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LITIGATION PRIVILEGE - RECENT DEVELOPMENTS AND FUTURE TRENDS

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Article abstract

The purpose of this paper is to describe key aspects of the law of litigation privilege in Ontario. Since the legal System has long assumed that the “adversarial nature of litigation is the best method to get at the truth”, this paper will examine the origins of the test to define litigation privilege. Since the conduct of litigation is dynamic, this paper will examine the dynamics of litigation privilege. Since technology is playing an increasingly central role in the practice of law, this paper will also examine the question of the attachment of litigation privilege to computer generated data.

LITIGATION PRIVILEGE[1]– RECENT DEVELOPMENTS AND FUTURE TRENDS

by Ani M. Abdalyan

ABSTRACT

The purpose of this paper is to describe key aspects of the law of litigation privilege in Ontario.[2] Since the legal system has long assumed that the "adversarial nature of litigation is the best method to get at the truth"[3], this paper will examine the origins of the test to define litigation privilege. Since the conduct of litigation is dynamic,[4] this paper will examine the dynamics of litigation privilege. Since technology is playing an increasingly central role in the practice of law, this paper will also examine the question of the attachment of litigation privilege to computer generated data.

RÉSUMÉ

Le but de cet article est de décrire les éléments fondamentaux de la législation ontarienne, «litigation privilege» (procédure de privilège, protection de documents pour les fins d'un litige). En vertu du système légal, il fut admis, depuis longtemps, que la nature des litiges est basée sur la confrontation, ce qui constitue le meilleur moyen pour découvrir la vérité. Cet article examine les origines du test servant à définir cette procédure en matière de litige. Comme la conduite de litige est dynamique, cet article étudie aussi la dynamique de cette procédure. Enfin, comme la technologie joue maintenant un rôle central sans cesse croissant, cet article fouillera l'admissibilité des documents électroniques dans cette procédure de litige.

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THE ORIGINS OF THE DOMINANT PURPOSE TEST

This paper takes as its starting point the decision of the House of Lords in *Waugh v. British Railways Board,*[5] the leading UK authority on the dominant purpose test for litigation privilege.[6]

The story in *Waugh* was that a joint internal report was prepared by two officers of the British Railways Board incorporating statements of witnesses when John Waugh, an employee of the board was killed from injuries as the locomotive he was driving collided with another. Although preparation of reports was the board's routine practice, this report was prepared for a dual purpose: to establish the cause so as to improve railway safety and, to submit to counsel in order to obtain legal advice regarding liability. The plaintiff sought production of the internal report and the board claimed privilege. The House of Lords held that the internal report was not prepared with the dominant purpose of contemplated litigation and was not privileged.

After considering authorities which had granted privilege to documents where one purpose of litigation was anticipated litigation, Lord Edmund-Davies adopted the dominant purpose test for litigation privilege, with its three comprising branches, as follows:[7]

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person, or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

Specifically, the *Waugh* decision sets out the current test in English jurisprudence for the legal proposition that a party who claims privilege for gathering papers and materials has the onus of showing three requirements to attach litigation privilege. The three requirements are as follows: (a) the document must be produced with contemplated litigation in mind, (b) the document must be produced with dominant purpose of contemplated litigation and (c) the prospect of litigation must be reasonable. In other words, "even when a document has been prepared in part for the purpose of obtaining legal advice in anticipation of litigation (a blend of solicitor-client and litigation privilege, perhaps) the document must be disclosed if it was prepared for additional purposes."[8]

THE RATIONALE FOR LITIGATION PRIVILEGE

Justice Sharpe prior to his judicial appointment expanded on the rationale for litigation privilege as follows:[9]

> Litigation privilege... applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature... Litigation privilege... applies only in the context of litigation itself.
>
> Litigation privilege... is geared directly to the process of litigation... Its purpose is more particularly related to the need of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversarial process) while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client.)
>
> Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth but the process which litigation privilege is aimed to protect – the adversary process – among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted. There is a need for a "zone of privacy" to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.

Canadian courts have also acknowledged that litigation privilege is a product and characteristic of our adversarial system. In *Susan Hosiery Ltd. v. Minister of National Revenue*[10], it was held that:

> ... under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were being prepared. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

In *Breau v. Naddy,*[11] the rationale for litigation privilege was set out as follows:

> It is based on our adversary system of litigation by which counsel control fact presentation before the court and decide the evidence and manner of proof of which a claim or defence will be established, without any obligation to make prior disclosure of material acquired in preparation of the case. Litigation privilege is grounded in the proposition that counsel must be free to make the fullest investigation and research without risking disclosure of counsel's opinions, strategies and conclusions.

Generally speaking, litigation privilege is found to arise in the context of "derivative communications", in contrast to direct communications. The law examines what communications or documents received by a lawyer from third parties in relation to litigation should be protected in the context of the policy rationale for the privilege rule[12] of which more is said below. Litigation privilege may attach to derivative communications i.e. solicitor-client communications with third parties or communications created internally by the client only if they occur in the contemplation of litigation.[13]

■ RULES OF CIVIL PROCEDURE (ONTARIO) – DISCLOSURE AND DISCOVERY

The dominant purpose test set out in the *Waugh* decision and adopted in Ontario about which more is said below is in substance the basis for the application of the discovery rules in Ontario. Rule 30 and Rule 31 of the Rules of Civil Procedure set out two procedural time-frames where the obligation to disclose documents comes up. First, prior to service of the sworn affidavit of documents and discovery and second after the discovery and at trail. Litigation privilege can be claimed at the two time-frames.

Rule 30.01 (1) provides that in rules 30.02 to 30.11,

(a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device; and

(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

Rule 30.02 (1) and (2) provide that all documents must be produced for inspection unless privilege is claimed.

Rule 30.03 (2) provides that a party must list in the affidavit of documents all documents relating to any matter in issue in the action and segregate privileged documents in a separate schedule and state the claims of privilege regarding each document.

Rule 30.04 (5) and (6) and Rule 30.06 provide that if there is a dispute over production for inspection or the validity of the claim of privilege, a party can bring a motion for the determination of the court regarding the adequacy of production and the matter of privilege.

Rule 30.09 sets out the situation at trial where the party has claimed privilege. It provides that if a party claims privilege regarding a document, that party cannot use the document at trial except to impeach the testimony of a witness or with leave of the trial judge. If the party wishes to use the document at trial, the party must abandon the privilege in writing and provide a copy of the document for inspection no later than ten days after the action is set down for trial.

Rule 31.06 (1) provides that examining party may ask any proper question relating to any matter in issue in the action and no question may be objected to on the ground that the information sought is evidence, the question constitutes cross-examination or the question constitutes cross-examination on the affidavit of documents of the party being examined.

Rule 31.09 (1) and (2) provide that after a party has been examined for discovery and discovers that the answer to a question on the examination was incorrect or incomplete when made or is no longer correct and complete, the party must provide the information in writing to the other party.

Rule 31.09 (3) provides that failure to comply with subrule (1) or (2) will cause the party not being able to introduce favorable information at trial (with regard to evidence) without leave of court and if the information is not favorable, without leave of court as is just in the circumstances.

■ GENERAL ACCIDENT V. CHRUSZ

On September 18, 1999, the Ontario Court of Appeal released its decision in *General Accident Assurance Company v. Chrusz*[14] wherein it set out a comprehensive review of the components of litigation privilege as well as solicitor-client privilege. Three judges, Carthy, Doherty and Rosenberg wrote decisions. The Court of Appeal ended a long-standing debate about the applicability of the substantial purpose test, and based upon the policy considerations of encouraging discovery, adopted the "dominant purpose test" vis-a-vis the application of litigation privilege in Ontario. The Court of Appeal also accepted "common interest" privilege.

☐ The Facts

The story in *Chrusz* started on November 15, 1994, when a building owned by Chrusz was damaged by fire. Bourret, the adjuster hired by the insurer, General Accident, reported that he suspected arson. General Accident retained Eryou, a lawyer, and instructed Bourret to report directly to the lawyer. In January 1995, Chrusz filed a proof of loss and General Accident made partial payment of the claim.

On May 3, 1995, Pilotte, a dismissed former employee of Chrusz, gave a statement under oath to Eryou and Bourret alleging Chrusz fraudulently increased the insurance claim and gave Eryou a videotape. Eryou had a transcript prepared of Pilotte's statement and returned the video after making a copy. A transcript was provided to Pilotte on June 2, 95 and on the same day General Accident commenced an action for fraud. Affidavit of documents were filed and privilege was asserted on numerous documents including Pilotte's statement and Bourret's reports. Chrusz filed a statement of defence with couter-claim for injurious falsehood, defamation, interference with contractual relations and sought production of documents.

☐ Dominant Purpose Test

Justice Carthy focused on litigation privilege and held that: "An important element of the dominant purpose test is the requirement that the document in question be *created* for the purposes of litigation, actual or contemplated."[15] Justice Carthy's analysis in this regard has been described as follows: "He concluded that rather than being a zone of privacy, litigation privilege is a *residual* zone of pri-

vacy – it is what is left in the solicitor's brief after the demands of discovery have been met."[16]

Justice Carthy held that litigation privilege attached to communications between the lawyer and third party adjuster or between the adjuster to client and lawyer and litigation privilege lasted so long as litigation was contemplated, i.e. at any time there was suspicion of arson. Where the dominant purpose of the communication was litigation then litigation privilege attached and continued so long as litigation was contemplated.

Justice Doherty also adopted the dominant purpose test for litigation privilege and held that there was litigation privilege attached to communications between the adjuster and the insurer and/or the lawyer after May 23, 1995.

Justice Rosenberg also adopted the dominant purpose test for litigation privilege.

☐ Equitable Considerations

Justice Doherty added equitable considerations to the application of litigation privilege. He set out his views as follows:[17]

> If it meets the dominant purpose test, then it should be determined whether in the circumstances the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production.
>
> ...
>
> In deciding whether to require material which meets the dominant purpose test to be produced, the policies underlying the competing interests should be considered.
>
> ...
>
> The policies underlying the disclosure interest are adjudicative fairness and adjudicative reliability. While we remain committed to the adversarial process, we seek to make that process as fair and as effective a means of getting at the truth as possible.

Justice Doherty held that these goals could suffer significant harm if Pilotte's statement is not ordered produced at the discovery stage of the proceedings. Justice Doherty also held that the production of Pilotte's statement would not reveal the insurer's legal strategy or the thoughts or opinions of its counsel. The statement was

not like an expert's report which could reflect the theory of the case developed by counsel or the counsel's point of view of the case. As a result, in dissent Justice Doherty held that the transcript of Pilotte's statement did not come within the domain of the lawyer's work product and was discoverable.

Justice Rosenberg however added that the equitable considerations and the balancing approach proposed by Justice Doherty could lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation and should be rejected.

☐ Copies of third party documents

On the issue of whether copies of third party documents should be disclosed, Justice Carthy tends to indicate that a photocopy of a document cannot be priviliged. He opined as follows:[18]

> (I)f original documents enjoy no privilege, then copying is only a technical sense of creation... (I)f copies were in the possession of the client prior to the prospect of litigation they would not be protected from production. Why should copies of relevant documents obtained after contemplation of litigation be treated differently?
>
> ...
>
> Zone of privacy is thus restricted in aid of the pursuit of early exchange of relevant facts and the fair resolution of disputes.

Although Justice Carthy's comments regarding copies of third party documents are *obiter dicta*, arguably Justice Carthy is tending toward disclosure of such documents unless the original is privileged.

On the issue of whether copies of third party documents are subject to privilege, Justice Doherty agreed with Justice Carthy but added that there may be instances where selective copying or results from research or the exercise of skill, knowledge and industry on the part of the solicitor could lead to litigation privilege.[19] Justice Doherty's comments in this regard however must be read in context, and more is said below under the heading solicitor-client privilege.

Justice Rosenberg agreed with Justice Carthy's statement of litigation privilege but he added that the comments regarding copies of non-privileged documents should be held in abeyance given that the issue did not arise in the case.

☐ Common Interest Privilege

The *Chrusz* decision was the first time in Ontario that the judiciary had a detailed discussion on common interest privilege[20]. Justice Carthy held that where the information in the lawyer's brief is shared with a third party, the privilege can still be preserved. As a result, Justice Carthy held that the provision to Pilotte by Eryou, the lawyer for the insurer, of a copy of Pilotte's signed statement, was not a waiver and was protected by privilege because Pilotte was so "closely aligned with General Accident in seeing his evidence pressed forward against Chrusz to protect Eryou against a waiver of his client's litigation privilege".

Justice Carthy held however that this was not an example of common interest privilege:[21]

> While solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation. It may not be inconsistent with litigation privilege vis-à-vis the adversary to communicate with an outsider, without creating a waiver, but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect.

Justice Carthy held that, at the time Pilotte made the statement, there was no pending litigation against him, and he was merely a witness. Therefore, disclosure to him by the solicitor was not subject to privilege as he was not a party with a common interest in sharing the trial preparation effort. There was not a privilege which may be called a "common interest" privilege. As a result, once Pilotte was added as a party, he could not assert privilege and had to make disclosure of the document.[22]

In this context, Thomas Curry has written as follows:[23]

> Although such cases will be exceedingly rare, where a witness gives a statement to a party and it is specifically mentioned in the case that disclosure of a copy of that statement to the witness is protected by litigation privilege, an adversary who wishes to see the statement before trial need only sue the witness for injurious falsehood or even negligent misrepresentation (claims many defendants could reasonably consider against witnesses) in order to effect disclosure.

☐ Solicitor-Client Privilege

Justice Doherty focussed considerable attention on the distinction between solicitor-client privilege and litigation privilege.

He focused on client-solicitor privilege, (as he preferred to call solicitor-client privilege) the oldest and best established privilege, which has been described as follows by the Supreme Court of Canada in *R. v. Shirose*:[24]

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waiver.

Justice Doherty set out his view on the perimeters of client-solicitor privilege as:[25] "serving the following purposes: promoting frank communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process."

He added:[26]

> The confidentiality of the communication is an underlying component of each of the purposes which justify client-solicitor privilege.
>
> ...
>
> The centrality of confidentiality to the existence of the privilege helps make my point that the assessment of a claim to client-solicitor privilege must be contextual. Sometimes the relationship between the party claiming the privilege and the party seeking disclosure will be relevant to determining whether the communication was confidential.

Solicitor-client privilege is usually framed in the context of communications between the client and the solicitor. It can however extend to communications between a solicitor or a client and a third party.

Justice Doherty adopted a functional approach to applying client-solicitor privilege to communications by a third party. His view was that third party communication should bring something more in order to trigger solicitor-client privilege. He opined as follows:[27]

I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communications between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

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

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

Justice Rosenberg held that the analysis of Justice Doherty's solicitor-client privilege should be adopted.

■ FUTURE TRENDS

☐ Zone of Privacy v Pursuit of Truth

The "dominant purpose test" for litigation privilege has been accepted and followed extensively throughout Canada.[28] Justice Sharpe has tied in the "zone of privacy" with litigation privilege and U.S. Supreme Court has provided immunity from discovery of the "solicitor's work product".[29] The modern trend is that litigation

privilege is giving way to societal values of broader disclosure. The zone of privacy however has been narrowed by Justice Carthy in the *Chrusz* decision.

Litigation privilege attempts to find a balance between the "lawyer's freedom to prepare in privacy" in his investigate pursuits in the context of the adversarial process and the modern approach to changing toward early discovery and "fairness in pursuit of truth."[30] As for the internal report of the corporation especially where an accident has occurred and a corporate defendant exists, to allow privilege to attach to such a report would be most unfair. The private thoughts of counsel, his notes and parts of his brief (e.g. opinions and mental impressions the lawyer has formed about the case as the result of the exercise of his professional skill) may be the only things that trigger litigation privilege.[31]

☐ Technology and the Law Office

As the nature of the law office and law practice becomes increasingly more technology-based, the question of the attachment of privilege to computer generated data will also become of central concern. With the increasing use of computers in the law office, "an office-full" of information may be protected by litigation privilege. Michael Geist has expressed his views in the following manner:[32]

> Solicitor-client privilege, the hallmark of a legal profession, depends upon client trust. The use of new technologies such as e-mail and the Web creates a series of security-related issues and threatens to jeopardize the client-solicitor privilege, so fundamental to the legal profession.

It was recently reported in the *Law Times* that:[33]

> It's abundantly clear in the United States that if you're a lawyer and you want electronic data in discovery, you get it. There might be some definition around what you get or what time period and whom it relates to, and what process might be used to collect and get it, but you get it. And, I suspect the same is or soon will be true here in Canada.

Subject to exception in Alberta, Canadian law societies have not yet released or implemented guidelines relating to the practice of law and the Internet. In 1998, however, the Law Society of Alberta released Guidelines on Ethics and the New Technology.[34] The Guidelines acknowledge that complex litigation matters will increasingly entail the use of litigation support software. In this

regard, Chapter 4 of the Code of Professional Conduct of the Law Society of Alberta, Relationship of the Lawyer to Other Lawyers, Rule 8 provides that:

> A lawyer who comes into possession of a privileged written communication of an opposing party through the lawyer's own impropriety, or with knowledge that the communication is not intended to be read by the lawyer, must not use the communication nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system.

John C. Trederwick, Jr. ed. *Winning with Computers: Trial Practice in the 21st Century*[35] has suggested that the following seven measures could be helpful in securing the solicitor's brief privilege or litigation privilege:[36]

1. Assert Attorney Work Product (solicitor's brief privilege) on all aspects of one's database.
2. Do not show witness reports to witnesses.
3. Do not allow trial experts to examine databases.
4. Have and use confidentiality agreements.
5. Maintain password security.
6. Guard back-up copies of database.
7. Make sure deleted filed are dead i.e. irretrievable.

■ CONCLUSION

The adversarial process consisting of party self-reliance and initiative is a long-standing and strong policy reason for the granting of litigation privilege. In *Ottawa-Carleton v. Consumers Gas*[37], Justice O'Leary held as follows:

> I have little doubt if one looks no further than this immediate case, that production of the documents in question would save the defendants enormous expense in preparing their case, would tend to focus the attention of the defendants sand their solicitors on the real issues in the case, would decrease the time needed to prepare for pre-trial and trial and might even increase the chances of settlement. These prospects make it very tempting in a case of

this kind to do what is expedient and order production of the documents in question.

> In my view however any benefit that might flow to the parties and the court in this case by ordering such production would be gained at the expense of serious interference with our adversarial system of justice and would reduce the likelihood of full and early disclosure in future cases. The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel might be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel.

The Rules of Civil Procedure however as well as decisions of the courts are tending to earlier and fuller disclosure, "designed to develop facts and narrow legal issues before trial, permit questioning virtually every officer of a corporation and examining literally thousands of documents in the course of litigating a single dispute."[38] In *Chrusz,* the Court of Appeal was critical of a lawyer's entitlement to privacy in his investigative pursuits. Justice Carthy favors earlier disclosure[39] and Justice Doherty has suggested less claims for privilege be asserted.

Precisely how the law of litigation privilege will unfold is unclear. What is clear however is that there must be careful consideration of the implications of greater disclosure especially in the new technologically driven era. Will litigation privilege be "notional and illusory" or "real and substantial"[40] in the context of the modern views of the function and goals of dispute adjudication.

☐ Notes

1. It is beyond the scope of this paper to set out the history of the evolution of the protection granted by litigation privilege. For a historic perspective, see N.J. Williams, "Discovery in Civil Litigation Trial Preparation in Canada" (1980) 58 Can. Bar. Rev. 1.

2. C.E. Reasons, "Solicitor's Brief Privilege and the Computer: Some Preliminary Observations" (1993) 14 Advocates' Q. 1 at 3. [In more recent times, the emerging view seems to be that "litigation is well designed for achieving a decisive outcome when other adversarial procedures have not worked." See B. Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*, (San Francisco: Jossey-Bass, 2000) at 12.]

3. *General Accident Assurance Company v. Chrusz* (2000), 45 O.R. (3d) 321 (C.A.) at 336.

4. *Waugh v. British Railways Board*, [1980] AC 521 H.L.

5. The Australian judiciary has adopted the sole purpose test for litigation privilege. See *Grant v. Downs* (1976), 135 C.L.R. 674 at 688.

6. *Supra*, note 4 at 544.

7. J. Thomas Curry, "General Accident v. Chrusz: New Views on Privilege" Advocates' Q. (2000) 23, 234-245 at 237.

8. "*Claiming Privilege in the Discovery Process*" in Law in Transition: LSUC Special Lectures, 1984, (Toronto: DeBoo, 1984) 163 at 164-5.

9. [1969] 2 Ex. C. R. 27 at 33.

10. (1995), 133 Nfld. & P.E.I.R. 196, at 199.

11. R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law*, "Communications made in Contemplation of Litigation" (Toronto: Butterworths, 1993) at 89.

12. Findings, opinions and conclusions of an expert as well as medical examiner, however, are subject to the sole purpose test. Rule 31.06(3) and Rule 33.04 (2) of Ontario's Rules of Civil Procedure provide that findings, opinions and conclusions of an expert must be disclosed unless they are prepared for contemplated litigation and for no other purpose. As a result, where a lawyer requests expert reports for the dominant purpose of litigation and no other purpose, the expert report does not have to be disclosed. In *Grant v. St. Clair Region Conservation Authority* (1985), 5 C.P.C. (2d) 281 at 285-6 (Ont. Gen. Div.), the Court held that the findings, opinions and conclusions of an expert must be disclosed unless they were made or formed in preparation for contemplated pending litigation and for no other purpose. It is not enough that such preparation was the dominant purpose. It must be the sole purpose.

13. *Chrusz, supra* note 3.

14. *Ibid.*, at 334. Justice Carthy rejected the "substantial" purpose test.

15. J. Thomas Curry, "General Accident v. Chrusz: New Views on Privilege" (2000) 23 Advocates' Q. 234-245, at 237.

16. *Supra*, note 13 at 365-366.

17. *Ibid.*, at 335-336.

18. *Ibid.*, at 334.

19. Common interest privilege was defined by Denning L.J. in *Buttes Gas and Oil Co. v. Hammer (No.3)*, [1980] 3 All E.R. 475 at 483-84 as follows: That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will.

20. *Supra*, note 17, at 336.

21. Thomas Curry has suggested that: "A party that shares information with another under the protection of common interest privilege must be certain first either that the recipient personally contemplated litigation, or that the circumstances of the recipient will not

change to require disclosure." See "General Accident v. Chrusz: New Views on Privilege" (2000) 23 Advocates' Q., 234-245, at 243.

22. *Ibid.*

23. [1999] 1 S.C.R. 565 at 601.

24. *Supra,* note 19 at 348.

25. *Ibid.,* at 349.

26. Ibid., at 365.

27. *Supra,* note 11, at 96 (note 34).

28. *Hickman v. Taylor* 329 US 495 (1946).

29. *Chrusz, supra* note 2.

30. *Supra,* note 1 at 50-53.

31. Michael Geist, *Internet Law in Canada,* (Toronto: Captus Press Inc., 2000) 690.

32. Law Times, Daryll-Lynne Carlson, "The Art of Savvy Electronic Sleuthing: Building Discoveries with All the Facts and More" February 25, 2002, v. 13, no.8, 11.

33. Law Society of Alberta, February 1998.

34. (Chicago, ABA Section of Law Practice Management, 1991), p.211.

35. *Supra,* note 2.

36. (1991) 74 D.L.R. (4th), 742 at 748.

37. Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Family and the Legal System,* (Boulder: Westview Press, Inc. 1994) 2nd ed. at 55.

38. *Chrusz, supra* note 25 at 335 where Justice Carthy says: "It is an instinctive reflex of any litigation counsel to collect evidence and to pounce at the propitious moment. That's the fun in litigation. But the ground rules are changing in favor of early discovery. Litigation counsel must adjust to this new environment and I can see no reason to think that clients may suffer except by losing the surprise effect of a hidden missile."

39. *Supra,* note 10 at 202.