mr. Eryou, expressed a clear intention that the contents of the statement should not be disclosed to its potential adversaries.” (Footnote Chrusz supra per Doherty J.A. at 21 of his reasons).

There is nothing intellectually dishonest or unfair in recognizing that confidentiality derives from the solicitor and client relationship, nor is the search for truth materially encumbered. Watson and Au view confidentiality from the wrong end of the telescope.

Agents, Third Parties and Legal Professional Privilege

It is well-accepted that legal professional privilege attaches not only to confidential communications between the solicitor and client for the purposes of obtaining or providing legal advice, but also to confidential communications between their respective employees for the same purpose. Legal professional

79 Dickson J. In Solosky also recognized this where he referred to “any consultation for legal advice, whether litigious or not”. Solosky, supra note 14 at 834 (emphasis added).

Watson and Au at 338 quote from McGillivray C.J.A.’s decision to support their contention that confidentiality is irrelevant to litigation privilege. However, they misinterpret the Chief Justice’s point by disregarding the paragraph preceding that which they quote. What McGillivray C.J.A. was saying was that, with respect to litigation privilege, confidentiality need only be present on the part of the solicitor and client. It was the third party’s intention of confidentiality which had “precisely nothing to do with the matter.”

80 For instance, conversations between a client and a member of a lawyer’s staff, and documents prepared by a corporate client’s employee or in-house counsel for the purpose of enabling the client to obtain legal advice, will be privileged.
privilege will also extend to confidential communications for the purpose of obtaining or providing legal advice between the agents of the lawyer and/or client. Presently, if a lawyer or client communicates with an independent third party for the purpose of obtaining or providing legal advice, that communication is not considered privileged. Accordingly, whether legal professional privilege attaches often turns on characterizing an individual as an agent or as a third party.

The writer maintains that agency must be viewed consistently with the scope and objectives of solicitor-client privilege: courts must only bestow privilege where the third-party communication is integral to the lawyer’s provision of legal advice. Although the concept of agency should not be stretched so as to enable third-party communications to pose as direct communications, one must keep in mind the ever-increasing complexity of practising law when determining if a communication was made “within the framework of the solicitor-client relationship”.81 Today, most lawyers and law practices must outsource other professional assistance in order to advise their clients. This is due to the intricacies of business and contemporary affairs, and the resultant explosion of speciality services to meet very specific needs. Lawyers can no longer be all things to all people. Advisors and experts outside of the lawyer-client relationship, such as accountants and valuators, are increasingly required to enable the lawyer to provide accurate legal advice. In fact, a failure to consult such experts may result in professional negligence. Experts may also be required where a client is not sufficiently sophisticated to frame the problem or issues for which he or she requires legal advice. Accordingly, advisors and experts may legitimately be deemed agents of the lawyer or client when consulted with a view to providing legal advice, with legal professional privilege attaching to their communications with the lawyer and client.

It is the role or function of the putative agent vis-à-vis the provision of legal advice, and the nature of the impugned communication, which is determinative of whether legal professional privilege attaches. Case law makes it clear that the inherent nature of the services provided by the putative agent, and the relationship of those services to the lawyer’s ability to give legal advice, are central in establishing when a third party is in fact an agent for the purposes of solicitor-client privilege. The writer maintains that agency must be considered in the context of solicitor-client privilege and its policy imperatives, rather than according to traditional and technical precepts of agency law.

In Wheeler v. Le Marchant,82 Susan Hosiery Ltd. v. M.N.R.83 and the recent case of General Accident Assurance Co. v. Chrusz,84 judges have engaged in

81 Descôteaux, supra note 15 at 875, per Lamer J.
82 (1881), 17 Ch.D. 675 (C.A.) (hereinafter, Wheeler).
83 Supra note 9.
a functional analysis of the role of putative agents. The result in each of these cases has made it clear that decisions on agency and legal professional privilege turn on evidence and the court’s evaluation of the necessity for the putative agent in relation to the obtaining and provision of legal advice, rather than on fixed rules of agency. As the case law indicates, counsel aspiring to ensure that privilege attaches to communications with parties external to the solicitor-client relationship must heed Wigmore’s caution: it is “not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular third person for the benefit of the client.”85 Where claims of agency are concerned, judges should expect no less than compelling evidence due to the precedential implications of finding agency.

The issue in the 1881 case Wheeler was whether communications between a solicitor and surveyors, before litigation was even contemplated, were privileged. It was argued that the solicitor needed to consult with the surveyors to enable him to advise his client, and therefore the communications should be privileged.86 Jessel M.R. rejected that argument, stating that the privilege “does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or his honour, of his fortune.”87 However, it would appear that Jessel M.R. categorized the surveyors’ communications as tangential to, rather than integral to, the solicitor’s ability to advise the client. Jessel M.R. opposed extending privilege to communications in “the ordinary business of life.”88 He therefore refused to permit solicitor-client privilege to attach to the impugned communications in Wheeler, which he found were merely “desired or required by the solicitor in order to enable him the better to give legal advice” since same would be “beyond what necessity warrants.”89 He repeatedly noted that legal professional privilege permits a client to obtain legal advice “safely”,90 suggesting that where communications with third parties are required to permit legal advice to be ‘safely’ obtained, i.e. the communications are essential to the provision of legal advice, they may be privileged. Accordingly, Wheeler suggests the necessity for and degree of a third party’s interaction or involvement in the provision of legal advice will be determinative.

In a concurring judgment, Cotton L.J. summarized the court’s reasons for denying privilege to the surveyors’ communications:

[The surveyors] were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the

---

84 Supra note 20.
85 Wigmore on Evidence, McNaughton Rev. (Boston: Little, Brown, 1961), vol. 8 at 619 (emphasis in original).
86 Wheeler, supra note 82 at 679.
87 Ibid. at 681.
88 Ibid. at 681.
89 Ibid. at 682 (emphasis added).
90 Ibid. at 682.
communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising the client are to be protected.\textsuperscript{91}

Since the court in \textit{Wheeler} was presented with an affidavit of documents baldly asserting privilege over the surveyors' communications,\textsuperscript{92} there was insufficient evidence to persuade the court that the surveyor was integral to, and an agent of, the solicitor-client relationship. Were the surveyors' communications "reasonably necessary ... in order that legal advice may be obtained safely and sufficiently"?\textsuperscript{93} Due to the lack of cogent evidence, the court could only conclude that they were not.\textsuperscript{94}

In contrast, the court in \textit{Susan Hosiery} was presented with sufficient evidence to warrant a finding that an accountant was a client's agent and therefore his communications were protected by legal professional privilege. In that case, a company's general solicitors retained a tax lawyer to give specific legal advice with respect to a business arrangement. The company also required the assistance of its accountant, who also acted as its auditor, so as to enable the company to obtain the legal advice. At examination for discovery, the company claimed legal professional privilege over communications amongst itself, its lawyers and the accountant.

On a motion to the Exchequer Court to compel disclosure, the company adduced extensive affidavits from its legal counsel as to the basis for its claim of legal professional privilege. In determining the claim to legal professional privilege on the basis of agency, Jackett P. reviewed the full text of the affidavits of the company's solicitor. He concluded that, "on the balance of probability", the accountant and the general solicitor "were acting as representative of the appellant [client Susan Hosiery] for the purpose of obtaining legal advice"\textsuperscript{95}

\textsuperscript{91} \textit{Ibid.} at 684 (emphasis added).
\textsuperscript{92} The text of the affidavit is set out \textit{ibid.} at 675-76. In his judgment, Cotton L.J. stated: "We have not an affidavit by them stating the exact circumstances under which these communications passed, or on what ground they seek to protect them. Their case is put, as I understand it, in this way: It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must also be privileged." \textit{Ibid.} at 684 (emphasis added).
\textsuperscript{93} \textit{Ibid.} at 683 per Jessel M.R. The use of the word "sufficiently" is unfortunate, as it appears to contradict his previous conclusion that the mere desire of a solicitor to give better legal advice will not support an agency relationship.
\textsuperscript{94} Wilson abhors the conclusion in \textit{Wheeler}, since in his view all third-party communications for the purpose of seeking legal advice should be protected. He states, "In the broad context of solicitor-client privilege, as it is now construed by the Supreme Court of Canada, \textit{Wheeler} must be wrong and should not be followed in Canadian courts." (Wilson at 364) Watson and Au, in turn, applaud the decision in \textit{Wheeler} as "quite reasonable" in not affording protection to third parties. (Watson at 327) This writer concurs that \textit{Wheeler} was correctly decided given the lack of evidence before the court to support a claim of agency.
\textsuperscript{95} \textit{Hosiery, supra} note 9 at 5283.
from the tax lawyer concerning the business arrangement. Interestingly, Jackett P. commented:

I think the Court may take judicial knowledge of the fact that corporations of all kinds are continuously faced with problems as to what arrangements are advisable or expedient having regard to the intricacies of the tax laws and that, while huge corporations have staffs of lawyers and accountants of their own through whom they seek advice of counsel learned in such special areas of practice, smaller corporations employ lawyers and accountants in general practice to act for them in obtaining special advice in connection with such matters.96

Watson and Au reject the extension of agency to an accountant where that accountant brings his own professional expertise to bear on the subject of the legal advice. They reject the functional analysis in Susan Hosiery in favour of a blanket holding that accountants who are more than mere conduits for information cannot be agents, and argue that the Exchequer Court "conferred a separate privilege on accountant-client communications", contrary to Canadian law.97 Since they did not discuss the relationship between the accountant and the tax lawyer's ability to advise the client on an intricate business arrangement, or the court's factual findings in that regard, Watson and Au miss the point.98 The point is, since the court found the accountant to be an agent of the solicitor-client relationship on the facts, it did not confer a separate privilege upon the accountant-client relationship.

In General Accident Assurance Co. v. Chrusz, an insurer claimed privilege over the reports of an independent adjuster it had retained to advise its outside counsel on all matters relating to a suspected arson. The insurer subsequently paid out on the claim in part, but upon receiving additional information, commenced an action against the insured for filing a fraudulent proof of loss and to recover monies advanced. After finding that litigation privilege would not attach to the insurance adjuster's reports,99 the motions court judge turned to the question of agency and legal professional privilege. He correctly placed the onus on the insurer claiming legal professional privilege100 to show that an

96 Ibid. at 5283.
97 Watson and Au at note 161. It is unfortunate that their comments on Susan Hosiery regarding this issue are limited to a footnote.
98 Wilson's silence on the issue of agency in Susan Hosiery is unfortunate, but presumably relates to his thesis that third-party communications for the purpose of obtaining legal advice should be privileged, and therefore there is no need to resort to agency.
99 Because the litigation contemplated at the time was not the same as that which eventually arose: Chrusz (1997), 34 O.R. (3d) 354 at 378-79 (Gen. Div.).
100 The Court of Appeal in Chrusz reversed the decision of the Divisional Court on this issue. Doherty J.A. (dissenting in part) agreed that a third party could be clothed by solicitor/client privilege where their function was essential to the maintenance or operation of the solicitor/client relationship. Doherty J.A. concluded, on the evidence filed by General Accident, that no such finding could be made in that case. (See Chrusz supra per Doherty J.A. at 18 of his reasons). The majority concurred in the ruling of Doherty J.A. on this point. (See Chrusz supra per Cathy J.A. at 17 of his reasons).
independent insurance adjuster was its agent for the purpose of obtaining legal advice. Because the motions court judge did not have the documents over which privilege was claimed, he invited them to be admitted for examination:

If such examination were to reveal that in creating the document under review [the adjuster] somehow acted as agent (as herein defined) for General Accident for the purpose of obtaining legal advice and not as an independent contractor, that document would be protected by legal professional privilege. Although agency seems extremely unlikely, General Accident cannot be foreclosed from requesting the court to examine the documents.

Clearly, the motions court judge considered it possible that an insurance adjuster could be an agent for the purpose of obtaining legal advice, which would result in the adjuster’s reports being privileged even if litigation was not contemplated. He simply had insufficient evidence to make that ruling in Chrusz.

Indeed, on appeal the Divisional Court held that the adjuster was, in the circumstances of the case, an agent of the defendant insurer for the purposes of obtaining legal advice. It thereby clothed the adjuster’s reports with solicitor-client privilege. It is submitted that if the Divisional Court erred, it erred in finding sufficient evidence that the independent adjuster was an agent of the insurer, *i.e.* that the insurer has satisfied the burden of one claiming privilege. The Divisional Court did, however, correctly observe that one may be an agent for the limited purpose of obtaining legal advice, although independent in other respects:

It matters not that on occasion the adjuster could be described as an independent contractor. When he is appointed the specific person to act for the client in obtaining legal advice, then his communications are privileged in the same way as are those of the client.

Watson and Au criticize the Divisional Court’s decision in Chrusz. They argue that an independent insurance adjuster simply cannot be an agent because he is independent, and they warn of the dire consequences of such a finding. The Divisional Court refused to give effect to such *in terrorem* and circular reasoning, electing instead to assess the evidence presented in the case. The analysis cannot stop with a mere determination that a third party is “independent” from the solicitor/client. Rather, a functional analysis of the third party’s role and the nature of the impugned communications is required.

---


103 *Ibid.* at 796 (Div. Ct.).

104 *Quaere* if the distinction between agents and third parties stems from the nature of the external advice: fact-finding (insurance adjuster) vs. providing opinion and analysis (accountant). It may be that in 1881 surveyors were considered more akin to fact-finders than professionals, and that modern insurance adjusters are on the borderline. Although it can always be argued that fact-finding is integral to the solicitor-client relationship, same may not be so complex or “intricate” (*per* *Hosier*, *supra* note 9 at 5283) as to mandate assistance of a party outside the solicitor-client relationship.
Watson and Au state that the Divisional Court’s ruling, “if followed, could ‘run a truck through’ the “carefully crafted current law” regarding legal professional privilege, agents and third parties. However, there are precious few cases regarding legal professional privilege and agency, to date, the law cannot be said to be “carefully-crafted”. The courts have yet to formulate a definitive test for determining when an individual is an agent or a third party. In Wheeler, Jessel M.R. suggested that the necessity of the third party is key: for a third party to be found an agent to the solicitor-client relationship, he or she must be so vital that the lawyer would be unable to provide legal advice to the client without the third-party’s involvement. Of course, the court must always examine the relationship with the third party to determine that it is bona fide for the purpose of obtaining legal advice, and not simply an attempt to clothe communications with privilege via agency.

Watson and Au predict that extending solicitor-client privilege to third parties would give rise to abuses, enabling lawyers to simply broker confidentiality, and substantially reduce the quantum of information available for disclosure in litigation. The writer agrees that privilege should not be extended to true third parties, and readily concedes that there is a potential for abusing privilege by way of over-extension. However, the writer maintains that Watson and Au over-dramatize the risk of failing to adopt a rigid, exclusionary approach to agency for three reasons. First, they fail to recognize that not all unusual claims of privilege are improper claims. For instance, it would appear that the claim of privilege over investigation material in Upjohn Co. v. United States was both legitimately made and appropriately upheld. Secondly, they overlook the practical reality that many documents arising from third parties in the context of legal advice would not be kept confidential by the lawyer and client, and thus would lose the benefit of legal professional privilege. For instance, third party information in a corporate, commercial or securities transaction might be disclosed to other parties to the transaction, regulatory authorities, bankers and others.

---

105 Watson and Au at 318.
106 Watson and Au only discuss the three cases discussed in this section, which this writer accepts as the most prominent.
107 None of the cases indicate that a third party may only be an agent where he or she is a mere conduit of information, as Watson and Au suggest at note 161. Also, the authors who Watson and Au cite at 347 make some suggestions for determining between agents and third parties, but do not advance a definitive test.
108 Watson and Au at 321-22.
109 449 U.S. 383 (1981), discussed in Watson and Au at notes 29 and 33. In Upjohn, solicitor-client privilege was claimed over information from corporate employees, compiled for the purpose of obtaining legal advice, into the extent of corporate bribery and the tax consequences thereof. Clearly, such investigation was not in the corporation’s “ordinary business of life” (per Wheeler, supra note 82 at 681; see also Waugh, supra note 26). Cf. investigations by an independent insurance adjuster on behalf of an insurer in Chrusz.
110 This is contrary to fears Watson and Au express at 321 regarding such transactions.
Thirdly, and most importantly, Watson and Au discount Wilson’s assertion that courts could appropriately deal with perceived abuses by examining the *bona fides* of the legal advice obtained.\(^{111}\) They state, “Generally courts do not feel comfortable prying into the circumstances or content of the communications for which solicitor-client privilege is claimed.”\(^{112}\) This contention ignores the fact that courts currently engage in evaluating the reasons giving rise to a third party communication when applying the dominant purpose test with respect to litigation privilege,\(^ {113}\) and are entitled to examine documents with regard to impugned claims of privilege.\(^ {114}\) The judiciary will ensure that legal professional privilege is not stretched beyond endurance.

The Court of Appeal in *Chrusz* accepted the wisdom of this approach, and recognized that a third party could be an agent for the purposes of determining a claim of litigation privilege where their function was essential to the maintenance or operation of the solicitor and client relationship. The analysis of Doherty J.A., writing for the court on this point, bears repeating in its entirety:

I agree with the Divisional Court that the applicability of client-solicitor privilege to communications involving a third party should not be determined by deciding whether Mr. Bourret is properly described as an agent under the general of agency. I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party’s retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party’s retainer.

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is

---

\(^{111}\) Wilson Rebuttal at 553; Watson and Au at 352. Indeed, the tobacco company case referenced in the newspaper article Watson and Au cite at 32, and *R. v. McCarthy Tétrault* (1992), 12 C.P.C. (3d) 42 (Ont. Prov. Div.) which Watson and Au cite at note 33, evidence that courts will review the *bona fides* motivating a claim of privilege if asked to do so. The fact that Watson and Au dislike the outcome in *R. v. McCarthy Tétrault* is a matter of their judgment, not a matter of law or process.

\(^{112}\) Watson and Au at 352.

\(^{113}\) This contention would also appear to fly in the face of Watson and Au’s suggestion at 346 that Canadian courts adopt and apply a “good cause production” exception to litigation privilege, as set out in Rule 26(b)(3) of the U.S. *Federal Rules of Civil Procedure*. Good cause production requires a court to “openly exercise a discretion to overrule a claim of litigation privilege wherever “good cause” exists.” (Watson and Au at 344).

\(^{114}\) Rules 30.06, 34.15 and 30.04(6) of the *Rules of Civil Procedure*. 
retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

In drawing this distinction, I return to the seminal case of Wheeler v. Marchant, supra. In distinguishing between representatives of a client or a solicitor whose communications attracted the privilege and those whose communications did not, Cotton L.J. referred to representatives employed by a client "to obtain the legal advice of the solicitor." A representative empowered by the client to obtain that advice stood in the same position as the client. A representative retained only to perform certain work for the client relating to the obtaining of legal advice did not assume the position of client for the purpose of client-solicitor privilege.

I find support for my position in the definition of client-solicitor privilege adopted in Rule 502 of the American Revised Uniform Evidence Rules (1986 amendment). The rule recognizes that in some situations, communications from third parties to the solicitor of a client should be protected by client-solicitor privilege. Rule 502(2) defines "representative of the client" as:

... one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

The definition ties the existence of the privilege to the third party's authority to obtain legal services or to act on legal advice on behalf of the client. In either case the third party is empowered by the client to perform a function on the client's behalf which is integral to the client-solicitor function. The agent does more than assemble information relevant to the legal problem at hand.

This functional approach to applying client-solicitor privilege to communications by a third party is sound from a policy perspective. It allows the client to use third parties to communicate with counsel for the purpose of seeking legal advice and giving legal instructions in confidence. It promotes the client's access to justice and does nothing to infringe the client's autonomy by opening her personal affairs to the scrutiny of others. Lastly, it does not impair the lawyer's ability to give his undivided loyalty to the client as demanded by the adversarial process. Where the client retains the authority to seek legal advice and give legal instructions, these policy considerations do not favour extending client-solicitor privilege to communications with those who perform services which are incidental to the seeking and obtaining of legal advice.

Conclusion

The tug-of-war between the protecting the solicitor-client relationship and the quest for the truth continues.

This tug-of-war is more than an academic exercise for the judiciary, as it invokes the values underlying our system of justice and its administration. These values, and the policies engendered therefrom, shape the attitudes of judges called upon to decide cases involving solicitor-client privilege, and the approach of Rules Committees attempting to sub-legislate the regulation of the litigation process.

Solicitor-client privilege has a single goal: facilitating the orderly interaction of persons in Canadian society by making the rule of law accessible, i.e. understandable and of use, to those it governs. The two prongs of solicitor-client privilege share this objective: legal professional privilege renders laws
understandable by permitting individuals to consult freely with lawyers, the communicators of the rule of law, while litigation privilege permits individuals, through their lawyers, to best use the adversarial system by ensuring privacy for trial preparation. Confidentiality is the common thread of solicitor-client privilege. Rather than "inevitably impeding the truth-finding process", confidentiality encourages truth finding by enabling full and frank disclosure (legal professional privilege) and by permitting thorough trial preparation (litigation privilege).

As in any area of law, the development of solicitor-client privilege is organic. It therefore stands to be further refined. For instance, with regard to agency and legal professional privilege, clear principles have not yet taken root. While there is no call to exponentially expand the concept of agency, there is a need to better define who may constitute an agent of the solicitor-client relationship given the exigences of modern life and of contemporary legal practice. Chrusz has been argued in the Ontario Court of Appeal, and that court's decision will no doubt be of assistance in the development of this area.

Solicitor-client privilege must be given the scope and respect afforded to any other "fundamental civil and legal right."116: it should neither be narrowly construed nor readily truncated. Truncating the privilege, either on an incremental basis or by policy, in reliance on apprehended and unproved theory that it impedes the truth, contradicts clear pronouncements of our highest court. In other words, there is no demonstrated reason for radical change117 to the present legislative and judicial treatment of solicitor-client. While Watson and Au state that they are not advocating further truncation to the privilege, as Wilson alleges, their endorsement of the proposition that "privilege inevitably impedes the truth finding process", is the most eloquent statement to the contrary.118

115Watson and Au at 315.
116 Solosky, supra note 14 at 839 per Dickson J.
117 The writer refers to both Wilson's extension of legal professional privilege to third party communications and to Watson and Au's suggested adoption of the "good cause production" (see supra note 112).
118 Watson and Au at 353.