

PRIVILEGE ATTACHING TO CLAIMS ADJUSTERS' REPORTS: THE QUÉBEC EXCEPTION

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This article reviews Québec and Canadian law on privilege with regards to the work product of claims adjusters. The author focuses specifically on the unique situation that prevails in Québec, the only jurisdiction in Canada with a blanket rule deeming adjusters' reports to be privileged as a matter of course.

After a brief overview of the law of privilege and its rationale, the article demonstrates how the modern approach to litigation privilege has led courts throughout Canada to move away from earlier jurisprudence that prevented disclosure of claims adjusters reports and have embraced the "dominant purpose" test to determine on a case by case basis whether a report is indeed privileged.

The author argues in favour of the adoption of this same rule by Québec courts, considering that the principles governing litigation privilege in Québec are the same as in Canada's common law jurisdictions and that the "dominant purpose" test is applied in Québec in every area except insurance law.

Cet article se veut un survol du droit québécois et canadien en matière de privilège s'attachant aux documents préparés par un expert en sinistre. L'auteur traite plus particulièrement de la situation unique qui prévaut au Québec, la seule juridiction canadienne où les rapports des experts en sinistres sont réputés privilégiés.

Suite à un bref aperçu de l'état du droit en matière de communications privilégiées, l'auteur analyse l'évolution de la jurisprudence qui a conduit les tribunaux canadiens à l'extérieur du Québec à délaisser leur position traditionnelle empêchant la communication des rapports

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préparés par les experts en sinistre et à adopter le test de l' « objet prédominant » afin de déterminer au cas par cas si un rapport était ou non couvert par le privilège.

L'auteur favorise l'adoption de la même règle par les tribunaux québécois, d'autant plus que les principes applicables au Québec en matière de communications ayant trait à un litige sont identiques à ceux des juridictions canadiennes de common law et que le test de l' « objet prédominant » est suivi en droit québécois dans tous les domaines sauf en matière d'assurances.

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I. Introduction

One of the main hurdles facing litigators in Québec in cases involving an insurer is the principle according to which claims adjusters' reports, no matter how relevant to the determination of a case they may be, are privileged and thus protected against disclosure. This rule, which traces its genesis back to the late nineteenth century,¹ was crystallized in the 1980s in two decisions of the Court of Appeal, *La Prévoyance Cie d'Assurance v. Construction du Fleuve Limitée*² and *Gerling Global Cie d'assurance générale v. Sanguinet Express inc.*³, both routinely relied upon by the Superior Court and the Court of Québec to deny access to the work-product of adjusters.⁴

¹ See *Pacific Mutual Insurance Co. of New York v. Butters* (1873), 17 L.C.J. 309 (Q.B.); *Knapp v. City of London Insurance Co.* (1885), 29 L.C.J. 233 (Q.B.); and *Montreal Street Railway Co. v. Feigleman* (1913), 22 Q.B. 102.

² [1982] C.A. 532 ("*La Prévoyance*").

³ [1989] R.D.J. 93 (C.A.) (leave to appeal denied, [1989] 1 S.C.R. xiv) ("*Gerling Global*").

⁴ For recent examples, see *Sécurité nationale, Compagnie d'assurances v. Crane du Canada*, S.C. Montréal No. 500-22-027453-987, October 17, 2002, per Mayrand J.; *Zurich du Canada v. Collard*, C.Q. Chicoutimi No. 150-22-002473-004, June 3, 2002, per Lortie J.; and *Labonté v. Promutuel Val St-François*, C.Q. Saint-François No. 450-22-003407-013, October 24, 2002, per Théroux J.

As a result of these decisions and the Court of Appeal's silence in this area since *Gerling Global*, Québec is now the only jurisdiction in Canada with a blanket rule deeming adjusters' reports to be privileged as a matter of course. In every other province, as well as at the Federal Court level, courts have abandoned their earlier jurisprudence that prevented disclosure of such reports for reasons similar to the ones that still prevail in Québec in favour of the "dominant purpose" test to determine on a case by case basis whether a report is indeed privileged.⁵

The "dominant purpose" test was first enunciated by Chief Justice Barwick of the High Court of Australia in his minority opinion in *Grant v. Downs*⁶ and later applied by the House of Lords in *Waugh v. British Railway Board*.⁷ Under this principled, more modern approach, a party

⁵ Léo Ducharme, *L'administration de la preuve*, 3rd ed. (Montréal: Wilson & Lafleur, 2001), at no. 293.

⁶ (1976), 135 CLR 674 (H.C. Aust.) ("*Grant*").

⁷ [1980] A.C. 521 (H.L.) ("*Waugh*"). *Waugh* has been followed everywhere in Canada outside of Québec; see *inter alia*, in British Columbia: *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44*, [1981] 5 W.W.R. 91 (B.C.C.A.) ("*Voth*"); *Shaughnessy Golf & Country Club v. Drake International Inc.* (1986), 26 D.L.R. (4th) 298 (B.C.C.A.) ("*Shaughnessy*"); and *Hamalainen (Committee of) v. Sippola*, [1992] 2 W.W.R. 132 (B.C.C.A.) ("*Hamalainen*"); in Alberta: *Nova v. Guelph Engineering Co.* (1984), 80 C.P.R. (2d) 93 (C.A. Alta.) ("*Nova*"); *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1996), 135 D.L.R. (4th) 69 (C.A. Alta.) ("*Moseley*"); and *Whitehead v. Braidnor Construction Ltd.* (2001), 304 A.R. 72 (Q.B.); in Saskatchewan: *Standard Machine Ltd. v. Royal Insurance Co. of Canada* (1996), 150 Sask.R. 161 (Q.B.); *Côté v. Saskatchewan Crop Insurance Corp.* (2002), 220 Sask.R. 49 (Q.B.); and *Norsask Forest Products Inc. v. Lefort* (2003), 237 Sask.R. 185 (Q.B.); in Manitoba: *Levin v. Boyce* (1985), 19 D.L.R. (4th) 128 (Man. C.A.); and *Cross v. Assuras* (1996), 139 D.L.R. (4th) 473 (Man. C.A.) (leave to appeal denied, [1996] S.C.C.A. No. 502 (QL)); in Ontario: *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) ("*General Accident*"); and *Refco Futures (Canada) Ltd. v. American Home Assurance Co.*, [2004] O.J. No. 1720 (QL) (S.C.J.); in New Brunswick: *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); and *Janel Ouellet Design Inc. v. Desbiens* (1998), 207 N.B.R. (2d) 128 (C.A.) ("*Janel*"); in Prince Edward Island: *Griffin v. Prince Edward Regional Administrative Unit No. 3 School Board* (1988), 52 D.L.R. (4th) 574 (P.E.I.S.C.A.D.); and *Breau v. Naddy* (1995), 133 Nfld. & P.E.I.R. 196 (P.E.I.S.C.T.D.); in Nova Scotia: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S.S.C.A.D.); and *MacDonald v. Wellington Insurance Co.* (1992), 117 N.S.R. (2d) 398 (S.C.T.D.); in Newfoundland & Labrador: *Bradbury v. Cabot Insurance Co.* (1988), 70 Nfld. & P.E.I.R. 310 (N.S.C.T.D.); in the Northwest Territories: *Butterfield v. Dickson*, [1994] N.W.T.R. 228 (S.C.); in the Yukon: *Fred v. Westfair Foods Ltd.*, [2003] Y.J. No. 102 (QL) (S.C.); and before the Federal Court of Canada: *Commercial Union Assurance Co. PLC v. M.T. Fishing Co.* (1999), 162 F.T.R. 174 (affirmed, (1999), 244 N.R. 397 (F.C.A.)); and *Gonthier v. Canada (Minister of Justice)*, [2004] F.C.J. No. 794 (QL) (F.C.C.).

seeking to be relieved from disclosing a communication or document on the grounds of privilege bears the burden of establishing that such document was prepared for a *dominant* (as opposed to any lesser standard) purpose, which is itself privileged.

The following will examine the approach adopted by the House of Lords in *Waugh* and will demonstrate that this approach has in fact been applied throughout Canada in all areas and by the Québec Court of Appeal in all other areas than the insurance litigation context.⁸ It will also be shown how over the last two decades the exception to the law of privilege that deemed adjusters' reports to be privileged as a matter of course has disappeared in common law Canada and that there is simply no justification for Québec to remain an aberration.

II. *Privilege: General Principles*

The modern approach to litigation in Québec, as everywhere else in Canada, is grounded on the "principe maintenant bien établi qui veut que toutes facilités soient accordées à une partie d'obtenir au préalable l'accès le plus généreux à la preuve qu'elle entend utiliser à l'appui de ses prétentions."⁹ L'Heureux-Dubé J. echoed this view in *Frenette v. Métropolitaine (La)*,¹⁰ expanding on the necessity for full disclosure of all material facts and evidence at an early stage in the litigation process in order to allow the trial judge to make a decision based on the most complete record possible:

Central to the resolution of this last question is the balancing process through which the courts must weigh an individual's right to privacy and confidentiality of his or her medical records against *society's interest in an efficient administration of justice which encourages full disclosure of all material facts of a case at the pre-trial stage so as to give a defendant the opportunity to prepare a full and complete defence, and to allow a trial judge*, as stated by Denning L.J. in *Jones v. National Coal Board*, [1957] 2 Q.B. 55 (C.A.), at p. 63, "*to find out the truth, and to do justice according to law*". (See also Henry L. Molot, "Non-Disclosure of Evidence, Adverse Inferences and the Court's Search for Truth" (1971), 10 Alta. L. Rev. 45.) (page 666) (our emphasis)

⁸ See, *inter alia*, *Sous-ministre du Revenu du Québec v. Fava*, [1984] R.D.J. 486 (C.A.) ("*Fava*"); *Federal Insurance Company v. Lasalle*, [1985] R.D.J. 230 (C.A.) ("*Federal Insurance*"); *Société d'énergie de la Baie-James v. Lafarge Canada inc.*, [1991] R.J.Q. 637 (C.A.) ("*Lafarge*"); *Tenir ltée v. John Abbott College*, [1992] R.D.J. 35 (C.A.) ("*Tenir*"); and *Cie Montréal Trust du Canada v. 2732-1413 Québec inc.*, [2000] J.Q. No. 3277 (QL) (C.A.) ("*Montréal Trust*").

⁹ *Croteau v. Perrault Mathieu Cie ltée*, [1990] R.D.J. 217 (C.A.), at page 219.

¹⁰ [1992] 1 S.C.R. 647.

It is thus widely accepted that disclosure is the rule and confidentiality, the exception.¹¹ Any limits on a party's right to have access to relevant evidence in the other party's control must be narrowly circumscribed and strictly interpreted. As a result, a party seeking to be shielded from the production of relevant documents on the basis of a privilege must do more than baldly assert the application of that privilege: he (she) carries the evidentiary burden of demonstrating, on a balance of probabilities, that each document for which protection is sought was prepared for a dominant purpose to which a privilege attaches. Unless such evidentiary burden is met, no privilege may be recognized and the documents must be disclosed.¹²

As McLachlin J. (as she then was) explained in *A.M. v. Ryan*,¹³ privileges are creations of the common law and are exceptions to the general duty imposed on everyone to provide all evidence relevant to a matter brought for determination before a court "so that the truth may be ascertained":

The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth": *Tammel v. United States*, 445 U.S. 40 (1980), at p. 50. (paragraph 19)¹⁴

In *Ryan*, and four years later in *R. v. McClure*,¹⁵ the Supreme Court of Canada reaffirmed the distinction made at common law between "generic" privileges – that cover all communications falling within their ambit – and privileges that are recognized on a "case by case" basis, according to Wigmore's well-known criteria. As McLachlin J. wrote in *Ryan*:

¹¹ See, *inter alia*, *Lafarge*, at pages 645-646; and *Langevin v. Heroxx Logistix Inc.*, [2001] R.J.Q. 409 (S.C.), at page 411.

¹² *Trempe v. Dow Chemical of Canada Ltd.*, [1980] C.A. 571, at page 579; *Laprairie Shopping Centre Ltd. et al v. Pearl*, [1998] R.J.Q. 448 (C.A.), at page 460; and *Société d'énergie Foster Wheeler ltée v. Société intermunicipale de gestion et d'élimination des déchets inc.*, [2001] R.J.Q. 2461 (C.A.) (affirmed, [2004] 1 S.C.R. 456) ("*Foster Wheeler*"), at pages 2467-2470. See also *R. v. Hawker Siddeley Canada Ltd.*, [1977] 2 F.C. 162 (C.A.), at page 166.

¹³ [1997] 1 S.C.R. 157 ("*Ryan*").

¹⁴ See also *R. v. Gruenke* [1991] 3 S.C.R. 263, at page 295.

¹⁵ [2001] 1 S.C.R. 445 ("*McClure*").

While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries – categories that do not include communications between a psychiatrist and her patient – it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 286. The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), sec. 2285. *First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be “sedulously fostered” in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.* (paragraph 20) (emphasis added)¹⁶

Legal privileges, *i.e.* the privilege covering communications between a client or his (her) agent and a lawyer for the purpose of obtaining legal advice – or solicitor-client privilege¹⁷ – and the privilege attaching to exchanges made in the context of contemplated or ongoing litigation – or litigation privilege (also known as legal professional privilege),¹⁸ are

¹⁶ See also *McClure*, at paragraphs 26-29.

¹⁷ In *McClure*, Major J. described solicitor-client privilege as follows:

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented. (paragraph 2)

¹⁸ In “Claiming Privilege in the Discovery Process”, *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984), at page 163, R.J. Sharpe (as he then was) distinguished litigation privilege from solicitor-client privilege as follows:

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client). (pages 164-165) (references omitted)

two such forms of “generic” privileges.¹⁹ They have long been recognized and enforced at common law, first as a rule of evidence and, since *Solosky v. The Queen*²⁰ and *Descôteaux v. Mierzwinski*,²¹ as a substantive rule applicable even before any trial or judicial hearing is held.²² Although in Québec both privileges are covered by the broader notion of “professional secrecy” found at article 9 of the *Charter of Human Rights and Freedoms*,²³ legal privileges are an import from the common law and as such, decisions from other common law jurisdictions are most relevant to the determination of the scope of those privileges, especially since the *Charter* itself does not create privileges but merely grants a “quasi-constitutional” status to professional secrecy, as defined by the common law and statutory provisions.²⁴

III. Adjusters' Reports and Claims of Privilege

Claims of privilege in the insurance litigation context routinely arise where a party, acting against an insurer, seeks communication of an adjuster's report. Typically, such report will contain an appraisal of the damages, a statement describing the circumstances surrounding the incident, statements from the insured and potential witnesses as well as the adjuster's conclusions. It will normally form the basis for the determination of the indemnification to be paid by the insurer to its insured.²⁵

Adjusters' reports are commonly prepared at a time where it is still impossible to determine whether the claim investigated will eventually lead to litigation, or if the report will be communicated to the insurer's lawyers for their assistance and advice. In fact, a large number of insurance claims are resolved without the necessity to have recourse to litigation or for lawyers to get involved. As will be argued below, applying the dominant purpose test to these circumstances would

¹⁹ *Maranda v. Richer*, [2003] 3 S.C.R. 193 (“*Maranda*”), at paragraph 11.

²⁰ [1980] 1 S.C.R. 821.

²¹ [1982] 1 S.C.R. 860 (“*Descôteaux*”).

²² See also *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at page 383; *Smith v. Jones*, [1999] 1 S.C.R. 455, at paragraph 45; *McClure*, at paragraphs 23-25; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, at paragraph 14; and *Maranda*, at paragraph 12.

²³ R.S.Q., c. C-12 (the “*Charter*”).

²⁴ See, *inter alia*, LeBel J.'s detailed analysis in *Foster Wheeler* (S.C.C.), at paragraphs 18-29. See also Jean-Claude Royer, *La preuve civile*, 3rd ed. (Cowansville: Éditions Yvon Blais, 2003) (“*La preuve civile*”), at no. 1140; and *Descôteaux*.

²⁵ See the definition of “claims adjuster” found in section 10 of *An Act respecting the distribution of financial products and services*, R.S.Q., c. D-9.2.

normally mean that reports prepared by adjusters at the pre-litigation stage in the investigation of a claim are not covered by litigation privilege and are therefore accessible to the party seeking their communication in the course of future litigation, unless a separate privilege may be found to cover the work-product of claims adjusters.

The first step before determining whether adjusters' reports are privileged should thus focus on the opportunity for our courts to recognize an independent privilege protecting the insurer-adjuster relationship. Pursuant to the rule laid out in *McClure*, only certain types of relationships may attract the recognition of a generic form of privilege, *i.e.* those relationships that have traditionally invited such protection:

For a relationship to be protected by a class privilege, thereby warranting a *prima facie* presumption of inadmissibility, the relationship must fall within a traditionally protected class. Solicitor-client privilege, because of its unique position in our legal fabric, is the most notable example of a class privilege. Other examples of class privileges are spousal privilege (now codified in s. 4(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5) and informer privilege (which is a subset of public interest immunity). (paragraph 28)

The relationship between claims adjusters and insurers has not traditionally attracted the application of such a privilege separate from litigation privilege, and there is no indication by any court in Québec or Canada that such a privilege exists. This only leaves the possibility of a "case by case" privilege.

For a specific relationship to give rise to the application of a "case by case" privilege, it must meet Wigmore's fourfold test. In *McClure*, Major J. provided examples of *ad hoc* privileges that had been recognized by the courts: doctor-patient, psychologist-patient, journalist-informant and religious communications.²⁶ As will be examined in greater detail below, courts outside of Québec have specifically refused to recognize a distinct privilege covering adjusters' reports. Applying Wigmore's criteria, it would appear from that jurisprudence that although communications between claims adjusters and insurers may be confidential, such confidentiality is not essential to the adjuster-insurer relationship, there exists no public good warranting that this relationship be "sedulously fostered", and the interests served by protecting the work-product of adjusters from disclosure fails to outweigh the public interest in favouring disclosure of all relevant facts and disposing correctly of the dispute between the parties.²⁷

Nonetheless, in two recent cases, *Général accident compagnie*

²⁶ *McClure*, at paragraph 29.

²⁷ See, *inter alia*, *Shaughnessy*; *Nova*; *Moseley*; and *General Insurance*.

*d'assurances du Canada v. Ferland*²⁸ and *Sécurité (La), assurances générales v. Gravel*,²⁹ the Court of Québec, sitting in appeal from decisions of the Commission d'accès à l'information, relied on a liberal interpretation of article 9 of the *Charter* and the blanket rule concerning adjusters' reports applied by the Court of Appeal in *La Prévoyance* and *Gerling Global* and held that such reports were covered by a privilege separate from legal privileges. With respect, in light of *McClure*, those judgments appear to be inconsistent with the general approach that governs the recognition of *ad hoc* privileges by our courts and hence in *Charest v. Québec (Ministère de la Solidarité sociale)*,³⁰ the Superior Court expressly declined to follow those authorities, describing their underlying rational as flawed.

Although article 9 of the *Charter* provides that "[e]very person has a right to non-disclosure of confidential information" and extends that protection to information disclosed to any professional, it does not in and of itself create privileges, but rather prevents the disclosure of confidential information held by a "person bound to professional secrecy by law", such as professionals governed by the *Code of Professions*.³¹ Claims adjusters are not "professionals" and thus the *Code of Professions* has no application to them. Section 21 of the *Code of ethics of claims adjusters*³² does provide that "[a] claims adjuster must not disclose personal or confidential information he has obtained, other than in accordance with the Act, and he must not use such information to the detriment of his client or with a view to obtaining a benefit for himself or for another person",³³ yet such wording appears to fall short of creating a distinct category of privilege covering the work-product of adjusters.

In *Paul Revere, Compagnie d'assurance-vie v. Chaîné*,³⁴ an insurer was resisting disclosure of a report prepared by an investigation agency on the basis that it was covered by a privilege distinct from legal privileges and covered by article 9 of the *Charter*. Pauzé J. rejected the insurer's contention, finding that section 9 of *An Act respecting detective or security agencies*,³⁵ a provision similar to section 21 of the

²⁸ [1997] C.A.I. 446 (C.Q.).

²⁹ [2000] C.A.I. 408 (C.Q.).

³⁰ [2002] J.Q. No. 82 (QL) (S.C.).

³¹ R.S.Q., c. C-26. Section 60.4 provides for a general duty of "professional secrecy".

³² R.R.Q., c. D-9.2, r. 1.02.

³³ See also, to the same effect, section 199 of the *By-Law of the Conseil des assurances de dommages respecting market intermediaries in damage insurance*, R.R.Q., c. I-15.1, r. 0.4.

³⁴ [2000] R.J.Q. 1937 (C.Q.) ("*Paul Revere*").

³⁵ R.S.Q., c. A-8.

Code of ethics of claims adjusters, did not create a privilege covering documents prepared by investigation agencies, and that the scope of article 9 of the *Charter* was limited to the protection of communications between a client and a professional hired by him (her). In so ruling, Pausé J. warned of the distinction to be drawn between a duty of confidentiality and professional secrecy, the former not being equivalent to the latter.³⁶ As McCarthy J.A. stressed in *Federal Insurance*, “[q]ue le rapport ait été destiné à « un cercle très restreint de personnes » n’en fait pas une communication privilégiée, comme le prétendent les intimées.”³⁷

IV. *Claims Adjusters’ Reports and Litigation Privilege*

Failing the recognition of a separate privilege covering claims adjusters’ reports, insurers turn to litigation privilege. That privilege is an offspring of solicitor-client privilege, although it gained independent recognition based on a different rationale. As Sopinka, Lederman and Bryant wrote in *The Law of Evidence in Canada*:³⁸

As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor’s information for the purpose of pending or contemplated litigation. Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients’ freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case. [...] (page 653) (references omitted)

Given its origin and its purpose, only documents prepared for the actual purpose of litigation should be covered by litigation privilege so as not to hinder anymore than necessary the discovery of truth by the judge called upon to assess the merits of a case. As R.J. Sharpe (as he then was) wrote almost 20 years ago:

[...] The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect – the adversary process – among other things,

³⁶ *Paule Revere*, at pages 1942-1943.

³⁷ *Federal Insurance*, at page 232.

³⁸ (Toronto: Butterworths, 1992).

attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial. (*"Claiming Privilege in the Discovery Process"*, page 165)

V. The "Dominant Purpose" Test

As seen briefly above, the "dominant purpose" test, now the preferred approach for ruling on claims of privilege, made its entry into the common law as a result of the House of Lords' decision in *Waugh*. The Law Lords were dealing with a claim under the *Fatal Accident Acts* brought by the widow of one of the victims of a train accident. In the course of the discovery process, the widow sought disclosure of an accident report made two days after the events. The report contained signed statements by the defendant's employees and one of the purposes for which it had been prepared was submission to the train company's lawyers. Rejecting its prior jurisprudence which held that in order for a document to attract the application of litigation privilege, it was sufficient that one of the *substantial* purposes for its preparation had been litigation, the House of Lords held that a document would be privileged only where the *sole or predominant* purpose for its preparation had been its use by lawyers in the course of apprehended or ongoing litigation.³⁹ As a result, where it could be established that a document had two or more purposes, none of which was predominant, and even where one of those purposes was submission to lawyers for assistance in the course of litigation, such document was not privileged and had to be disclosed.⁴⁰ In the words of Barwick C.J., who in *Grant* enunciated the test adopted in *Waugh*, the criteria for privilege could be summed up as follows:

Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: *a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.* (page 677) (emphasis added)

³⁹ See Lord Wilberforce's speech, at pages 1172-1174. For a brief overview of the English caselaw leading to *Waugh* and its reversal by the House of Lords, see Dugas J.A.'s opinion in *Lafarge*, at pages 646-648.

⁴⁰ *Fava*, at pages 489-490; *Lafarge*, at pages 647-648; and *Montréal Trust*, at paragraphs 16-18.

Waugh was for the first time applied in Québec by the Court of Appeal in *Fava*, in the context of a tax appeal. Revenue Québec had taken the position that an audit report prepared by one of its auditors for the purpose of assessing a taxpayer was covered by litigation privilege and thus could not be communicated to the taxpayer in the course of an examination on discovery of the auditor. Revenue Québec was attempting to assert the privilege on the basis that the report, although prepared before any legal proceedings were instituted, might eventually be used by Revenue Québec's counsel in defending it against the taxpayer's appeal of the assessment. Rothman J.A., writing for Kaufman and L'Heureux-Dubé J.J.A. (as she then was), relied on *Waugh* to dismiss Revenue Québec's objection on the basis that the audit report was not prepared for the dominant purpose of ongoing or anticipated litigation. In fact, the report had at least one other important purpose, namely the preparation of the assessment to be issued against the taxpayer.⁴¹

A year later, in light of *Fava*, the Court of Appeal put into question its earlier jurisprudence in this area, and more specifically its decision in *La Prévoyance*. In *Federal Insurance*, the Court had to decide whether the communication of a report prepared for a municipality to determine the possible causes of a fire could be compelled in the context of an action for damage filed against the municipal authorities as a result of the fire. McCarthy J.A., delivering the judgment of the Court, applied the dominant purpose test and overruled the Superior Court's decision denying access to the report, stating that there was simply no evidence to the effect that the report had been predominantly prepared to assist the municipality's lawyers in the course of apprehended or ongoing litigation.⁴²

This principled approach to privilege, that places the burden on the party asserting it and insists on the *purpose* of the communication, as opposed to the identity of the parties involved, has been followed by the Court of Appeal ever since in every area, save in the insurance context.⁴³

VI. *The Law in Other Canadian Jurisdictions*

In every Canadian jurisdiction outside of Québec, the law is now settled: the onus is on the party claiming the application of litigation privilege to show that the dominant purpose for the preparation of a document the communication of which is sought was pending or

⁴¹ *Fava*, at page 489.

⁴² *Federal Insurance*, at page 232.

⁴³ See note 8 *supra*.

anticipated litigation, according to the test laid out by the House of Lords in *Waugh*, even when dealing with claims adjusters' reports. Courts outside of Québec have unanimously rejected their earlier jurisprudence that held otherwise and now refuse to grant any form of special status to documents prepared in the insurance context.

British Columbia was the first Canadian jurisdiction to adopt the test laid out in *Waugh*. The leading case on litigation privilege in that province is that of its Court of Appeal in *Shaughnessy*, drawing on its earlier decision in *Voth*, which had made applicable in that province the House of Lords' judgment in *Waugh*. Until *Voth*, the relevant criteria had been the substantial purpose of the communication, based on the older English caselaw and according to which it was sufficient for a document to be privileged that a substantial purpose for its creation had been anticipated litigation, thereby covering adjusters' reports as a matter of course since it was assumed that there was always a possibility that they would eventually be communicated to the insurers' lawyers for litigation purposes.

Shaughnessy involved an action arising out of the destruction by fire of the plaintiff's clubhouse building. The plaintiff's insurers had brought a subrogated claim against the defendant for having caused the fire. The issue before the Court was whether the insurers were entitled to invoke litigation privilege with respect to various adjusters' reports and like documents prepared for them in the course of the investigation that had followed the incident. Esson J.A., writing for the Court, noted at the outset:

Until a few years ago, there likely would have been no realistic basis for attacking the claim for privilege. But a significant change in the law was brought about by this court's decision in *Voth Bros. Construction (1974) Ltd. v. North Vancouver S. Distr.* (1981), 29 B.C.L.R. 114 in which the rule of "dominant purpose" laid down by the House of Lords in *Waugh v. Br. Railways Bd.*, [1979] 3 W.L.R. 150; 2 All E.R. 1169 was adopted. (page 302)

After reviewing the evidence, which consisted for the most part of affidavits sworn by the insurers' representatives and the adjuster as well as the transcripts of the cross-examinations of these individuals, Esson J.A. drew a distinction between the different types of reports that would be produced in the course of the investigation of an insured's claim: on the one hand, those documents created to settle the insured's claim, not covered by any form of "automatic" privilege, and, on the other hand, those reports specifically prepared for assistance of counsel in the course of ongoing or contemplated litigation and thus protected by litigation privilege. Esson J.A. added that the fact that a report had been produced where "suspicious circumstances" surrounded the event

having given rise to the claim did not mean that litigation would ensue in every case or that all such reports should be privileged.⁴⁴

Moreover, Esson J.A. was emphatic that “[...] there is no special rule applicable to adjusters’ reports”⁴⁵ and overruled the earlier jurisprudence to the contrary as follows:

That analysis [of the earlier jurisprudence], in my respectful view, gives insufficient weight to the essential question of the dominant purpose for the document coming into being and, in the context of adjusters’ reports, gives virtually no weight to the considerations in favour of open discovery which lie at the root of the change in the law brought about by *Voth* and the authorities upon which it is based. The emphasis on policy caused sight to be lost of the necessity for distinguishing among the reports in a case where the party claiming privilege, on its own evidence, ultimately conceded that some of the reports were not for the dominant purpose of assisting in litigation. (page 309)

Finally, Esson J.A. dismissed the analysis of McEachern C.J.S.C. (as he then was) in *Somerville Belkin Industries Limited v. Brocklesby et al.*,⁴⁶ where the Chief Justice had made an attempt to revert to the law as it stood before *Voth* and had held adjusters’ reports to be privileged as a matter of course:

In support of the decision in this case, the plaintiff referred to the recent decision of McEachern C.J.S.C. in *Somerville Belkin Industries Limited v. Brocklesby et al.* [1985] 6 W.W.R. 85 which decision, we were told, is presently under appeal. After referring to the large number of decisions which, since *Voth*, have considered whether adjusters’ reports are privileged, McEachern C.J.S.C. said at p. 88:

In each of these cases there was difficulty applying the principles established in *Voth* and I note five of them were taken to the Court of Appeal at great expense to the parties. It is time for this kind of litigation to come to a decent end if such can be accomplished within the authorities.

In my view it is permissible to state that adjusters’ reports and other documents prepared by them or as a result of their efforts or inquiries are privileged. I say this because litigation is always a reasonable prospect whenever there is a casualty, whether such litigation be between the insured and his insurer regarding indemnity, or between third parties and the insured, and the documents are created with litigation very much in mind. That is one of the predominant reasons for their creation. (page 88)

⁴⁴ *Shaughnessy*, at page 307.

⁴⁵ *Ibid.*, at page 308.

⁴⁶ [1985] 6 W.W.R. 85 (B.C.S.C.).

That is very similar to the approach taken in this case. It is one which is consistent with the law before Voth, when it was sufficient that the anticipation of litigation be a substantial consideration for the creation of the document. It is, with respect, not consistent with the rule laid down in Voth. The fact that litigation is a reasonable prospect after a casualty, and the fact that that prospect is one of the predominant reasons for the creation of the reports is now not enough. Unless such purpose is, in respect of the particular document, the dominant purpose for creating the document, it is not privileged. (pages 309-310) (emphasis added)

Shaughnessy was reaffirmed a few years later in *Hamalainen*, in the context of an action arising out of a motor vehicle accident. The Court had to deal with a claim for disclosure of certain adjusters' reports as well as a statement taken from a potential witness by one of the adjusters. Affidavits had been filed by the insurer's representative in charge of the investigation and one of the adjusters. These affidavits contained statements to the effect that from the moment the claim was received, there was a reasonable prospect that litigation would ensue and that as a result, the adjusters' services were retained in view of assisting counsel.

Wood J.A., writing for the Court, commented on the affidavits as follows:

Secondly, and more importantly, *both affidavits appear to be based on what I view as a significant error of law, namely the assumption that because litigation seemed likely the reports must necessarily have been prepared for the "principal purpose of assisting in the preparation for and the conduct of" such litigation.* This assumption is most clearly expressed in the highlighted portion of paragraph five of Nuthall's affidavit, but it underlies the often repeated conclusion to be found in both. *Quite apart from the error inherent in assuming such a nexus, the proposition quoted suggests that the principal purpose of a report must necessarily be its dominant purpose. That such is clearly not the case is evident from [...] Shaughnessy Golf Club [...].*(page 137) (emphasis added)

Wood J.A. then laid out the applicable test in circumstances such as these, stating that the onus was on the party claiming privilege to establish that on a balance of probabilities, each of the documents for which privilege was claimed met a two-pronged test:

- (a) Was litigation in reasonable prospect at the time it was produced, and If so, what was the dominant purpose for its production? (page 139)

In Wood J.A.'s views, it was not sufficient that there be a "reasonable prospect" of litigation for a document to be privileged and that even in situations where litigation was likely to arise, there was often an initial

period during which the dominant purpose of any investigation conducted or report prepared was mere “fact finding”, the documents emanating therefrom not being privileged.⁴⁷

Moving eastward, in *Moseley*, the Alberta Court of Appeal had to examine a situation where disclosure of a statement made by an insured to a claims adjuster following a serious accident was opposed by the insurer. The latter was of the view that litigation privilege attached to the statement since in the case of accidents causing serious bodily injury, “litigation is virtually always contemplated and the dominant purpose is always the first step in preparation of eventual contemplated litigation.”⁴⁸

After examining the adjuster’s role in the case before him, Conrad J.A. stressed that the rationale behind the recognition and protection of litigation privilege was to allow the parties to freely prepare their case for judicial determination:

The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created particularly to prepare one’s case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation. As a rule, this preparation will be orchestrated by a lawyer, though in some cases parties themselves will initiate certain investigations with a view to providing information for the “lawyer’s brief”. The litigation may already be pending or simply contemplated. [...] Thus *at the time of creation*, preparation for litigation must be the dominant purpose. (pages 75-76) (emphasis in the original)⁴⁹

Conrad J.A. then rejected the insurer’s contention that *Waugh* should not be applied in the insurance context. Advancing arguments that had been rejected in British Columbia in *Shaughnessy*, the insurer was arguing that an adjuster’s report was always prepared in contemplation of litigation, to deal either with the claim to be advanced by the insurer’s own insured or with a third party claim. That proposition laid at the core of the Alberta Court of Appeal’s decision in *Bourbonnie v. Union Insurance Society of Canton, Ltd.*,⁵⁰ a case predating *Waugh*. Conrad J.A. dismissed the insurer’s contention on the basis of the more recent decision of *Nova* where “this court recognized that those English authorities relied upon in *Bourbonnie* had been displaced by *Waugh*.

⁴⁷ *Hamalainen*, at page 140.

⁴⁸ *Moseley*, at page 71.

⁴⁹ See also the opinion of Le Bel J.A. (as he then was) in *Kruger Inc. v. Kruco Inc.*, [1988] R.J.Q. 2323 (C.A.), at pages 2325-2326.

⁵⁰ (1959), 19 D.L.R. (2d) 445 (C.A. Alta.).

The *Nova* decision went on to expressly overrule *Bourbonnie*, and in doing so the court set out the governing rule.”⁵¹ This new rule had been formulated by Stevenson J.A. (as he then was) in *Nova* as follows:

[...] I do not see any real impediment to the functioning of the adversary system in restricting this rule of privilege as the House of Lords has done [in *Waugh*]. The only case for exclusion which can be made is for documents which were brought into existence by reason of an intention to provide information to solicitors. That this is an object is insufficient — such a test provides a cloak where other purposes predominate. Such a test would clothe material that probably would otherwise have been prepared, and otherwise not privileged, with a privilege intended to serve a narrow interest. Such a test conflicts with the object of discovery today which is to disclose material provided for other purposes. It would be possible to formulate other tests, but in the interest of uniformity as well as for the reasons expressed by the House of Lords, I would adopt the dominant purpose test.

[...] Legal professional privilege, today, can only be justified on the basis of the adversary system. That system accommodates a broad discovery process. The rules today permit extensive examination of employees and the discovery of information in the hands of agents and employers. Legal professional privilege should be examined in that light and when so examined should be given the narrow rather than the broader scope. (pages 101-102)

Conrad J.A. added that the test was a “strict one” and that “litigation privilege will not automatically apply to statements taken or reports made by insurance adjusters investigating serious personal injury accidents.”⁵² Moreover, he specifically warned against recourse to “all or nothing” rules in the area of privilege, holding that “it is inappropriate to set down rules that specific fact situations — for example insurance adjusters’ investigations of serious accidents — always (or never) give rise to litigation privilege”⁵³ and that “[e]ach case will turn on its own facts.”⁵⁴

After examining the evidence available to the chamber’s judge, Conrad J.A. concluded:

[...] Ultimately, there is nothing in the evidence to indicate that at any stage of the taking of the statement, the dominant purpose of the respondents for having a statement taken was for use in or preparation for litigation. *That purpose cannot be determined from subsequent events which indicate that the statement is now useful for litigation.*

⁵¹ *Moseley*, at page 76.

⁵² *Ibid.*, at page 77.

⁵³ *Ibid.*, at page 78.

⁵⁴ *Ibid.*, at page 79.

[...] *Even if the statement of the adjuster indicates he thought there might be litigation, it would be only one purpose — not the dominant one. These facts fall short of satisfying the test spelled out in Nova that “[t]he only case for exclusion which can be made is for documents which were brought into existence by reason of an intention to provide information to solicitors.”* It follows that litigation could not have been a dominant purpose on these facts [...]. (pages 79-80) (emphasis added)

This approach has also been followed by the New Brunswick Court of Appeal. In *Janel*, the Court was dealing with a case arising out of a fire in the basement of a commercial property. The insured was suing his insurer for denying coverage. A claim of privilege was made by the insurer regarding the documents prepared by a claims adjuster. Ryan J.A., writing for Daigle C.J.N.B. and Larlee J.A., held as to the application of the “dominant purpose” test:

[...] In order to be dominant it must be the principal or controlling purpose and, most of all, the evidence must support this chief purpose. Here, it does not.

In *McCaig and McCaig v. Trentowsky* (1983), 47 N.B.R. (2d) 71 this court held that where the adjuster’s reports serve a dual purpose the evidence must show, on a balance of probabilities, that the dominant purpose in their preparation was for submission to a solicitor in contemplation of litigation. In coming to this conclusion, the New Brunswick Court of Appeal relied upon the approach approved by the House of Lords in *Waugh v. British Railways Board*, [1980] A.C. 521. [...] (page 139)

Finally, in *General Accident*, the Ontario Court of Appeal was the last Canadian jurisdiction outside of Québec to reject its earlier jurisprudence and to embrace *Waugh*’s “dominant purpose” test. Carthy J.A., writing for the majority, first recognized the trend toward broader and better discovery:

[...] *The modern trend is in the direction of complete discovery* and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.

Our modern rules certainly have truncated what would previously have been protected from disclosure. [...] (pages 331-332)

Carthy J.A. also stressed the evolving nature of privileges:

In a very real sense, litigation privilege is being defined by the rules as they are amended from time to time. Judicial decisions should be consonant with those changes and should be driven more by the modern realities of the conduct of litigation and perceptions of discoverability than by historic precedents born in a very different context. (page 332)

Rejecting the older case of *Blackstone v. Mutual Life Insurance Co. of New York*,⁵⁵ Carthy J.A. joined the other appellate authorities in adopting the dominant purpose test as formulated in *Waugh* and did so did so on “policy considerations of encouraging discovery.”⁵⁶

Moreover, Carthy J.A. rejected the idea that an insurer only had recourse to claims adjusters where it was more likely than not that litigation would ensue since he recognized that there existed a plethora of situations where an adjuster would be hired without litigation being contemplated:

In my view, an insurance company investigating a policy holder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be that negotiations and even litigation will follow as to the extent of the loss but until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured. (page 338)

In light of the above, it is clear that disclosure of all relevant evidence at the earliest possible stage in the litigation process in order to avoid “surprises” and “trial by ambush” has now assumed a central role in litigation everywhere in Canada. As Rothman J.A. wrote in *Fava* 19 years ago, “[i]n my view, the trend towards more liberal disclosure of evidence is no less evident in Canada and in Quebec than it is in England.”⁵⁷ In light of the developments that have taken place in the jurisprudence of the last two decades in courts throughout Canada, documents and reports prepared for insurers should not benefit from a more favourable treatment than any other relevant piece of information in a party's hands.

VII. *Québec's Stumbling Block: Gerling Global*

The main obstacle to the application of the “dominant purpose” test in the insurance litigation context in Québec is the Court of Appeal's

⁵⁵ [1944] O.R. 328 (C.A.).

⁵⁶ *General Accident*, at page 333.

⁵⁷ *Fava*, at page 491.

decision in *Gerling Global*, where it had to determine whether a claims adjuster's report was covered by litigation privilege. Dubé J.A., writing for the Court, after mentioning *Fava*, overturned the Superior Court's decision forcing disclosure of the report, stating "je crois que dans le présent cas, il n'y avait aucun motif de s'écarter de la jurisprudence générale concernant les rapports d'ajusteurs d'assurance et de suivre comme il [the first judge] l'a fait la jurisprudence particulière établie pour *Federal Insurance Company* dans un cas tout à fait différent du présent."⁵⁸

With respect, this last comment seems to have been based on a narrow a reading of the Court of Appeal's decisions in *Fava* and *Federal Insurance* that ill-accords with McCarthy J.A.'s remarks in the latter case where he appeared to reject the earlier jurisprudence of the Court as found in *La Prévoyance*, to the extent of its inconsistency with *Waugh* and *Fava*:

Même si cet arrêt [*La Prévoyance*] sert peut-être d'appui aux intimés dans le présent cas, il faut tenir compte de l'évolution considérable du droit depuis 1952 [sic] que souligne M. le juge Rothman, dont l'opinion est partagée par M. le juge Kaufman et Mme le juge L'Heureux-Dubé, dans l'affaire *Fava*. Effectivement, même s'il est dans l'intérêt de la justice de faciliter la libre communication entre client et avocat, les communications privilégiées représentent, ne l'oublions pas, des exceptions aux règles générales de la preuve. Il est encore plus dans l'intérêt de la justice de faciliter la divulgation au tribunal de toute circonstance pertinente au litige. (page 233) (references omitted)

Moreover, in *Gerling Global*, there appeared to be no evidence tendered by either party that would establish the purpose of the report sought to be disclosed, or at least none was mentioned by the Court of Appeal. Moreover, the insurer claiming privilege was the defendant in warranty in the main action and it thus appears that the adjuster's report would have been prepared at a time when the insurer was already involved in litigation. There is no question that such report would have been privileged as it would have clearly been prepared for the purpose of pending litigation, thereby meeting the test laid out in *Fava*.⁵⁹

In spite of these distinguishing factors and McCarthy J.A.'s comments in *Federal Insurance*, *Gerling Global* is frequently cited by counsel and judges alike in justifying the denial to disclose adjusters' reports. Given what precedes and the fact that all jurisdictions outside of Québec have moved away from the claims adjusters' "exception", there appears to be no reason why *Gerling Global*, which is based on

⁵⁸ *Gerling Global*, at page 96.

⁵⁹ See the opinion of Gendreau J.A., writing for LeBel (as he then was) and

principles predating *Waugh* and *Fava* that have been rejected elsewhere, should remain applicable in Québec.

VIII. Conclusion

In the final analysis, the mere fact that an insurer may eventually be subrogated in the rights of its insured against a third party pursuant to articles 2474 and 2620 of the *Civil Code of Québec*⁶⁰ does not create any additional rights in favour of that insurer,⁶¹ nor is it an indication that an adjuster's report will necessarily be used by counsel in the course of litigation or that such potential use is, as a matter of course, the dominant purpose for its creation.

A privilege attaching as a matter of course to adjusters' reports runs afoul of the fundamental right of litigants to have access to all relevant evidence to prepare their case as its direct effect is to limit the documents to which a party may have access. In so doing, it often prevents the trier of fact from reaching the truth of the matter. This danger is heightened in the case of insurance litigation in that, according to *Gerling Global* and its progeny, a whole class of litigants who routinely appear before our courts – namely insurers – are shielded from ever disclosing evidence that may be crucial to the resolution of a dispute, thereby hindering the discovery of truth and placing litigants opposing insurers at a clear disadvantage.

There is no question that this is an area of the law that needs to be modernized and put into step with the jurisprudence of the Court of Appeal laid out in *Fava* and applied everywhere else in Canada.⁶² Indeed, there is a clear need for a strong statement by the Québec Court of Appeal that the “dominant purpose” test applied on the basis of the evidence tendered by the parties – as opposed to broad generalizations that do not take into account the specific circumstances of a case – must be followed where a court is called upon to rule on a claim of privilege. There should be no room for artificial exceptions not born out of any principled approach, especially in light of the trend toward broad disclosure which guides the courts both in this province and throughout Canada.

Tourigny J.J.A., in *Marcoux v. Union commerciale du Canada*, [1993] R.J.Q. 2034 (C.A.), distinguishing *Gerling Global*, at page 2037.

⁶⁰ S.Q. 1991, c. 64 (the “C.C.Q.”).

⁶¹ Article 1651 C.C.Q.

⁶² See the comments of Royer in *La preuve civile*, at no. 1149.

