

CIVIL LITIGATION BASICS—2008
PAPER 5.1

Privilege in Practice

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PRIVILEGE IN PRACTICE

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I. Introduction

The purpose of this paper is to provide guidance in dealing with issues of privilege which arise in the course of document production. This is an area which can be difficult. It calls for sound knowledge of legal principles; readiness to investigate the relevant facts; and good judgment, all informed by regard for counsel’s ethical obligations and respect for the court’s process.

Part II of the paper contains an overview of the applicable law. In Part III, we discuss how to recognise circumstances in which privilege should be claimed, and how to critically assess claims made by the opposing party. We emphasise the central importance of acquiring the necessary facts to making an appropriate assessment of privilege. We go on to identify some ethical issues which arise. Part IV deals with bringing and defending applications for the production of privileged documents, with particular attention to developing a proper evidentiary record. We end with some strategic suggestions for responding to privilege applications.

II. A summary of the Applicable Law

It is essential starting point for counsel to be familiar with the law relating to privilege. Without such knowledge, counsel will not be in a position to identify potential claims of privilege and could inadvertently disclose privileged communications or documents. Counsel who is ill-informed may also fail to recognise situations where overly broad assertions of privilege have been made. This could result in the failure to obtain discovery of highly probative evidence. Knowing the law will enable counsel to be attuned to the facts necessary to make a proper assessment of privilege, and to appreciate when further inquiries to obtain the relevant facts are necessary. This last point is particularly important, and we will return to it below.

A detailed examination of the law of privilege, and of the relevant categories, including class privilege and case by case privilege, are beyond the scope of this paper. For further reading, we refer you to McLachlin and Taylor, *British Columbia Practice*, 2nd ed. (Vancouver: Butterworth’s, looseleaf ed.) at 26-35 to 26-95; Manes, *Solicitor Client Privilege in Canadian Law* (Toronto: Butterworth’s, 1993); Sopinka, *The Law of Evidence in Canada* (Toronto: Butterworth’s, 1999) at 709-852; and Andrew Nathanson and Jennifer Francis, “Principles of Privilege” in *Document Production* (Vancouver: CLE, 2002) at 5.1.01 to 5.1.14. What follows is a brief review of the main categories of privilege.

A. Solicitor-Client (or “Legal Advice”) Privilege

I. The Requirements for the Establishment of the Privilege

Solicitor-client privilege is the classic privilege that protects communications between a person and his solicitor that are made for the purpose of obtaining legal advice.

The pre-conditions to establishing solicitor-client privilege are summarized in *R. v. B.* (1995), 3 B.C.L.R. (3d) 363 (S.C.) at para. 22: (a) there must be a communication, whether oral or written; (b) the communication must be of a confidential character; (c) the communication must be between a client (or his agent) and a legal advisor; and (d) the communication must be directly related to the seeking, formulating, or giving of legal advice. These factors were cited with approval by the Court of Appeal in *British Columbia (Securities Commission) v. B.D.S.*, [2003] B.C.J. No. 979, 2003 BCCA 244 at para. 46. For a three part test (in which (a) and (c) are subsumed) see: *Majormaki Holdings v. Wong*, 2007 BCSC 1399; *Reid v. British Columbia (Egg Marketing Board)*, 2006 BCSC 346; and *Pritchard v. Ontario Human Rights Commission*, [2004] 1 S.C.R. 809, 2004 SCC 31.

The question of whether the communication was related to the seeking or giving of legal advice is where difficulties most often arise.

In *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 50 C.C.C. (2d) 495 at 501, Dickson J. said:

It is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity or in which counsel gives advice are protected.

In *R. v. McClure*, [2001] 1 S.C.R. 445, Major J. adopted Wigmore’s statement of the requirement, as follows:

In order for the communication to be privileged, it must arise from communication between a lawyer and the client where the latter seeks lawful legal advice. Wigmore, *supra*, sets out a statement of the broad rule, at p. 554:

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 waived.

The question of whether a particular document or communication is made in the course of seeking or giving legal advice is often a difficult one. The courts have recognized that there is a continuum of seeking or giving legal advice such that privilege may attach in particular circumstances even though the document itself does not incorporate specific legal advice (*British Columbia (Securities Commission) v. B.D.S.*, 2002 BCSC 664, appeal dismissed [2003] B.C.J. No. 979, 2003 BCCA 244).

It is our view that it is wrong to take too narrow a view of what is meant by “relating to” or “directly relating to” the purpose of giving legal advice. We can probably all think of situations in which the process of giving legal advice has included communications between ourselves which might, at first glance, appear to be fairly remote from the advice ultimately given but which were a *bona fide* part of the professional consultation process. A good working rule, when dealing with documents, is that communications between lawyer and client in a professional capacity are generally privileged unless, upon examination, there is good reason to think otherwise.

2. Purely Factual Records Are Not Privileged

On the other hand, purely factual records or “a report of acts” are not privileged merely because they were created in the course of a solicitor-client relationship. On that basis, a solicitor’s trust account ledger, accounting records and certain other records may be ordered produced (*Re Ontario Securities Commission and Greymac Credit Corp* (1983), 146 D.L.R. (3d) 73 (Ont. Div. Ct.); *Re Taylor Ventures*

Ltd. (1999), 60 B.C.L.R. (3d) 348 (S.C.) at para. 7; *Re Application under s. 441.1(3)(c) of the Criminal Code of Canada*, [1990] B.C.J. No. 2986 (S.C.); and *Re Wirick* (2002), 37 C.B.R. (4th) 151, 2002 BCSC 1355).

The name of a client may well be privileged information and should be treated as such. For instance, in *R. v. Fink*, [2002] S.C.J. No. 61, the Court stated that “[t]he name of the client may very well be protected by solicitor-client privilege, although this is not always the case.” (See also *Re Wirick*, *supra*.)

3. Communications with In-house Counsel

While communications with in-house counsel enjoy the same protection as communications with outside counsel, the courts have recognised that in-house counsel may wear different hats, and may be involved in giving business or strategic counsel in addition to legal advice (see *Crown Zellerbach Canada Ltd. v. Canada (Deputy Attorney General)*, [1982] C.T.C. 118, [1981] B.C.J. No. 118 (S.C.) and *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (1996), 18 B.C.L.R. (3d) 150 (S.C.)). In a particular circumstance, lawyers may be acting as business executives, directors, trustees or executors, and not as counsel. It is the nature of the communication and the relevant circumstances, and not merely the status of the parties to the communication, which will be determinative of a claim of privilege.

4. Fundamental Importance of Solicitor-Client Privilege and its Corresponding “Near Absolute” Status

In a series of cases the Supreme Court of Canada has declared in very forthright terms that solicitor-client privilege is a substantive right (and not just an evidentiary principle) of fundamental importance in our system of justice. For instance, in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, the majority stated that solicitor-client privilege is a principle of fundamental justice and a civil right of supreme importance. (See also: *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353); *Goodis v. Ontario*, [2006] 2 S.C.R. 32, 2006 SCC 31.)

The importance that has been placed upon the privilege has resulted in repeated statements by the Court that, while the rule is not absolute and there are exceptions to it, attempts to override or interfere with it should be rebuffed except where absolutely necessary.

In *R. v. McClure*, [2001] 1 S.C.R. 445 (a case dealing with the innocence at stake exception to the privilege), Major J. stated at para. 35:

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.

The Court has clearly stated that while the privilege is an exception to the rule of full disclosure, it is not an exception to the requirements of fair process but an integral part of it:

Procedural fairness does not require the disclosure of a privileged legal opinion. [Privilege and procedural fairness] may co-exist without being at the expense of the other ... The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege. (*Pritchard v. Ontario*, [2004] 1 S.C.R. 809)

The practical significance of all of this is that attempts to pierce or displace the privilege should only be undertaken where absolutely necessary and defences of privileged information are appropriately bolstered by the weight of this jurisprudence.

The exceptions to the privilege such as the “innocence at stake” exception or the fraud exception are briefly reviewed below.

Solicitor-client privilege endures indefinitely and is available to successors in title.

B. Litigation or Solicitor's Brief Privilege

I. The Nature and Purpose of the Privilege

Litigation privilege (sometimes called "solicitor's brief" privilege or, in the US, "attorney work product" privilege) protects from disclosure documents that are prepared for the purpose of litigation.

In *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, the Supreme Court of Canada stated that the object of litigation privilege is to ensure the efficacy of the adversarial process. To achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. It is based upon the need for a protected area, or "zone of privacy," to facilitate investigation and preparation of a case for trial by the adversarial advocate.

It ensures that a solicitor may, for the purpose of preparing himself to advise on or conduct proceedings, proceed with complete confidence that the information or material that he gathers from his client and others for this purpose, and what advice he gives, will not be disclosed to anyone except with the consent of his clients. The privilege extends to "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs ... aptly though roughly termed ... as the 'work product of the lawyer'" (*Hickman v. Taylor*, 329 US 495 (1947)).

2. The Requirements for the Establishment of the Privilege

The requirements for litigation privilege are that the documents in question must have been created (1) in contemplation of litigation which is "in reasonable prospect," and (2) for the "dominant purpose" of use in the litigation.

Litigation can properly be said to be in reasonable prospect when a reasonable person, with all the relevant information, would conclude that it is unlikely that the claim for loss will be resolved without litigation (*Himalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.)). This requirement is often relatively easy to satisfy.

The dominant purpose test was set out in *Grant v. Downs* (1976), 135 C.L.R. 674, 11 A.L.J.R. 577 (Aust. H.C.), adopted in BC in *Voth Bros. v. North Vancouver*, [1981] 5 W.W.R. 91 (C.A.) and affirmed by the Supreme Court of Canada in *Blank, supra*. In *Voth Bros., supra*, the Court described the requirement as follows:

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

The dominant purpose test is where most contests arise. (See our comments on dominant purpose in Part IV below, dealing with applications for production of privileged communications).

3. Litigation Privilege Arising in Regulatory Proceedings or Investigations

The "litigation" which must be in reasonable prospect in order for litigation privilege to arise is not confined to court process. It extends to regulatory proceedings:

Considering the rationale for litigation privilege, it is reasonable to conclude that an investigation by a regulatory authority such as the SEC can give rise to litigation privilege in the same manner as a court proceeding. Although there appear to be no Canadian authorities directly on point, courts in the United States have recognized

such an extension of privilege to proceedings before administrative agencies which determine ‘contested cases’: *Flores v. The Fourth Court of Appeals*, 777 S.W. 2d 38 and to certain proceedings before the SEC: *In re Sealed Case 87-5290* 856,F. 2s 268.

Bank v. Leu Ag v. Gaming Lottery Corp., [1999] O.J. No. 3949, aff [2000] O. J. no. 1137, para. 4

Further, since investigations by regulatory authorities may ultimately lead to proceedings with serious consequences for those being investigated, the privilege may arise at the onset of the regulatory investigation and prior to the commencement of an actual proceeding. (See *Bank Leu Ag v. Gaming Lottery Corp.* para. 4 and *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (Alta. C.A.), [1988] A.J. No. 810, page 3.)

In *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, (B.C.C.A.) [2002] B.C.J. No. 2779, the College claimed that documents created in the course of an investigation into an individual for professional misconduct were privileged. The Court of Appeal reviewed both *Ed Miller Sales* and *Bank Leu AG*, and accepted the ratio of those decisions. Further, for the purposes of the judgement the Court assumed that an individual who is being investigated by the College would have a claim for litigation privilege over documents that were collected in anticipation of disciplinary proceedings, although it found against the College’s claim of privilege because it did not stand in an adversarial relationship to the complainant, but rather had a statutory mandate to serve the public interest.

4. Differences Between Solicitor-Client and Litigation Privilege—Avoidance, Confidentiality and Termination

In *Blank, supra*, the Supreme Court of Canada made it clear that solicitor-client and litigation privilege should not be seen as two branches of the same tree but as different privileges arising for different reasons and not necessarily subject to the same rules.

The Court clearly did not regard litigation privilege as being as fundamental or “near absolute” as solicitor-client privilege and thus, not so hard to displace as solicitor-client privilege.

One important aspect of the distinct nature and purpose of the two privileges is that, unlike legal advice privilege, confidentiality is not an essential component of litigation privilege. Information obtained from third parties in the course of litigation who neither need nor have any expectation of confidentiality is nevertheless subject to litigation privilege (*Blank, supra*, at paras. 28 and 32).

Another important aspect of the difference between the two privileges is that litigation privilege terminates with the proceeding for which the document was created, whereas solicitor-client privilege endures indefinitely. However, this is subject to a very significant and necessary proviso. The proceedings in question are to be given an enlarged definition so that separate proceedings involving the same or related parties and related causes of action will be treated as the same proceeding for the purpose of the privilege. In fact, the Court stated that it is sufficient if the separate proceedings raise common issues and share the essential purpose of the original proceedings for which the document was created (see *Blank, supra*, at paras. 38 to 41).

Finally, it should be remembered that while the privileges are distinct, they often overlap. In *Blank*, the Court pointed out, at para. 50, that even if litigation privilege has terminated with the proceedings:

... many of the documents in the lawyer’s brief will, in any event, remain exempt from disclosure by virtue of legal advice privilege. In practice, a lawyer’s brief normally includes materials covered by the solicitor-client privilege because of their evident connection to legal advice sought or given in the course or, or in relation to, the originating proceedings.

5. Copy Documents

The privilege extends to copies of pre-existing unprivileged documents where the creation of the copies satisfies the dominant purpose test. This was explained by McEachern C.J.B.C. in *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (C.A.):

... where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

Interestingly, in *General Accident v. Chrusz*, the Ontario Court of Appeal doubted the correctness of the result in *Hodgkinson v. Simms*. Carthy J.A. expressed a preference for the reasoning in Craig J.A.'s dissent, and would have held that in-gathered copy documents were not protected by litigation privilege. Doherty J.A. and Rosenberg J.A. preferred to leave the question open. In BC, the privilege does not protect copies that are made without the exercise of judgment: for instance copying every page of a set of records did not create privilege in *Seller v. Grizzle* (1994) 95 B.C.L.R. (2d) 297.

C. Without Prejudice Privilege

1. The Requirements for the Establishment of the Privilege

This privilege protects settlement negotiations. It arises from the public interest in settlements. It is intended to allow parties to negotiate disputes freely, without fear of later prejudice: *Middlecamp v. Fraser River Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.).

For the privilege to arise it is not necessary that the phrase "Without Prejudice" be used on or in the document, nor is the use of such phrase determinative. Further, the communication need not contain an actual settlement proposal. The essential question is whether the document was exchanged for the purpose of initiating, or in the course of, settlement negotiations (*Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, [2006] B.C.J. No. 1776).

The privilege extends to negotiations to settle other disputes involving one of the parties: *Middlecamp, supra*. In BC, it covers both the negotiations preceding a settlement and the settlement agreement itself (*B.C. Children's Hospital v. Air Products Canada* (2003), 11 B.C.L.R. (4th) 281; leave granted: 2003 SCCA No. 240).

2. Exceptions to the Privilege

In *Middlecamp, supra*, McEachern C.J.B.C. in *obiter*, observed that there are circumstances in which exceptions to the privilege might arise. He referred to circumstances in which parties settle on terms which include an agreement that evidence will be furnished in connection with the litigation in which the application for disclosure is made. In such circumstances the applicant is entitled to know about such arrangements. The Chief Justice also mentioned possible exceptions arising out of fraud and where disclosure is required to meet cases of laches, want of notice or the passage of a limitation period.

Recently in *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, the Court of Appeal may have enlarged the circumstances in which an exception may arise. Finch C.J.B.C. wrote:

To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both *relevant*, and *necessary in the circumstances of the case* to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.

However, mere relevance is not enough to establish an exception to the rule. Even documents that go to the core of the case are not producible solely by virtue of that quality. It is necessary to show that a competing public interest outweighs the public interest in encouraging settlement (*Heritage Duty Free Shop Inc. v. Canada*, [2005] B.C.J. No. 670 (C.A.)).

D. Confidential Communication within Special Relationships

I. The Requirements for the Establishment of the Privilege

The Supreme Court of Canada has now made it clear that privilege can arise, outside the established categories, on a case-by-case basis, if certain criteria are met. The criteria generally applied are Wigmore's famous four criteria (although the Supreme Court of Canada has said that they are not carved in stone):

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which, in the opinion of the community, ought to be *sedulously fostered*.
- (4) The *injury* that would enure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Slavutych v. Baker, [1976] 1 S.C.R. 254; *R v. Gruenke*, [1991] 3 S.C.R. 263; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *McClure*, *supra*, at para. 29.

In deciding whether to establish a case-by-case privilege, the Court has stated that the courts should also take into account "Charter values" (*M. (A.) v. Ryan*, *supra*).

Despite the potentially broad application of these criteria the courts have shown themselves to be reluctant to apply them except in special circumstances. See: Sopinka and Lederman: *Law of Evidence in Canada*, at 722, para. 14.22.

2. Partial Privilege

Privilege arising on these grounds does not necessarily result in the blanket exclusion of all documents. It may result in partial privilege if that is what is required to strike the proper balance between the interest in protecting the communication and the interest in the proper disposition of litigation. Documents should be considered individually or by sub-groups on a case-by-case basis (*M. (A.) v. Ryan*, *supra*). The judge can limit disclosure to certain documents, edit the documents to remove non-essential information and impose conditions on who may see the documents.

E. Other Categories of Privilege

There are of course other categories of privilege, such as "public interest immunity," the privilege against incrimination, and other statutory privileges. Counsel should also be attuned to their related obligations of confidentiality (see *Professional Conduct Handbook*, Chapter 5, s. 1) and under privacy legislation.

In a similar vein, while not strictly a matter of privilege, in *Dhanai v. Dhalla*, 2005 BCCA 317, the Court of Appeal stated that the courts must attempt to avoid overly broad production orders if they will result in the disclosure of personal or confidential information of third parties:

Rule 26(1) provides for discovery of all documents that are or were in the possession of a litigant 'relating to any matter in question in the action.' A litigant can be compelled to disclose all relevant documents that are or were in his possession or

control, and to produce all relevant documents currently in his possession or control. He cannot be compelled to produce documents that are not relevant. Where the documents are of a personal nature or involve the privacy interests of third parties, the court should carefully avoid making a disclosure order that ignores these interests because it is unnecessarily broad.

F. Waiver or Overriding the Privilege

I. Waiver

Privilege may be waived by an intentional act such as voluntarily disclosing privileged communications by, for instance, including them in an affidavit.

In considering intentional waiver it must be recalled that the privilege may only be waived by the client. In *McClure, supra*, Major J. cited M. M. Orkin, *Legal Ethics: A Study of Professional Conduct* (1957), at 84:

It is the duty of a solicitor to insist upon this privilege which extends to 'all communication by a client to his solicitor or counsel for the purpose of obtaining professional advice or assistance in a pending action, or in any other proper matter for professional assistance' [Ludwig, 29 C.L. Times 253; *Minet v. Morgan* (1873), 8 Ch. App. 361]. The privilege is that of the client and can only be waived by the client.

If privilege is to be intentionally waived, express instructions should be obtained.

Not all intentional disclosure of privileged communications will result in a general waiver. In *British Coal Corp v. Dennis Rye Ltd. (No. 2)*, [1988] 3 All E.R. 816 (C.A.), the provision of documents provided for the limited purpose of a criminal inquiry was not considered to have waived the privilege.

It is also clear that waiver may happen by implication rather than intention. Perhaps the most common example of this is where one party puts his state of mind in issue in the pleadings (*Rogers v. Bank of Montreal* (1985), 61 B.C.L.R. 239 (S.C.), aff'd 62 B.C.L.R. 387 (C.A.)). The same principle applies with statements in affidavits. This must be borne in mind when drafting pleadings or affidavits. For example, in *United Furniture Warehouse LP v. 551148 B.C. Ltd.*, [2007] B.C.J. No. 78, in-house counsel for the plaintiff swore an affidavit in support of an application seeking short leave for service and hearing of an application for an injunction. In the affidavit in-house counsel deposed to the fact that she believed the facts set out in the plaintiff's claims to be true and the claims advanced to be valid. Counsel's intentional expression of an opinion, based upon a review of the claims, constituted a waiver of privilege, and accordingly in-house counsel's file was ordered to be produced.

More generally, a court may find there to have been waiver where fairness and consistency so require (*S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)).

It is not a waiver of privilege to share information with another party who has a common interest (*Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.)). This is commonly done among co-defendants, although it may be wise to do it pursuant to a Defence Agreement.

For waiver of privilege see also Dolden, E.A., *Waiver of Privilege*, (1990) 36 C.P.C. (2d) 56.

2. Communications in Furtherance of a Crime or Fraud

No privilege attaches to communications that are made for the purpose of assisting someone to perpetrate a crime (including a criminal fraud) (*Solosky v. Canada*, [1980] 1 S.C.R. 821; *R. v. Campbell*, [1999] 1 S.C.R. 565).

But the privilege is not displaced merely on the basis of a mere allegation of fraud. There must be evidence that gives some weight to the allegation and shows that it is honestly advanced and has sufficient credence to justify exercising the Court's discretion (*Middlecamp, supra* and *Pax Management Ltd. v. C.I.B.C.*, [1987] 5 W.W.R. 252 (B.C.S.C.)).

There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a “dupe” or conspirator (*R. v. Campbell, supra*; *Majormaki Holdings v. Wong*, 2007 BCSC 1399).

There are cases which suggest that this exception can apply to the furtherance of non-criminal wrongful conduct (*Williams v. Quebrada Railway, Land and Copper Co.*, [1895] 2 Ch. 751; *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.)) and are usually cited in support of expanding the exception to at least tortious conduct. (See John Sopinka, Sidney N. Lederman & Alan W. Bryant, 2d. (Toronto: Butterworths, 1999)). There are also several decisions from BC that purport to expand the exception to tort and/or any breach of duty or wrongful act, some even going so far as to include a breach of contract. These cases include: *Middelkamp v. Fraser Valley Real Estate Board* (1992), 70 B.C.L.R. (2d) 157; *Middelkamp v. Fraser Valley Real Estate Board*, [1993] 1 W.W.R. 436 (C.A.); *Knight's Mineral Exploration & Co., Partnership v. Corocoran & Co.* (1993), 79 B.C.L.R. (2d) 94; and *Goldman, Sachs & Co. v. Sessions*, [1999] B.C.J. No. 2815 (S.C.) (QL). In our view, there is a real question about expanding this exception in this fashion in light of the Supreme Court of Canada's recent statements (such as *McClure, supra*) about the near absolute nature of solicitor-client privilege and the necessity for restricting its abrogation to clearly defined exceptions.

3. Public Policy

Privilege may have to give way in order to afford an accused person the right to make full answer and defence when innocence is at stake (*R v. Stinchcombe*, [1991] 3 S.C.R. 326).

There is also a public safety exception (*Smith v. Jones* (1999), 169 D.L.R. (4th) 385 (S.C.C.)).

It may be that there remains a discretion in the court to order disclosure of documents that would otherwise be covered by litigation privilege, for instance where one party has had no opportunity to make its own investigation and the evidence no longer exists (*Knight's Mineral Exploration Company v. Corcoran* (1993), 79 B.C.L.R. (2d) 94; *Kaiser v. Bufton*, [1993] B.C.J. No. 1696; *Bank of Montreal v. Quality Feeds*, [1993] B.C.J. No. 2135). But see *Lougheed v. Filgate* (1995), 5 B.C.L.R. (3d) 101 (S.C.).

In light of the pronouncements of the Supreme Court of Canada about the near absolute nature of solicitor-client privilege cited above, it is our view that no such discretion properly exists in regard to communications that are covered by that privilege.

III. Recognising and Assessing Claims of Privilege

A. General Considerations

In reviewing documents for privilege or assessing claims of privilege made by the opposing party, there are a number of issues that commonly arise which counsel should consider: In the case of solicitor-client advice privilege: Was the communication with a lawyer? Was it for the purposes of seeking or giving legal advice? Was the communication preliminary to or reasonably related to those purposes? If litigation privilege may apply, was litigation in reasonable prospect when the document was created? What was the purpose for which it was created? Was the privilege waived, for example, by voluntary disclosure to a third party, or by an affirmative step taken by the party in the litigation? If there was disclosure to a third party, did they have a common interest, such that the common interest exception to waiver applies? Do any exceptions (fraud, future crime) apply?

These questions should be analysed in light of all information in counsel's possession, or which counsel can reasonably obtain. This includes the contents of the document itself and other documents; information from the client and from other witnesses; the chronology of events; the surrounding context; and common sense, logic and experience. Proper assessments cannot be made without acquiring all the relevant information. This frequently requires going beyond the documents themselves to get an explanation from the client or witnesses.

B. The Importance of Acquiring the Relevant Facts

There is an abundance of judicial commentary on the importance of safeguarding privilege. In order to discharge this important responsibility, counsel must not only know the relevant law, but they must acquire the necessary facts to properly assess potential claims of privilege. The legal tests for privilege are relatively well settled, though not without difficulty in their application. It is most often the facts that give rise to disagreements over whether particular communications or documents are privileged.

C. Determining Whether One of Your Documents is Privileged

The question of whether a document is privileged is often confronted by junior counsel as they review their client's production and prepare the list of documents. In many cases, there will be few privileged documents, and they will be obvious. In larger cases like product liability actions; aboriginal litigation; class actions; securities, corporate and large scale commercial litigation; or where the client is a large corporation with far-flung operations and many employees; or where there are or have been multiple proceedings involving the same subject matter, recognising and making assessments of privilege becomes increasingly difficult.

1. Determine Who All the Senders and Recipients of the Documents Are

When reviewing the documents in such cases, counsel should ensure that they are briefed on or inquire about the following factual matters. First, it is important to know whom all the senders and recipients of documents are, particularly in this age of e-mail proliferation.

2. Determine Whether a Lawyer was Involved

Second, counsel should determine who is a lawyer, and what involvement they have had. On a single, large matter it is not uncommon to see the involvement of multiple in-house counsel; outside counsel from different firms, often advising on specialty areas (securities law, banking, competition, intellectual property and tax, to name a few); previous litigation counsel; and counsel handling aspects of the same dispute in other jurisdictions. There may be lawyers who are not acting as counsel but as directors, executives or in other non-legal capacities.

3. Find Out what Happened at the Early Stages

Third, it is often crucial to understand in detail what happened early on, once the concern or dispute was identified. How was the problem framed, and what were the key decision-makers told about it? What steps were taken to investigate the problem? By whom? At whose direction? For what purpose? Was the advice of in-house or outside counsel sought, and what advice did they give? A complete understanding of these and other contextual facts will be essential to assessing when litigation was in "reasonable prospect" and the "dominant purpose" for creating the documents for the purposes of a litigation privilege claim. They may also disclose that the information was gathered at the direction of counsel or that certain documents were created for the purposes of obtaining advice from counsel.

D. Assessing the Other Party's Claim of Privilege

1. Investigation of Facts

In assessing a claim of privilege made by the opposing party, counsel will need to know as many of these same facts as possible. That may mean canvassing these matters through interrogatories or on discovery. The other side's document production will often be fertile ground for evidence that tends to disprove the existence of litigation privilege. In the case of an equipment failure, the documents may disclose, for example, that an outside expert was consulted to confirm the repair recommendations of the party's technical personnel, rather than for the dominant purpose of preparing for anticipated litigation.

2. Rule 26(2.1)

Where counsel have reason to be concerned about privilege claims, they may wish to insist on adherence to Rule 26(2.1), which provides that “[t]he nature of any document for which privilege from production is claimed must be described in a manner that, without revealing information that is privileged, will enable the other parties to assess the validity of the claim of privilege.”

It follows from this discussion that it is important to preserve the client’s files in their original condition: see Paul Bennett, “Produced Documents” in *Document Production* (Vancouver: CLE, 1992), at 2.1.04. By way of example, when assessing a claim of solicitor’s brief privilege based on the skilful selection of copy documents, it may be important to know whether a particular document was found in in-house counsel’s file or in a file belonging to another employee. If found in both files, it may be privileged in counsel’s file but not in the employee’s.

Making proper assessments of privilege requires analytical rigor. It is good practice to ensure that for each document for which privilege is asserted, not only is a statement of the grounds of the privilege identified (as required by Rule 26(2)), but that counsel is able to articulate the factual and legal basis for the privilege.

E. Ethical Issues

I. Counsel’s Responsibility in the Listing Process

It has often been said that “[n]owhere in civil procedure is the responsibility of the lawyer greater than in the area of discovery of documents”: *Boxer v. Reesor* (1983), 43 B.C.L.R. 352 (S.C.), per McEachern C.J.S.C. (citing Fraser & Horn, *The Conduct of Civil Litigation in British Columbia*). The “duty upon a solicitor is now, and has always been, to make full, fair and prompt discovery”: *Grossman v. Toronto General Hospital* (1983), 41 O.R. (2d) 457 (H.C.).

In *Grossman*, the family of a patient who went missing for 12 days at Toronto General Hospital and who was later found dead in an air duct shaft, sued the hospital for negligence. The hospital delivered an affidavit of documents asserting solicitor-client and litigation privilege over a broad class of documents. None of the documents for which privilege was claimed were particularised. In dismissing the hospital’s appeal from a decision of a master ordering production and full particulars of the documents for which privilege was claimed, Reid J. stated at 462-63:

The answer made in the second part of the first schedule is a mere boilerplate calculated to conceal all and any documents from inspection. The result was to deprive opposing counsel of any basis for challenging the privilege claimed. Equally, if a challenge had been made, no court could have decided it, without resorting to ordering production of all the documents referred to ... Since no one could have known from reading the schedule what documents are referred to, that would have been an order made in the dark.

... The integrity of the system depends on the willingness of lawyers to require full and fair discovery of their clients. The system is, in a sense, in the hands of the lawyers. The opportunity for stonewalling and improper concealment is there. Some solicitors grasp it. They will make only such production as can be forced from them. That is bad practice. It can work real injustice. It causes delay and expense while the other side struggles to see that which they had right to see from the first. In such a contest the advantage is to the long purse. The worst consequence is that the strategy is sometimes successful, giving its perpetrators a disreputable advantage. The practice must be condemned. If it were widespread it would undermine the trial system.

Questions of privilege often involve a delicate balancing. On the one hand, counsel is duty-bound to protect the privilege, which, as we have noted, belongs not to him, but to the client. Where the

privilege is arguable, counsel should assert the privilege unless it is waived: see, for example, *Milverton Capital Corp. v. Thermo Tech Technologies Inc.* (2003), 16 B.C.L.R. (4th) 336 (S.C.) at para. 14. On the other hand, it is improper to make overly broad or unsupportable claims of privilege, particularly if this is done to deliberately insulate documents from production; to apply a categorical approach to documents without assessing them individually; or to make a claim of privilege without first acquiring the facts necessary to make a good faith assessment of the privilege.

In *Milverton, supra*, Groberman J. was critical of Campney & Murphy for listing confidential client documents which were conceded to be non-privileged in Part 3 of their list, calling it “an abuse.” He also held at para. 17 that “[b]y failing to turn its mind to the legitimacy of claims of privilege over individual documents, Campney & Murphy has failed to establish a claim of privilege over any.”

2. Inadvertent Disclosure

Another ethical issue, which sometimes arises, involves the inadvertent disclosure of privileged documents or communications. This occurs when a lawyer’s letter to his client is mistakenly delivered to the opposing counsel, or when a clearly privileged document like an opinion or expert report is included in a party’s production. This is addressed in the *Professional Conduct Handbook*, Chapter 5, s. 15 (“use of opponent’s documents”). The Handbook provides that where a lawyer has access to or comes into the possession of a document which he has reasonable grounds to believe belongs to or was intended for an opposing party and was not intended for the lawyer to see, he shall return it unread and uncopied. Where the lawyer has read the document without realising that it was not intended for him, he must return it, uncopied, and comply with s. 15(b). While s. 15 nowhere refers to privileged documents, it is by its terms broad enough to extend to inadvertent disclosures of privileged documents as well as confidential documents belonging to opposing parties. An injunction would also be available in such circumstances (*Lord Ashburton v. Pape*, [1913] 2 Ch 469).

The consequences of not properly handling privileged documents that are inadvertently disclosed can be severe. In *Chan v. Dynasty Executive Suites*, [2006] O.J. 2877, the Court disqualified counsel after they received privileged documents that were inadvertently disclosed in the discovery process. When the disclosing party realized its mistake, it demanded return of the documents. The receiving party, however, refused and instead reviewed them in detail, even though they acknowledged that some of the documents appeared on their face to be privileged.

IV. Bringing and Defending Applications for Production of Privileged Communications

The first consideration (beyond the decision to bring the application) on an application seeking the production of documents over which privilege is claimed must be putting the proper record before the court.

A. The Respondent’s Evidence

We will address the respondent’s evidence first, since the relevant facts are usually fully known only to the respondent who is asserting the privilege.

I. Onus on the Party Claiming Privilege

The onus is on the party asserting the privilege. The material should address the nature of the document and all the facts relevant to the applicable test for privilege. The failure to address the factual foundation necessary to support the privilege in the case of each document can be fatal, as in *Shaughnessy Golf and Country Club v. Unigard Services Ltd.* (1986), 1 B.C.L.R. (2d) 309 (C.A.). However, this is subject to the proviso that in cases involving a large volume of potentially privileged documents it may not be practically possible to address each document individually. In such

circumstances, counsel should ensure that the affidavit material provides meaningful disclosure of the nature of the documents in issue, sufficient to allow the court to assess the claim of privilege for all of the documents, by category if not individually (*Thomson v. Berkshire Investment Group Inc. et al*, 2007 BCSC 50).

2. Bare Assertions Insufficient

The respondent's affidavit material must go beyond bare assertions, unsupported by material facts. For instance, where litigation privilege is in issue, the bald assertion by the author that a document was created for the dominant purpose of litigation will not be sufficient to discharge the respondent's onus (*Thiara v. Potrebenko* (1991), 57 B.C.L.R. (2d) 385 (S.C.); *Brayley v. Pappas* (1991), 64 B.C.L.R. (2d) 37). The court will inquire into the relevant circumstances at the time the document was created. It may be necessary to adduce evidence from more than one witness.

3. Dominant Purpose

Overcoming the onus is made more difficult by the statement of Wood J.A. in *Himalainen v. Sippola*, *supra*, at 262 that:

Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation.

The court may conclude that the purpose of the creation of documents at the early stages of an investigation was to find the facts rather than for the purposes of litigation, unless clear affidavit material demonstrates that at the time that the document was prepared something pointed decisively to inevitable litigation and that was its dominant purpose (*Bank of Montreal v. Quality Feeds, supra*; *Schellert v. Nestegaard* (1985), 61 B.C.L.R. 380; *Krusel v. Firth*, [1992] B.C.J. No. 2443).

If the affidavits fail to rule out the possibility that the investigation was commissioned for purposes other than litigation (favourite examples are insurance coverage or adjustment of a loss) the claim of privilege may well fail (*Brayley v. Pappas, supra*; *Krusel v. Firth*, [1992] B.C.J. No. 1695). However, documents produced both for the purposes of litigation, and to fulfill regulatory requirements owed to a third party, may still be covered by litigation privilege (*Thomson v. Berkshire et al., supra*).

B. The Applicant's Evidence

The applicant will not often be in a position to offer direct evidence. Exceptions might occur where a former employee of the respondent turned whistleblower and was co-operating with the applicant, or where the applicant was able to obtain evidence from a third party source, or there was evidence that the respondent had waived privilege by providing the documents to a third party.

The applicant may choose to argue the application on the basis of weaknesses or contradictions in the respondent's evidence, or inferences from the documents or surrounding circumstances. This may be risky. In *Saric v. Toronto Dominion Bank*, 1999 BCCA 459, a review application, a panel of the Court of Appeal adopted the conclusion of Hall J.A. in chambers that the appellant had not established a sufficient factual basis to challenge the defendant bank's evidence in support of its claims of privilege. Hall J.A. observed that the appellant might have called for a further and better affidavit of documents, or sought cross-examination on the bank's affidavit. The appellant did neither.

Interrogatories and examinations for discovery are also available as means for developing a record to challenge the respondent's assertions of privilege. It may in fact be strategically wise to defer bringing an application to challenge a claim of privilege until after discoveries are complete.

C. Arguing the Law and Applying it to the Facts

It is not uncommon for counsel to adopt the approach of assuming that the master or judge who hears the application will have dealt with many applications of this kind, will know all the up-to-date law applicable to the application and will “figure it out” without the benefit of well-researched and considered arguments. This is particularly true in cases which do not involve large amounts of money where counsel are attempting to avoid running up expense.

This is not a good approach. Privilege applications can turn on any number of legal points and require a careful application of the facts to the applicable case law. These are complicated applications that require well-researched and thought out submissions. The answers are rarely obvious. It is not only unfair to simply toss it into the lap of the chambers judge but not a good recipe for success.

D. Inspection by the Court

It has been said that the “usual procedure” is to provide copies of the documents in issue to the court at the hearing of the application: Jonathan McLean and Renee Ritchot, “Enforcing the Obligation” in *Document Production* (Vancouver: CLE, 2002), at 6.1.06. Rule 26(12) confers a discretion to inspect the documents. In many cases, the court has reviewed the documents and made detailed findings on whether documents or categories were privileged: see, for example, *Crown Zellerbach, supra*. This will not always be practical, especially where large numbers of documents are in issue. In *Milverton*, Groberman J. at para. 13 was critical of what he saw as a wholesale attempt to offload counsel’s obligation to make an assessment of privilege onto the court:

Campney & Murphy’s suggestion that the court should go through the documents and decide which are privileged is not only an abrogation of its own duties, it is also completely unworkable. The court may examine documents and determine whether or not they are privileged when there is a dispute between the parties. In such circumstances, the party claiming privilege satisfies itself that there is an arguable ground for such a claim and presents the argument. In contrast, in this case it is proposed that the court simply be given the documents. The court cannot rummage through Campney & Murphy’s files or corporate memory to gain information as to the source or pedigree of a particular document, nor can it make inquiries of various persons to clarify the content or context of a document.

This passage also underscores the integral function that fact-finding plays in making appropriate assessments of privilege.

It is our view that counsel should not readily come to the conclusion that the best course is to invite the Court to review the documents. The first approach should be to attempt to describe the documents in issue and why they are privileged. Usually this is done by describing them in categories, defined by facts that are relevant to the privilege arguments. In our experience this is usually sufficient and it is not necessary to put the Court to the task of reviewing the documents. One additional benefit to this approach is that the Court will not have information (from reviewing the documents) that is unavailable to one of the litigants (the applicant—who has not seen the documents). Only if this approach is impractical should the Court be invited to review the documents and then only those that it is necessary for the Court to review. In a case involving large quantities of documents, consider whether it is possible to provide examples for the Court to review.

E. Strategic Considerations for Applicants

I. Other Avenues May be Available to Obtain the Information

It may not be necessary to apply for disclosure of privileged communications because the information may be available through other procedures.

While a memorandum that was prepared for the dominant purpose of litigation that records what a witness saw may be privileged (*S & K Processors v. Campbell, supra; Susan Hosiery v. MNR*, [1969] Ex. C.R. 27; the observations themselves are not). They can be obtained through interrogatories or examination for discovery in the case of a party or rule 28 and subpoena in the case of a non-party (*Bestway Lath v. McDonald* (1973), 31 D.L.R. (3d) 47; *Harmony Shipping*, [1979] 3 All E.R. 177).

2. Weigh the Cost

Applications of this kind are expensive and time-consuming. Careful consideration should be given to making them. The delights of a fishing trip seldom justify the cost when the client is paying. You should also remember that if you go fishing in your opponent's waters, it is an invitation for him to come fishing in yours.

F. Strategic Considerations for Respondents

We offer the following prescriptive suggestions for potential respondents. Like most medicine, they tend to work better in advance. By the time the application has been brought, the respondent's room to manoeuvre is more limited.

1. Redact and Disclose the Remainder

Where a document contains some information that is privileged, it may be appropriately redacted. The balance of the document can then be disclosed. The basis of the redaction should be clearly identified. It has been held that where the privileged material is so intermingled with non-privileged information that to edit the document would be impractical, the entire document may be treated as privileged (*Merritt v. Imasco Enterprises Inc.*, [1992] B.C.J. No. 2319 (S.C.)). If redaction is possible, it should be done as part of the initial production, rather than offered as a last-ditch attempt to avoid an application.

2. It May be Better to Waive

Respondents should also consider whether it is advisable to simply to disclose the documents, and avoid an unfavourable result which may give rise to difficulties in later cases. Tenaciously asserting litigation privilege can sometimes provoke suspicion. Judges are wary of trial by ambush, and often subscribe to Lord Edmund-Davies' observation that "Justice is better served by candour than by suppression" (*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 at 1182). Some privileged documents may in fact assist, and while the respondent may be within its rights to withhold them in counsel's brief until trial, it may be more useful to disclose them early to promote settlement, or to do some early persuasion of the judge who is case-managing the proceedings.

These considerations may apply to solicitor-client communications as well. Reliance on the advice of counsel may be an essential feature of a respondent's defence strategy where, for example, a plaintiff brings a derivative action alleging the directors caused the company to enter into an improvident transaction, and the directors seek to rely on s. 157(1)(b) and (d) of the *Business Corporations Act* (reliance in good faith on the written report of a lawyer, etc. (s. 157(1)(b))). A similar example occurred in 2003. As part of its hostile bid for PeopleSoft Inc., Oracle Corp. commenced an action in Delaware, seeking to invalidate PeopleSoft's poison pill and newly adopted customer assurance program as improper anti-takeover defences. PeopleSoft elected to waive its attorney-client privilege over communications between PeopleSoft's directors and outside counsel in an effort to support the reasonableness of the directors' actions.

The ultimate decision on waiver must of course be made by the client. It is incumbent on counsel to ensure the decision is an informed one.

V. Conclusion

The central theme of this paper is that to properly discharge their obligations to safeguard the client's privilege, which includes making careful, individualised assessments before claiming privilege over specific documents, counsel must be acquainted with the applicable law and diligently inform themselves of all relevant facts. Difficult questions will undoubtedly arise. We think the following advice (Nathanson and Francis, "Principles of Privilege," *supra* at 5.1.01) is worth repeating:

... the principles and legal tests for privilege often raise difficult questions in their application. Those questions are very often matters of judgment on which experienced and diligent counsel could reasonably disagree. When a privilege issue arises, counsel should allow for the fact that principled disagreements are possible, and even inevitable. It follows that where differences of opinion over claims of privilege arise, counsel ought to be able to discuss them candidly, and without rancour. Similarly, when opposing counsel question an assertion of privilege, counsel should allow for the fact that his or her judgment is not infallible, should carefully entertain the concerns raised and consider obtaining a second opinion.