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SOLICITOR-CLIENT PRIVILEGE AND THE CONFLICT OF LAWS

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Canadian courts have traditionally viewed solicitor-client privilege as a matter of procedure that is governed by the laws of the forum. However, in a series of decisions rendered outside the conflict of laws context, the Supreme Court of Canada has held that the privilege is also a matter of substance. This raises the possibility of a new "substance-based" choice of law rule that would require Canadian courts to apply foreign privilege laws. The author concludes that the traditional lex fori rule remains the preferable one, but that it should be justified on public policy grounds rather than the forum's control over procedure.

Traditionnellement, la perspective des tribunaux canadiens à l'égard du secret professionnel constituait une question de procédure régie par les lois du for. Toutefois, dans une série de décisions rendues par la Cour suprême du Canada, dans un contexte autre que celui du conflit de lois, la Cour soutient que le privilège est également une question de fond. Cette optique entraîne la possibilité d'une nouvelle règle fondée sur le choix de la loi applicable selon le fond, exigeant ainsi que les tribunaux canadiens mettent en application des lois internationales portant sur le privilège. L'auteur conclut au maintien de la règle traditionnelle lex fori, à la condition qu'elle soit fondée sur des raisons d'ordre public plutôt que sur le simple désir qu'elle soit gérée par le tribunal ayant juridiction.

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> Ford argues simply that privileges are substantive and therefore the law of the state with the most significant relationship to the particular issue applies; the Whites argue just as simply that privileges, like rules of evidence, are procedural, and therefore the law of the forum applies. The reality is more complicated.[1]

1. Introduction

The treatment of solicitor-client privilege in the conflict of laws has always been a neglected topic.[2] Neither the Supreme Court of Canada, nor any other Commonwealth court of final appeal, has addressed the issue. The few decisions in this area offer a comparatively Spartan analysis, and academic literature in this country is scant.[3]

This lack of attention is surprising. Questions of privilege are both ubiquitous and of great importance to the legal system. Further, there are significant differences between how the laws of privilege are applied among different jurisdictions.[4] The recent decision of the European Court of Justice in *Akzo Nobel Chemicals Ltd v European Commission*, holding that solicitor-client privilege does not extend to communications with

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1 *Ford Motor Co v Leggat*, 904 SW 2d 643 at 646 (Tex 1995) [*Ford*].

2 By "solicitor-client" privilege is meant the form of privilege sometimes known as "legal advice" or "attorney-client" privilege (i.e. communications between solicitor and client for the purpose of giving or seeking legal advice). The other form of privilege sometimes associated with solicitor-client privilege, "litigation" privilege, is not intended to be captured by this expression. For a discussion of the distinction between these two forms of privilege, see *Blank v Canada (Minister of Justice)*, 2006 SCC 39, 2 SCR 319 [*Blank*].

3 See Adam Dodek, "Solicitor-Client Privilege in Canada: Challenges for the 21st Century" (Discussion Paper for the Canadian Bar Association, February 2011) [unpublished] at 32, who observes that Canadian courts "have not begun to grapple" with this issue.

4 The choice of law question does not arise unless there are material differences between the privilege laws of the jurisdictions in question; see *Kuwait Airways Corp v Iraqi Airways Co (No 6)*, [2002] 2 AC 883 (HL) at para 15 [*Kuwait Airways*]; and *In re: Teleglobe Communications Corp*, 493 F 3d 345 at 358-59 (3rd Cir 2007) [*Teleglobe*]. However, such differences are common: see Christopher F Dugan, "Foreign Privileges in US Litigation" (1996) 5 J Int'l L & Prac 33 at 41-42; James McComish, "Legal Professional Privilege: A New Problem for Australian Private International Law" (2006) 28 Sydney L Rev 297 at 300-10; and Dodek, *supra* note 3 at 15-29 and 53. Even within the United States, there are significant differences regarding the scope of attorney-client privilege and the principles that apply to its waiver: see Stewart E Sterk, "Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems" (1977) 61 Minn L Rev 463, n 8. Similar differences have also been noted among the European states; see *Akzo Nobel Chemicals Ltd v European Commission (C-550/07)*, [2011] 2 AC 338 (ECJ (Grand Chamber)) at paras 70-72 [*Akzo Nobel*].

in-house counsel, offers a stark illustration of this phenomenon.[5] Given the increasing prevalence of multinational litigation, it is likely that a growing number of disputes over the governing law of privilege claims will find their way before Canadian courts.[6]

At present, however, the choice of law rules for privilege are mired in uncertainty. This derives from the fact that, traditionally, Anglo-Canadian conflicts jurisprudence has focused upon the distinction between substance and procedure when addressing the governing law of privilege. The rule which emerged was that solicitor-client privilege, by virtue of its connection to the broader law of evidence, was a matter of procedure. Consequently, the privilege was a matter to be determined by the laws of the forum (*lex fori*) in any case involving a foreign element.

Despite this case law, several Supreme Court of Canada decisions have rejected the view that privilege is only a procedural rule of evidence. Instead the Court has held that solicitor-client privilege is also a substantive rule of fundamental importance to the Canadian legal system. While these cases were decided outside the conflict of laws context, they have begun to destabilize the traditional choice of law rule for privilege, and leave it ripe for review.

Drawing on these and similar developments abroad, some commentators have suggested that the traditional "procedure-based" choice of law rule should be abandoned. In its place, they have proposed that courts adopt one of several "substance-based" choice of law rules, similar to those developed in the United States. These substance-based rules condition the governing law of solicitor-client privilege upon various connecting factors, such as the place with the most significant relationship

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5 *Akzo Nobel*, *ibid* at paras. 40-51. Compare *R v Campbell*, [1999] 1 SCR 565 at para 50 [*Campbell*]; and *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31at paras 19-21 and 28, 1 SCR 809 [*Pritchard*].

6 The choice of law problem for solicitor-client privilege may arise in many different ways, with varying degrees of complexity. Consider, for instance, if the lawyer is situate in Toronto, the client in Quebec, and the subject of the legal advice is a transaction with a BC party concerning property situate in Alberta. If the counterparty were to bring a dispute over the transaction in a BC court, what jurisdiction's law of privilege would apply? Similarly, what privilege law would apply if the client were a New York resident charged with a criminal offence in Canada, and he or she sought to challenge a search warrant issued to obtain emails between the client and a California attorney, called to the New York bar, which are stored in a Toronto lawyer's office? What if the client was a multinational conglomerate, whose employees in different jurisdictions obtained legal advice from a team of cross-border lawyers working for a global law firm, with respect to parallel antitrust litigation in Europe, Canada and the United States?

to the communications, or the place with the greatest interest in the application of its own privilege laws.

It is the thesis of this paper that a substance-based choice of law rule should be rejected. The Supreme Court of Canada has repeatedly emphasized that solicitor-client privilege must remain as close to absolute as possible, and cannot depend upon a case-by-case balancing of interests. Yet this is precisely what would occur if courts were to adopt a substance-based rule that requires them to weigh multiple connecting factors in order to determine the governing law of privilege claims. Further, many of the substance-based rules are designed to protect the expectations of the solicitor and the client. The primary rationale for solicitor-client privilege is not, however, to protect the expectations or even the rights of individual parties, but to facilitate the administration of justice as a whole. Indeed, a substance-based rule that requires courts to apply foreign privilege laws may raise constitutional concerns in Canada, where control over the administration of justice – and hence over the privilege itself – appears to lie within the jurisdiction of the forum province under section 92(14) of the *Constitution Act, 1867*.[7]

Rather than approach the choice of law issue from within the procedural/substantive debate, it would be preferable for Canadian courts to openly address the public policy interests at play. Three such interests are of particular importance here. First, there is a strong public policy interest in the disclosure of all relevant information in legal proceedings. Applying a foreign privilege law that is not recognized in the forum would be contrary to that policy. Second, there is an even stronger public policy interest in protecting the integrity of the solicitor-client relationship. Declining to apply a forum's privilege law because it is not recognized in a foreign state could undermine that relationship in the forum itself, and thus be contrary to public policy as well. Third, there is a comity interest in deferring to the laws of the jurisdiction with the strongest connection to the claim of privilege. However, comity is neither an absolute obligation, nor an end in itself, and cannot require courts to act in a way that is contrary to the public policy of the forum. In situations where the forum has a strong public policy in the application of its own law regardless of the content of the foreign one, the demands of comity are muted.

The result of this analysis is a reaffirmation of the *lex fori* rule. This rule offers the certainty and simplicity of the traditional rule that characterized privilege as solely procedural. But unlike the traditional rule, it is firmly anchored in the modern view that solicitor-client privilege is

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7 (UK), 30 & 31 Vict, c 3, Reprinted in RSC 1985, App II, No 5.

also a "civil right of supreme importance in Canadian law."[8] Thus, instead of resting upon the outmoded notion that the privilege is only a matter of evidence, it proceeds from a secure doctrinal footing, and accurately reflects the major public policy interests at play.

In the discussion that follows, I first review the traditional choice of law rule for privilege. Thereafter, I consider the problems with the *lex fori* rule, and the alternative substance-based rules that have been formulated to replace it. Finally, I offer a critique of these substance-based rules, and argue why the *lex fori* rule should continue to apply based on public policy.

2. The Traditional Choice of Law Rule

In cases where an action is brought in a Canadian court that involves claims governed by the laws of a foreign jurisdiction, the general rule is that matters of procedure, as opposed to substance, will continue to be governed by the laws of the forum.[9]

Traditionally, Anglo-Canadian courts have classified solicitor-client privilege as a matter of procedure rather than substance. Indeed, even today the leading Canadian and English commentators on the conflict of laws are unanimous in the view that whether a witness may claim privilege in a legal proceeding is a matter of procedure, and is therefore to be determined by the law of the forum.[10]

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[8] *Lavallee, Rackel & Heintz v Canada (AG)*, 2002 SCC 61 at para 36, 3 SCR 209 [*Lavallee*].

[9] *Livesley v E Clemens Horst Co*, [1924] SCR 605 at 608 [*Livesley*]; *Regas Ltd v Plotkins*, [1961] SCR 566 at 571-72; *National Gypsum Co v Northern Sales Ltd*, [1964] SCR 144 at 150; *Tolofson v Jensen*, [1994] 3 SCR 1022 at 1049 and 1067- 68 [*Tolofson*]; *Club Resorts Ltd v Van Breda,* 2012 SCC 17 at para 111, SCJ No 17 (QL) [*Van Breda*]. In considering whether a given legal rule constitutes a matter of substance or procedure, the courts of the forum will apply the forum's own conflict of laws principles; see *Traders Finance Corp v Casselman*, [1960] SCR 242 at 248 [*Traders*]; and *Vogler v Szendroi*, 2008 NSCA 18 at para 26, 290 DLR (4th) 642 (NSCA), leave to appeal refused, [2008] SCCA No. 171 [*Vogler*].

[10] See Janet Walker, *Castel & Walker's Canadian Conflict of Laws*, 6th ed, looseleaf (Markham, Ont: LexisNexis Canada Inc, 2005+) vol 1 at 6-5, para 6.3c; Lawrence Collins, ed, *Dicey, Morris and Collins on The Conflict of Laws*, 14th ed (London: Sweet & Maxwell, 2006) vol 1 at 184 and 188, paras 7-015 and 7-025; *Halsbury's Laws of Canada: Conflict of Laws* (Markham, Ont: LexisNexis, 2006) at 475, para 116; and *Halsbury's Laws of England*, 5th ed, (London: LexisNexis, 2011) vol 19 at 212, para 320. See also Richard S Pike, "The English Law of Professional Privilege: A Guide for American Attorneys" (2006) 4 Loy U Chi Int'l L Rev 51 at 85-86. The issue is not directly addressed in the other leading Canadian conflicts text, Stephen Pitel and Nicholas Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) (though at 41-42, the authors do discuss the interesting ruling in *R v Spencer*, [1985] 2 SCR 278 [*Spencer SCC*],

Perhaps the leading case in this regard is *Lawrence v Campbell*.[11] In *Lawrence*, the issue was whether communications between Scottish solicitors practicing Scottish law in England,[12] and their Scottish client in Scotland, were protected from documentary production on the basis of solicitor-client privilege.[13] The Court was required to consider this question in circumstances where the plaintiff brought an action in England against both the Scottish client and the Scottish solicitor (alleging that the latter held the debts in trust for him), and English law, but arguably not Scottish law,[14] would have recognized the privilege and prevented documentary production.

Kindersley VC held that the communications were privileged from production, since the governing law was that of England rather than Scotland. He stated:

> … sitting in an English Court, I can only apply the English rule as to privilege, and I think that the English rule as to privilege applies to a Scotch solicitor and law agent practising in London, and therefore the letters in question are privileged from production.[15]

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discussed below). Somewhat curiously, the case which many of the commentators cite for this proposition is *United States of America v McRae* (1867), 3 Ch App 79 (CA) [*McRae*]. However, *McRae* merely holds, at 87, that the law of the forum governs the common law privilege against exposure to penalties, not the law of the jurisdiction in which the exposure to penalties may occur. Because *McRae* was not concerned with solicitor-client privilege, it cannot serve as a reliable guide to the issues in this area.

11 (1859), 62 ER 186, 4 Drew 485 [*Lawrence*]. Along with *Lawrence*, two other early English decisions are sometimes cited in connection with the proposition that the governing law of privilege is the law of the forum; see *Bunbury v Bunbury* (1839), 48 ER 1146, 2 Beav 173; and *Macfarlan v Rolt* (1872), LR 14 Eq 580. However, while the courts in these decisions appear to have assumed that this was the rule in relation to legal advice provided by foreign lawyers, neither engaged in any substantive analysis of the matter.

12 Though the defendants were not admitted to practice as English solicitors, they were entitled to appear before the House of Lords; see *Lawrence*, *ibid* at 485 and 488.

13 The communications apparently related to debts that were governed by English law; see *ibid* at 490.

14 Counsel for the plaintiff sought to rely upon the Scottish *res gestae* exception to privilege, but counsel for the defendants argued that this exception did not apply in England; see *ibid* at 487-88. As noted in *Kennedy v Wallace* (2004), 208 ALR 424 (FCA) at para 43 [*Kennedy*], aff'd (2004), 213 ALR 108 (FCAFC) [*Kennedy FC*], this submission by defendant's counsel that Scottish law did not recognize the privilege was, in a somewhat "puzzling" development, not "properly addressed" by the Court.

15 *Lawrence*, *ibid* at 491; see also *United States of America v Mammoth Oil Co*, [1925] 2 DLR 966 (Ont CA) at 966-67 and 977-78 [*Mammoth*], where the Court distinguished *Lawrence*, but without rejecting the *lex fori* rule.

The decision in *Lawrence* was later applied in *In re Duncan*.[16] Unlike *Lawrence*, which dealt with communications between a foreign client and a domestic (albeit foreign-qualified) solicitor, *Duncan* dealt with communications between a domestic client and a foreign solicitor. The litigation in *Duncan* involved a challenge to a foreign will by the plaintiff, an executor who was named under some of the testator's earlier foreign wills. Prior to contemplating proceedings in England, the plaintiff commenced proceedings on the European continent to challenge the will. He then made communications to his foreign legal advisers relating to the European proceedings.

At issue before the Court was whether those communications were privileged from discovery in the context of the English action. The defendant argued that the plaintiff was incapable of asserting privilege, on the ground that such privilege was not recognized in the foreign lawyers' jurisdiction, which was said to represent the governing law of the privilege.[17]

Ormrod J found this argument inconsistent with *Lawrence*, and held that the plaintiff was entitled to assert solicitor-client privilege over his communications with foreign lawyers. In doing so, he ruled that the law of the forum would govern solicitor-client privilege, regardless of whether any proceedings (domestic or foreign) were contemplated when the communications were made. Ormrod J stated that "[t]hese matters are matters to be decided according to the practice of this court,"[18] and observed:

> … Any other conclusion would lead to an impossible position for if this court were required to investigate the position of such communications in foreign law it must first determine the foreign law, but what law governs the relationship of English client and foreign lawyer, at any rate, when no proceedings are in contemplation? There is no forum and therefore no *lex fori*. The nationality of the foreign lawyer is as irrelevant as his address for this purpose.[19]

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16 [1968] 2 WLR 1479 (Eng PBAD) [*Duncan*].

17 The defendant also argued that some of the communications could not attract litigation privilege since the proceedings in contemplation of which they were prepared were foreign rather than domestic. However, Ormrod J rejected this argument, noting at 313: "In my judgment, if they were prepared in connection with proposed or actual litigation in a foreign court or courts they are just as entitled to privilege in the present action as if they had been prepared for it." A similar ruling was made in *Bank Leu Ag v Gaming Lottery Corp* (1999), 43 CPC (4th) 73 (Ont Sup Ct) at para.4, aff'd (2000), 132 OAC 127 (Div Ct).

18 *Duncan*, *supra* note 16 at 311.

19 *Ibid*. See also *Minnesota Mining & Manufacturing Co v Rennicks (UK) Ltd (No 1)*, [1991] FSR 97 (Ch D) at 98.

The ruling in *Duncan* has been referred to in a handful of Canadian cases.[20] Most notably, in *Morrison-Knudsen Co v British Columbia Hydro and Power Authority*,[21] Macdonald J cited it for the proposition that solicitor-client privileged communications with a foreign lawyer may remain privileged according to the law of the forum, even where they are not privileged according to the law of the foreign lawyer's jurisdiction.

For the most part, the traditional *lex fori* rule at work in these cases has been applied uncritically and unconsciously by Canadian courts.[22] Thus:

(1) In addition to *Morrison-Knudsen*, there are other cases in which the courts have assumed that the privileged status of legal advice provided by a *foreign lawyer* (whether to a domestic[23] or foreign client[24]) should be determined on the basis of domestic privilege principles.

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20 See e.g. *Hartz Canada Inc v Colgate-Palmolive Co* (1988), 27 CPC (2d) 152 (Ont HC) at 154-55 [*Hartz*].

21 (1971), 19 DLR (3d) 726 (BCSC) at 729-31 [*Morrison-Knudsen*]. In *Morrison-Knudsen*, Macdonald J held that communications between US in-house counsel of a US parent company, and officers of that US company and its Canadian subsidiaries relating to a contract governed by Canadian law, were privileged in the context of a Canadian action against the parent and the subsidiaries. In doing so, Macdonald J relied upon *Duncan* for the proposition that advice by a foreign lawyer is capable of attracting solicitor-client privilege (though no party directly raised the question of whether the governing law of the privilege claims was that of the forum or that of the jurisdiction where the in-house counsel practiced).

22 See e.g. *Oilworld Supply Co v Audas*, [1985] BCJ No 1472 (SC) (QL) at para 20 ("it is well established that questions as to… privilege are matters of procedure governed by the law of the *lex fori*"). See also *Re Magnex International Inc* (2000), 271 AR 123 (CA) at paras 35, 41, 43 and 58; and *R v Dorsay* (2006), 223 BCAC 192 (CA) at para 14, leave to appeal refused, [2006] SCCA No 374.

23 See *Western Assurance Co v Canada Life Assurance Co* (1987), 63 OR (2d) 276 (Master) at 278 [*Western Assurance*]; *Pitney Bowes of Canada Ltd v Canada*, 2003 FCT 214 at paras 4 and 8-23, 229 FTR 277; *UPM-Kymmene Corp v Repap Enterprises Inc*, [2001] OJ No 4220 (Sup Ct) (QL) at paras 2 and 8-14; *FCMI Financial Corp v Curtis International Ltd*, [2003] OJ No 4713 (Sup Ct) (QL) at paras 23-33; and *Imperial Tobacco Co v Newfoundland and Labrador (AG)* 2007 NLTD 172 at paras 68-115, 276 Nfld & PEIR 123 (NLSC (TD)) [*Imperial Tobacco*]. See also *Hoy v Medtronic, Inc*, 2001 BCSC 944 at paras 25-48, 91 BCLR (3d) 352 (SC) (applying Canadian law in finding that communications between foreign lawyers and domestic lawyers acting on behalf of a domestic client were subject to solicitor-client privilege).

24 *Hartz*, *supra* note 20 at 154-55; *Whirlpool Corp v Camco Inc* (1997), 72 CPR (3d) 444 (FCTD) at 447-49 [*Whirlpool*]. See also *Gould v Lumonics Research Ltd*, [1983] 2 FC 360 (CA) at 365-66, where the Court applied domestic law when assessing privilege over advice by US counsel in relation to US law, but without indicating whether the clients were themselves Canadian or American.

(2) Similarly, there are cases where courts have assumed that the privileged status of legal advice provided by a domestic lawyer to a *foreign client* should be determined on the basis of domestic privilege principles, even where the domestic lawyer advised on foreign law.[25]

(3) Finally, there are cases where courts have assumed that the question of whether a *disclosure of information abroad* resulted in a waiver of privilege should be determined on the basis of domestic waiver principles.[26]

Accordingly, the traditional position in Canada seems clear: solicitor-client privilege is governed by the law of the forum. Although there are very few Canadian cases that have actually examined the rationale for this rule, it

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[25] See e.g. *Mutual Life Assurance Co of Canada v Canada* (1988), 28 CPC (2d) 101 (Ont HC) at 103-104; and *Copthorne Holdings Ltd. v Canada*, 2005 TCC 491 at paras 1 and 11-12, 4 CTC 2085 (TCC). Interestingly, in *Mammoth*, *supra* note 15, the Court appeared to hold that solicitor-client privilege could not attach to communications where the lawyer was not qualified to practice in the jurisdiction to which the advice related. However, while this principle has been followed in some cases (see e.g. *Whirlpool*, *supra* note 24 at 447-49), there are many other cases which have held that privilege can still be asserted over legal advice provided by a lawyer who is not actually qualified to opine in the jurisdiction to which the advice relates; see e.g. *Northwest Mettech Corp v Metcon Services Ltd*, [1996] BCJ No 1915 (Master) (QL) at paras 34-39; and *Imperial Tobacco*, *supra* note 23 at paras 69-70 (though *c.f. Canada (Minister of National Revenue) v Newport Pacific Financial Group SA*, 2010 ABQB 568 at paras 40-44 and 56-57, [2011] 3 WWR 117 (Alta QB) [*Newport*], requiring that the lawyer, whether foreign or domestic, be "lawfully entitled to practice law in the jurisdiction in which they provided the advice"). Thus, in *Gower v Tolko Manitoba Inc*, 2001 MBCA 11 at paras 41-46, 196 DLR (4th) 716 (Man CA), the Manitoba Court of Appeal rejected the rule whereby lawyers not qualified in a given jurisdiction cannot provide legally privileged advice in relation to the laws of jurisdiction, as being inconsistent with "the realities of the modern practice of law." This position is supported by several commentators, including Ronald D Manes and Michael P Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 38-41; John Sopinka *et al*, *The Law of Evidence in Canada*, 3rd ed (Markham, Ont: LexisNexis Canada Inc, 2009) at 946-47; and Robert W Hubbard *et al*, *The Law of Privilege in Canada*, looseleaf (Aurora, Ont: Canada Law Book, 2006+) vol 2 at para 11.125. There is also support for this position in England (*International Business Machines v Phoenix International Computers Ltd*, [1995] FSR 184 (Ch D) at 196-98), Australia (*Kennedy*, *supra* note 14 at paras 62, 199-202 and 227) and the United States (*Restatement of the Law (Third): The Law Governing Lawyers* (St Paul, Minn: American Institute of Law Publishers, 2000) at §72, Comment e).

[26] See *Western Assurance*, *supra* note 23 at 277; *Allied Signal Inc v Dome Petroleum Ltd*, [1995] 5 WWR 720 (Alta QB) at para 11; and *United States of America v Friedland* (1996), 30 OR (3d) 568 (Gen Div) at 574.

would seem to be based upon the classification of privilege as a matter of procedure rather than substance.

3. Problems with the Traditional Choice of Law Rule

Against the backdrop of this jurisprudence, but without reference to it, the Supreme Court of Canada has issued several decisions in recent years which challenge the notion that solicitor-client privilege is a matter of procedure.[27] Though none of these cases considered the issue in the choice of law context, the Supreme Court has repeatedly stated that solicitor-client privilege is not only an evidentiary principle, but also a substantive rule of law.[28] A similar evolution has taken place in England[29] and elsewhere in the Commonwealth.[30] The Supreme Court of Canada has even suggested that the privilege enjoys a constitutional status under the *Canadian Charter of Rights and Freedoms*,[31] though it appears to be retreating from that view in its more recent jurisprudence.[32] The Court's modern approach is encapsulated in *Lavallee, Rackell & Heintz v Canada (AG)*, where it

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27 In contrast to solicitor-client privilege, it would seem well-established that litigation privilege continues to remain a matter of procedure; see *Morrissey v Morrissey* (2000), 196 DLR (4th) 94 (Nfld CA) at para 20; *Blank*, *supra* note 2 at paras 23-25; *Llewellyn v Carter* (2008), 58 CPC (6th) 195 (PEICA) at para 25.

28 See *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10, 2 SCR 574 [*Blood Tribe*]: "While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance." Similar sentiments are expressed in *Solosky v The Queen*, [1980] 1 SCR 821 at 836-37 and 839 [*Solosky*]; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 870-73 and 875 [*Descôteaux*]; *Smith v Jones*, [1999] 1 SCR 455 at paras 44-45 and 48-50 [*Smith*]; *R v McClure*, 2001 SCC 14 at paras 17 and 21-25, 1 SCR 445 [*McClure*]; *Lavallee, supra* note 8 at paras 12-18 and 21; *Maranda v Richer*, 2003 SCC 67 at para 12, 3 SCR 193 [*Maranda*]; *Foster Wheeler Power Co v Societé intermunicipale de gestion et d'élimination des déchets (SIGED) Inc*, 2004 SCC 18 at para 34, 1 SCR 456 [*Foster Wheeler*]; *Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paras 14-15, 2 SCR 32 [*Goodis*]; and *Blank*, *supra* note 2 at para 24.

29 See *R v Derby Magistrates' Court*, [1996] AC 487 (HL) at 507; *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax*, [2003] 1 AC 563 (HL) at para 31; and *Three Rivers District Council v Governor and Company of the Bank of England*, [2004] UKHL 48 at paras 87 and 94-95 [*Three Rivers*].

30 In Australia, see *Goldberg v Ng* (1995), 185 CLR 83 (HCA) at 93-94; and *The Daniels Corporation International Pty Ltd v Australian Competitoin and Consumer Commission* (2002), 213 CLR 543 (HCA) at para 9. In New Zealand, see *B v Auckland District Law Society*, [2003] 2 AC 736 (PC) at para 37 [*Auckland*].

31 Part I of the *Constitution Act, 1867*, being Schedule B to the *Canada Act, 1982* (UK), 1983, c. 11. See *Lavallee, supra* note 8 at para. 21.

32 *R v National Post*, 2010 SCC 16 at para 39, 1 SCR 477 [*National Post*].

stated that solicitor-client privilege is a "civil right of supreme importance in Canadian law."[33]

In light of these developments, it is open to serious question whether solicitor-client privilege should continue to be characterized as a matter of procedure for choice of law purposes.[34] This issue has yet to be squarely addressed by a Canadian court.[35] Nonetheless, in the context of assessing whether legislation is substantive or procedural for the purposes of the presumption against retroactivity, the Supreme Court of Canada did make the following observations:

> … [R]ules of evidence are usually considered to be procedural, and thus to presumptively apply immediately to pending actions upon coming into force: *Howard Smith Paper Mills Ltd. v The Queen*, [1957] S.C.R. 403. However, where a rule of evidence either creates or impinges upon substantive or vested rights, its effects are not exclusively procedural and it will not have immediate effect: *Wildman v The Queen*, [1984] 2 S.C.R. 311. Examples of such rules include solicitor-client privilege…[36]

There is also considerable doubt, at the level of principle, about the continued "procedural" status of solicitor-client privilege in the conflict of laws.[37] While the courts historically gave an extremely broad meaning to "procedure" in the conflict of laws context, the modern tendency is to approach this concept in much narrower terms.[38] Further, the traditional

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33 *Lavallee*, *supra* note 8 at para 36.

34 See Hodge M Malek *et al*, eds, *Phipson on Evidence*, 17th ed (London: Sweet & Maxwell, 2010) at 654: "When *Re Duncan* was decided, the prevailing view was that privilege was merely a right to refuse to produce material on discovery or at trial. …[T]he modern view is that privilege is a fundamental right. Substantive rights are typically governed by the law governing those rights rather than the *lex fori*." See also Bankim Thanki, ed, *The Law of Privilege*, 2nd ed (Oxford: Oxford University Press, 2011) at 221-22.

35 *C.f. Cook v Parcel, Mauro, Hultin & Spaanstra, PC* (1996), 136 DLR (4th) 414 (BCSC) [*Cook*], aff'd (1997), 143 DLR (4th) 213 (BCCA) [*Cook CA*], leave to appeal refused, [1997] SCCA No 218, discussed below.

36 *Re Application under s 83.28 of the Criminal Code*, 2004 SCC 42 at para 57, 2 SCR 248. While the distinction between substance and procedure in relation to retroactive legislation is of course different than the distinction in the conflict of laws, it is notable that the Supreme Court of Canada has drawn upon the distinction in the retroactivity context when discussing it in the choice of law context; see *Tolofson*, *supra* note 8 at 1070-1071.

37 See McComish, *supra* note 4 at 310-12.

38 *243930 Alberta Ltd v Wickham* (1990), 75 O R (2d) 289 (CA) at 304 [*Wickham*]. The modern attitude of the courts appears driven by the fact that the distinction between substance and procedure, while easy to state, has proven difficult to apply; see *Somers v Fournier* (2002), 60 OR (3d) 225 (CA) at para 13 [*Somers*]. Indeed,

characterization of privilege as a matter of procedure is based on little more than the fact that "procedure" in the conflict of laws encompasses the law of evidence,[39] including the compellability of witnesses.[40] However, in *Tolofson v Jensen*,[41] the Supreme Court of Canada held that the question of whether a matter is procedural or substantive for conflict of laws purposes turns upon *policy*, not rote categorization.

Canadian courts have yet to engage in this type of explicit policy analysis with regard to solicitor-client privilege, though courts in other jurisdictions have done so. The result there has been to formulate alternative choice of law rules which respond to the privilege's status as a matter of substance rather than procedure. As shall be seen, however, these "substance-based" rules raise as many, if not more, questions, than the traditional *lex fori* one.

4. Substance-Based Alternatives to the Traditional Choice of Law Rule

There is very little Commonwealth discussion of the substance-based choice of law rule most appropriate to solicitor-client privilege.[42] However, there is a wealth of commentary on this point in the United States, where issues of privilege have long given rise to conflicts among

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as noted by Lord Pearson in *Chaplin v Boys*, [1971] AC 356 (HL) at 395 [*Chaplin*], the jurisprudence has yet to draw a definitive boundary between substance and procedure (though attempts at such a distinction have certainly been made; see e.g. *John Pfeiffer Pty Ltd v Rogerson* (2000), 203 CLR 503 (HCA) at 543-44).

39 The seminal decisions are *Yates v Thomson* (1835), 6 ER 1541 (HL), 3 Cl & Fin 544 at 586-88; and *Bain v Whitehaven and Furness Junction Railway Co* (1850), 10 ER 1 (HL), 3 HLC 1 at 18-20. See also *Livesley, supra* note 9 at 608 ("a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence"). It should be noted that not every aspect of the law of evidence qualifies as a matter of procedure; see *Mahadervan v Mahadervan*, [1964] P 233 (Eng Div Ct) at 243; *Works v Holt* (1976), 22 RFL 1 (Ont Prov Ct) at 23-25; and John H Wigmore, *Evidence in Trials at Common Law*, Peter Tillers Revision (Boston: Little, Brown and Co, 1983) vol I at 336-43.

40 *Wickham*, *supra* note 38 at 304.

41 *Supra* note 8 at 1067-72. See also *Block Bros Realty Ltd v Mollard* (1981), 122 DLR (3d) 323 (BCCA) at 326-28; *Somers*, *supra* note 38 at para 14; and *Vogler*, *supra* note 9 at paras 27 and 38-39. *C.f. Harding v Wealands*, [2007] 2 AC 1 (HL) at paras 36, 68-69 and 83. Reference should also be made to *Chaplin*, *supra* note 38 at 392-93, where Lord Wilberforce noted that courts may be motivated by a domestic policy preference in favour of the law of the forum when determining whether a given law should be characterized as substantive or procedural.

42 For a scholarly treatment of this issue from a Commonwealth perspective, see McComish, *supra* note 4, discussed further below.

the various state and federal courts.[43] Before turning to the limited Commonwealth case law in this area, it will be instructive to consider the American approach.

US conflict of laws jurisprudence addresses the issue of privilege from two different perspectives:

(1) where the conflict arises between the federal and state laws of privilege (a "vertical" choice of law problem); and

(2) where the conflict arises between the laws of privilege belonging to two different states, or between either federal and state law and the laws of another country (a "horizontal" choice of law problem).

Since the vertical choice of law cases involve questions of law unique to the American federal court system,[44] it is the horizontal choice of law jurisprudence which interests us here.

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[43] Despite the mass of literature on the subject, there are surprisingly few appellate cases in which US courts have considered choice of law problems for attorney-client privilege specifically (and not some other form of privilege). See Edward J Imwinkelried, *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges*, 2nd ed (New York: Wolters Kluwer, 2010) at 450, who suggests that the "case law on this issue is 'sparse' and conflicting." The same point is made by Christopher B Mueller and Laird C Kirkpatrick, *Federal Evidence*, 3rd ed (Minn: Thomson/West, 2007) at §5:8.

[44] Vertical choice of law problems in the United States are governed by Rule 501 of the *Federal Rules of Evidence*, which provides that federal courts must apply federal common law to claims of privilege except where they arise in proceedings where an element of the claim is governed by state law. In that case, the federal court must apply state privilege law (including, it is generally thought, the state conflict of laws rules for the "horizontal" conflicts described below; see Dugan, *supra* note 4 at 34-38). Vertical choice of law issues in the United States are discussed in some detail by Earl C Dudley, Jr, "Federal Rule of Evidence 501: Privilege and Vertical Choice of Law" (1994) 82 Geo LJ 1781; Paul R Rice, *Attorney-Client Privilege in the United States*, 2nd ed, looseleaf (St. Paul, Minn: West Group, 1999+) vol 2, ch 12; and Imwinkelried, *ibid* at 222-43. In Canada, a similar but not identical provision exists in s 40 of the *Canada Evidence Act*, RSC 1985, c C-5, which provides that in any proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken apply. See also s 53(2) of the *Federal Courts Act*, RSC 1985, c F-7, along with the definition of "solicitor client privilege" in s 232(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), and *Herman v Canada (Deputy AG)*, [1979] 1 SCR 729 at 749-50. However, unlike in the United States, there is very little vertical choice of law jurisprudence in Canada. Indeed, it is not even clear whether disputes over solicitor-client privilege would amount to disputes over "evidence" sufficient to engage s 40 of the *Canada Evidence Act*.

Like the English and Canadian courts, American courts traditionally adopted a horizontal choice of law rule for privilege which identified the *lex fori* as the governing law, on the theory that privilege was a matter of evidence, and therefore of procedure.[45] This approach was reflected in §597 of the *Restatement (First) of Conflict of Laws*,[46] which provided simply that "[t]he law of the forum determines the admissibility of a particular piece of evidence."

However, the views of the US courts have evolved significantly since the time when the *Restatement (First)* was first published in 1934.[47] While some courts still cling to the view that privilege is a matter of procedure governed by the *lex fori*,[48] many others have rejected the traditional choice of law rule, in part on the ground that privilege is a matter of substance.[49]

American courts have adopted several different approaches when assessing the horizontal choice of law rule for a substance-based theory of privilege. Nevertheless, the multiplicity and flexibility of these approaches has given rise to even more uncertainty than the traditional *lex fori* rule.[50]

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45 See e.g. *Metropolitan Life Ins Co v McSwain*, 115 So 555, 557 (Miss 1928). See also *Supreme Lodge KP v Meyer*, 198 US 508, 516-517 (1905) (patient-physician privilege); *Doll v Equitable Life Assur Soc of the US*, 138 F 705, 710 (3rd Cir 1905) [*Doll*] (patient-physician privilege); *Webster v Columbian Nat Life Ins Co*, 116 NYS 404, 407-408 (App Div 1909) (patient-physician privilege); and *Palmer v Fisher*, 228 F2d 603, 608-609 (7th Cir 1955), cert denied, 351 US 965 (1956) [*Palmer*] (accountant-client privilege).

46 *Restatement of the Law: Conflict of Laws* (St Paul, Minn: American Law Institute Publishers, 1934).

47 For an early critique of the *Restatement (First)* approach, see JB Weinstein, "Recognition in the United States of the Privileges of Another Jurisdiction" (1956) 56 Colum L Rev 535.

48 For appellate cases, see *Pritchard-Keang Nam Corp v Jaworski*, 751 F 2d 277 at 281 footnote 4 (8th Cir. 1984), cert dismissed, 472 US 1022 (1985); and *Kessel v Leavitt*, 204 W Va 95 at 183-84 (1998), cert denied, 525 US 1142 (1999). See also *Cervantes v Time, Inc*, 464 F 2d 986 at 989 footnote 5 (8th Cir 1972), cert denied, 409 US 1125 (journalist privilege). Notably, the traditionally "procedural" status of privileges, and the fact that they fall within the legislative jurisdiction of the forum, was recognized by the US Supreme Court in *Sun Oil Co v Wortman*, 486 US 717 at 728 (1988).

49 See Wigmore, *supra* note 39, vol. I at 349 ("Modern law tends to treat privileges as substantive for purposes of interstate conflicts of laws. Hence, privileges asserted in a lawsuit within the forum state may be governed by the law of a foreign state").

50 See Donald W Price, "A Choice of Law Analysis of Evidentiary Privileges" (1989) 50 La L Rev 157 at 179, noting that in the absence of a *lex fori* rule "the diversity of the potential situations makes it impossible for courts to formulate a rule of general applicability. Therefore, the courts should undertake an extensive factual inquiry in every case."

This uncertainty was maligned in an influential 1991 article written by Steven Bradford, who observed that "[t]he available choice-of-law theories and the cases support practically any result."[51] Such problems underline a fundamental dissonance between the American and Commonwealth approaches to choice of law, which was recognized by the Supreme Court of Canada in *Tolofson*.[52]

To begin, there is a divide between the horizontal choice of law rules applied under US federal and state common law. The former contain a series of overlapping approaches for dealing with horizontal conflicts between the US federal law of privilege, and the privilege laws of another jurisdiction.[53] Most of these approaches were formulated when assessing whether communications with persons acting as foreign patent agents should remain privileged in US litigation,[54] and do not appear designed to apply to communications with actual foreign lawyers. Commentators have identified at least three such approaches:[55]

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51 Steven Bradford, "Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution" (1991) 52 U Pitt L Rev 909 at 912.

52 See *Tolofson*, *supra* note 8 at 1055-57. This point is discussed in more detail in the text accompanying footnotes 110-113 below. For a discussion of the American "rule selection" and "interest analysis" approaches to choice of law that were criticized in *Tolofson*, see Pitel and Rafferty, *supra* note 10 at 220-23.

53 As observed in one of the leading cases, *Golden Trade, SrL v Lee Apparel Co*, 143 FRD 514, 519 (SDNY 1992) [*Golden Trade*], "the courts have failed to develop a consistent approach" to this issue. See also Mueller and Kirkpatrick, *supra* note 43 at §5:8, who observe that "[t]here is no distinctly federal horizontal choice-of-law tradition, either for privileges or for substantive law generally." It is noteworthy here that in some US cases involving international elements, questions of privilege will be determined by the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 18 March 1970, 847 UNTS 231; see *Renfield Corp v E Remy Martin & Co, SA*, 98 FRD 442 at 443-44 (D Del 1982) [*Renfield*].

54 Canadian courts faced with similar issues have adopted a "bright line" approach requiring application of the forum's privilege laws, and thus hold that communications with foreign patent agents, even if privileged under the laws of the foreign jurisdiction, are not privileged in Canada; see *Lilly Icos LLC v Pfizer Ireland Pharmaceuticals,* 2006 FC 1465 at para 11, 304 FTR 262 (FC) [*Lilly Icos*]. See also *Gould v Lumonics Research Ltd.*, [1983] 2 FC 360 (CA).

55 See Masamichi Yamamoto, "How Can Japanese Corporations Protect Confidential Information in U.S. Courts? Recognition of the Attorney-Client Privilege for Japanese Non-*Bengoshi* In-House Lawyers in the Development of a New Legal System" (2007) 40 Vand J Transnat'l L 503 at 523. Yamamoto also notes that additional approaches have been proposed by some commentators. Along with the three approaches set out below, a handful of US courts applying federal common law have invoked substance-based horizontal choice of law rules similar to those which are discussed below as arising under the State law (e.g. the "most significant relationship" approach); see e.g. *Renfield*, *supra* note 53; and *VLT Corp v Unitrode Corp.*, 194 FRD 8at 16 (D Mas 2000) [*VLT*].

(1) the "touch base" approach;[56]
(2) the "bright line" approach;[57] and
(3) the "functional" approach.[58]

Under the "touch base" approach – which appears to be the dominant one applied by the federal courts – the first step is to ask whether the communications "touch base" with the United States, or are linked solely to other jurisdictions.[59] If they "touch base" with the United States, then American law will usually govern.[60] If they do not, then the courts will apply the law of the foreign jurisdiction that has the "predominant interest" in them (based on factors such as where the privileged relationship was entered into, or where it was centered at the time when the communication was made),[61] unless that law is contrary to US public policy.[62] The other two approaches largely involve the application of the forum's privilege laws – albeit, in the case of the functional approach, with a heightened sensitivity to differences in how non-lawyers may be treated in foreign

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56 This approach is discussed below. The seminal case is *Duplan Corp v Deering Milliken, Inc*, 397 F Supp 1146 at 1169-70 (D SC 1975). For a more recent case applying this approach, which summarizes much of the intervening jurisprudence, see *Gucci America, Inc v Guess?, Inc*, 271 FRD 58 at 64-70 (SDNY 2010) [*Gucci*].

57 The "bright line" approach is effectively the traditional *lex fori* rule, and would apply domestic privilege law to any communications with foreign legal professionals; see e.g. *Status Time Corp v Sharp Electronics Corp*, 95 FRD 27 at 31-33 (SDNY 1982). For a critique of this approach, see Rice, *supra* note 44, vol 2 at §12:21, 39-44.

58 The "functional" approach asks whether the foreign legal professional, though not a lawyer, nevertheless performs tasks that are functionally equivalent to one in the foreign jurisdiction, sufficient to permit the application of attorney-client privilege under US law; see e.g. *Heidelberg Harris, Inc v Mitsubishi Heavy Industries Ltd*, 1996 US Dist LEXIS 19274 at 23-28 (ND Ill 1996). See also *Renfield*, *supra* note 53.

59 See *Odone v Croda International PLC*, 950 F Supp 10 at 12-13(D DC 1997) [*Odone*]. There is some debate around the standard for when a communication will "touch base" with the United States, with certain courts suggesting that a non-incidental connection is necessary: see *VLT*, *supra* note 55; and *Gucci*, *supra* note 56. For an extensive analysis of this issue, see *AstraZeneca LLP v Breath Ltd*, 2011 WL 12421800 at 4-8 (D NJ 2011).

60 See, however, *VLT*, *ibid*, suggesting that even where communications do touch base with the United States, American law may not govern if another jurisdiction has a more "direct and compelling interest" in them (based on factors such as the parties and substance of the communications, where the relationship was centered, the needs of the international system, and the policies of US federal law).

61 *Bayer AG v Barr Laboratories Inc*, 1994 US Dist LEXIS 17988 at *13-*14 (SDNY 1994). Some courts have also suggested that the relevant foreign jurisdiction will be the one where the foreign patent application to which the communication relates is pending; see *In re Rivastigmine Patent Litigation*, 239 FRD 351at 356 (SDNY 2006).

62 See *Golden Trade, supra* note 53; and *Astra Aktiebolag v Andrx Pharmaceuticals, Inc*, 208 FRD 92 at 98 (SDNY 2002).

legal systems. To date, there appears to be no definitive endorsement of any of these approaches at the appellate level.

As for the choice of law rules applied under state law, Bradford catalogues four different approaches, other than the procedural *lex fori* rule and the public policy-based approach discussed further below:[63]

(1) the "interests" approach;[64]
(2) the "most significant relationship" approach;[65]

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63 Bradford, *supra* note 51at 915-16. Bradford's four approaches are similar to those listed in Wigmore, *supra* note 39, vol I at 349-58.

64 The "interests" approach essentially focuses upon whether applying a particular state's law would serve a policy concern of that state. The interests in question include: (1) the interests of the forum; (2) the interests of the state of deposition; (3) the interests of the state or states in which the underlying cause of action arose; (4) the interests of the state where the client is domiciled; (5) the interests of the state where the other parties to the case are domiciled; (6) the interests of the state where the attorney practices; and (7) the interests of the state that is the *situs* of the attorney-client communication. Where more than one state has an interest in the application of its privilege law, the court will weigh those interests, and determine which one should ultimately prevail. There is substantial disagreement between courts and commentators over how this balancing exercise should occur. See Price, *supra* note 50; Bradford, *ibid* at 921-32; and Rice, *supra* note 44, vol 2 at 33-36, para 12:17. For examples of appellate cases applying the "interests" approach, see *National Steel Products Co v The Superior Court of Riverside County*, 164 Cal App 3d 476 at 485-86 (Cal App 1985); *KL Group v Case, Kay & Lynch*, 829 F 2d 909 at 915-16 (9th Cir 1987); and *Carbis Walker, LLP v Hill, Barth and King, LLC*, 930 A 2d 573 at 578, 580-81 (Pa Super 2007). See also *Samuelson v Susen*, 576 F 2d 546 at 551 (3rd Cir 1991) [*Samuelson*] (hospital staff privilege).

65 The "most significant relationship" approach is based upon §6 of the *Restatement (Second) of Conflict of Laws*, and looks to determine which state has the most significant relationship with the communications in question. Section 6 does not directly speak to privilege, but sets out a list of general factors that US courts may consider when determining what state has the most significant relationship with a given issue (which are set out in footnote 70 below). Additionally, in the specific context of privilege, Comment e to §139 of the *Restatement (Second)* defines the state with the most significant relationship to the communication (as discussed below). For an appellate case applying the "most significant relationship" approach, see *In re Arterial Vascular Engineering, Inc*, 2000 Tex App LEXIS 7874 at 35-37 (2000). See also *Samuelson*, *ibid*. Some courts have also applied a variant of the "most significant relationship" approach, which focuses upon the jurisdiction with the most significant relationship to the underlying cause of action rather than to the communication; see *Hyde Construction Co v Koehring Co*, 455 F 2d 337 at 341 (5th Cir 1972); *Woelfling v Great-West Life Assur Co*, 30 Ohio App 2d 211 at 220-21 (1972) [*Woelfling*]; and *Barnes v Confidential Party*, 628 So 2d 283 at 289 (Miss 1993). *C.f. Doll*, *supra* note 45. However, as noted by McComish, *supra* note 4 at 330, basing the choice of law rule upon the *lex causae* cannot account for the many privilege cases, like search warrant challenges, where there is no underlying cause of action.

(3) the "better law" approach;[66] and
(4) the approach advocated by §139 of the *Restatement (Second) of Conflict of Laws*.[67]

Significantly, none of these approaches was designed specifically for attorney-client privilege. Instead, they have also been applied to other forms of US testimonial privilege (such as physician-patient privilege). As such, there is significant doubt over whether they accurately reflect the underlying policy considerations which are unique to the choice of law process for solicitor-client privilege.[68]

The approach most frequently taken by appellate courts applying state conflicts laws appears to be the one advocated by the *Restatement (Second)*.[69] That approach requires the court to first identify the place with

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66 The "better law" approach is based upon a series of factors for choice of law decisions that were articulated by Robert A Leflar; see "Choice-Influencing Considerations in Conflicts Law" (1966) 41 NYU L Rev 267. The relevant considerations are: (1) predictability of results; (2) maintenance of the interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. Bradford notes that the "better law" approach is essentially identical to the "most significant relationship" approach, except for the fact that it includes among its factors the question of which state posses the "better rule of law;" see generally Bradford, *supra* note 51at 941.

67 *Restatement of the Law (Second): Conflict of Laws* (St Paul, Minn: American Law Institute Publishers, 1971).

68 This point is discussed by Sterk, *supra* note 4.

69 For examples of appellate cases applying the *Restatement (Second)* approach to attorney-client privilege, see *Ford, supra* note 1 at 646-48; *Gonzalez v State*, 45 SW 3d 101 at 103-105 (Tex Crim App 2001) [*Gonzalez*]; *Sterling Finance Management, LP v UBS Painewebber, Inc*, 782 NE 2d 895 at 903-904 (Ill App 2002) [*Sterling*]; *In re Union Carbide Co*, 2003 Tex App LEXIS 9683 at 10-12 [*Union Carbide*]; *Allianz Insurance Co v Guidant Co*, 869 NE 2d 1042 at 1056-60 (Ill App 2007), appeal denied, 875 NE 2d 1109 (Ill 2007) [*Allianz*]; and *Teleglobe*, *supra* note 4 at 358-59, 386. US Appellate courts have also frequently applied the *Restatement (Second)* approach to forms of privilege other than attorney-client privilege: see e.g. *Woelfling*, *supra* note 65 at 220-21; *State v Kennedy*, 396 NW 2d 765 at 769-70 (Wis App 1986), review denied, 401 NW 2d 10 (Wis 1987); *State v Eldrenkamp*, 541 NW 2d 877 at 881-82 (Iowa 1995); *People v Thompson*, 950 P 2d 608 at 611 (Colo App 1997); *Kos v State*, 15 SW 3d 633 at 636-38 (Tex App 2000); *State v Washington*, 105 Wn App 67 at 71 (2001); *State v Heaney*, 689 NW 2d 168 at 173-77 (Minn 2004) [*Heaney*]; *State v Lipham*, 910 A 2d 388 at 392, footnote 3 (Me 2006), cert denied, 551 US 1107 (2007); *Major v Commonwealth*, 275 SW 3d 706 at 714-16 (Ky 2009); and *Saleba v Schrand*, 300 SW 3d 177 at 181-83 (Ky 2009). It appears the popularity of the *Restatement (Second)* approach has grown in recent years. Bradford, writing in 1991, stated that this approach had not been widely adopted at that time; see Bradford, *supra* note 51at 941.

the "most signification relationship" to the communication – usually where the communications "took place" – based on the following test:

> The state which has the most significant relationship with a communication will usually be the state where the communication took place, which, as used in the rule of this Section, is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing. …
> The state where the communication took place will be the state of most significant relationship in situations where there was no prior relationship between the parties to the communication. If there was such a prior relationship between the parties, the state of most significant relationship will be that where the relationship was centered unless the state where the communication took place has substantial contacts with the parties and the transaction. …[70]

Once the place with the most significant relationship is identified, §139 of the *Restatement (Second)* proposes the following analysis:

> 139. (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.[71]
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.[72]

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[70] *Restatement (Second)*, §139, Comment e. See also *Sterling*, *ibid*; *Union Carbide Co*, *ibid* at 10-11; and Willis LM Reese and Barry D Leiwant, "Testimonial Privileges and Conflict of Laws" (1977) 41 Law & Contemp Probs 85 at 92-93. The *Restatement (Second)*, §6(2), also sets out the following additional factors used to determine the "most significant relationship" with any legal issue, including issues of privilege: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

[71] Comment c to §139 of the *Restatement (Second)* rationalizes this subrule on the basis that admitting evidence which is not privileged under the law of the state with the most significant connection to the communication cannot defeat the expectations of the parties, and will be in the interests of the forum since it will assist in arriving at the true facts.

[72] Comment d to §139 of the *Restatement (Second)* rationalizes this subrule on the basis that the forum and the state with the most significant relationship to the communication will have strong competing interests (the forum in favour of open litigation, and the other state in favour of privilege). It notes that "the factors that the

Thus, save in cases where the exclusion of the communications is required by the forum's "strong public policy" or "some special reason" (or where both the forum and the foreign jurisdiction are *ad idem* on the application of the privilege, such that there is no conflict of laws at all), the *Restatement (Second)* approach creates a default rule in favour of admissibility.[73]

Because of the unpredictability generated by this and the other substantive choice of law rules canvassed above, Bradford rejects all of them in favour of a bright-line "territorial" rule.[74] According to him, the appropriate choice of law rule for attorney-client privilege should be the law of the jurisdiction in which the attorney practices. While this approach has not received a great deal of judicial approval, it is supported by other US academics.[75]

Bradford's approach is also supported by the Australian commentator James McComish. Like Bradford, he criticizes the uncertainty that follows from the "interests" and "most significant relationship" approaches.[76] McComish also reviews several potential "territorial" rules for the privilege (the *lex causae*, the law about which advice was sought, the place of the communication, the law upon which the client relied, and the law governing the lawyer/client retainer), and concludes that the law of the solicitor's jurisdiction of practice is the most preferable one.[77]

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forum will consider in determining whether or not to admit the evidence are: (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties". For cases that applied these factors to conclude that the forum's policy favouring admissibility outweighed the privileged status of the communications under the law of the state with the most significant relationship, see *Sterling*, *supra* note 69; and *Allianz*, *supra* note 69.

73 See *Gonzalez*, *supra* note 69 at 104 footnote 3; and Dugan, *supra* note 4 at 38. The approach advocated by the *Restatement (Second)* therefore resembles the old "double actionability" rule for choice of law in tort, pursuant to which a tort claim with a foreign element could not succeed unless it was actionable in both the foreign jurisdiction and the forum. This double actionability rule was rejected by the Supreme Court of Canada in *Tolofson*, *supra* note 8.

74 Bradford, *supra* note 51at 912 and 943-51.

75 See Timothy P Glynn, "Federalizing Privilege" (2002) 52 Am U L Rev 59 at 125.

76 McComish, *supra* note 4 at 329 ("In the end, smorgasbord justice is no justice at all, and this is reason enough not to adopt the American approach to questions of foreign privilege.")

77 McComish, *ibid* at 330-36. For a contrary view from Australia, which suggests that legal advice privilege should be governed by the *lex fori*, see Christopher Kee and Jeremy Feiglin, "Legal Professional Privilege and the Foreign Lawyer in Australia" (2006) 80 ALJ 131 at 138-40.

Finally, there are at least two Commonwealth cases that support the abandonment of the *lex fori* rule in favour of a substance-based alternative. The first is the Australian decision of *Kennedy v Wallace*,[78] which is discussed by McComish. In *Kennedy*, Gyles J reviewed *Lawrence* and *Duncan* and made the following remarks in *obiter*, without actually endorsing a specific choice of law rule:

> A particular respect in which the discussion of foreign legal advice in the authorities has been unsatisfactory is in relation to the choice of law implications. … The position taken in England without any real discussion seems to be that the matter is governed entirely by the law of the forum without any consideration of choice of law. The position in the United States appears to be more sophisticated:
>
> > "Where there is a substantial connection to both the United States and a foreign jurisdiction, such as the communication having been made abroad or having been made to a foreign professional, the attorney-client privilege law of the country with the predominant, most important, or most direct and compelling connection to or interest in the matter should be applied." Paul F Rothstein and Susan W Crump, *Federal Testimonial Privileges* (2004) SS 2:40… .[79]

While Gyles J's judgment was affirmed on appeal, the majority of the Full Court did not adopt these comments regarding the governing law of privilege.[80]

The second Commonwealth case is the British Columbia ruling in *Cook v Parcel, Mauro, Hultin & Spaanstra, PC*.[81] In *Cook*, a US law firm provided advice to a Canadian company on matters of US law. The US government initiated quasi-criminal proceedings against the company, and sought an order from a US federal court in Colorado requiring that the law firm disclose certain documents situate in the United States. The law firm claimed privilege over some of the documents on behalf of the company. However, it did not claim privilege over documents on behalf of the Canadian directors of the company. As a result, those directors brought an action in British Columbia, seeking declaratory and injunctive relief

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78 *Supra* note 14. At issue in *Kennedy* was whether the Court should grant an application for the return of notes, seized through a search warrant, that involved communications between the applicant and a foreign lawyer. Gyles J ultimately held the communications were not privileged, because they were made for the purpose of using Swiss laws to keep transactions and assets hidden from Australian authorities.

79 *Ibid* at para 51. For an earlier Australian case that seemed to accept the traditional *lex fori* rule for privilege, see *British-American Tobacco Co Ltd v Phillip Morris Ltd* (1996), 36 IPR 36 (FCA).

80 See also *Arrow Pharmaceuticals Ltd v Merck & Co Inc* (2004), 210 ALR 593 (FCA) at para. 13, where Gyles J referred to his own earlier judgment in *Kennedy*, but again left the matter open.

81 *Supra* note 35.

against the law firm on the ground that some of the documents in its possession were subject to solicitor-client privilege in favour of the directors. In response, the law firm brought a motion to set aside service *ex juris*.

The directors claimed that the motion to set aside service *ex juris* should be dismissed, on the theory that their claims to privilege should be determined in accordance with BC law, and therefore by a BC court. They argued that matters of solicitor-client privilege were a "fundamental civil and legal right," not a mere contractual obligation, and should therefore be determined in Canada, where the alleged beneficiaries of the right resided, where the law firm travelled to meet with them, and where it sent its advice. Drost J rejected this argument. He held that the governing law of the privilege was Colorado, owing to the significant connections between it and the documents. Paradoxically, Drost J cited both *Lawrence* and *Duncan* in arriving at this conclusion, stating:

> The plaintiffs rely heavily on the submission that British Columbia law should govern the existence of solicitor-client privilege asserted by a resident of British Columbia. I am not persuaded by this argument. In my view, where the contract of service was signed in a foreign country, the subject matter of the contract is in that foreign country, and the alleged breach of privilege would be by a foreign solicitor practising in that foreign country, the law to be applied is that of the foreign country.
>
> Authority for this proposition can be found in *Lawrence v Campbell* (1859), 4 Drew. 485, a case cited in *Re Duncan*, [1968] 2 All E.R. 395. There, the English law of privilege was held to apply to communications between a Scotsman living in Scotland and his Scots solicitors practising in London, the communications being about debts due to him in England. The Scotsman did not "carry" his Scottish right of privilege to another country when dealing with foreign solicitors about legal matters in that foreign country.
>
> … For the reasons given, I am of the view that the State of Colorado has the closest and most real connection with the transaction between these parties and that the law of that State should be the governing law.[82]

Drost J's judgment was affirmed on appeal. However, while the Court of Appeal agreed with Drost J's decision to set aside service *ex juris*, it expressly did so on the basis of different reasons.[83] Prowse JA, writing for the Court, also declined to consider whether the directors' claims to privilege were governed by BC or Colorado law. Instead, she held that the determination of the proper law of the privilege issue should be determined by the US court, based on its own conflict of laws principles.[84]

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82 *Ibid* at paras 50-52.

83 *Cook CA*, *supra* note 35 at para 24.

84 *Ibid* at paras 44-45.

5. Problems with the Substance-Based Alternatives

As the foregoing review suggests, there are clearly several substance-based alternatives to the traditional choice of law rule for solicitor-client privilege. Some of these alternatives command a large measure of judicial and academic support. Accordingly, it would be unwise for Canadian courts to continue to apply the *lex fori* rule without considering the viability of other approaches. However, on closer examination, the substance-based alternatives are not the panacea they appear to be.[85]

First, as a matter of precedent, there is very little Commonwealth case law that adopts such an approach. The ruling of Gyles J in *Kennedy* offers little more than an *obiter* observation by a court of first instance, which was not taken up by the Full Court on appeal. Indeed, Allsop J of the Full Court (with whom the majority concurred on this point)[86] rejected Gyles J's further suggestion that legal advice provided by foreign lawyers could not be privileged, and in doing so stated that:

> … the underlying rationale of the privilege [would be] satisfied by the recognition of the availability of legal privilege in relation to foreign lawyers *in a substantially similar fashion* to the recognition of the privilege in relation to Australian lawyers….[87]

As for *Cook*, while the lower Court there did apply a substance-based rule (grounded upon the place of the legal services contract, the place the legal advice concerned, and the place where the solicitor was called and was practicing), there are several problems with this judgment.

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85 Part of the problem is that questions of privilege, while in part substantive, do not usually involve the assertion of an underlying cause of action. As a result, it is difficult to situate such questions within traditional choice of law rules, which usually focus upon the *lex causae* of a substantive dispute; see McComish, *supra* note 4 at 337 and 341. As McComish notes at 341, "the classification of legal professional privilege as 'substantive' perhaps raises more questions than it answers, so far as private international law is concerned." This unique feature of solicitor-client privilege is one of the reasons why it should attract a unique choice of law rule, like the one based on public policy discussed below.

86 *Kennedy FC*, *supra* note 14 at para 62.

87 *Ibid* at para 209 [emphasis added]; see also paras 200 and 208. At para 214, Allsop J did go on to observe that "nothing I have said should be taken as expressing a view on the existence of privilege in Australia where, under the legal system governing the foreign lawyer, or under the legal system of the state where the advice was given, no privilege would attach." However, in *RMBSA Corporate Services Ltd v Secretary for Justice (No 2)*, [2010] 2 HKC 331 at paras 32-35 [*RMBSA*], the Court held that Allsop J's comments did not alter the *lex fori* rule for solicitor-client privilege enunciated in *Lawrence*.

Most significantly, the reliance which the Court placed upon *Lawrence* and *Duncan* in *Cook* appears flawed. Although Drost J was correct in stating that *Lawrence* was a case where English privilege law applied to communications between a Scottish client and his Scottish solicitor practicing in England about English law, England was also the *forum*. It was because of that, and not because of the other points of contact between England and the communications, that the *Lawrence* Court held the foreign client's privilege should be governed by English law. A similar result was reached in *Duncan*. There, Ormrod J held that the privilege asserted by a domestic client over communications with foreign lawyers, in relation to matters of foreign law, was governed by domestic law, since "these matters are matters to be decided according to the practice of this court."[88] Thus, neither *Lawrence* nor *Duncan* held that the law which governed the client's entitlement to solicitor-client privilege depended upon the law which had the most significant connection to the communications. Instead, both held that the *lex fori* governed the issues of privilege as a matter of principle. There is thus good reason to doubt the correctness of *Cook*.

Further, the reasoning in *Cook* seems to conflate the law which governs privilege and the law which governs the relevant legal services contract.[89] In light of the modern view that solicitor-client privilege represents a substantive legal right, it is difficult to support the traditional categorization of privilege as a procedural matter that is governed by the *lex fori*. Yet simply assimilating the governing law of a privilege claim with the governing law of the relevant legal services contract is also inconsistent with the status of privilege as a substantive legal right. This reduces privilege to a mere private law right, instead of a rule of law which has roots in both the Constitution and the administration of justice. It also ignores the fact that privilege may apply to communications between a prospective client and a solicitor, in circumstances where no retainer, and hence no "legal services contract," even results.[90]

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88 *Duncan*, *supra* note 16 at 1484.

89 See in this respect McComish, *supra* note 4 at 333-34, who states that a choice of law rule based upon the law of the retainer is inadequate since identifying that law can itself be difficult, and it may often have no relation to the legal work being done. *C.f. Prudential Insurance Co of America v Prudential Insurance Co Ltd*, [2003] EWCA Civ 1154 at paras 22 and 27 [*Prudential*], where the Court seemed to suggest that insofar as settlement or "without prejudice" privilege is based upon an express or implied contract, the choice of law applicable to the privilege may be governed by the contract itself. See also *Instance v Denny Bros Painting Ltd*, [2000] FSR 869 (Ch D) at 888-89.

90 *Descôteaux*, *supra* note 28 at 876-77 and 878-81. Notably, at para 60 of *Cook*, Drost J even seemed to suggest that the privilege rights in question belonged to the *solicitors*, not the clients, contrary to the cases discussed at footnote 124 below.

Finally, Drost J's conclusion may have been influenced by the fact that he was not asked to rule upon privilege over documents in connection with an action in British Columbia, but rather in connection with a documentary production dispute in a US court, which would have to be enforced in the United States in any event since that was where the documents were located. Thus, he was effectively asked to give declaratory relief which would dictate the existence of privilege to a US court. This was one of the primary reasons relied upon by the Court of Appeal in dismissing the appeal,[91] where Prowse JA noted that "the ultimate determination of the proper law to be applied to the issue of privilege is an issue to be resolved by the court of Colorado on the basis of its own conflicts of law rules."[92] A similar conclusion was reached by the Alberta Court of Appeal in *Re YBM Magnex International Inc*, where it overturned a declaratory order relating to privilege in the context of extraprovincial legal proceedings on the basis that "it should be the court that will actually determine the outcome of an action that should determine the existence and status of any privilege alleged."[93] These comments suggest that *Cook* may be limited to its facts, and that Drost J actually applied the traditional *lex fori* rule, recognizing that the forum in which the request for production was made was itself in the United States.[94]

Second, even apart from their lack of direct judicial support in Canada and other Commonwealth countries, the substance-based alternatives do not reflect the orthodox rationale for solicitor-client privilege.[95] This rationale was given its classic exposition by Lord Brougham LC in *Greenough v Gaskell*:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.

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91 *Cook CA*, *supra* note 35 at paras 37-42.

92 *Ibid* at para 45.

93 (2000), 271 AR 123 (CA) at para 41.

94 See *Cook*, *supra* note 35 at para 56; and *Cook CA*, *supra* note 35 at paras 44-45.

95 This orthodox rationale has been criticized by some commentators; see Adam Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35 Queen's LJ 493. However, as noted by Bradford, *supra* note 51 at footnote 168, the role of the conflicts scholar is not to critique the underlying rationale for the privilege, but rather to formulate a choice of law rule on the assumption that this rationale is correct. For the purposes of the present paper, the orthodox rationale is not challenged.

> But *it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice*, *which cannot go on, without the aid of men skilled in jurisprudence*, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. …[96]

Thus, as the Ontario Court of Appeal noted in *United States of America v Mammoth Oil Co*, "the rule is a rule of public policy established in the interest of justice rather than a rule established for the protection of particular persons such as the solicitor or his client."[97] On this view, solicitor-client privilege does not exist merely to enforce rights that are personal to the solicitor or client themselves.[98] Rather, to quote Major J in *R v McClure*:

> … This privilege, by itself, *commands a unique status within the legal system*. The important relationship between a client and his or her lawyer *stretches beyond the parties and is integral to the workings of the legal system itself.* The solicitor-client relationship is a *part of that system, not ancillary to it*. See *Gruenke, supra*, per Lamer C.J., at p. 289:
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> > The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are *essential to the effective operation of the legal system.* Such communications are *inextricably linked with the very system which desires the disclosure of the communication*.[99]

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96 (1833), 39 ER 618, 1 My & K 98 at 103 [emphasis added]. This passage has been cited by the Canadian courts on numerous occasions. See e.g. *Solosky*, *supra* note 28 at 834; and *Geffen v Goodman Estate*, [1991] 2 SCR 353 at 382-83.

97 *Supra* note 15 at 979.

98 See *Campbell*, *supra* note 5 at para 49: "The solicitor-client privilege is based on the functional needs of the administration of justice."

99 *Supra* note 28 at para 31[emphasis added]. At para 41, Major J continued by stating "[s]olicitor-client privilege *while also personal is broader* and is important to the administration of justice as a whole" [emphasis added]. The Supreme Court of Canada has reiterated these sentiments on several other occasions: see *Smith*, *supra* note 28 at paras 45-50; *Campbell*, *ibid* at para 49; and *Blood Tribe*, *supra* note 28 at para 30. It should be noted that, in *Descôteaux*, *supra* note 28 at 871-72, Lamer J stated that solicitor-client privilege rested upon a right of confidentiality that "is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others." However, later in the same case (at 883), Lamer J stated that the privilege is "a right that society recognizes as essential for the better administration of justice." Accordingly, as indicated in *McClure*, it would seem that privilege is not simply a personal right of the client, but also – and primarily – a broader principle that is designed to serve the legal system as a whole. For additional statements to this effect, see *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997), 188 CLR 501 (HCA) at

The important point here is not simply that solicitor-client privilege engages broader social and public interests beyond the immediate parties; indeed, many other legal principles that are subject to substance-based choice of law rules do so as well (as, for example, in the law of torts). Rather, it is that the broader interests engaged by the privilege are crucial to the administration of justice within the forum. Since solicitor-client privilege is "inextricably linked with the very system which desires the disclosure of the communication," it should be governed by that system's body of laws, not the laws of a foreign legal system. In this respect, solicitor-client privilege "commands a unique status within the legal system" – including by extension the conflict of laws – since it is "integral to the workings of the legal system itself." Unlike most other substantive rights, the privilege is *a priori* to and "a part of that system, not ancillary to it."

Accordingly, it seems anomalous to base a choice of law rule for solicitor-client privilege upon connecting factors that are specific to the parties, such as the place where the communications took place, the jurisdiction where the solicitor is licensed, or the law which governs the solicitor-client retainer.[100] In focusing upon the particular features of the solicitor, the client, or the communication, the substance-based rules promote the expectations of the parties at the expense of the legal system by which those expectations will rise or fall.[101] Such an approach ignores the indissoluble bond between solicitor-client privilege and the administration of justice in the forum, and is irrational from a conflict of flaws perspective.[102]

582; *Lavallee, supra* note 8 at para 36; *Auckland*, *supra* note 30 at para 46; and *Foster Wheeler*, *supra* note 28 at para 34.

100 The deficiencies with these and similar substance based rules that predicate the choice of law determination upon the territoriality of a single factor are discussed by McComish, *supra* note 4 at 330-34.

101 See Dugan, *supra* note 4 at 37, who observes that the "most significant relationship" choice of law rule "places a relatively high value on the *expectation* of the party making the communication that he is or should be able to rely upon the privilege law of the state most closely connected to the communication."

102 See *Tolofson*, *supra* note 8 at 1046-47: "The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law." In the same paragraph, La Forest J called the "expectations of the parties" a "somewhat fictional concept." This approach was confirmed more recently in *Van Breda*, *supra* note 9 at para 181. See also McComish, *supra* note 4 at 332-33, who criticizes a choice of law rule based upon the law on which the client relied. It is noteworthy in this respect that, in *AM v Ryan*, [1997] 1 SCR 157 at para 32 [*Ryan*], the Supreme Court of Canada accepted that solicitor-client privilege may legitimately create the risk of occasional injustice. Accordingly, the privilege is not driven solely by individual expectations or considerations of fairness, but incorporates

As well, this approach ignores the fact that the parties' expectations of which privilege rules will apply must ultimately turn upon their expectations about choice of law rules in the forum where they perceive the potential for a dispute. Since many of those rules currently apply the *lex fori*, there should be little violence done to the parties' expectations by adhering to that approach. Most lawyers would advise a client concerned about cross-border privilege issues that many places, Canada included, are likely to determine issues of privilege based upon their own domestic laws.[103]

Third, as a matter of policy, the substance-based alternatives are likely to create more uncertainty about the law applicable to solicitor-client privilege than the *lex fori* rule, and thus diminish the privilege's effect. This is because most of the substance-based rules (such as the interests, most significant relationship, better law and *Restatement* approaches) require the courts to weigh multiple competing factors to determine the governing law. Even the more "territorial" rules may require difficult judgments before the applicable law can be identified (for instance, the place where a "relationship" is centered could be one of several locations if the client and law firm are each multinational entities with employees and lawyers dispersed throughout the globe). Such balancing makes it difficult to predict the choice of law outcome in advance,[104] and is prone to manipulation by counsel.[105]

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broader concerns about the administration of justice as a whole. The choice of law rule applicable to the privilege should reflect these features.

[103] See also Wigmore, *supra* note 39, vol I at 354, observing that the emphasis on protecting the parties' expectations in articulating choice of law rules for other forms of privilege has less relevance to attorney-client privilege, since "attorneys… may deliberately and carefully aim to keep their conversations with their clients within the ambit of a particular attorney-client privilege."

[104] Bradford, *supra* note 51 at 936-37.

[105] See Rice, *supra* note 44, vol 2 at 36-37, para 12:17. It is true that a *lex fori* rule could also be manipulated by counsel through forum shopping; see Sterk, *supra* note 4 at 484; and *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18 at para 49, SCJ No 18 (QL) [*Éditions Écosociété*]. However, forum shopping may occur even under a substance-based choice of law rule (where, e.g., a particular forum's conflict of laws principles would require the application of favourable privilege laws from another jurisdiction). Indeed, as recognized recently in *Éditions Écosociété*, *ibid* at para 54, the substance-based choice of law rules may themselves contribute to forum-shopping, since they leave open the possibility that the laws of more than one jurisdiction will apply. Further, disputes over privilege are usually not the principal matter at issue in legal proceedings, but are rather ancillary matters that arise in the context of determining the evidence available to resolve the parties' other substantive rights. Accordingly, as a practical matter, it seems unlikely that litigants will choose a particular forum merely on account of its privilege laws; see Bradford, *ibid* at 921. Additionally, "the jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection

While the same may be said of the *lex fori* rule, on the ground that it is difficult to make advance predictions about the forum for potential disputes,[106] the forum is itself one of the connecting factors commonly used in the substance-based rules. Accordingly, the substance-based alternatives do not eliminate the uncertainty associated with identifying the likely forum. Instead, they merely compound it by requiring parties to make predictions about the *situs* of additional connecting factors that are themselves ambiguous (such as the "place of the communication"),[107] and about how the forum and all of those factors will be weighed together. Further, the parties will *always* have to confront the uncertainty of predicting the forum, regardless of what choice of law rule one adopts, since choice of law rules are in the first instance specific to the forum itself.[108] Parties thus cannot even predict the applicable choice of law rule (whether *lex fori* or substance-based) without first making a preliminary prediction about the forum.

The comparatively "bright line" nature of the *lex fori* is an important consideration in selecting the appropriate choice of law rule. As the Supreme Court of Canada stated in *McClure*:

> … solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.[109]

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with the forum jurisdiction;" see *Tolofson*, *supra* note 8 at 1054 (and see, in the criminal context, *R v Hape*, 2007 SCC 26 at paras 59-62, 2 SCR 292 [*Hape*]; and s 478 of the *Criminal Code*). Thus, a *lex fori* rule is unlikely to be applied to communications having only a tenuous connection to the forum. To the extent that problems of forum shopping arise, and another jurisdiction is clearly the more appropriate forum than the one chosen by the plaintiff, they can be addressed through the doctrine of *forum non conveniens*.

106 See Bradford, *ibid* at 936-37 and 946; and Daiske Yoshida, "The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals" (1997) 66 Fordham L Rev 209 at footnote 194.

107 Commentators have repeatedly pointed out that a focus on the "place of the communication" fails to account for the modern reality of solicitor-client communications, which often take place instantaneously over the internet or a telephone. It also fails to account for the bilateral nature of solicitor-client privilege, which extends to communications for both the *giving* and *receiving* of legal advice. Communications between the same parties in the same two jurisdictions could thus be subject to different laws under a "place of the communication" rule, even where they relate to the same issue, which would be absurd; see McComish, *supra* note 4 at 331-32.

108 See *Traders, supra* note 9 at 248; see also *Van Breda*, *supra* note 9 at para 34, holding that the Canadian constitution does not require that all provinces adopt uniform rules of private international law.

109 *McClure*, *supra* note 28 at para 35. The Supreme Court of Canada has frequently reiterated this point; see *Pritchard*, *supra* note 5 at para 18; *Blood Tribe*, *supra* note 28

It is worth noting in this regard that in *Tolofson*, the Supreme Court of Canada's leading choice of law decision, the Court declined to adopt an American choice of law rule for tort (known as the "proper law of the tort") that would require "qualitatively weighing the relevant contacts with the competing jurisdictions to determine which has the most significant connections with the wrong."[110] Instead, while La Forest J acknowledged the flexibility of the rule, he found that this flexibility was outweighed by the rule's "extreme uncertainty."[111] He went on to observe that "[o]ne of the main goals of any conflicts rule is to create certainty in the law,"[112] and held that while "the underlying principles of private international law are order and fairness, order comes first."[113] The parallels between the flexible "proper law of the tort" rule rejected in *Tolofson*, and the substance-based choice of law rules proposed for solicitor-client privilege, are obvious, and underscore the fundamental differences between the Canadian and American approaches to choice of law.

The Supreme Court recently reaffirmed this aspect of *Tolofson* in *Club Resorts Ltd v Van Breda*,[114] and its companion judgment, *Éditions Écosociété Inc v Banro Corp.*[115] In *Van Breda*, the Court reformulated the common law "real and substantial connection" test for when provincial

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at paras 9-10; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 75, 1 SCR 815 [*Criminal Lawyers Association*]. Similar comments have been made by the United States Supreme Court; see *Upjohn Co v United States*, 449 US 383 at 393 (1981) [*Upjohn*] ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."); and *US v Jicarilla Apache Nation*, 131 S Ct 2313at 2328-29 (2011) ("for the attorney-client privilege to be effective, it must be predictable"). Some Commonwealth courts have even suggested there can be no balancing of interests when it comes to the privilege, and that the privilege is absolute; see *Auckland*, *supra* note 30 at paras 46-55; *Three Rivers*, *supra* note 29 at para 24 (*c.f. McE v Prison Service of Northern Ireland*, [2009] 1 AC 908 (HL) at paras 55, 57, 81-82 and 105). However, while in Canada solicitor-client privilege is nearly absolute, it is still subject to some exceptions; see *Criminal Lawyers' Association*, *ibid* at para 53.

110 *Tolofson*, *supra* note 8 at 1055.

111 *Ibid* at 1056.

112 *Ibid* at 1061.

113 *Ibid* at 1058. This point was reiterated in *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)*, 2001 SCC 90 at para 71, 3 SCR 907 [*Holt Cargo*]; and *Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78 at para 20, 4 SCR 205 [*Spar Aerospace*]. See also *Castillo v Castillo*, 2005 SCC 83 at para 27, 3 SCR 870 [*Castillo*] *per* Bastarache J (concurring in the result), stating that in rejecting the proper law of the tort in favour of the *lex loci delicti* as the choice of law rule in *Tolofson*, "La Forest J was also motivated by a number of important policy considerations, including the need for *certainty, predictability*, and *ease of application*" [emphasis added].

114 *Supra* note 9.

115 *Supra* note 105; see also *Breeden v Black*, 2012 SCC 19, SCJ No 19 (QL).

courts may assert jurisdiction *simpliciter* over *ex juris* defendants. In doing so, the Court placed great emphasis upon the primacy of order, predictability and certainty as the values at the heart of private international law.[116] Although the Court's reasons focused primarily upon jurisdiction *simpliciter*, LeBel J stressed the interconnectedness of private international law, and observed that "the framework established for the purpose of determining whether a court has jurisdiction may have an impact on choice of law."[117] He then noted that the judicial trend in identifying new conflicts rules was to rely upon objective connecting factors rather than pure judicial discretion,[118] and referred to *Tolofson* as a case where "the Court's concern was to assure predictability in the application of the law of conflicts to tort claims," being motivated by the values of "order" and "certainty" at the root of the conflicts system.[119] Finally, LeBel J made the following remarks:

> The real and substantial connection test *does not mean that* problems of assumption of jurisdiction or other matters, such as *the choice of the proper law applicable to a situation* or the recognition of extraprovincial judgments, *must be dealt with on a case-by-case basis by discretionary decisions of courts,* which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. …
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> …
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> Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction *cannot be an unstable, ad hoc system made up "on the fly" on a case-by-case basis — however laudable the objective of individual fairness may be.* As La Forest J. wrote in *Morguard*, *there must be order in the system,* and it must permit the development of a just and fair approach to resolving conflicts. *Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law* governing the assumption of jurisdiction by a court. *Parties must be able to predict with reasonable confidence* whether a court will assume jurisdiction in a case with an international or interprovincial aspect. …[120]

The Supreme Court reiterated this preference for conflict rules which promote order, predictability and certainty over individual fairness through *ad hoc* exercises of judicial discretion in *Éditions Écosociété*. At issue

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116 *Van Breda*, *supra* note 9 at paras. 35, 66, 70, 73-75, 82 and 93.

117 *Ibid*, at para 16. *C.f. Éditions Écosociété*, *supra* note 105 at para 61, observing that the role played by substantive law (such as the elements of a tort) may differ in the context of jurisdiction *simpliciter* and choice of law.

118 *Van Breda, ibid* at para 35.

119 *Ibid* at paras 37-38.

120 *Ibid* at paras 70 and 73 [emphasis added]; see also para 93.

there was how the *forum non conveniens* test should apply to an interprovincial libel action. In addressing this issue, LeBel J considered the applicable choice of law as one of the factors in the *forum non conveniens* analysis, and in doing so rejected a choice of law rule for defamation that would turn upon the "centre of gravity" of the tort, based on the place of the "most substantial publication."[121] As with the rejection of the "proper law of the tort" rule proposed in *Tolofson*, the *Éditions Écosociété* Court rejected the "most substantial publication" rule as one which would provide courts and litigants with "little guidance."[122] Instead, LeBel J suggested that the choice of law rule for defamation should be either the traditional *lex loci delicti* rule, or possibly the place of the most substantial harm to the plaintiff's reputation (though he declined to make a final determination on this point).

In view of these cases, it seems clear that the uncertainty and unpredictability created by the US substance-based choice of law rules for privilege are contrary to the philosophy that underlies private international law in Canada. It may still be argued that the substance-based rule advanced by Bradford and McComish – founded on the solicitor's jurisdiction of practice – will not create the uncertainty of the other substance-based rules, but carries instead the same "bright line" advantage as the *lex fori* rule. However, as discussed above, a choice of law rule that focuses upon characteristics specific to the solicitor or client is inconsistent with the principle that solicitor-client privilege exists to serve the forum's legal system itself.[123] Further, privilege belongs to the client alone rather than the solicitor, and may only be waived by the client.[124] It thus seems incongruous that the solicitor should be used to determine the law by which privilege over the communications will be governed, since they are the party with the least interest in the communications.

Indeed, the "jurisdiction of practice" rule appears to conflate solicitor-client privilege with the lawyer's ethical duty of confidentiality. The latter is an aspect of the lawyer's professional obligations, and is shaped (at least in Canada) to a large degree by the rules promulgated by the provincial law societies.[125] It is not difficult to understand why this particular duty should

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121 *Éditions Écosociété*, *supra* note 105 at para 52.

122 *Ibid* at para 54.

123 This is acknowledged by McComish, *supra* note 4 at 334.

124 This principle has been frequently reiterated by the Supreme Court of Canada: see *Smith*, *supra* note 28 at para 46; *McClure*, *supra* note 28 at para 37; *Lavallee, supra* note 8 at para 39; and *Blood Tribe*, *supra* note 28 at para 10.

125 See e.g. Rule 2.03(1) of the Law Society of Upper Canada's *Rules of Professional Conduct*. The Commentary to this Rule states: "This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or

be governed from a conflict of laws perspective by the jurisdiction where the lawyer is regulated. On the other hand, solicitor-client privilege, from which the ethical duty is distinct,[126] is a rule of public policy held necessary in the interests of the justice system as a whole. As the Supreme Court of Canada indicated in *McClure*, this rule is inexorably linked to the justice system that is asked to compel disclosure of the privileged communications. It should therefore be governed by it.

There is also reason to doubt whether a rule based upon the law of the solicitor's jurisdiction of practice is even "bright line" at all. As the Supreme Court of Canada recognized in *Tolofson*, "lawyers called to the bar in several provinces are to be found in every major city in this country."[127] How would this choice of law rule work in a situation where such a lawyer gave or received the communications? Indeed, the "jurisdiction or practice" rule neglects the fact much legal advice is no longer given by a single lawyer, but rather by several lawyers working as a team. What would be the result if the communications were with several such lawyers, some of whom are called in different or even multiple jurisdictions? Would it matter if the lawyers practiced at different law firms, or gave advice about the laws of a foreign jurisdiction in which none of them were licensed to practice at all? What if the advice was not given on behalf the lawyers themselves, but rather in the name of a multi-national law firm or firms? What if the advice was given by someone who was allowed to give legal advice without being a member of a legal bar,[128] or by someone whom the client reasonably but mistakenly believed was a lawyer?[129]

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documentary communications passing between the client and the lawyer. The ethical rule is wider."

126 See *R v Cunningham*, 2010 SCC 10 at para 31, 1 SCR 331 [*Cunningham*]; and Sopinka, *supra* note 25 at 913.

127 *Tolofson*, *supra* note 8 at 1061.

128 See e.g. *Renfield*, *supra* note 53 where privilege was extended to communications with French in-house counsel who were not members of a bar. The Court observed that "[b]ecause there is no clear French equivalent to the American 'bar,' in this context membership in a 'bar' cannot be the relevant criterion for whether the attorney-client privilege is available." In many jurisdictions, legal advice by persons who are not members of a formal legal bar may be quite common, since legal education outside North America can often be pursued as a course of undergraduate studies, with admission to the bar requiring further specialty courses; see Lawton P Cummings, "Globalization and the Evisceration of the Corporate Attorney-Client Privilege: A Re-Examination of the Privilege and a Proposal for Harmonization" (2008) 76 Tenn L Rev 1 at 17-18.

129 Several courts and commentators have noted the possibility of privilege arising in relation to communications with a person who is not actually qualified as a lawyer, but whom the client reasonably believes to be such; see *Hartz*, *supra* note 20 at 155; *Gucci*,

These and other factual permutations suggest that a "jurisdiction of practice" rule is not truly bright line, but will require further refinements and sub-rules to respond to the increasingly global practice of law. This is illustrated by Bradford's own minimization of these issues (which he spends but a single paragraph addressing).[130] While McComish exerts greater effort on these problems,[131] he is driven in the end to acknowledge that courts may sometimes have to resort to additional choice of law factors (such as the *lex causae*, the place of residence, the place of the "most substantial connection") in order to address the realities of

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supra note 56 at 7-8, 16-24; Manes and Silver, *supra* at 35-38; *Restatement of the Law (Third): The Law Governing Lawyers*, *supra* note 25 at § 72, Comment e; and Sopinka, *supra* note 25 at 945. *C.f. Newport*, *supra* note 25 at para 40-44 and 56-57 (where the Court held that solicitor-client privilege can only extend to communications with persons who are part of the regulated legal profession), discussed in Neil Guthrie, "Privilege: Recent Developments" (2012) 39 Adv Q 349 at 350-53. Insofar as solicitor-client privilege can arise in relation to communications with a person who is not actually licensed to practice law, it would seem anomalous to adopt a requirement that the "solicitor" be licensed in the choice of law context; see *Éditions Écosociété*, *supra* note 105 at para 55.

[130] Bradford, *supra* note 51 at 952. Bradford's solution to the problem of the lawyer licensed in multiple jurisdictions is arbitrary and unconvincing. He suggests that in such cases, the court should apply the weaker of those jurisdictions' privilege laws. But while such a rule may limit attempts to manipulate privilege laws, as Bradford suggests (eg, by clients seeking advice from lawyers licensed in particular jurisdictions), it is contrary to the principle that solicitor-client privilege must remain as close to absolute as possible. It is also contrary to basic ideas of fairness, and would inhibit the mobility of the legal profession. Consider, for example, if a Canadian law school graduate initially becomes licensed in New York in order to practice securities law, but shortly thereafter returns to Canada to practice criminal law. Why should a Canadian client consulting that lawyer in defence of a criminal charge have to suffer a weaker New York privilege law simply because of the lawyer's short and unrelated foray into the United States? Such a rule would be completely arbitrary from the client's perspective, and would discourage lawyers from seeking experience in foreign jurisdictions even though such experience contributes beneficially to the development of the law in the forum. The untenability of Bradford's solution is acknowledged by McComish, *supra* note 4 at footnote 283, who calls it "implausible and unnecessary."

[131] McComish's own solution to the problem of a lawyer licensed to practice in more than one jurisdiction is to apply the law of the place about which the lawyer purports to advise. However, as he himself acknowledges, such a rule would break down where a lawyer advises about multiple legal areas or provides transnational advice; see McComish, *ibid* at 331 and 335. It would also be difficult to apply where the lawyer does not advise about the laws of a specific jurisdiction but rather on how to act in a particular legal context more generally (as per *Samson Indian Band v Canada*, [1995] 2 FC 762 (CA) at para 8). McComish also notes that a "jurisdiction of practice" rule will have difficulties addressing situations where multiple lawyers provide advice, and suggests in such cases that the privilege could be governed by two or more different bodies of law. It is not clear how, or even if, such a rule could work in practice.

transborder legal practice.[132] By contrast, no such issue exists with the *lex fori* rule.[133] In every jurisdiction where a choice of law issue arises in judicial proceedings,[134] there can be only one forum, though the choice of law issue may arise in more than one jurisdiction simultaneously.[135]

Fourth, a substance-based choice of law rule that requires courts to decide privilege questions based on foreign laws could give rise to constitutional concerns.[136] Such concerns were recognized by the Supreme Court of Canada, in relation to choice of law in tort, in *Tolofson*:

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[132] McComish, *ibid* at 334-36.

[133] In the commercial context, it may even be possible for parties to predict with relative certainty what forum, and hence what privilege, will apply, by including forum-selection clauses in their agreements and other transactional documents.

[134] The situation may be different if the issue arises in the context of a commercial arbitration. However, the choice of law rules for non-judicial bodies are outside the scope of the present paper. For discussions of this issue, about which there is a wealth of literature, see e.g. Tom Ginsburg and Richard M Mosk, "Evidentiary Privileges in International Arbitration" (2001) 50 Int'l & Comp LQ 345; and Daria Kozlowska, "Privilege In the Multi-Jurisdictional Area of International Commercial Arbitration" (2011) 14 Int'l Arb L Rev 128. The situation may also be different if the issue arises in the context of an investigation rather than judicial proceeding. But even then, the parties may challenge any attempt to derogate from solicitor-client privilege by bringing proceedings before a court, which would serve as the forum. As Dawson J noted in *Baker v Campbell* (1983), 153 CLR 52 (HCA) at 131-32, "[S]hould any dispute arise, the means exist whereby a judicial determination of the dispute may be obtained as is indicated by this and the other cases in which such a dispute has arisen."

[135] In some cases, there may be difficulties identifying the forum if evidence is sought in a different jurisdiction than the one which will resolve the underlying legal dispute (eg, based on letters rogatory). This issue has given rise to considerable discussion in the United States, where the courts appear divided over the choice of law rule to be applied by the deposition state where its own privilege laws differ from those of the state that will hear the trial; see Sterk, *supra* note 4 at 495-506; Reese and Leiwant, *supra* note 70 at 98-103; and the *Restatement (Second)*, §139, Comment f. In Canada, however, the use of pre-trial depositions of witnesses has been much less common than in the United States; see *Lafarge Canada Inc v Khan* (2008), 89 OR (3d) 619 (Sup Ct) at para 38. The Canadian courts appear to regard the jurisdiction in which the evidence is sought as the "forum" for this purpose, and will thus apply that jurisdiction's privilege laws (and any of its other laws that concern the "fundamental values … and … rights of the witness") where they conflict with those of the jurisdiction that will determine the larger legal proceeding; see *Appeal Enterprises Ltd v First National Bank of Chicago* (1984), 46 OR (2d) 590 (CA) [*Appeal Enterprises*]; and *USA v Pressey* (1988), 65 OR (2d) 141 (CA), leave to appeal refused, [1988] SCCA No. 282 [*Pressey*]. See also *Gulf Oil Corp v Gulf Canada Ltd*, [1980] 2 SCR 39 at 56-58 [*Gulf Oil*].

[136] See *State Farm Mutual Automobile Insurance Co v Canada (Privacy Commissioner)*, 2010 FC 736 at paras 20 and 119, 376 FTR 59 (FC), where the argument was raised (but not decided) that federal privacy legislation could not abrogate litigation privilege in provincial proceedings, since this would be contrary to s 92(14) of the

> … the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures.... I note that provincial legislative power in this area would appear to rest on s. 92(13) "Property and Civil Rights in the Province." If a court is thus confined, it is obvious that an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties. Thus an attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns. … I go no further regarding the possible resolution of these problems. What these considerations indicate, however, is that *the wiser course would appear to be for the Court to avoid devising a rule that may possibly raise intractable constitutional problems.*[137]

Unlike in *Tolofson*, provincial jurisdiction over solicitor-client privilege does not appear to flow solely or even predominantly from section 92(13) of the *Constitution Act, 1867*, concerning "Property and Civil Rights in the Province." Instead, while there is little case law on point, the jurisdiction seems predominantly attributable to section 92(14), the "Administration of Justice in the Province."[138] Both the production of all relevant evidence,[139] and the right to resist such production on the basis of solicitor-client privilege,[140] are intimately related to the administration of justice. Accordingly, the ultimate judicial and legislative power over the privilege applicable in a given legal dispute should not reside in a province outside the forum (unlike in the case of a tort, which may be viewed as giving rise to "Civil Rights in the Province" where the tort occurred, pursuant to section 92(13)). Instead, it should fall within the prerogative of the forum itself – the province whose administration of justice is being invoked – and

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Constitution Act, 1867. It is interesting in this regard that Bradford suggests his choice of law rule will only result in greater certainty if it is imposed on all states by federal legislation; see Bradford, *supra* note 51 at 950-51. Such federal legislation would create serious constitutional problems in Canada for the reasons noted below.

137 *Tolofson*, *supra* note 8 at 1065-66 [emphasis added]. The constitutional underpinnings of private international law, including the territorial restrictions upon choice of law rules under s 92 of the *Constitution Act, 1867*, were recently reiterated in *Van Breda*, *supra* note 9 at paras 21-23, 28- 35 and 69-71.

138 Section 91(27) of the *Constitution Act, 1867* also vests the federal government with exclusive jurisdiction over "the Procedure in Criminal Matters." However, to the extent that solicitor-client privilege is a matter of "procedure," the federal government appears to have made the provincial laws of privilege apply in federal proceedings under s 40 of the *Canada Evidence Act*, RSC 1985, c C-5 (subject to special provisions in other enactments).

139 *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc*, 2001 SCC 51 at para 74, 2 SCR 743; *Three Rivers*, *supra* note 29 at paras 28 and 61.

140 *Blank*, *supra* note 2 at para 26; *Cunningham*, *supra* note 126 at para 26. *C.f. Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 262, 3 SCR 457, suggesting without analysis that "privileges" fall within "civil rights" under s 92(13) of the *Constitution Act, 1867*.

should neither be abrogated on the basis of another province's rules, nor extended beyond the forum's own borders.

The Supreme Court of Canada averted to a similar problem in *Castillo v Castillo*. It held there that the Alberta Legislature could not be constitutionally required to apply a foreign limitation period longer than its own, even though limitation periods – like perhaps solicitor-client privilege – are matters of "substance" under conflict of laws principles, since this would affect its control over the administration of justice in the province:

> Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act,* 1867 (the "Administration of Justice in the Province"). Tolofson was a "choice of law" case. *The Court's classification of limitation periods for "choice of law" purposes as substantive rather than procedural did not* (and did not purport to) *deny the province's legislative authority over the "Administration of Justice in the Province"*. A foreign jurisdiction, by adopting a limitation period longer than that of Alberta, cannot validly impose on Alberta courts an obligation to hear a case that Alberta, as a matter of its own legislative policy, bars the court from entertaining.[141]

This is not to say that a substance-based choice of law rule would necessarily violate the constitution. Indeed, as the Supreme Court of Canada noted more recently in *Van Breda*, the territorial limits in section 92 of the *Constitution Act, 1867* only require that conflicts rules confer legitimacy upon the exercise of state power by ensuring a sufficient relationship with the province, and that this may occur through different types of rules.[142] Nevertheless, it is reasonable to point out that a substance-based choice of law rule "may possibly raise intractable constitutional problems" of the sort which led the *Tolofson* Court to chart a different course.

6. The Traditional Rule Revisited

From the preceding analysis, it will be seen that a substance-based choice of law rule is inferior to a *lex fori* rule for several reasons. Such a rule has little judicial support outside the United States. It also is inconsistent with

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[141] *Castillo*, *supra* note 113 at para 5. *C.f.* Bastarache J's reasons (concurring in the result) at paras 36-40 and 46-47. For an analogous ruling, see *Hunt v T&N Plc*, [1993] 4 SCR 289 [*Hunt*], where the Court held that a Quebec "blocking statute" which prohibited the removal of business records from the province in response to extraprovincial judicial orders was constitutionally inapplicable to litigation in other provinces.

[142] *Van Breda*, *supra* note 9 at paras 31, 33-34 and 71; see also para 67, where LeBel J cautioned against turning "every private international law issue into a constitutional one."

the orthodox rationale for solicitor-client privilege. Further, it would infuse the privilege with considerable uncertainty, despite repeated admonitions by the Supreme Court that the privilege must remain as close to absolute as possible. And it does not accurately reflect the unique constitutional dimensions of the privilege in Canada. The question, then, is whether a *lex fori* rule can still be justified under Canadian conflict of laws principles.

As discussed above, it is difficult to predicate a *lex fori* rule upon the traditional view that the privilege is a matter of evidence and hence "procedure."[143] Indeed, the Supreme Court of Canada now views solicitor-client privilege as a substantive rule of law. To be sure, the privilege would appear to retain its evidentiary status when it is asserted to avoid testimony or other materials from being tendered as evidence before a court or tribunal; it is only when the privilege is asserted without regard to the material's inadmissibility as evidence (during a challenge to an investigation, for example) that it is exclusively substantive.[144] Thus, in *Lavallee*, the Supreme Court of Canada stated that:

> Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law.[145]

However, the fact that the privilege may retain its evidentiary character in some contexts does not justify the characterization of privilege in other contexts as procedural, and so governed by the *lex fori*. Further, even in those contexts where the privilege is evidentiary, it is still not completely bereft of its dualistic status as a substantive legal principle. For instance, the Supreme Court of Canada has drawn various principles from the substantive status of solicitor-client privilege, such as the narrowness of the exceptions to it, without suggesting that those principles are inapplicable where the privilege is asserted in a traditionally "evidentiary" capacity.[146] The Supreme Court has also recognized that the evidentiary

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143 As McComish states, *supra* note 4 at 312: "[T]he true controversy is not so much whether the law of privilege is procedural or substantive… Rather the real issue – assuming that the law of privilege is indeed substantive – is to determine what law should apply." See also Mueller and Kirkpatrick, *supra* note 43 at §5:8 ("[T]he idea that privileges are part of the law of procedure, and hence that the law of the forum should always govern privilege questions, is now thoroughly discredited").

144 *Solosky*, *supra* note 28 at 836-37; *Descôteaux*, *supra* note 28 at 873-76 and 893; *Lavallee*, *supra* note 8 at paras 19-20, 44 and 49; *Foster Wheeler*, *supra* note 28 at para 34; Thanki, *supra* note 34 at 4-5.

145 *Lavallee*, *supra* note 8 at para 49.

146 *Goodis*, *supra* note 28 at paras 14-17; *Blank*, *supra* note 2 at para 24. See also *Campbell*, *supra* note 5, where the privilege was asserted to prevent testimony in the context of a stay application, and the Court did not suggest that the principles applicable

and substantive aspects of the privilege can apply simultaneously, as, for example, when a search warrant is being issued.[147]

Accordingly, there seems little merit to an approach that would continue to treat solicitor-client privilege as procedural for conflict of laws purposes on some occasions, but not others. Such an approach would incorporate all the problems with the substance-based rules discussed above in cases where the privilege is not used in an evidentiary capacity. And it would then compound them by requiring courts to identify when, precisely, the privilege is being asserted in a substantive as opposed to an evidentiary context, which is a characterization that resists a bright line test given the numerous procedural postures in which the privilege may be raised. In the end, therefore, the characterization of privilege as procedural seems an inadequate foundation for a choice of law rule. As Lord Scott of Foscote stated in *Three Rivers DC v Bank of England (No 4)*:

> … There has been some debate as to whether [legal advice privilege] is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. *Its characterisation as procedural or substantive neither adds to nor detracts from its features.*[148]

One could still argue that, even if the privilege is no longer viewed as being exclusively procedural outside the choice of law context, it should still be seen as procedural within that context, such that the traditional *lex fori* rule continues to apply on that account. And this approach does find some support in the case law.[149] In *Circosta v Lilly*, the Ontario Court of Appeal held that the Rules Committee could not promulgate a rule of civil procedure requiring disclosure of litigation-privileged documents, since such privilege was a matter of "substantive" law under the section 111(9) of the *Judicature Act*[150] and so beyond the Committee's powers, but cautioned that this ruling was not necessarily inconsistent with the characterization of privilege as a matter of procedure for conflicts of law purposes:

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to the privilege were any different than in the cases it cited involving the assertion of privilege in a substantive capacity.

147 *Descôteaux*, *supra* note 28 at 893.

148 *Supra* note 29 at para 26 [emphasis added]; see also *RMBSA*, *supra* note 87 at paras 32-33.

149 See *Castillo*, *supra* note 113 at para 5; *Ravndahl v Saskatchewan* (2007), 43 CPC (6th) 201 (Sask CA) at para 17, aff'd, [2009] 1 SCR 181; and *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at paras 27-28, 1 SCR 649.

150 RSO 1960, c 197.

> … In private international law "procedure" is a term of very wide significance and includes… the privilege by the exercise of which a party is exempted from disclosing communications made to a legal adviser… In the sphere of conflict of laws as an exclusory law it might be viewed as procedural and hence governed by the lex fori: it is none the less the right of the client founded on well-settled legal principles. Thus it is a substantive right to be adversely affected only by the direct action of the Legislature rather than one which could be taken away by a procedural rule… .[151]

Nevertheless, it seems unlikely that solicitor-client privilege could continue to be treated as "procedural" in the choice of law context without doing violence to that concept. In *Tolofson*, the Supreme Court of Canada held that rules of procedure in the conflict of laws are those which "will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties."[152] The Court also held that this characterization is to be made as a matter of policy and principle, not on account of the fact that the rule may fall within a legal category which the conflict of laws has traditionally viewed as "procedural" in the abstract.[153] Accordingly, the fact that the privilege is a matter of "evidence" in some respects is not sufficient to sustain its characterization as "procedural" in the conflict of laws. Instead, it must also be asked whether a *lex fori* rule for the privilege is justified on the basis of *convenience* to the forum.[154] And it is here that the analysis breaks down.

A court which finds it necessary to apply the *lex fori* rule to solicitor-client privilege is unlikely to be motivated by considerations of "convenience." The time has long passed when the privilege was viewed as a part of the adjectival law which "aid[s] the forum court to 'administer [its] machinery as distinguished from its product.'"[155] Instead, such a court is likely to be driven by the belief that the privilege is so fundamental, not merely to the rights of the parties but to the justice system itself, that it will brook no interference with it by foreign laws and the uncertainties that attend their application. To call such a privilege "procedural" because a *lex fori* rule is found necessary simply attaches a label to the choice of law conclusion; it does not explain why that conclusion has been reached. Given that matters in the conflict of laws "should be categorized as

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151 (1967), 61 DLR (2d) 12 (Ont CA) at 15; see also *Harrington v Lowe* (1996), 190 CLR 311 (HCA) at 341.

152 *Tolofson*, *supra* note 8 at 1072.

153 *Ibid* at 1068-69 and 1071.

154 *Ibid* at 1067-68. The Court accepted that "our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself."

155 *Ibid* at 1067.

procedural only if the question is beyond any doubt,"[156] the procedural/substantive distinction no longer affords a tenable basis for the *lex fori* rule.

7. Public Policy: An Alternative Solution

If the *lex fori* rule is to remain viable, it is submitted that the courts should openly focus upon the public policy reasons in its favour. While this approach is novel,[157] solicitor-client privilege "commands a unique status within the legal system,"[158] and raises special considerations of public policy given its fundamental importance to the administration of justice. These considerations make it possible to justify a *lex fori* rule without relying upon the artificial distinction between substance and procedure at all. Under well-established principles of private international law, an issue that is substantive, and thus ostensibly governed by foreign law, will remain subject to Canadian law if the foreign law is contrary to Canadian public policy.[159]

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156 *Ibid* at 1068-69.

157 See Bradford, *supra* note 51 at 917-18, who notes that public policy has received "limited use" as a choice of law foundation for attorney-client privilege in the United State. However, the possibility of public policy serving as the impetus for a *lex fori* rule for legal professional privilege has been accepted in some American courts, as discussed below. See also *Conseil québécois sur le tabac & la santé v JTI-MacDonald Corp*, 2011 QCCS 2376 at paras 42-44, leave to appeal refused, 2011 QCCA 1356 (Chambers) (where the Court suggested that solicitor-client privilege was a matter of "public order," and so could not be governed by foreign law within the Quebec courts). Public policy as a justification for the *lex fori* is also suggested in some of the literature; see Ginsburg and Mosk, *supra* note 134 at 380-381; Hubbard, *supra* note 25 at para 11.125; Malek, *supra* note 34 at 654; and Thanki, *supra* note 34 at 222. The only substantial analysis against a public policy-based choice of law rule for privilege is that offered by Bradford and McComish. In Bradford's view, the public policy solution is "overstated," since it would always result in the application of forum's law; see Bradford, *supra* note 51 at 918. However, this analysis offers little insight into the viability of a public policy rule itself, since universal application of the forum's law may well be a desirable outcome. As for McComish, he concludes that public policy should not prevent the forum from applying the foreign privilege law except if the communications are undertaken to facilitate a crime or a fraud, and the foreign law does not recognize a crime or fraud exception to the privilege comparable to that of the forum; see McComish, *supra* note 4 at 337-41. For the reasons below, it is submitted that this approach is unduly narrow.

158 See *Blood Tribe*, *supra* note 28 at para 30: "There is no such parity of legal status and importance. Solicitor-client privilege 'commands a unique status within the legal system... . [It] is integral to the workings of the legal system itself'… An argument that equates the status of solicitor-client privilege with "confidential commercial information" is simply a denial of its fundamental importance…".

159 *Gulf Oil*, *supra* note 135 at 62; see also *Kuwait Airways*, *supra* note 4 at paras 16-17.

The principal difficulty with applying this concept to foreign claims of privilege is that the public policy doctrine has traditionally been given a narrow role in private international law,[160] even more so than when it is invoked in the context of domestic legal disputes.[161] Thus, in *Beals v Saldhana*,[162] the Supreme Court of Canada held that public policy would only prevent the recognition of a foreign judgment in Canada if it was contrary to the "fundamental morality of the Canadian legal system"[163] or the "Canadian concept of justice,"[164] and would "shock the conscience of the reasonable Canadian."[165] Plainly, a doctrine of this nature could not serve as a general foundation for a *lex fori* rule. There will be many situations in which a foreign privilege law does not meet this threshold, despite being contrary to Canadian privilege law itself.

Nevertheless, there are also several reasons that justify extending the public policy doctrine to conflicts involving solicitor-client privilege. First, part of the reason why the public policy defence may have been applied so narrowly in conflicts jurisprudence is that questions of "procedure" – privilege included – were traditionally governed by the *lex fori* in any event.[166] Accordingly, until the comparatively recent transformation of solicitor-client privilege from a rule of procedure into a substantive civil right, there was no need for Canadian courts to consider whether public policy should be used to justify the application of domestic privilege laws. To the extent that the concept of "procedure" has been narrowed in modern times, there should be room for the public policy doctrine to enjoy some corresponding growth.

Second, there is case law from the Supreme Court of Canada decided after *Beals* which indicates that the public policy doctrine is not as myopic as suggested in that judgment.[167] In *Pro Swing Inc v Elta Golf Inc*,[168] the

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160 *Beals v Saldhana*, 2003 SCC 72 at paras 41 and 75, 3 SCR 416 [*Beals*].

161 *Society of Lloyd's v Saunders* (2001), 55 OR (3d) 688 (CA) at para 49, leave to appeal refused, [2001] SCCA No 527 [*Society of Lloyd's*]; *Kuwait Airways*, *supra* note 4 at para 114.

162 *Supra* note 160.

163 *Ibid* at para 72.

164 *Ibid* at paras 71 and 77.

165 *Ibid* at para 77.

166 See Collins, *supra* note 10, vol 1 at 93.

167 See also *Society of Lloyd's*, *supra* note 161 at paras 65 and 70, where in a case decided prior to *Beals* and not referred to in it, the Ontario Court of Appeal held that to condone a breach of securities legislation could be contrary to "public policy" in the conflict of laws context, and that this public policy concept was not restricted to moral imperatives but extended also to "fundamental values" and "essential principles of justice" (which, it is submitted, would include solicitor-client privilege).

168 2006 SCC 52, 2 SCR 612 [*Pro Swing*].

Supreme Court refused to grant recognition and enforcement of an Ohio contempt judgment, which required that the defendant – an Ontario corporation – provide personal information regarding its suppliers and purchasers. The contempt judgment was issued after the defendant was found to have breached an Ohio consent decree, in which it had agreed to refrain from selling goods in violation of the Ohio plaintiff's trademark. The majority of the Court, *per* Deschamps J, found that public policy considerations could preclude enforcement of this part of the order:

> … [P]ublic policy and respect for the rule of law go hand in hand. Courts are the guardians of Canadian constitutional values. They are sometimes bound to raise, *proprio motu*, issues relating to public policy. … In the case at bar… there are, in my view, concerns with respect to parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure. The quasi-constitutional nature of the protection of personal information has been recognized by the Court on numerous occasions…
>
> … This is but an example of public policy considerations that judges must consider before agreeing to recognize and enforce a judgment on a foreign country's behalf.[169]

While these comments of the Supreme Court were *obiter*, it is but a small step from holding that public policy may require the enforcement of domestic privacy laws to holding that it may also require enforcement of domestic privilege laws. If anything, solicitor-client privilege should be an even more attractive candidate for this doctrine, since it appears to rank higher on the hierarchy of public interests than privacy.

Third, the Supreme Court of Canada's recent judgment in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*[170] suggests that courts are taking an increasingly "functional" approach to public policy. In *Tercon*, Binnie J (with whom the majority agreed on this point) found that the doctrine of public policy could justify the non-enforcement of a contractual exemption clause where the public policy reasons against enforcement overrode the public policy behind freedom of contract.[171] In other words, Binnie J held that the public policy doctrine required courts to weigh the principal public policy in favour of enforcement (freedom of contract) against the public policy concerns in favour of non-enforcement.

While *Tercon* obviously arose in a different context, there is no reason why the same analysis cannot apply to public policy in the conflict of laws.

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169 *Ibid* at paras 59-61.

170 2010 SCC 4, 1 SCR 69 [*Tercon*].

171 *Ibid* at paras 62, 82, 85, 115-23, 135 and 140.

As in the sphere of contract law, there is a specific public policy in the conflict of laws context that grounds the enforcement of foreign laws, though it takes the form of *comity* rather than freedom of contract.[172] Pursuant to *Tercon*, the public policy doctrine in the conflict of laws could be applied by asking whether the public policy behind comity is overridden by any public policy reasons against enforcing a foreign law. This approach would demystify the concept of public policy in private international law, and ensure that the major competing policy interests are fully considered.

Further, despite the limited role public policy has historically been given in the conflict of laws, it is clear that comity is not absolute.[173] Comity is essentially an attitude of deference to the actions of other sovereign states legitimately taken within their territory,[174] which involves "informal acts performed and rules observed by states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation."[175] Such acts are said to be justified on the ground that they facilitate interstate relations and global cooperation,[176] and are based upon both respect for foreign sovereignty, and the common interest and practical necessity that states act courteously towards one another.[177] However, comity is not a rule of law,[178] nor even an end in itself.[179] Instead, it is merely a principle designed to secure the larger objectives of order and fairness.[180]

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[172] See *Tolofson*, *supra* note 8 at 1047 and 1049-50; *Spar Aerospace*, *supra* note 113 at paras 20-21; *Canada (Justice) v Khadr*, 2008 SCC 28 at paras 3 and 17, 2 SCR 125 [*Khadr*]; and *Van Breda*, *supra* note 9 at para 74. In addition to comity, there are other accounts of how and why courts apply foreign law (or rights arising under them), such as the "vested rights," "local law" and "justice and convenience" theories; see Walker, *supra* note 10, vol 1 at 1-17 to 1-20, paras 1.13.c.ii and 1.13.c.iii; and Pitel and Rafferty, *supra* note 10 at 206-209. However, the comity principle has been accepted as the dominant justification by the Supreme Court of Canada.

[173] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1096 [*Morguard*].

[174] *Hape*, *supra* note 105 at para 47; *Van Breda*, *supra* note 9 at para 74.

[175] *Hape*, *ibid*.

[176] *Ibid* at para 50.

[177] *Morguard*, *supra* note 173 at 1107; *Pro Swing*, *supra* note 168 at para 26; *Hape*, *ibid* at paras 47 and 49-50.

[178] *Hape*, *ibid* at para 47.

[179] *Hunt*, *supra* note 141 at 325.

[180] *Holt Cargo*, *supra* note 113 at para 71; *Spar Aerospace*, *supra* note 113 at para 20.

The comity principle thus has definite limits. Courts will not defer to foreign sovereignty where it would be contrary to fundamental precepts of the forum.[181] In *Pro Swing*, the Supreme Court of Canada stated:

> *Comity is a balancing exercise.* The relevant considerations are respect for a nation's acts, international duty, convenience and protection of a nation's citizens. Where equitable orders are concerned, courts must take care not to emphasize the factor of respect for a nation's acts to the point of imbalance. An equitable order triggers considerations of both *convenience for the enforcing state and protection of its judicial system*. …
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> …
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> … As mentioned above, comity concerns not only respect for a foreign nation's acts, international duty and convenience, but *also the protection of a nation's citizens and domestic values*.[182]

Accordingly, comity does not require Canadian courts to apply foreign laws in a way that is prejudicial to the forum's own system of justice. Nor does it require them to apply foreign laws where this would be contrary to the forum's public policy. In *R v Zingre*, Dickson J stated:

> It is upon this *comity of nations* that international legal assistance rests. Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect *unless it be contrary to the public policy of the jurisdiction* to which the request is directed (see *Gulf Oil Corporation v Gulf Canada Limited et al.* [[1980] 2 S.C.R. 39]) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.[183]

Fourth, and related to this point, comity also should not require the forum's courts to apply laws which are based upon the public policy of the *foreign* jurisdiction – like those relating to privilege and disclosure – with the same rigour as other types of laws. Unlike ordinary laws, those based upon public policy reflect delicate value judgments which the enacting community cannot expect will be accepted with the same enthusiasm

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181 *Hape*, *supra* note 105 at paras 50-52 and 101; *Khadr*, *supra* note 172 at para 18; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 14 and 16, 1 SCR 44.

182 *Pro Swing*, *supra* note 168 at paras 27 and 40 [emphasis added]. See also *Spar Aerospace*, *supra* note 113 at para 15 (citing early authority that "comity attenuates the principle of territoriality by allowing states to apply foreign laws so that rights acquired under them can retain their force, *provided that they do not prejudice the states' powers or rights*" [emphasis added]).

183 [1981] 2 SCR 392 at 401[emphasis added]. See also *Gulf Oil*, *supra* note 135 at 61 ("I fail to see how public policy can be ignored in the interests of comity towards a foreign court").

elsewhere. This was emphasized by the English Court of Appeal in *Prudential Insurance Co of America v Prudential Insurance Co Ltd*, where it refused to enjoin a party from using documents in litigation outside England based on English settlement privilege:

> … The question in those cases is whether the English court, by ordering a person not to make use of "without prejudice" material in foreign proceedings, should seek to impose on the conduct of the foreign proceedings a restraint which is justified only by its own perception of what public policy requires. In my view it is plain that that question must receive the answer "No." In that context it is important to keep in mind that the rule in England – in so far as it is based on public policy – has evolved in response to the need to balance two different public interests, "namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation".... The latter interest is a reflection of the principle that trials should be conducted on the basis of a full understanding, by both parties and the court, of the facts relevant to the issues in dispute. The "without prejudice" rule has to be seen as encroaching upon that principle. The justification for such encroachment, in the eyes of the English courts, has been the greater public interest in promoting settlements. But it would be insular not to recognise that courts in other jurisdictions might think – or might be required by legislation to accept – that a different balance should be struck; and *arrogant to seek to impose on the conduct of litigation in other jurisdictions a rule which is based on our own perception of where the greater public interest lies.*[184]

Fifth, while there do not appear to be a great many examples of *lex fori* choice of law rules premised upon public policy,[185] there is juridical support for the view that public policy does in fact require the application of the forum's solicitor-client privilege laws under both of the scenarios considered in the *Restatement (Second)*:[186]

(1) where the foreign law creates a superior claim to privilege than the forum; and

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184 *Supra* note 89 at para 23 [emphasis added].

185 This is likely because the public policy doctrine as it has evolved in the conflict of laws does not involve an inflexible, "definitional" approach to the matters that are governed by the *lex fori*, but functions instead as a flexible, case-by-case exception where the normal choice of law rules would require a matter of substance to be governed by foreign law; see *Society of Lloyd's*, *supra* note 161 at para 66. However, this does not mean that the public policy doctrine is incapable of serving in this capacity. Indeed, the need for solicitor-client privilege to remain "as close to absolute as possible" (*McClure*, *supra* note 28 at para 35) provides the ideal setting in which public policy can support a *per se* choice of law rule.

186 In this sense, the rules of solicitor-client privilege may be viewed as akin to "mandatory laws" of the forum; see Walker, *supra* note 10, vol 1 at 1-10, para 1.11.c.

(2) where the foreign law creates a weaker claim to privilege than the forum.[187]

It is to this case law that we now turn.

8. Public Policy and the Stronger Foreign Privilege Law

Under the first scenario from the *Restatement (Second)*, the approach proposed herein can be stated as follows. In circumstances where the forum's laws call for the disclosure of information, applying foreign privilege laws to prevent such disclosure will impede the forum's open litigation process.[188] Since the forum has a strong public policy interest in favour of open litigation, comity concerns should not require that the foreign law be enforced.[189] Instead, the forum should apply its own disclosure laws. To do otherwise could entice foreign litigants to bring actions in Canada to take advantage of its more liberal discovery rules, and thus obtain information which the foreign privilege law prevents the other party obtaining from them.[190]

While this position is relatively novel, it is similar to the approach taken under the *Restatement (Second)*. Further, there is support for it in the

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[187] The identification of what "foreign law" is relevant for this purpose is itself fraught with complexities, as indicated by the substance-based choice of law rules in the United States. However, for the purposes of this paper, it is sufficient merely to posit that a notional foreign jurisdiction exists (e.g. the place where the communication was made), and proceed to consider whether its privilege laws can ever trump those of the forum.

[188] The conflict between this countervailing value of full disclosure, and the values underlying solicitor-client privilege, has been frequently recognized by the courts. See e.g. *Grant v Downs* (1976), 135 CLR 674 (HCA) at 685 [*Grant*]; *United States v Zolin*, 491 US 554 at 562 (1989) [*Zolin*]; *LLA v AB*, [1995] 4 SCR 536 at paras 33 and 66 [*LLA*]; *Ryan*, *supra* note 102 at para 19; and *Three Rivers*, *supra* note 29 at paras 28, 61 and 86.

[189] See *Société Nationale Industrielle Aérospatiale v US Dist Court for Southern Dist of Iowa*, 482 US 522 at 542 (1987).

[190] See *Odone*, *supra* note 59. *C.f. Appeal Enterprises*, *supra* note 135. Of course, it could be argued in response that to allow foreign litigants to take advantage of Canadian privilege rules would encourage forum shopping here. However, as discussed at footnote 105 above, the possibility of such forum-shopping should not be determinative.

case law.[191] In *R v Spencer*,[192] the Ontario Court of Appeal and the Supreme Court of Canada recognized that a foreign law which creates a claim to privilege that is superior to the claim under Canadian law is unenforceable for reasons of public policy. The successive courts in *Spencer* held that a Bahamian statute, which made it a criminal offence for bankers to testify about certain matters, could not prevent a Canadian resident and citizen who had previously worked as a Bahamian banker from being compelled to testify in Canadian criminal proceedings involving a third a party. In the Ontario Court of Appeal, MacKinnon ACJO based his decision expressly upon considerations of public policy:

> The English and Canadian text writers on private international law do, indeed, emphasize the paramountcy of fundamental public policy of the domestic law…
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> …
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> … To permit a foreign jurisdiction to shape the laws of Canada on a matter of fundamental principle has no support historically or legally. It must be for the Canadian courts or the Legislatures to determine on clearly defined grounds whether a privilege exists exempting a witness from the basic obligation to give evidence. As noted by the text writers, the obligation or duty to assist in the search for truth is a reciprocating one in our society; a duty necessary to the proper and fair administration of justice. Whether a witness is a compellable witness is a question for the *lex fori*…
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> …
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> In my view, *the aspect of public policy,* as already defined, *involved in the instant case applies to all cases whether they be civil or criminal* and foreign laws cannot exempt witnesses, otherwise competent, compellable and present, from giving evidence within their knowledge in our courts.[193]

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[191] The Supreme Court of Canada has repeatedly emphasized the importance of the related "open court principle;" see e.g. *Named Person v Vancouver Sun*, 2007 SCC 43 at paras 31-34, 3 SCR 253; and *Canadian Broadcasting Corp v Canada (AG)*, 2011 SCC 2 at paras 1-2 and 28-30, 1 SCR 19. See also, in addition to the cases discussed below, *Appeal Enterprises*, *ibid*; and *Pressey*, *supra* note 135 (decisions where the Court refused to apply foreign privileges not recognized under Canadian law in the context of applications to enforce letters rogatory issued by the foreign courts). The potential application of public policy in circumstances where the forum's privilege is weaker than that of the foreign law is also acknowledged by Bradford, *supra* note 51at footnote 53. For a decision of the US Supreme Court which supports this principle, see *Baker v GMC*, 522 US 222 at 238 (1998) [*Baker*]. See also *Kennedy*, *supra* note 14 where Gyles J, despite criticizing the traditional *lex fori* rule, suggested that foreign privilege laws should not trump domestic laws where the latter require disclosure.

[192] (1983), 145 DLR (3d) 344 (Ont CA) [*Spencer CA*], aff'd in *Spencer SCC*, *supra* note 10.

[193] *Spencer CA*, *ibid* at 352-53 and 357 [emphasis added].

On further appeal to the Supreme Court of Canada, MacKinnon ACJO's ruling was affirmed. La Forest J – who would later go on to author *Tolofson* – stated:

> … In [the Court of Appeal's] view, the public and the courts have a right to Mr. Spencer's evidence whether or not the giving of this evidence constituted a crime in the Bahamas. I agree with this conclusion substantially for the reasons given by MacKinnon, A.C.J.O. …
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> …
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> … To allow Mr. Spencer to refuse to give evidence in the circumstances of this case *would permit a foreign country to frustrate the administration of justice in this country* in respect of a Canadian citizen in relation to what is essentially a domestic situation. Indeed such an approach could have serious repercussions on the operation of Canadian law generally.[194]

The decision in *Spencer* did not involve a claim to *solicitor-client* privilege arising under foreign law. However, MacKinnon ACJO's reasons are cast in sufficiently broad terms to capture that situation. Further, while *Spencer* arose in the context of criminal proceedings, where the forum has a particular interest in the disclosure of all relevant information[195] (and where a Canadian court may be required to order disclosure of the communications in any event as a constitutional matter based on the "innocence at stake" exception),[196] it has since been applied to civil[197] and regulatory[198] proceedings as well. Accordingly, there is precedent that

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194 *Spencer SCC*, *ibid* at 280-81 [emphasis added]; see also *Baker*, *supra* note 182 at 238.

195 See *R v Stinchcombe*, [1991] 3 SCR 326 at 340; and *Heaney*, *supra* note 69. The increased reluctance of courts to apply foreign privilege laws in criminal matters has also been noted by commentators; see Mosk and Ginsburg, *supra* note 125 at 373. See further Price, *supra* note 50 at 160, who observes that conflict of laws issues do not usually arise in criminal proceedings, since the choice of law is largely determined by the domestic court's assumption of jurisdiction. This observation has resonance in Canada as well, given the courts' reluctance to apply foreign penal laws in domestic proceedings; see *Gulf Oil*, *supra* note 126 at 62.

196 See *McClure*, *supra* note 28 at paras 38-61.

197 *Ritter v Hoag*, 2003 ABQB 88 at para 37, 334 AR 266 (QB), rev'd on other grounds 2004 ABCA 421, 363 AR 372 (CA), leave to appeal refused, [2005] SCCA No 90; *Lilly Icos*, *supra* note 54 at paras 8-16. See also *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co* (1988), 90 AR 323 (CA), where the Court applied the same principle in refusing to give effect to a right of confidentiality claimed under a foreign judicial order. These cases reflect the orthodox view that solicitor-client privilege should be the same in both criminal and civil proceedings; see *R v Stone* (1997), 113 CCC (3d) 158 (BCCA) at para 50, aff'd [1999] 2 SCR 290; and *Auckland*, *supra* note 30 at para 44. *C.f. Maranda*, *supra* note 28 at paras 27-29.

198 *Exchange Bank & Trust Inc v British Columbia (Securities Commission)*, 2000 BCCA 389 at paras 14-15, BCJ No 1227 (QL) (Chambers).

public policy may indeed prevent Canadian courts from applying foreign privilege laws where they are stronger than their own domestic laws of privilege.

This is not to suggest that a court should pay *no* regard to foreign privilege laws which are not recognized within the forum in deciding whether to admit evidence.[199] There may be situations in which a court takes into account the foreign privilege in the exercise of its residual discretion to exclude evidence based on grounds of unfairness,[200] or in deciding to recognize a case-by-case privilege under the Wigmore criteria.[201] However, that would not be an application of the foreign privilege law itself, but rather an application of domestic law in which the foreign law is considered as a factor in the exercise of the court's discretion.[202] Based on *Spencer*, a foreign privilege law should not be applied directly in derogation of the truth-seeking function of the domestic court.

9. Public Policy and the Stronger Domestic Privilege Law

The converse of the situation considered immediately above is where the forum's privilege laws would prohibit disclosure of the information, but the laws of the foreign jurisdiction do not. Under that scenario, the approach proposed herein may be stated this way. The forum has a strong public policy in favour of applying its own privilege laws, even if the solicitor-client relationship at issue is not centered within the forum itself. If the information is ordered disclosed, it would effectively mean there exists a "comity" exception to the forum's solicitor-client privilege. Such an exception could undermine the forum's ability to keep its privilege as close to absolute as possible, and have a chilling effect on the solicitor-client relationships which *are* localized within the forum. Accordingly, the preferable solution is for the forum to refuse disclosure based on its own privilege laws.

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199 See *Brannigan v Davison*, [1997] AC 238 (PC) at 249-51, where the Privy Council referred to *Spencer* and left open whether the forum court should have the discretion to permit the witnesses from refraining to testify where this could lead to prosecution under a foreign law. There may also be situations where the court declines to order disclosure based on foreign laws if the order could expose persons actually situate in the foreign jurisdiction to criminal penalties there; see *Frischke v Royal Bank* (1977), 17 OR (2d) 388 (CA).

200 See: *R v Buhay*, 2003 SCC 30 at para 40, 1 SCR 631; and *Hape*, *supra* note 105 at para 108.

201 See *National Post*, *supra* note 32 at paras 53 and 55.

202 This is different from a true application of foreign law, unless one accepts the controversial "local law" theory for choice of law, explained by Pitel and Rafferty, *supra* note 10 at 208.

It must be acknowledged that such an approach is contrary to the dominant trend of the literature on this subject.[203] Thus, the *Restatement (Second)* asserts that:

> There can be little reason why the forum should exclude evidence that is not privileged under the local law of the state which has the most significant relationship with the communication even though this evidence is privileged under the local law of the forum. Admitting such evidence cannot defeat the expectations of the parties since, if they relied on any law at all, they would have relied on the local law of the state of most significant relationship. This state has a substantial interest in determining whether evidence of the communication should be privileged. If this state has not chosen to make certain evidence privileged, its interests obviously will not be infringed if this evidence is admitted by the forum. Admission of this evidence, if relevant, will usually be in the best interests of the forum since such admission will assist the forum in arriving at the true facts and thus in making a correct disposition of the case.[204]

However, this view is not unanimous. Other commentators have suggested that a forum should apply its own privilege laws where they are stronger than those of the relevant foreign jurisdiction.[205] Rosenberg, writing in relation to mediation privilege, suggests:

> Where the forum state recognizes a privilege not recognized in the state where the communications occurred, the forum state should continue to recognize the privilege. The rationale for recognition is that any failure to enforce the local privilege in local courts may cause a loss in confidence by the public in the sanctity of the mediation relationship.[206]

Similarly, Imwinkelried observes that in cases where the forum's privilege law is built upon important values, a court may be justified in applying that

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[203] See Weinstein, *supra* note 47 at 543-44; Robert Allan Sedler, "Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws" (1962) 37 NYUL Rev 813 at 870-71; Sterk, *supra* note 4 at 479; Reese and Leiwant, *supra* note 70 at 93 and 104; and Bradford, *supra* note 51at 927-28.

[204] *Restatement (Second)*, Comment c. For an American case that accepted this rationale, see *Gonzalez*, *supra* note 69. See also *Kennedy*, *supra* note 14 at para 51 ("It would be something of an affront to ordinary notions of justice if, for example, legal advice to an Australian as to how to take advantage of secrecy provisions of a tax haven were not privileged from production in the tax haven but were privileged from production in Australia").

[205] See Stephen A Calhoun, "Globalization's Erosion of the Attorney-Client Privilege and What US Courts Can Do to Prevent It" (2008) 87 Tex L Rev 235 at 250, footnote 111.

[206] Joshua P Rosenberg, "Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws" (1994) 10 Ohio St J Disp Resol 157 at 171; see also 169.

law even where it is stronger than that of the relevant foreign jurisdiction, "because intruding upon the private enclave protected by a privilege could offend that value even if the conversation occurred outside the forum."[207] He goes on to observe that this theory, which he terms a "humanistic" one, "could lead to the same result as the early 'procedural' approach [but] the theory offers a sounder basis for applying the forum's privilege law."[208] Some commentators have also emphasized that a rule which prohibits the forum from continuing to apply its own privilege law in the face of a weaker foreign one would "unnecessarily complicate the advice privilege test."[209]

Further, as noted above, the approach in the *Restatement (Second)* is not limited to solicitor-client privilege, but extends to many other types of privilege as well. Given the "unique status" of solicitor-client privilege in the Canadian legal system,[210] it should possess a choice of law rule that responds to its own special features.[211] Indeed, the *Restatement (Second)* itself recognizes that there may be categories of privilege which are so important to the forum that they should be enforced regardless of their non-recognition abroad:

> … On still rarer occasions, the state of the forum might consider a given privilege, as that of priest and penitent, sacrosanct and therefore not permit introduction of the evidence even though the state of the forum has no relationship to the transaction and the privilege was not recognized in the state of most significant relationship.[212]

From the perspective of Canadian law, solicitor-client privilege appears to qualify as "sacrosanct." Additionally, several Canadian appellate courts have recognized that solicitor-client privilege is a matter of public

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207 Imwinkelried, *supra* note 43 at 457.

208 *Ibid*.

209 Kee and Feiglin, *supra* note 77 at 140; see also 138-39.

210 *McClure*, *supra* note 28 at paras 25 and 31; *Blood Tribe*, *supra* note 28 at para 30.

211 Sterk, *supra* note 4 at 469 ("To the extent that different privileges protect fundamentally different interests, it is inappropriate to treat them uniformly for choice of law purposes.")

212 *Restatement (Second)*, Comment c. The same point is made by Reese and Leiwant, *supra* note 70 at 90, 94, 102 and 104. See also Sterk, *ibid* at 494-95, observing that if the rationale for attorney-client privilege is procedural fairness, then "the forum state would always be justified in recognizing its own privilege, and never in recognizing the privileges of C, since, within constitutional limitations, each state should be able to set its own standards to assure fairness in litigation."

policy[213] (a point that has also been made by the House of Lords,[214] the High Court of Australia[215] and the United States Supreme Court[216]). As the Supreme Court of Canada said in *Smith v Jones*:

> … The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitorclient privilege.[217]

The Supreme Court of Canada has also recognized that lawyers play an "important role" in "ensuring access to justice and upholding the rule of law."[218] Insofar as solicitor-client privilege is a necessary adjunct to the right to counsel,[219] it may thus ultimately be viewed as an aspect of the rule of law itself.[220]

Given this singularly important public policy status of solicitor-client privilege within Canadian law, courts should not deter to foreign privilege laws that would afford less protection than domestic ones. While there do not appear to be any Canadian cases which analyze this question from the perspective of the public policy doctrine,[221] there are some American cases

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213 *Blood Tribe*, *supra* note 28 at paras 9 and 11. The Supreme Court has also recognized that privilege more generally, and not merely solicitor-client privilege, is a question of public policy; see *R v Gruenke*, [1991] 3 SCR 263 at 288; and *LLA*, *supra* note 188 at para. 33.

214 *Lyell v Kennedy (No 2)* (1883), 9 App Cas 81 (HL) at 86; *Bullivant v Victoria (AG)*, [1901] AC 196 (HL) at 200-201; *O'Rourke v Darbishire*, [1920] AC 581 (HL) at 628; *Three Rivers*, *supra* note 29 at para 86.

215 *Grant*, *supra* note 188 at 685; *Baker v Campbell* (1983), 153 CLR 52 (HCA) at 88, 93-94, 114 and 127.

216 *Upjohn*, *supra* note 109 at 389; *Zolin*, *supra* note 188 at 562; *Mohawk Industries, Inc v Carpenter*, 130 S Ct 599 at 606 (2009).

217 *Supra* note 28 at para 51.

218 *British Columbia (AG) v Christie*, 2007 SCC 21 at para 22, 1 SCR 873; see also *Campbell*, *supra* note 5 at para 49.

219 See *Descôteaux*, *supra* note 28 at 880-81, accepting that "[t]he privilege protecting from disclosure communications between solicitor and client is a fundamental right - as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege." See also *Three Rivers*, *supra* note 29 at paras 30-34.

220 See *Three Rivers*, *ibid* at para 34 ("…the author refers to the rationale underlying legal advice privilege as 'the rule of law rationale'… I, for my part, subscribe to this idea"). See also *Kennedy*, *supra* note 14 at paras 62 and 201.

221 See, however, *Gulf Oil*, *supra* note 135 at 54-63, where the Court refused to order production of documents requested by letters rogatory on the ground that this would be contrary to domestic public policy. See also *Uszinska v France (Republic)* (1980), 27 OR (2d) 604 (HCJ). It is also possible that, in some criminal cases, a Canadian court must apply the principles of solicitor-client privilege that have developed under the

which hold that the forum should apply its own privilege laws where they are stronger than the foreign laws on grounds of public policy.[222] In addition, there is a recent English Court of Appeal decision – *Bourns Inc v Raychem Corp*[223] – which explicitly relied upon the "public interest" in holding that English courts should not deny claims to legal privilege simply because the privilege may have been waived under foreign law:

> Raychem does not suggest that under English law privilege is lost in England because privilege cannot be claimed for documents in another country. To suggest otherwise would mean that a court, when deciding whether to uphold a claim for privilege, would need to be informed as to whether privilege could be claimed in all the countries of the world. Our system of civil procedure is founded on the rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other party's inspection all documents in their possession, custody or power relating to the issues in the action" (per Bingham L.J. in *Ventouris v Mountain* [1991] 1 W.L.R. 607 at 611). *Privilege is an exception to that rule justified on the ground of public interest.* It involves a right to keep confidential the document and the information in it. *The fact that under foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant.* The crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use. If it is, then privilege in this country can be claimed and that claim, if properly made, will be enforced.
>
> … It follows that the documents remain privileged under English law, whether or not the right to privilege from production in a foreign country is deemed not to exist or to have been waived.[224]

Charter to exclude evidence obtained by Canadian state actors abroad; see *Lavallee, supra* note 8; and *Hape*, *supra* note 105 at para 113.

222 *Wexler v Metropolitan Life Ins Co*, 38 NYS 2d 889 at 890 (NY City Ct 1942); *Palmer*, *supra* note 45 at 608; *Hare v Family Publications Service, Inc*, 334 FSupp 953 at 961 (D Md 1971).

223 [1999] FSR 641 (CA) [*Bourns*]. In *Bourns*, documents were disclosed by Bourns to Raychem, along with Raychem's English and US lawyers, in the context of an English taxation of costs proceeding. The documents had allegedly been relied upon by Bourns's expert in earlier US antitrust proceedings involving the same parties, which had resulted in a verdict against Raychem. Raychem wished to use the documents in order to set aside the US judgment. However, Bourns brought an injunction application before the English court. In holding that the injunction should issue, the English Court of Appeal rejected Raychem's argument that Bourns had waived privilege in England by virtue of its expert's reliance upon the documents in the US proceedings. It arrived at this conclusion regardless of whether the expert's reliance upon the documents resulted in a waiver of privilege under US law.

224 *Ibid* at 677 [emphasis added]; see also *ibid* at 678. As noted by McComish, *supra* note 4 at 313, *Bourns* was a case about whether foreign waiver rules should apply within the forum, not whether foreign rules as to the existence of privilege should apply. But the Court in *Bourns* noted that the forum would govern the issue of whether the privilege "is deemed not to exist *or* to have been waived." Accordingly, the *Bourns* Court

The House of Lords refused leave to appeal in *Bourns*. However, the decision was reconfirmed by the English Court of Appeal in *British American Tobacco (Investments) Ltd v USA*, where it made the following comments:

> As for the ruling in the US courts and the Australian courts that privilege has been waived, that depends on the domestic law of those countries as interpreted and applied by their courts. In this case this court is only concerned with the position under English law. As Aldous LJ said in *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 at 167h privilege is not lost under English law because it cannot be claimed in another country …
>
> In my judgment, similar considerations apply when determining whether documents, which are no longer privileged, have ceased to be so as the result of voluntary waiver of privilege or otherwise"[225]

It is significant that these two recent appellate cases, which affirm the *lex fori* rule for privilege on public interest grounds, are English. This is because, as in Canada, the English courts also regard solicitor-client privilege as a substantive legal right rather than a procedural rule of evidence outside the conflict of laws context.[226] This did not, however,

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seems to have accepted that the forum would govern both the existence and waiver of the privilege.

[225] [2004] EWCA Civ 1064 at paras 38-39; see also *ibid* at para 43. In this case, the Court considered whether privilege over documents which had been entered into the public domain by the appellant, as the result of a US court order, had been voluntarily waived by it, or only lost on the basis of compulsion (in which case it could still be asserted under English law). Although US and Australian courts had already found that the disclosure of the documents was made on the basis of a voluntary waiver, the Court held that their conclusions were irrelevant to the question of wavier in England (where the respondent sought to examine a witness for the appellant on matters relating to the documents). For a more recent English decision where the Court seemed to accept that questions of privilege are governed by the laws of the forum, see *R (on the application of Prudential Plc) v Special Commissioner of Income Tax*, [2010] 3 WLR 1042 (QBD) at para 29, aff'd [2011] QB 669 (CA).

[226] See the cases cited at footnote 29 above. See also the recent case of *Australian Crime Commission v Stewart* (2012), 286 ALR 713 (FCA) at paras. 33-66, where the Federal Court of Australia rejected the submission that the *lex fori* could not continue to serve as the choice of law rule for solicitor-client privilege because the Australian courts recognized the privilege as being substantive rather than procedural in nature. The Court in *Stewart* held that Australian privilege laws applied to documents which were prepared: (a) in California; (b) by attorneys licensed to practice in California; (c) under a retainer agreement governed by Californian law; (d) in order to advise clients primarily on Californian law. In reaching this conclusion, the Court noted among other things the submission that, because the privilege was based upon public policy and the administration of justice, it would be anomalous to apply foreign privilege laws in derogation of domestic ones.

prevent the English Court of Appeal from finding that the privilege should continue to be governed by the laws of the forum, even where they afforded the privilege greater protection than the laws of the relevant foreign jurisdiction.

10. Conclusion

The preceding discussion illustrates that the choice of law analysis for privilege is a matter of considerable complexity. It is perhaps for this reason that Canadian courts have refrained from examining it in detail. However, it will be necessary for them to confront these problems soon. Otherwise, there is a danger that the substance-based choice of law rules will creep in by degrees. The American experience with these rules, and in particular the uncertainty they create, suggests that such a trend should be discouraged. Otherwise, the resulting uncertainty could compromise not only solicitor-client privilege itself, but also the very objectives of order and fairness that comity is designed to achieve.[227] As the Supreme Court of Canada said recently in *Van Breda*:

> … Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system. In the words of La Forest J. in *Morguard*, "what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice" (p. 1097; see also H. E. Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741.[228]

In the end, courts must ask themselves to what extent comity requires that they subordinate the forum's public policy to that of another jurisdiction. The problem with a choice of law rule that would apply foreign privilege law is not simply that the content of the foreign law may be contrary to the privilege laws of the forum. It is that the very act of opening one's doors to foreign law, to any foreign law, will undermine the "as close to absolute as possible" status of the privilege within the forum. Further, such a rule does not comport with the unique constitutional and doctrinal foundations of the privilege. It is therefore the substance-based choice of law rules *themselves*, and not merely the foreign laws which they would apply, that are contrary to Canadian public policy.

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227 See *Spar Aerospace*, *supra* note 113 at para 81.

228 *Van Breda*, *supra* note 9 at para 74.

Doubtless there may be instances in which applying the foreign law would be fairer to the parties involved. Choice of law rules must aspire, however, to more than simply vindicating the expectations of litigants in individual cases. They must also recognize the alterity of the foreign jurisdiction in a way that promotes, rather than prejudices, the administration of justice within the forum. Since solicitor-client privilege is integral to that system of justice itself, a special sensitivity to it is required in the conflict of laws. Courts should not adopt a choice of law regime that could cause the privilege to degenerate into a wilderness of single instances.[229] There are occasions on which the law must remain firm. Solicitor-client privilege is one of them. In this regard, the comments of an English equity judge still resonate through the centuries:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them… Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, 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, are too great a price to pay for truth itself.[230]

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229 "Mastering the lawless science of our law, That codeless myriad of precedent, That wilderness of single instances …": Alfred, Lord Tennyson, *Aylmer's Field* (1793).

230 *Pearse v Pearse* (1846), 63 ER 950, 1 De G & S 12 at 28-29.