Clerk's Stamp:

COURT FILE NUMBER	2501-19283
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
RESPONDENT	COMPEER FINANCIAL, PCA
APPLICANTS	SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA ENTERPRISES INC., RAY PRICE , DEBBIE UFFELMAN, CRAIG THOMPSON, DAVID PRICE, ARTHUR PRICE and GLEN PRICE
DOCUMENT	**BRIEF OF THE APPLICANTS**
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BOOK OF AUTHORITIES OF THE APPLICANTS, SUNTERRA FARMS LTD ET AL., REGARDING APPLICATION TO STRIKE DOCUMENTS, DISMISS OBJECTIONS AND REQUIRE WITNESSES TO ANSWER TO BE DECEMBER 1, 2025

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RULES OF COURT

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Questioning witness before hearing

6.8 A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and

(a) rules 6.16 *[Contents of appointment notice]* to 6.20 *[Form of questioning and transcript]* apply for the purposes of this rule, and

(b) the transcript of the questioning must be filed by the questioning party.

How the Court considers applications

6.9(1) The Court may consider a filed application in one or more of the following ways:

(a) in person, with one, some or all of the parties present;

(b) by means of an electronic hearing if an electronic hearing is permitted under rule 6.10 *[Electronic hearings]*;

(c) by a process involving documents only.

(2) Applications may be decided by a judge or applications judge.

AR 124/2010 s6.9;136/2022

Electronic hearing

6.10(1) In this rule, "electronic hearing" means an application, proceeding, streamlined trial or trial conducted, in whole or in part, by electronic means in which all the participants in a hearing and the Court can hear each other, whether or not all or some of the participants and the Court can see each other or are in each other's presence.

(2) An electronic hearing may be held if

(a) the parties agree and the Court so permits, or

(b) on application or on the Court's own motion, the Court orders an electronic hearing.

(3) The Court may

(a) direct that an application for an electronic hearing be heard by electronic hearing,

(b) direct that an application, a streamlined trial or a trial be heard in whole or in part by electronic hearing,

(c) give directions about arrangements for the electronic hearing or delegate that responsibility to another person,

(d) give directions about the distribution of documents and the practice and procedure at the electronic hearing, or

(e) order that an electronic hearing be completed in person.

(4) The court clerk must participate in an electronic hearing unless the Court otherwise directs.

AR 124/2010 s6.10;23/2021;126/2023

Evidence at application hearings

6.11(1) When making a decision about an application the Court may consider only the following evidence:

(a) affidavit evidence, including an affidavit by an expert;

(b) a transcript of questioning under this Part;

(c) the written or oral answers, or both, to questions under Part 5 *[Disclosure of Information]* that may be used under rule 5.31 *[Use of transcript and answers to written questions]*;

(d) an admissible record disclosed in an affidavit of records under rule 5.6 *[Form and contents of affidavit of records]*;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

(2) An affidavit or other evidence that is used or referred to at a hearing and that has not previously been filed in the action must be filed as soon as practicable after the hearing.

If person does not get notice of application

6.12 If it appears to the Court at the time an application is heard that a person who should have been served with notice of the application was not served, the Court may

(a) dismiss the application,

(b) adjourn the hearing for notice to be served, or

(c) if the Court considers it appropriate to do so, hear and decide the application.

Recording hearings when only one party present

6.13 Unless the Court otherwise orders, a hearing of an application in which only one party makes a personal appearance must be recorded word for word by a method that is capable of providing a written transcript.

Subdivision 4
Appeal from Applications Judge's Judgment or Order

Appeal from applications judge's judgment or order

6.14(1) If an applications judge makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.

(2) A notice of appeal in Form 28 must be filed and served within 10 days after the judgment or order is entered and served and returnable within a reasonable time, not exceeding 2 months, after the date the notice of appeal is filed.

(3) An appeal from an applications judge's judgment or order is an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

(4) The record of proceedings is

(a) the application before the applications judge,

(b) affidavits and other evidence filed by the parties respecting the application before the applications judge,

(c) any transcript of proceedings before the applications judge, which must be ordered and paid for by the appellant, unless the Court determines, or the parties agree, that transcripts are not needed, and

(d) the applications judge's judgment or order and any written reasons given for the decision.

(5) The appellant must file and serve on the respondent to the appeal, within one month after service of the notice of appeal,

(a) any transcript of proceedings described in subrule (4)(c),

(b) any additional evidence referred to in subrule (3), and

(c) any further written argument.

(6) The respondent to the appeal must file and serve on the appellant, within 20 days after service of the documents referred to in subrule (5),

(a) any further written argument the respondent wishes to make, and

(b) any additional evidence referred to in subrule (3).

(7) The appellant may, within 10 days after service of the documents referred to in subrule (6), file a brief written argument responding to any unanticipated additional evidence or further argument raised by the respondent.

(8) A party may rely on its original written argument, if any, that was before the applications judge or any further argument filed under subrule (5)(c) or (6)(a), or both the original argument and the further argument.

AR 124/2010 s6.14;143/2011;136/2022

Information note

Section 12 of the *Court of King's Bench Act* provides for an appeal of an applications judge's order.

Where the applications judge has given formal written reasons, it will often be unnecessary to provide a transcript of the proceedings before the applications judge.

Subdivision 5
Procedure for Questioning

Appointment for questioning under this Part

6.15 If a party is entitled to question a person under this Part, that party may do so by serving on the person a notice of appointment for questioning in Form 29, and rules 6.16 *[Contents of appointment notice]* to 6.20 *[Form of questioning and transcript]* apply.

Contents of notice of appointment

6.16(1) A notice of appointment for questioning must

(a) specify a reasonable date, time and place for the appointment for questioning,

(b) describe any records the person is required to bring to the appointment for questioning, and

(c) request the person to be questioned to specify any arrangements necessary to accommodate the person's reasonable needs which, to the extent reasonably possible, must be accommodated.

(2) The notice of appointment for questioning must be served 5 days or more before the appointment date

(a) on the person to be questioned, or if a lawyer acts for that person, on the lawyer, and

(b) on each of the other parties.

(3) On application, the Court may resolve a dispute over the date, time, place and person to be questioned and any related matters, and the records to be produced at the appointment for questioning.

(4) The attendance of a person to be questioned and the records to be produced at the appointment for questioning may be required by an order under rule 6.38 *[Requiring attendance for questioning]*.

Information note

If the person to be questioned on an affidavit in support of an application or originating application is outside Alberta and a party to the application seeks to question that person in Alberta, an application for a certificate to attach to a subpoena must be made under the *Interprovincial Subpoena Act*.

Payment of allowance

6.17(1) When a notice of appointment for questioning is served, an allowance must be paid by the questioning party to or on behalf of the person to be questioned, unless the Court dispenses with an allowance.

(2) If an allowance is not paid, the person who is the subject of the notice of appointment for questioning need not attend the appointment unless ordered to do so by the Court.

(3) The allowance to be paid is

(a) the amount determined under Schedule B *[Court Fees and Witness and Other Allowances]*, or

(b) if there is a dispute over the amount to be paid, the amount ordered by the Court.

Lawyer's responsibilities

6.18(1) If a lawyer is served with a notice of appointment for questioning and an allowance is also paid, the lawyer must,

(a) as soon as practicable, inform the person to be questioned about the appointment, and

(b) use the allowance only for the purpose for which it is paid.

(2) If a person to be questioned does not attend the appointment for questioning, the allowance must, unless the parties otherwise agree or the Court otherwise orders, be repaid to the person who paid it by

(a) the lawyer, or

(b) if the lawyer paid the allowance to another person, that other person.

Interpreter

6.19(1) If a person to be questioned will not be able to understand the questions or be able to answer the questions without the aid of an interpreter, the person to be questioned must give reasonable notice of that fact to the party who served the notice of appointment for questioning, and the questioning party must then notify every other party that an interpreter will be present.

(2) The questioning party must provide an interpreter

(a) who is impartial and competent, and

(b) who takes an oath to interpret the questions and answers correctly and honestly.

(3) The cost of the interpreter must initially be borne by the questioning party.

Form of questioning and transcript

6.20(1) A person questioned on an affidavit under this Part or a person questioned as a witness for the purpose of obtaining a transcript under this Part for use at a hearing may also be questioned by any other party, and the person questioned may then be questioned again by the questioning party on that person's answers to the questions of other parties.

(2) Questioning and questioning again under this rule by parties adverse in interest may take the form of cross-examination.

(3) The questions and answers must be recorded word for word by a person qualified to do so

(a) by a method that is capable of producing a written transcript, and

(b) in a manner agreed on by the parties or directed by the Court.

(4) The person recording the oral questioning must

(a) keep in safe custody the recorded questioning,

(b) if required to do so, honestly and accurately transcribe the recorded questioning and deliver a copy of the transcript, as required, and

(c) on or attached to any transcript

(i) state the person's name,

(ii) specify the date and place where the questioning occurred, and

(iii) certify the transcript, or the portion of the questioning transcribed, as complete and accurate.

(5) The questioning party must

(a) make necessary arrangements for the questioning to be recorded, and

(b) file the transcript unless the Court otherwise orders.

(6) A person is qualified to record and transcribe oral questioning under this Part if the person is

(a) an official court reporter,

(b) a person appointed by the Court as an examiner under the *Alberta Rules of Court* (AR 390/68), or

(c) a shorthand writer, sworn to record the questioning word for word and to impartially fulfil the duties imposed by subrule (4), who

(i) is an agent or employee of an official court reporter, or

(ii) has been approved by the parties.

Division 2
Preserving Evidence and Obtaining Evidence Outside Alberta

Preserving evidence for future use

6.21(1) The Court may order that a person be questioned, under oath,

(a) for the purpose of preserving evidence, or

(b) for any other purpose satisfactory to the Court.

Court of King's Bench of Alberta

Citation: Great North Equipment Inc v Penney, 2024 ABKB 391

Date: 20240627
Docket: 2301 08144
Registry: Calgary

Between:

Great North Equipment Inc. and 1185641 BC Ltd.

Applicants/Plaintiffs

- and -

Bradley Penney, Neil Macdonald, Dustin Monilaws, Paloma Pressure Control LLC, Paloma PC Holdings LLC, Indeed Oilfield Supply LLC, and Indeed Alberta Corp.

Respondents/Defendants

Scott Luscombe, Nthan Underwood, and Leah Carlson

Rule 6.8 Respondents

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] The Applicants examined three individuals who are not parties to this action pursuant to Rule 6.8 to obtain evidence to support their application to extend an interlocutory injunction preventing the Respondents from soliciting their employees and clients. During the examinations, the Applicants requested that the non-party witnesses give undertakings to produce records and information. The undertakings were taken under advisement and subsequently refused.

[2] The Applicants submit that the non-party witnesses are obliged to answer reasonable undertaking requests in the same way as witnesses subject to cross-examination on an affidavit pursuant to Rule 6.7. The Respondents reject this position. They say that a non-party witness is to be treated the same as a witness at trial and that there is no obligation to answer undertakings. Counsel for the parties were unable to identify any case where the question of the obligation to answer undertakings was decided under Rule 6.8 or its predecessor, Rule 266.

[3] For the sake of clarity, I will refer to the Respondents/Defendants as the Respondents and the Rule 6.8 Respondents as the non-party witnesses.

II. Rule 6.8 – Examination of a Non-Party for a Pending Application

[4] The right of a party to examine a non-party to obtain evidence for a pending application goes back to the mid-19th century practice of the High Court of Chancery: ***Dechant v Law Society of Alberta***, 2000 ABCA 265 at paras 12-13. The original Chancery rule was substantially replicated in former Rule 266 which read as follows:

> A party to an action or proceeding may by service of an appointment issued by an officer having jurisdiction in the judicial district where the witness resides to issue appointments for the examination of parties for discovery, require the attendance of a witness to be examined before that officer for the purpose of using his evidence upon any motion, petition or other proceeding before the court or any judge or judicial officer in chambers; and his attendance may be procured and his examination conducted in the same manner as those of a witness at the trial [emphasis added].

[5] Pursuant to Rule 266 the examination of a non-party witness proceeded as an examination-in-chief. Only if the witness proved to be hostile could an application be made to the Court for permission to conduct a cross-examination. Regardless of the mode of examination, the transcript was part of the examining party's evidence on the application.

[6] Rule 266 was studied by the Alberta Law Reform Institute ("ALRI") as part of the Rules of Court Project in the early 2000s: Consultation Memorandum No. 12.10: Motions and Orders (July 2004) at 35-38. The General Rewrite Committee recommended that Rule 266 be modified to permit cross-examination of adverse parties without first requiring a Court application to have the witness declared hostile.

[7] Rule 266 became Rule 6.8 in the *Alberta Rules of Court*, Alta. Reg. 124/2010:

> 6.8 Questioning witness before hearing – A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and
>
> (a) rules 6.16 to 6.20 apply for the purposes of this rule, and
>
> (b) the transcript of the questioning must be filed by the questioning party.

[8] Rule 6.16, which is incorporated into Rule 6.8, provides that a notice of appointment may specify records that a witness must bring to questioning. Rule 6.20(2), consistent with the ALRI recommendation, provides that a cross-examination may be conducted where the witness is adverse in interest.

III. Evidence for Applications

[9] The types of evidence that may be put before the Court on an application is set out in Rule 6.11. Two kinds of oral evidence are permitted. Evidence obtained prior to a hearing and recorded in a transcript and oral evidence given in Court. Oral evidence in Court is only permitted on an application with leave of the Court. Oral evidence in Court at an application "must be given in the same manner as at trial": Rule 6.11(2).

[10] The starting point is that affidavits and transcripts of oral evidence put before the Court on an application stand in place of *viva voce* evidence being given in Court. Accordingly, the mode of adducing evidence on an application is analogous to the approach used at trial and fundamentally different than Part 5 questioning (*i.e.* what used to be called oral discovery). A witness may be required to attend at trial and bring relevant records: Rules 8.8 & 8.9. A witness at trial, however, is not required to give and answer undertakings.

[11] The purposes of Part 5 questioning are set out in Rule 5.1. Rule 5.1(1) explains that a purpose of record production and oral questioning is to "obtain evidence that will be relied on in the action." Undertakings are an essential feature of the Part 5 questioning process because they assist the parties to obtain evidence that will be relied on in the action. Rule 5.30 provides as follows:

> 5.30 Undertakings – (1) If, during questioning, a person answering questions
>
> (a) does not know the answer to a question but would have known the answer if the person had reasonably prepared for the questioning, or if as a corporate representative the person had reasonably informed himself or herself, or
>
> (b) has under the person's control a relevant and material record that is not privileged,
>
> the person must undertake to inform himself or herself and provide an answer, or produce the record, within a reasonable time.
>
> (2) After the undertaking has been discharged, the person who gave the undertaking may be questioned on the answer given or record provided.

[12] There is no rule comparable to Rule 5.30 in Part 6, Division 1 of the *Rules of Court* which concerns applications. This is, of course, because evidence for an application is generally adduced according to the same principles as at trial and witnesses do not give undertakings when testifying at trial. Perrel J in ***Ontario v Rothmans Inc***, 2011 ONSC 2504 explained at para 114, "[i]f a witness does not know the answer to a question in cross-examination at trial, the witness will not be required to undertake to obtain the answer."

[13] Alberta has not taken a strict approach to enforcing the principle that cross-examination on an affidavit is treated in the same fashion as evidence given at trial. Master Prowse, as he was then known, reviewed 80 years of case law in ***Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd***, 2008 ABQB 671. He concluded at para 5 that a Court "should be reluctant to direct that undertakings be provided" and that "it should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery." He then explained that undertakings should be required to be given and answered in circumstances where:

(a) the deponent has referred to information or documents in the affidavit, or could only have made the assertions contained in the affidavit after having reviewed the information or documents being sought, or

(b) the undertakings relate to an important issue in the application, and the provision of such information:

(i) would not be overly onerous, and

(ii) would likely significantly help the court in the determination of the application.

[14] Alberta's departure from a strict rule against undertakings in cross-examinations is prudent and consistent with the foundational rules of the *Rules of Court* which prioritize proportionality and efficiency so that matters may be "fairly and justly resolved in ... a timely and cost-effective way": Rule 1.2. Justice Graesser in ***Rozak (Eatate)***, 2011 ABQB 239 at para 40 explained that requiring a deponent to answer undertakings as contemplated by Master Prowse levelled the playing field because a deponent is often able to supplement their evidence with a further affidavit prior to the application being heard. The Alberta approach to undertakings arising from cross-examinations on affidavits is pragmatic, not permissive.

IV. Rule 6.8 and Undertakings

[15] The Applicants submit that the pragmatic approach to Rule 6.7 should be adopted for Rule 6.8. They submit that the purpose of Rules 6.7 and 6.8 is the same, to obtain evidence to assist the Court in deciding applications. They cite the fact that witnesses being examined pursuant to Rule 6.8 may be required to bring records to the questioning: Rule 6.16. The Applicants contend that requiring witnesses examined pursuant to Rule 6.8 to answer undertakings would "incentivize" them "to meet their preparation obligations at first instance." They further raise the spectre of inefficiency of what they say the logical alternative is, serving a new notice to attend that requires the witnesses to re-attend for examination with the missing records.

[16] There is a fundamental difference between witnesses examined pursuant to Rule 6.7 and Rule 6.8. Witnesses who have sworn an affidavit have consented to taking an active role in the litigation; they are either parties or have agreed to assist a party. It is reasonable to ask such witnesses to answer undertakings in the circumstances stated by Master Prowse in ***Dow Chemical***. Indeed, their choice to provide an affidavit implies their consent to provide information and records referred to in their affidavit and to provide other information that would significantly assist the Court so long as it is not overly onerous to do so.

[17] Witnesses who are examined pursuant to Rule 6.8 are strangers to the litigation in the sense that they are not parties. Witnesses examined pursuant to Rule 6.8, as in the present case, have a connection to the events in dispute but, for whatever reason, have not been joined to the litigation as parties. Such witnesses have not consented to taking an active role in the litigation and it is reasonable that they be treated differently than witness who have provided an affidavit. A Rule 6.8 examination should be no more intrusive than necessary – this is a theme that runs through the principles governing Rule 6.8 examinations identified by Feth J, as he then was, in ***Gow Estate (Re)***, 2021 ABQB 305 at para 15.

[18] The Ontario analogue to Rule 6.8 is Rule 39.03 of the *Rules of Civil Procedure*, RRO 1990, Reg 194. Though Ontario discovery and applications evidence practice is different and generally more restrictive than in Alberta, it is still worth noting that undertakings are not given on examinations pursuant to Rule 39.03. Associate Justice Todd Robinson observed in ***Xie v. Gross***, 2022 ONSC 5359 at para 35:

> Generally, the scope of a witness' examination under rule 39.03 is limited to information that is within their personal knowledge. Witnesses examined under rule 39.03 are not required to take steps to inform themselves of matters beyond their personal knowledge or make inquiries of others, and they are not obliged to give undertakings: *Magnotta Winery Corporation v. Ontario (The Alcohol and Gaming Commission)*, 2020 ONSC 561 at paras. 52 and 57; *Arnold v. Arnold*, 2021 ONSC 7983 at para. 6.

[19] Maintaining a rule against undertakings in the context of Rule 6.8 balances the interests of litigants in obtaining evidence for their application and the interests of strangers to litigation to minimize their involvement. The rule is also consistent with the principle that the presentation of oral evidence obtained in advance of an application to the Court follows the model for presentation of *viva voce* evidence in Court on an application or trial.

[20] The risk inherent in a rule against requiring undertakings in Rule 6.8 examinations is that witnesses will be deliberately ill-informed and uncooperative. This risk can be addressed through other means. For example, the Court has the power to compel a witness to re-attend for questioning pursuant to Rule 6.38. And, in extreme cases, the contempt power may be used to compel compliance.

V. The Undertakings Requested

[21] An underlying issue with the records request and the undertakings for which answers are being sought in this application is that they more closely resemble the type of questions advanced in Part 5 questioning than the type of questions asked in questioning in advance of an application. The request to bring records in the Notices of Application issued to the non-party witnesses in the present case was broad and the disputed undertaking requests are more intrusive and onerous than typically seen on a cross-examination on affidavit.

[22] The Applicants' approach is understandable. The application for which the questioning is being done is an interlocutory injunction and the first part of the tripartite injunction test requires the court to assess, on a preliminary basis, the strength of the plaintiff's case. The scope of questioning is, therefore, co-extensive with Part 5 questioning – it goes to all aspects of the action. The Applicants are being thorough and diligent in seeking as much information as possible to support their position.

[23] Just because the Applicants' approach is rational in the circumstances does not mean that the Court should permit Part 5 questioning. An interlocutory injunction is an interim remedy pending trial. If full Part 5 questioning is conducted before every interlocutory injunction application, then we might as well just skip straight to the trial. The Court's consideration of the strength of a plaintiff's case in an interlocutory injunction application is done on a preliminary basis because it is understood that a more robust evidential record will be available at trial. Parties must often make their best case to the Court on an imperfect evidential record. Again, it

is important to keep in mind the foundational rules and their emphasis on fairly and justly resolving matters before the Court in a timely and cost-effective way: Rule 1.2

[24] The Notices to Attend requested that the non-party witnesses bring "all records in respect of relevant and material matters...." The Notice to Attend went on to describe the nature of the issues in the action to which the records must be relevant and material. Through the undertakings the Applicants seek to have the non-party witnesses produce bank records, cell phone records, "copies of all emails, text messages, or other communications" with the Respondents and others, social media messages, and calendar invitations. These are onerous and intrusive requests to make of any witness on a questioning in advance of an application, let alone a non-party witness. These requests fundamentally seek Part 5 record disclosure from these non-parties in the context of an interlocutory injunction application.

[25] Even if I had found that undertakings may be required in an examination pursuant to Rule 6.8 in a fashion analogous to Rule 6.7, I would have found that the requests in the present case are too intrusive and onerous. Producing the requested records will put the non-party witnesses to significant inconvenience. Further, I am not convinced of the necessity of many of the requests. Many of the records sought may be available from existing parties to the action. Most of the communications records sought involve the Respondents and should be available from the Respondents.

VI. Conclusion

[26] The application is dismissed. The judge hearing the interlocutory injunction application presently scheduled for July 16, 2024 may determine the question of costs.

Heard on the 26th day of June, 2024.
Dated at the City of Calgary, Alberta this 27th day of June, 2024.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Kris R. Noonan, Matti Lemmens, David M. Price, & Cameron Penn, Stikeman Elliott LLP
for the Applicants

Keely Cameron and Navdeep Kaur, Bennett Jones LLP
for the Rule 6.8 Respondents, Paloma Pressure Control LLC and Paloma PC Holdings LLC.

Court of Queen's Bench of Alberta

Citation: Gow Estate (Re), 2021 ABQB 305

Date: 20210419
Docket: ES14 05515
Registry: St. Paul

Court File Number	ES14 05515
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial Centre	St. Paul
Estate Name	George Logan Gow
Applicants	Frances Neill and Logan Gow
Respondents	Helen Millar and Sheryl Gow
Personal Representatives	Helen Millar and Sheryl Gow
Beneficiaries (Residuary)	Helen Millar and Sheryl Gow
Beneficiaries (Non-residuary)	Frances Neill, Logan Gow, Jennifer Dormady, Melissa Ruud, Garrett Gow, Cameo Gow, Tyler Millar, Christopher Neill, Morgan Millan, Brielle Dormandy, Hunter Dormandy, Hayden Boyda

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Reasons for Decision
of the
Honourable Mr. Justice K.S. Feth

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[1] The Applicants, Frances Neill and Logan Gow, are challenging the will of their late father, George Logan Gow. They ask this Court for advice and directions to determine whether

two adverse parties can be compelled to attend questioning at this stage of the proceedings and to produce records attendant to that questioning.

[2] The Applicants have an outstanding application to set aside an informal grant of probate and to direct a trial to formally prove the will (the "Trial Application"). They allege that their father either lacked testamentary capacity when the will was executed or that undue influence was exercised over him by other family members.

[3] Helen Miller and Sheryl Gow are the deceased's other children and the personal representatives of his estate (the "Personal Representatives"). They reject the incapacity and undue influence allegations and oppose the application for a trial to prove the will in solemn form.

[4] The Trial Application is scheduled to be heard in special chambers. The Personal Representatives have cross-applied to summarily dismiss that application.

[5] In support of the Trial Application and in opposition to the summary dismissal application, the Applicants want to compel the Personal Representatives to attend questioning and to produce certain records that are potentially relevant to the issues in those applications. As the Personal Representatives have not filed affidavits, the Applicants rely on Rule 6.8 of the *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Civil Procedure Rules*") to compel the attendances. The Personal Representatives contend that Rule 6.8 is inapplicable to these circumstances.

Background

[6] An informal grant of probate issued on May 22, 2020 for the deceased's last will.

[7] On application by a person interested in the estate, the Court may set aside an informal grant of probate and require formal proof of a will: Rule 75(1)(b) of the *Surrogate Rules*, Alta Reg 130/95 ("*Surrogate Rules*").

[8] In objecting to the grant of probate, the Applicants filed their Trial Application supported by an affidavit from Frances Neill. The Personal Representatives' lawyer questioned Ms. Neill on her Affidavit.

[9] The Personal Representatives then filed a cross-application requesting summary dismissal of the Trial Application relying only on Ms. Neill's Affidavit and the questioning on Affidavit. Their position is that the Applicants cannot meet the evidentiary burden necessary to justify a hearing into the formal proof of the will.

[10] Counsel for the Applicants served the Personal Representatives with Notices of Appointment for Questioning, which included a demand that the Personal Representatives produce the following records:

a. Solicitor files pertaining to the deceased's estate planning;

b. The deceased's medical records, including a copy of a certain physician's file, hospital records, medical exams and reports;

c. Documents relating to the deceased renewing his driver's licence;

d. The deceased's previous wills;

e. Other estate planning records and documents pertaining to the deceased's farming corporation, including any valuations of the corporation and the minute book; and

f. Documents relating to a power of attorney for the deceased, including any financial dealings of his property completed under a power of attorney.

[11] In objecting to questioning and to the production of records at this stage of the proceedings, the Personal Representatives submit that the *Surrogate Rules* govern the Trial Application and do not permit pre-application discovery. Until the Applicants have satisfied the Court that a hearing into the formal proof of the will is warranted, the privacy interests of the deceased must be respected, including those protecting privileged legal communications and confidential health information, and the estate should not be subjected to the delay and expense occasioned by discovery.

[12] The Applicants submit that questioning under Rule 6.8 is compatible with the *Surrogate Rules* and supports the Court's truth-seeking function. As the Applicants have an evidentiary burden imposed on them when seeking a trial to formally prove the will, questioning is permissible in trying to discharge that obligation.

The Procedural Rules

a) Questioning a witness for a court application

[13] Rule 6.8 of the *Civil Procedure Rules* permits questioning to assist with an application before the Court:

> 6.8 A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and
>
> > (a) rules 6.16 [Contents of appointment notice] to 6.20 [Form of questioning and transcript] apply for the purposes of this rule, and
> >
> > (b) the transcript of the questioning must be filed by the questioning party.

[14] Rule 6.8 is similar to its predecessor, Rule 266. The rule finds its origins in a longstanding practice in Canadian and British civil courts allowing for the collection of evidence from individuals, including parties, who cannot or will not provide affidavit evidence for motions: ***Dechant v Law Society of Alberta***, 2000 ABCA 265 at paras 12-14 [***Dechant***].

[15] Numerous principles circumscribe the scope and manner of such questioning, including:

a. The information sought must be relevant and material to the pending motion: ***Dechant*** at para 17; ***Alberta Treasury Branches v Leahy***, 1999 ABQB 842 at paras 20-26 [***Leahy***]; ***Robertson v Edmonton (City) Police Service (#6)***, 2003 ABQB 188 at para 13, aff'd 2003 ABCA 279; ***AP v SP***, 2017 ABQB 672 at para 15;

b. The questioning is not an examination for discovery and a fishing expedition is not permitted: ***Leahy*** at para 22;

c. Parties adverse in interest can be examined: Rule 6.20(2); ***Ferguson v Cairns*** (1959), 21 DLR (2d) 659 at 662, [1959] 30 WWR 276 (Alta CA) [***Ferguson***];

d. The questioning party usually conducts an examination-in-chief of the witness and cannot cross-examine, but unlike the predecessor rule, cross-examination is permitted of parties adverse in interest: ***Dechant*** at para 15; Rule 6.20(2); ***Precision Drilling Canada Limited v Yangarra Resources Ltd***, 2013 ABQB 492 at paras 30, 37-38, 49, 54;

e. The witness may also be questioned by any other party and may then be questioned again by the party who summoned the witness: Rule 6.20(1);

f. All of the evidence obtained at the questioning is placed before the judge hearing the application and forms part of the case of the party who summoned the witness: ***Dechant*** at para 15; ***Ferguson*** at 662;

g. To the extent a witness is directed to produce records for the questioning, the notice must identify the records sought with as much precision as is fair and feasible, much like a subpoena *duces tecum*, and the records must be relevant to the pending application: ***Apotex Inc v Alberta*** (1996), 182 AR 321, 38 Alta LR (3d) 153 at paras 38-39; ***Leahy*** at paras 24-26;

h. The Court may regulate the questioning for abuse of process, including whether the application itself is an abuse of process: ***Dechant*** at para 14;

i. The Court may order the witness to attend for questioning and to bring records to the questioning: Rule 6.38; and

j. The Court may provide directions in advance of the questioning on the scope of permissible questions: ***Dechant*** at para 16.

[16] Rule 6.8 applies to every application filed in this Court unless a rule or an enactment otherwise provides or the Court otherwise orders or permits: Rule 6.1(a).

b) The *Surrogate Rules*

[17] Rule 2(1) of the *Surrogate Rules* confirms that the *Civil Procedure Rules* generally apply to surrogate proceedings and applications:

> 2(1) The *Alberta Rules of Court* (AR 124/2010) apply to an application to the court if the matter is not otherwise dealt with under these Rules or the context indicates otherwise.

[18] The hearing procedure for an application respecting a contentious matter, including a request for a formal proof of will trial or summary dismissal of such a request, is addressed in Surrogate Rule 64(1), which states in relevant part:

> 64(1) The court, on hearing an application, may
>
> (a) receive evidence by affidavit or *orally;*
>
> (b) dispose of the issues arising out of the application as it considers appropriate;
>
> (b.1) direct a person to file a reply, accompanied with an affidavit, if evidence is to be submitted, or a demand for notice;
>
> (c) direct a trial of issues arising out of the application;

> ...
>
> (i) *make any order that the court considers necessary in the circumstances*. [*emphasis added*]

[19] Division 3 of Part 2 of the *Surrogate Rules* is entitled "Formal Proof of a Will." Surrogate Rule 83 in Division 3 of Part 2 prescribes:

> 83(1) The hearing in an application for formal proof of a will under this Division must be in the form of a trial before the court and must not be held in chambers,
>
> (a) if several witnesses are necessary in the opinion of the court, or
>
> (b) if the court orders a trial.
>
> (2) If the hearing is a trial, the applicant must apply to the court in chambers for directions on the procedure to be followed at the trial.
>
> (3) The court on application under subrule (2) may
>
> (a) set the procedure to be followed at the trial, including
>
> (i) giving directions on pre-trial disclosure of documents and questioning,
>
> (ii) ordering the production of documents,
>
> (iii) stating the parties and their roles,
>
> (iv) ordering the representation of parties, or
>
> (v) dispensing with pre-trial procedures and sending the matter straight to trial,
>
> or
>
> (b) despite subrule (1), order a hearing in chambers on affidavit or oral evidence or both respecting certain issues.

[20] Pre-trial disclosure of documents and questioning is contemplated once a trial is ordered, but no express provision exists in the *Surrogate Rules* for disclosure and questioning prior to deciding the application for a trial.

[21] The Court's powers regarding formal proof of a will are stated in Surrogate Rule 90:

> 90 On an application under this Division the court may
>
> ...
>
> (c) determine which will of the deceased, if any, to admit to probate;
>
> ...
>
> *(i) determine any other matter that the court considers relevant or that is incidental to the application.* [*emphasis added*]

[22] An "application under this Division" includes an application for formal proof of a will to be heard through a trial: Surrogate Rule 75(1).

c) Foundational rules assist with interpretation

[23] The purpose and intention of the rules, including Rule 6.8 and the *Surrogate Rules*, is informed by the foundational principles contained in Rule 1.2 of the *Civil Procedure Rules*:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense,
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
>
> (d) to oblige the parties to communicate honestly, openly and in a timely way, and
>
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.
>
> (3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,
>
> (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
>
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
>
> ...
>
> (4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

[24] The foundational rules apply to the *Surrogate Rules*. See: Surrogate Rule 2; ***Surrendi (Estate of) v Surrendi***, 2001 ABQB 1099 at para 13; ***McAndrew Estate (Re)***, 2020 ABQB 614 at para 32.

[25] These foundational principles balance the Court's truth-seeking function against the objective of timely and affordable process. The Court's procedure must be proportionate to the interests at stake: ***Hryniak v Mauldin***, 2014 SCC 7 at paras 27 – 29.

Challenging the will

[26] The Supreme Court of Canada explained in ***Vout v Hay***, [1995] 2 SCR 876, 1995 CanLII 105 (SCC) at para 26 [***Vout***], that on proving:

> ... the will was duly executed with the requisite formalities, and having been read over to or by the testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

[27] This presumption of validity is rebuttable, but imposes an evidentiary burden on the person challenging the validity of the will: ***Logan Estate (Re)***, 2021 ABCA 6 at para 21 [***Logan Estate CA***].

[28] The burden can be satisfied by "the attacking party introducing evidence of suspicious circumstances, that is, evidence which, if accepted, would tend to refute knowledge and approval or testamentary capacity, thus causing the legal burden to revert to the proponent" of the will: ***Logan Estate (Re)***, 2019 ABQB 860 at para 18.

[29] The suspicious circumstances may be invoked by: (a) circumstances surrounding the preparation of the will, (b) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud: ***Vout*** at para 25.

[30] When determining whether a trial is necessary to formally prove a will, the test is whether the person seeking to rebut the presumption has raised a "genuine issue to be tried": ***Quaintance v Quaintance (Estate)***, 2006 ABCA 47 at paras 19 and 23 [***Quaintance***]. A genuine issue requires an "evidentiary foundation" for a "well-grounded suspicion": paras 19-20. However, the standard is not a high threshold: ***Logan Estate CA*** at para 22.

[31] The evidentiary burden, nevertheless, requires corroboration through material evidence other than the applicant's own evidence due to s 11 of the *Alberta Evidence Act*, RSA 2000, c A-18, which reads:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.
>
> See: ***Logan Estate CA*** at para 16

[32] Material evidence of corroboration must be independent of the person bringing the challenge, assist "the judicial mind appreciably to believe one or more of the material statements of facts deposed by the party," and "materially enhance the likelihood of the truth of the [challenging] party's statement": ***Logan Estate CA*** at para 17, referring in part to ***Bayley v Trust and Guarantee Co Ltd***, [1931] 1 DLR 500 at 505-507, 1930 CanLII 427 (Ont CA) and ***Murphy Estate v McLean Estate***, 1992 ABCA 240 at paras 30-31.

[33] Section 11 of the *Alberta Evidence Act* guards against applications proceeding on nothing more than suspicion, innuendo and speculation: ***Logan Estate CA*** at para 18.

[34] The process to formally prove a will therefore operates in two stages. The first is a gate-keeping function in which the challenging parties must demonstrate, corroborated by other material evidence, that a genuine issue for trial is raised about the preparation of the will, the testator's capacity, or the testator's free will being compromised by coercion or fraud.

[35] The judge hearing the application for a proof of will trial may summarily determine that a trial is unnecessary if the evidence permits the judge to determine the necessary material facts and apply the law to those facts, and a summary disposition is a proportionate, more expeditious and less expensive means to achieve a just result: ***Logan Estate CA*** at para 24.

[36] Conversely, if the Court is satisfied that a genuine issue for trial exists, the presumption of validity is rebutted and the second stage – a trial or other hearing – is engaged.

[37] At the second stage, a full inquiry proceeds into the merits. Discovery through questioning and record production is expressly contemplated by Surrogate Rule 83. When determining the scope of permissible discovery, the will is not presumed to be valid.

Pre-application questioning is available

[38] The Personal Representatives contend that Rule 6.8 does not apply because Surrogate Rule 2 excludes the *Civil Procedure Rules* for a matter:

a. "dealt with under these [*Surrogate Rules*]" or

b. where "the context indicates otherwise."

[39] They argue that the *Surrogate Rules* only allow the disclosure of documents and questioning if a trial is ordered. I do not agree.

[40] Surrogate Rule 83 authorizes the Court to set *pre-trial* disclosure of documents and questioning after a trial is ordered, but the *Surrogate Rules* are silent about *pre-application* disclosure and questioning prior to the hearing of an application for a proof of will trial. Since the procedure for hearing the Trial Application is not expressly "dealt with" under the *Surrogate Rules*, the *Civil Procedure Rules* are not excluded on that basis.

[41] Similarly, the context does not indicate that questioning should be prohibited. The *Surrogate Rules* contemplate pre-trial rather than pre-application discovery, but questioning under Rule 6.8 is not discovery. The scope of the questions and any attendant document production is restricted, both by the principles regulating pre-motion questioning and the narrowed purpose of the application (i.e. to show a genuine issue to be tried, corroborated by other material evidence).

[42] Surrogate Rule 64(1)(a) expressly contemplates the possibility of oral evidence for the Trial Application, although the process for collecting and presenting that evidence is not explicitly described. The *Civil Procedure Rules,* including Rule 6.8, are of general application and supply the necessary procedure.

[43] This approach is consistent with the Court's truth-seeking function, early resolution objectives, proportionality and procedural fairness.

[44] Pre-application questioning facilitates a measured search for the truth. Early disclosure also facilitates honest, open and timely communication between the parties, crystalizes the issues in dispute, and promotes settlement – as contemplated by the foundational rules.

[45] The importance of early disclosure in surrogate disputes has long been recognized. In ***Kryczka v Kryczka***, (1979) 17 AR 263, 1979 CanLII 3801, at para 5, Justice Hetherington (as she

then was) approved of the following sentiments from ***Menzies v McLeod*** (1915), 34 OLR 572 at 576, 25 DLR 777:

> The court favours an early disclosure of all matters surrounding the execution of the impeached will from those who know, that an opportunity may be given in a proper case to withdraw from hopeless or unnecessary litigation.
>
> It is to be remarked also that in probate actions especially the court exercises a wider latitude in ordering discovery than in other actions not 'in rem', owing to the nature of the issues raised. It is the duty of the court not only to do justice between the parties, but also to do justice to the deceased...

[46] Disclosure at the first stage of the proceedings, however, is constrained by the effects of any legal presumptions and the need to balance competing interests. At this point, the testator's will is presumptively valid and ostensibly reflects his wishes. Until a genuine issue is demonstrated, corroborated by other material evidence, that presumption must be honoured. The deceased's privacy interests should be viewed through that lens when disclosure is sought of privileged and confidential information, including legal advice and health records. Similarly, the estate should not be strained by complex, time-consuming and expensive discovery that bleeds the beneficiaries of their inheritance and therefore frustrates the testator's presumptive intentions.

[47] Access to pre-application questioning advances procedural fairness since the Applicants are obligated to meet an evidentiary burden and obtain corroboration through material evidence from other sources. In meeting their onus, measured litigation procedures should not be foreclosed to them.

[48] Concerns about procedural fairness also arise if a respondent may selectively introduce evidence through partial pre-application disclosure or the cross-examination of an applicant, knowing that the respondent is shielded from any corresponding questioning.

[49] Here, the Personal Representatives authorized some partial disclosure of information about the testator's health, testamentary capacity and intentions, and estate planning through letters sent by the estate's lawyer to the Applicants. The letters are included within the Trial Application evidentiary record. The Personal Representatives, through their own lawyer, then cross-examined Frances Neill about the selective disclosures, knowing that a transcript of the questioning would form part of the record before the judge hearing the Trial Application. That selective presentation of the evidence, with no opportunity to explore the Personal Representatives' knowledge, risks a misleading presentation of the facts to this Court.

[50] Procedural fairness must also address the Personal Representatives' cross-application for summary dismissal. In other circumstances, Rule 6.8 can be used to question a party seeking summary dismissal: ***SWAT Consulting Ltd v Canadian Western Bank***, 2018 ABQB 875 at para 87; ***Cicalese v SSMPG Integrating Services Inc***, 2020 ABQB 605 at paras 145-146; ***Honourable Patrick Burns Estate Memorial Trust v P Burns Resources Ltd***, 2014 ABQB 779 at para 13. No compelling reason is offered for an absolute prohibition on that procedure in surrogate proceedings. Concerns about fishing expeditions, the testator's privacy interests, and excessive delay and expense occasioned by exuberant demands for disclosure can be managed by the Court.

[51] Immunizing an adverse party from questioning is especially concerning when undue influence is raised. The living witness who is likely the most knowledgeable about the interactions with the testator would be hidden from the Court.

[52] Even if Rule 6.8 was not available, pre-application questioning could be ordered under the *Surrogate Rules*. Surrogate Rule 64(1)(i) allows the Court to "make any order that the court considers necessary in the circumstances." Moreover, Surrogate Rule 90(i) permits the Court to "determine any other matter that the court considers relevant or that is incidental to the *application*", which includes the application for the formal proof of will trial.

[53] Regardless of whether the questioning proceeds under Rule 6.8 or one of the *Surrogate Rules*, the Court may restrict the scope of the questioning to prevent abuse of process, safeguard sensitive information, and respect proportionality.

[54] Here, Francis Neill deposes to facts demonstrating that she is not engaged in an abuse of process. She identifies past representations from the testator by which he communicated intentions that are incompatible with the dispositions contained in the probated will. She provides evidence about the testator's declining health during the year preceding his final will, including some cognitive capacity concerns. She also provides facts from which undue influence might be inferred. The current evidence is enough to assuage concerns about a fishing expedition.

[55] For the interlocutory application before me, the parameters of the proposed Rule 6.8 questioning have not been delineated, except that specific requests for documents have been noted from which an intention to question about their contents and surrounding circumstances may be inferred. I will address possible restrictions on that questioning in the context of my comments below about the production of documents.

[56] Without limiting the scope of permissible questioning, I confirm the Personal Representatives may be questioned as ordinary fact witnesses about their personal interactions with the testator during his lifetime, including their observations of his mental capacity and their involvement in his testamentary decision-making.

[57] Questioning the Personal Representatives about information acquired in their roles as estate representatives after the testator's death might be restricted by the testator's privacy interests in that information and privilege claims over solicitor-client communications. However, to the extent the Personal Representatives have waived confidentiality or privilege, that might permit questioning. As waiver was not argued before me, I decline to provide any directions on that issue at this time.

[58] The parties may return to me if directions are required about the scope of permissible questioning.

Pre-application record production is constrained

[59] The Applicants seek the estate solicitors' files, medical records, driver's licence documents, previous wills, other estate planning and farming corporation records, and financial documents for dealings completed under a power of attorney. Disclosure is purportedly required because the Personal Representatives "hold all the cards" and an injustice will result without that information.

[60] The balance between disclosure in aid of litigation and the deceased's privacy interests depends on the nature of the records involved and the testator's expectation of privacy: for example, solicitor-client communications demand a high level of protection. In the parties' submissions, the reasons for seeking or resisting disclosure of specific categories of records were not addressed in any detail. I will therefore confine my comments to general observations, except where sufficient information was offered for a ruling. Either party may seek additional directions from me.

a) Solicitor-client privileged communications

[61] Solicitor-client privilege is a substantive rule of law and a principle of fundamental justice: ***Alberta (Information Privacy Commissioner) v University of Calgary***, 2016 SCC 53 at paras 38-41 [***University of Calgary***]; ***Descôteaux v Mierzwinski***, [1982] 1 SCR 860, 141 DLR (3d) 590; ***Solosky v The Queen***, [1980] 1 SCR 821 at 833, 1979 CanLII 9 (SCC).

[62] As a substantive rule, "solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary" and "only yields in 'certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis'...": ***University of Calgary*** at para 43.

[63] Solicitor-client privilege survives the relationship and the client's death, but an exception arises for cases involving wills and trusts where disclosure of lawyer-client confidences furthers the interests of the former client: ***Geffen v Goodman Estate***, [1991] 2 SCR 353, 1991 CanLII 69 (SCC) [***Geffen***]. The interests of the deceased client are advanced by allowing confidential information to be admitted to ascertain the deceased's wishes and true testamentary intentions: ***Geffen*** at 385; ***Bre-X Minerals Ltd (Trustee of) v Verchere***, 2001 ABCA 255 at para 23.

[64] The exception is reflected in Surrogate Rule 85(2) by which any "person who took instructions for the preparation of the will is compellable as a witness and subject to *pre-trial* disclosure and production of documents and oral questioning." [*emphasis added*] The rule says nothing about disclosure, production or questioning before a trial is ordered.

[65] When access to privileged communications is allowed, disclosure may be constrained and managed by the Court to ensure that the deceased testator's privacy is respected. This approach honours the testator's expectation that the devolution of his estate could be planned in confidence with the assistance of trusted advisors: ***Aldred Estate (Re)***, 2018 ABQB 600.

[66] At this stage of the proceedings, the probated will is presumed to reflect the testator's intentions. Confidential information is not required to ascertain those intentions since they are expressed through the will. Consequently, *pre-application* disclosure is unnecessary.

[67] A mere allegation that the will is suspect therefore does not attract the exception to the privilege. If the result were otherwise, all testators would be at risk of having their confidential communications with legal advisors exposed through unsubstantiated applications to the courts. That would defeat the purpose of the privilege. Furthermore, the time, effort and expense of sifting through the history of privileged communications would diminish the inheritance left to the beneficiaries and frustrate the efficiency the testator envisioned by organizing the disposition of his estate. All of that would offend the testator's intentions.

[68] Accordingly, in the normal course, until a genuine issue for trial corroborated by other material evidence is established, resulting in an order directing formal proof of the will, the privilege survives and disclosure of solicitor-client communications should not occur.

[69] The evidentiary record in this matter, however, raises a complication: the testator's Personal Representatives may have waived the privilege, at least in part. A June 8, 2020 letter from one of the estate's lawyers to the Applicants' counsel discusses some of the circumstances under which the testator prepared his wills in 2014 and 2015. The letter was copied to the attention of the Personal Representatives and suggests they authorized the disclosures.

[70] The estate lawyer's letter mentions some of the advice provided, including a recommendation to speak with an accountant before executing one of the wills, which the testator apparently disregarded. The lawyer also reported some of her observations and opinions about the testator's capacity and directions, as well as the views of another lawyer in her firm who assisted the testator with his 2016 will.

[71] The estate lawyer provided a second letter to the Applicants' counsel on June 23, 2020, again with the apparent consent of the Personal Representatives. Reference was made to specific concerns the testator shared about the disposition of his estate, as well as his intentions for the structure of his cash bequests and specific gifts.

[72] The letters are part of the evidentiary record for the Trial Application. The partial disclosure of potentially privileged communications invites the concern that selective disclosure might create an unfair advantage or a misleading picture of the testator's intentions and capacity. That risk might attract an implied waiver of the privilege. See discussion in ***HZ v Unger***, 2012 ABQB 18 at paras 28-32.

[73] Communications protected by solicitor-client privilege should only be disclosed where "absolutely necessary", applying "as restrictive a test as may be formulated short of an absolute prohibition in every case": ***Goodis v Ontario (Ministry of Correctional Services)***, 2006 SCC 31 at para 20.

[74] At this juncture, as the parties have not specifically addressed waiver, I will not provide any further guidance on this point.

b) Medical information

[75] A significant expectation of privacy is engaged by a person's medical records, although the privacy interest is not absolute: ***McInerney v MacDonald***, [1992] 2 SCR 138, 1992 CanLII 57 (SCC); ***M(N) v Drew (Estate of)***, 2003 ABCA 231 at para 120. Health records are also statutorily safeguarded: *Health Information Act*, RSA 2000, c H-5, ss 2(a) and 31.

[76] Health information can be protected from disclosure in litigation: ***AM v Ryan***, [1997] 1 SCR 157, 143 DLR (4th) 1 at para 38.

[77] The privacy interests in health information continue after death: ***Vlasic v Fleming***, 2019 BCSC 1735 at para 49; ***People First of Ontario v Porter, Regional Coroner Niagara*** (1991), 5 OR (3d) 609, 1991 CanLII 7198 (Ont SCJ), varied on other grounds at (1992), 6 OR (3d) 289, 1992 CanLII 7462 (Ont CA).

[78] Section 35(1) of the *Health Information Act* nevertheless provides for disclosure of health records, even where consent is not given, in various circumstances, including where the person is deceased.

[79] Section 104(d) of the *Health Information Act* authorizes a personal representative to access the deceased's health information if the exercise relates to the administration of the deceased's estate.

[80] Disclosure is not granted as of right. The Court must balance the protection of the testator's privacy interests against the necessary level of disclosure to advance the administration of justice. Moreover, as explained in ***Neuberger v York***, 2016 ONCA 191, at para 68, the Court's role is not simply to adjudicate upon a dispute between parties:

> …It is the court's function and obligation to ascertain and pronounce what documents constitute the testator's last will and are entitled to be admitted to probate. Further, the granting of probate does not bind only the parties to the proceeding. Unless and until probate is set aside, it operates *in rem* and can affect the rights of other persons. The court also has a special responsibility to the testator, who cannot be present to give voice to his or her true intentions.

[81] These competing interests must be considered when deciding whether and to what extent the deceased's medical records will be exposed to a person challenging the will.

[82] The Applicants have not expressly informed me about the scope of the medical production sought. The Trial Application requests records from 2012 until death. However, the June 23, 2020 letter indicates that the Applicants were pursuing all medical documentation spanning the last ten years of the testator's life. The Personal Representatives refused, characterizing the request as "overreaching" and impractical. The testator lived independently for almost all of that ten-year period and his treating physicians and attendances were largely unknown to the Personal Representatives.

[83] The estate's lawyer volunteered some medical information to the Applicants, in particular, a 2016 memorandum from a physician addressing the testator's overall medical condition, including a cognitive review, for a motor vehicle operator's licence renewal. The memorandum describes subtle changes in memory and word-finding difficulties, but no concerns regarding praxis, executive functioning, recognition, or social cognition. The memorandum also summarized the testator's medical history, current medications, and a mental state examination.

[84] The effect of the medical disclosure is that much of the deceased's recent medical history has been revealed to the Applicants. Additional disclosure should only marginally infringe on his privacy interests.

[85] In striking a balance between truth-seeking and privacy, while ensuring the testator's true intentions are honoured, I agree that disclosure of the deceased's medical records for a ten-year span seems excessive. The production should be focused on the timeframe during which his capacity is in doubt. Wills were created from 2014 through 2016 with some suggestion that the testator's approach to his estate planning changed during that time. Limiting the disclosure to those years seems to be reasonable. However, if the parties cannot agree, they may return to me.

[86] If a court order is required to facilitate the Personal Representatives' efforts to collect medical records from non-parties, counsel may approach me.

c) Driver's licence records

[87] The Applicants seek documents relating to the deceased obtaining his driver's licence. The physician's memorandum has already been disclosed. Nothing before me indicates that additional relevant and material records exist.

d) Previous wills

[88] The estate lawyer's letters identify previous wills from 2012, 2014, and 2015. The lawyer gave the Applicants a memorandum which was attached to the 2012 will, but apparently not the will itself. The letters also disclosed certain patterns the estate lawyer observed in the testator's wills over the years.

[89] As the testator's 2016 will is presumptively valid, prior wills would not usually be relevant. However, the limited disclosure authorized by the Personal Representatives lacks context without the wills. The incomplete disclosure could be misleading for the judge hearing the Trial Application. Subject to further submissions from counsel, production of the wills from 2012 to 2015 seems to be appropriate.

e) Estate planning documents and the corporate records

[90] Insufficient information and submissions are before me to provide any preliminary guidance about producing estate planning records outside the solicitors' files and the testator's corporate records. The testator's pre-death financial life is confidential: ***Duhn Estate***, 2021 ABQB 35 at paras 35, 39.

f) Power of attorney records

[91] The testator's Power of Attorney was exercised in January 2020. He passed away on March 28, 2020. The submissions do not explain how these records, including transactions conducted by the attorneys, assist the Applicants in meeting their evidentiary burden for the Trial Application. I therefore decline to comment about disclosing these records.

Conclusion

[92] A Rule 6.8 questioning is allowed. The parties may return to me or another judge of this Court to obtain further directions about the scope of the permissible questions and the document production, if they cannot resolve those matters themselves.

[93] Costs of this application are reserved for determination at the Trial Application.

Heard on the 17th day of March, 2021.
Dated at the Town of St. Paul, Alberta this 19th day of April, 2021.

K.S. Feth
J.C.Q.B.A.

Appearances:

Marco S. Poretti
for the Applicants

Helen Ward
for the Respondents

Dechant v. Law Society of Alberta, 2001 ABCA 81

Date: 20010326
Docket: 98-18047
99-18594
99-18606

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MADAM JUSTICE BENSLER

Appeal No. : 98-18047

IN THE MATTER OF THE *Legal Profession Act*, S.A. 1990, c. L-9.1,
sections 51, 52, 53, 54, 55, 56, 58, 59, 61, 62
and the Regulations and *Code of Professional Conduct* thereto.

IN THE MATTER OF Complaints filed by Jeanette Dechant
with the Law Society of Alberta.

IN THE MATTER OF Complaints filed with the Law Society of Alberta
against Jeanette Dechant.

IN THE MATTER OF A Hearing regarding the Conduct of Jeanette Dechant.

AND IN THE MATTER OF the *Alberta Rules of Court*, Part 33 and Part 56.1.

BETWEEN:

JEANETTE DECHANT

APPELLANT/
Applicant

- and -

THE LAW SOCIETY OF ALBERTA

RESPONDENT/
Respondent

BETWEEN: Appeal No. 99-18594

JEANETTE DECHANT

Appellant/Plaintiff

-and-

RONALD G. STEVENS, THE LAW SOCIETY OF ALBERTA, NEIL WITTMANN, BARBARA ROMAINE, ALAN MACLEOD, PHILIP LISTER, LINDSAY MACDONALD, DAVID C. MAXWELL, PETER FREEMAN, JAMES MCLEOD, and DAVID GUENTER

Defendants

AND BETWEEN:

NEIL WITTMANN, THE LAW SOCIETY OF ALBERTA, BARBARA ROMAINE, ALAN MACLEOD, PHILIP LISTER, LINDSAY MACDONALD, DAVID C. MAXWELL, PETER FREEMAN, JAMES MCLEOD, DAVID GUENTER

Cross-Appellants

- and -

JEANETTE DECHANT

Cross-Respondent

BETWEEN: Appeal No. 99-18606

JEANETTE DECHANT

Respondent (Plaintiff)

- and -

RONALD G. STEVENS

Appellant (Defendant)

- and -

NEIL WITTMANN, THE LAW SOCIETY OF ALBERTA, BARBARA ROMAINE, ALAN MACLEOD, PHILIP LISTER, LINDSAY MACDONALD, DAVID C. MAXWELL, PETER FREEMAN, JAMES MCLEOD, DAVID GUENTER

(Defendants)

MEMORANDUM OF JUDGMENT AS TO COSTS

JEANETTE DECHANT

On her own behalf

COUNSEL:

Appeal No. 99-18047
A.W. MacDONALD Jr., Q.C. and
S.J. BURRELL
For The Law Society of Alberta

Appeal No. 99-18606
K.L. MOHOLITNY
For Ronald G. Stevens

G.F. SCOTT, Q.C.
For The Law Society of Alberta

MEMORANDUM OF JUDGMENT AS TO COSTS

THE COURT:

[1] Ms. Dechant appeals, in part, a ruling of the Chambers Judge awarding costs solely for disbursements made in relation to the withdrawal of the Law Society's application to strike. She also applies for costs of the appeals in Action No. 98-18047 (the "266 appeal") and the appeal and cross appeal in Action Nos. 99-18594 and 99-18606 (the "privilege appeals"). Dechant suggests that the restriction of costs awardable to lay litigants to disbursements is no longer tenable given recent developments in the Canadian law of costs. Further, she says that any interpretation of r. 600 or r. 601 of the *Alberta Rules of Court* which excludes lay litigants from the definition of "party" is discriminatory and in breach of s. 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11 ["the *Charter"*].

[2] The unsuccessful parties on appeal (referred to throughout as the defendants) concede that Ms. Dechant is entitled to some costs to compensate for lost opportunities, but they argue that Column 5 is not appropriate for an unrepresented litigant. Rather, they say that the matter is simply one of discretion. See: ***Huet* v. *Lynch***, [2001] A.J. 145 (C.A.).

[3] Thus, questions of entitlement and quantification arise. Ms. Dechant seeks full costs under Column 5 with respect to both the appeals and the court below, arguing that it is discriminatory and against *Charter* values for courts to discriminate between unrepresented and represented litigants when awarding costs. She relies on ***Skidmore* v. *Blackmore***, [1995] 4 W.W.R. 524 (B.C.C.A.) where the court concluded that the removal of the distinction between self-represented litigants and lawyer-represented litigants is consonant with principles underlying the *Charter*. In short, Ms. Dechant submits that the costs schedule under the *Rules* applies to all parties and that any deviation from that schedule requires justification. Otherwise, discrimination results from costs awarded solely for actual disbursements or expenditures. Alternatively, she seeks a discretionary award of $30,000.

[4] In her submissions, Ms. Dechant also seeks to distinguish ***Huet***. Alternatively, she argues that ***Huet*** is not in line with the decisions of other courts in Canada and of the Court of Queen's Bench of Alberta, and she seeks a reconsideration of ***Huet***. No formal application, however, was filed. In any event, we would not be prepared to reconsider ***Huet***.

Decision

[5] Rule 600 defines costs as follows:

600(1) In Rules 601 to 612

(a) "costs" includes all the reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceeding, including, without restricting the generality of the foregoing,

(i) the charges of barristers and solicitors,
(ii) the charges of accountants, engineers, medical practitioners or other experts for attendance to give evidence and, if the court so directs, the charges made by such persons for investigations and inquiries or assisting in the conduct of the trial,
(iii) the charges of legal agents,
(iv) expenses for the preparation of plans, models, or copies of documents,
(v) the fees payable to officers of the court, and
(vi) witness fees or conduct money for witnesses, together with the expenses of obtaining the attendances of witnesses at trial, and upon any examination;

[6] Section 601(1) then sets out the principles governing costs awards and notes the various matters that the court may consider. Section 601(2) then allows the court to fix costs as follows:

(2) In awarding costs, the Court may

(a) fix all or part of the costs with or without reference to Schedule C;

(b) award or refuse costs in respect of a particular issue or part of a proceeding;

(c) award a percentage of taxed costs, or award taxed costs up to or from a particular stage of a proceeding;

(d) award all or part of the costs

(i) to be taxed as a multiple or a proportion of any column of Schedule C, or
(ii) on a solicitor and client basis, or as a proportion of those costs;

(e) award a gross lump sum instead of, or in addition to, any taxed costs;

(f) award costs to one or more parties on one scale, and to another party or other parties on the same or another scale;

(g) direct whether or not any costs are to be set off.

Accordingly, no party enjoys an absolute entitlement to Schedule C costs. Costs are always discretionary based on the matters set out in r. 601(1). While there is a tendency to automatically order Schedule C costs, these costs are not and should not be treated as automatic.

[7] In ***Huet***, this court dealt with the issue of costs for the unrepresented litigant and held that costs were always discretionary and available for the unrepresented litigant on a discretionary basis. Thus, r. 600 was not interpreted as absolutely barring an award of costs to an unrepresented litigant over and above disbursements.

[8] The various principles underlying costs set out in r. 601(1) also support Ms. Dechant's argument that indemnity is not the only rationale for a costs order. An ability to award costs serves many objectives. Costs provide partial indemnity for legal fees incurred, encourage settlement, and discourage frivolous actions as well as improper and unnecessary steps in litigation. See: ***Huet***.

[9] Nonetheless, indemnity for expenses paid has historically formed the basis of an order for costs. In *The Law of Costs*, looseleaf (Canada Law Book: Aurora, 1998) 2-1, Mark Orkin cites the case of ***Smith* v. *Butler*** (1875), L.R. 19 Eq. 473 at 475 for a nineteenth-century definition of party-and-party costs which is still widely utilized by modern Canadian courts:

> ...all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them.

[10] Orkin justifies the continued use of this historic principle by suggesting that indemnity continues to be the "essence" of party-and-party costs and that it should be the guiding principle in the use of judicial discretion to award such costs. According to the principle of indemnity, Dechant could not claim party-and-party costs because she suffered no expense in hiring a lawyer to litigate her claims – and she cannot, therefore, be indemnified for it.

[11] Rule 600 includes the fees of barristers and solicitors in its definition of costs. But even then, the courts have always been reluctant to order solicitor-client fees absent

exceptional circumstances. Generally, a costs award beyond disbursements is only a partial indemnity of fees and should never, under any circumstances, exceed solicitor-client fees. In short, the possibility of a profit over and above expenses should not be an incentive to litigation or needless steps in litigation. Costs should always bear a relationship to the result, the amounts involved, the importance of the issues, the efficiency with which the litigation was conducted, and the other matters set out in r. 601.

[12] In short, there should always be a relationship between the costs and the cause. The high costs of Schedule C will often make that schedule inappropriate. Thus, we reject Ms. Dechant's claims of entitlement to Schedule C costs and reiterate that Schedule C is not an automatic entitlement and that costs are always discretionary.

[13] While indemnification is the traditional approach, several courts in this and other jurisdictions have adopted a more flexible attitude toward the awarding of costs to self-represented litigants. See: ***Shillingford* v. *Dalbridge Group Inc.*** (2000), 268 A.R. 324 (Q.B.); ***Skidmore* v. *Blackmore***, *supra*. Before 1995, few courts awarded costs that exceeded mere disbursements to self-represented litigants, and many judges held that a lay party with no lawyer could *only* recover costs reflected in disbursements. See: ***Kendall and Dolphin Ventures Ltd.* v. *Hunt (#2)*** (1979), 16 B.C.L.R. 295 (C.A.). In ***Skidmore***, however, Cumming J.A. (for the Court) rejected the historic "indemnity" approach to costs due to changes in the structure of the *Supreme Court Rules* and basic changes in the law of costs in British Columbia (at 538):

> There are good reasons for allowing self-represented lay litigants to receive the benefit of recent developments in the law of costs. There is no logical reason for allowing a self-represented solicitor to claim costs under App. B of the *Supreme Court Rules*, while denying the same to a self-represented lay litigant. Because party and party costs are based on a tariff in this province, there is no danger of overcompensating self-represented lay litigants, and it would not be difficult to assess the costs to be paid.

[14] As noted, Schedule C costs are not an automatic entitlement. We do accept that in addition to the underlying objective of partial indemnity, costs are also intended to promote settlement and deter frivolous actions. The threat of costs is always an important factor in the settlement process and without this "hammer," there is less of a disincentive to litigate.

[15] The balancing of the various policy objectives associated with costs for the unrepresented litigant presents courts with a difficult challenge. Inequity can result from a strict indemnity approach where only one party faces a threat of costs. As noted, however, costs can always be awarded at the end of the day and the threat of costs exists for all. Moreover, anticipated legal fees for the represented litigant provide their own incentive

to settle - one which the unrepresented litigant does not face. In fact, policy concerns arise where unrepresented litigants receive costs on other than an indemnity basis. For example, the expectation of costs may encourage litigation and discourage settlement because of an anticipated windfall to the unrepresented litigant that could result from a costs award. Certainly costs under Schedule C are substantial. Awarding costs to an unrepresented party in excess of expenses creates serious dangers in that regard. Similarly, those dangers have always been a good reason for keeping party-and-party costs well below the solicitor-client level except in exceptional circumstances. The ability to award partial Schedule C costs makes it clear that not all cases are entitled to the full schedule and, having regard to the schedule, we imagine that there are few cases that would attract a double Schedule C award.

[16] It is true that unrepresented litigants expend time and effort presenting their law suits. Represented litigants, however, also sacrifice a considerable amount of their own time and effort for which no compensation is paid. Any award of costs is merely a partial reimbursement for their lawyer’s fees. As noted, an award of costs to represented litigants should never be higher than their solicitor-client fees, which are only awarded in exceptional circumstances. Thus, applying an identical costs schedule to both represented and unrepresented litigants will work an inequity against the represented litigant who, even with an award of costs, will be left with some legal fees to pay and no compensation for a personal investment of time. What the *Rules* do provide is that both kinds of litigants are to be paid for their out-of-pocket expenses.

[17] While the *Rules* provide that both represented and unrepresented litigants are to be compensated for out-of-pocket expenses, these parties cannot be treated exactly the same, because they are not in the same circumstance. On the one hand, represented parties are generally left with out-of-pocket expenses for legal fees over and above the costs awarded. In addition, represented parties have lost opportunity for time personally expended on their own suit (e.g., time consulting with lawyers, attendance in court, etc.), costs which are not compensated. Applying an identical costs schedule to the unrepresented litigants, who have no out-of-pocket expenses for the legal fee portion of the suit, effectively awards fees for their own time and work. In short, self-litigation could become an occupation.

[18] As this court noted in ***Huet***, it is difficult to determine the costs payable to unrepresented litigants in relation to Schedule C. The preferable approach is to view the matter of costs as discretionary. The court should seek an equitable result between the parties while balancing the various policy objectives of costs. Thus, we reject the idea that Schedule C is the automatic rule and that it simply represents a value for work to which all successful litigants are entitled.

[19] That balancing of equities involved in crafting a just costs award is a delicate exercise. When determining an appropriate costs award for a successful unrepresented litigant, courts should consider many factors, including the lost opportunities of the litigant as a result of self-representation. For the sake of expediency, proof of the exact value of that lost opportunity is not required (or we would be into trials about costs). Nonetheless, whether a person has lost time from work to represent themselves is a relevant factor to consider. If an unrepresented litigant was not otherwise employed, the fee portion of costs attributable to lost opportunity may not exist or, at a minimum, would be significantly less than a person who has suffered a loss of income due to employment absences.

[20] We reject the argument that Schedule C is an assessment of what particular work is worth and thus should apply regardless of whether any cost was in fact incurred. In our view, costs under the *Rules* are still primarily concerned with reimbursement for costs expended and a partial indemnification for legal fees, having regard to value for work. We recognize, however, that costs may include lost opportunity costs of the unrepresented litigant. That said, unrepresented and represented litigants are not in the same position. Schedule C does not provide an automatic basis for determining costs for unrepresented litigants and may also frequently not be appropriate for represented litigants.

[21] When awarding costs above disbursements for the unrepresented litigant, the court must look at the particular facts of each case. Was the matter complicated? Was the work performed of good quality? Did the self-representation result in unnecessary delays? Did the litigant take up an unreasonable amount of time of opposing parties or the courts? Did the litigant lose time from work? In general terms, what is the lost opportunity of the unrepresented litigants? What would they have earned if not required to prepare their own case? Did the other side take advantage of the fact that they were facing unrepresented litigants by taking frivolous and unnecessary steps to thwart that litigant? Did the other side refuse to entertain reasonable requests to discuss settlement? What is an appropriate amount for the issues involved? All of the factors set out in r. 601(1) which are relevant in a particular case should be considered when selecting the appropriate costs award.

[22] Ms. Dechant argues that a lawyer representing herself should be awarded costs on the same basis as a represented party because a lawyer brings the same level of skill to the job. She relies on several cases where lawyers acting on their own behalf were awarded full costs. See: ***Jaffe* v. *Dearing*** (1992), 7 C.P.C. (3d) 225 (Ont. Gen.Div.); ***Re Wright* & *McTaggart*** (1990), 75 O.R. (2d) 394 (Gen.Div.); ***Fellowes, McNeil* v. *Kansa General International Insurance Ltd.*** (1997), 37 O.R. (3d) 464 (Gen.Div.). With respect, we do not agree. The award is not an award for value of the work. Moreover, where a lawyer is not working as a lawyer, he or she should not be compensated for a lost opportunity

which does not in fact exist. Rather, such a lawyer should be treated as any other lay litigant. This type of litigant should be compensated for lost opportunity only and that opportunity should bear some relationship to reality.

[23] The case of an unrepresented litigant who is also a lawyer is particularly germane in this case because Ms. Dechant is a non-practising lawyer. She attributes her inactivity, in part, to the inappropriate appeal by the Law Society in her judicial review application of her disbarment, which has delayed her reinstatement. We reject that argument. It relies, at least in part, on the supposition that Ms. Dechant will be successful in the law suit. It is more appropriate to compensate any damages that flow from her restriction from practice at trial, rather than during a costs motion on an interim application.

[24] Finally, there is the question of disbursements. The only specific disbursement addressed was that of photocopying. Ms. Dechant asks for an award of 25 cents per page for photocopying rather than the 15 cent award made in ***Huet***. In our view, she is entitled to all reasonable disbursements, and copying is a legitimate disbursement. If she can prove that she has paid 25 cents a page to some arm's length person, the fee should be allowed. Otherwise we order 15 cents a page.

[25] Photocopying is a difficult disbursement to address. Evidence in a given case may show that there should be no charge for photocopies for the represented litigant because the cost associated with copying is just part of the overhead of the firm which is compensated by a general costs order. Alternatively, there may be evidence in a given case as to the actual costs incurred as a result of farming out the expense to a third party. It may even be that a general costs award should be higher for the unrepresented litigant who does not receive a costs award over and above disbursements.

Application

[26] Turning to the facts of this case, we are of the view that there should be an award of costs over and above the disbursement awards for the appeal in the privilege action. The appeal lasted 2 & ½ days plus time spent speaking to costs. Counsel for the defendants concede that it is an appropriate case for an award for lost opportunity. They note that there was some reference to Ms. Dechant's working for $100 a day at one time and suggest a fee in the range of $1,000 or slightly more. Ms. Dechant says that her earnings are irrelevant. Even if relevant, she was capable of earning at least $50 an hour briefing, but had to devote her time to the law suit. She seeks Schedule C, Column 5 costs or, alternatively, an award of $30,000.

[27] This appeal plus submissions on costs (which involved oral submissions and written briefs) relate to very complicated issues. Ms. Dechant did a thorough job of addressing the issues, which reflects the considerable time she obviously spent in respect of this

matter. We are of the view that it is appropriate to make an award beyond that of disbursements to account for lost opportunity. This was an interlocutory matter and the Law Society appealed and was unsuccessful. Moreover, while the pleadings do not prove or establish malice and it is only assumed because of the *Rules*, the Law Society saw fit to proceed only with a striking motion at the time rather than an application for summary judgment on the issue of malice. It lost, it appealed and lost again. There should be an award of costs for this extra step. In our view, however, $30,000 is completely out of the range for appropriate costs in this appeal, even if Ms. Dechant had been represented.

[28] Considering the lost opportunity and the disincentive to litigation which costs appropriately promote, we set the costs at $2,500 for the appeal in the privilege action together with all reasonable disbursements. We are not prepared to order costs beyond disbursements in the court below. As the Chambers Judge was of the view that he was restricted in the costs that could be awarded to Ms. Dechant, we leave it open for her to address costs associated with that application at the end of the day in the event she is successful in the main action.

[29] In summary, there will be one set of costs in the sum of $2,500, plus reasonable disbursements, payable jointly and severally by the parties in the privilege action, costs to be paid forthwith. The defendants have not satisfied us that there is any reason to defer payment.

[30] Regarding disbursements, Ms. Dechant is entitled to all reasonable disbursements. If she has paid 25 cents per page for the photocopying, she should be allowed that expense. If not, we are satisfied that 15 cents per page is an appropriate figure.

[31] With respect to the 266 appeal, we are cognizant of Ms. Dechant's argument regarding the withdrawal of Mr. McDonald as counsel. Nonetheless, in view of mixed success, we direct that the parties bear their own costs.

APPEAL HEARD on March 8, 2001

MEMORANDUM FILED at Calgary, Alberta,
this 26th day of March, 2001

_____

CONRAD J.A.

McFADYEN J.A.

BENSLER J.

Colleen Pritchard *Appellant*

v.

Ontario Human Rights Commission *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Canadian Human Rights Commission and Manitoba Human Rights Commission *Interveners*

Colleen Pritchard *Appelante*

c.

Commission ontarienne des droits de la personne *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario, Commission canadienne des droits de la personne et Commission des droits de la personne du Manitoba *Intervenants*

INDEXED AS: PRITCHARD *v.* ONTARIO (HUMAN RIGHTS COMMISSION)

Neutral citation: 2004 SCC 31.

File No.: 29677.

Hearing and judgment: March 23, 2004.

Reasons delivered: May 14, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

RÉPERTORIÉ : PRITCHARD *c.* ONTARIO (COMMISSION DES DROITS DE LA PERSONNE)

Référence neutre : 2004 CSC 31.

N° du greffe : 29677.

Audition et jugement : 23 mars 2004.

Motifs déposés : 14 mai 2004.

Présents : Les juges Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Barristers and solicitors — Solicitor-client privilege — In-house counsel — Legal opinions — Whether legal opinion prepared by in-house counsel for administrative board protected by solicitor-client privilege.

Administrative law — Judicial review — Solicitor-client privilege — In-house counsel — Legal opinions — Complainant seeking production of legal opinion prepared by Human Rights Commission's in-house counsel — Whether legal opinions prepared by in-house counsel protected by solicitor-client privilege.

Administrative law — Judicial review — Procedure — Record of proceedings — Solicitor-client privilege — Decision-maker served with notice of application for judicial review of its decision must file in court for use in application record of proceedings in which decision was made — Whether expression "record of the proceedings" in s. 10 of Ontario Judicial Review Procedure Act abrogates solicitor-client privilege — Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 10.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Avocats et procureurs — Privilège avocat-client — Avocat interne — Avis juridique — L'avis juridique établi par un avocat interne pour un organisme administratif est-il protégé par le privilège avocat-client?

Droit administratif — Révision judiciaire — Privilège avocat-client — Avocat interne — Avis juridique — Plaignante ayant demandé la production d'un avis juridique établi par l'avocate interne de la Commission des droits de la personne — L'avis juridique établi par un avocat interne est-il protégé par le privilège avocat-client?

Droit administratif — Révision judiciaire — Procédure — Dossier de l'instance — Privilège avocat-client — L'organe décisionnel auquel est signifié une requête en révision judiciaire de sa décision doit déposer à la cour, aux fins de la requête, le dossier de l'instance d'où émane la décision — L'expression « dossier de l'instance » employée à l'art. 10 de la Loi sur la procédure de révision judiciaire de l'Ontario a-t-elle pour effet d'écarter le privilège avocat-client? — Loi sur la procédure de révision judiciaire, L.R.O. 1990, ch. J.1, art. 10.

The appellant filed a complaint with the Ontario Human Rights Commission against her former employer. She later sought judicial review of the Commission's decision not to deal with most of her complaint. When the Commission refused her request for the production of various documents, including a legal opinion provided to the Commission by in-house counsel, the appellant brought a motion before a judge of the Divisional Court for the production of all documents that were before the Commission when it made its decision, including the legal opinion. The motion was granted. On appeal on the sole issue of the production of the legal opinion, a three-judge panel of the Divisional Court upheld the motions judge's decision. The Court of Appeal set aside the orders pertaining to the legal opinion, holding that the opinion was privileged.

Held: The appeal should be dismissed.

Solicitor-client privilege applies to a broad range of communications between lawyer and client and applies with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that that lawyer is "in-house" does not remove the privilege and does not change its nature. Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if privilege arose in the circumstances. Here, the communication between the Commission and its in-house counsel was a legal opinion and protected by solicitor-client privilege.

Procedural fairness does not require the disclosure of a privileged legal opinion and does not affect solicitor-client privilege. Both may co-exist without being at the expense of each other. In this case, the appellant was aware of the case to be met without production of the legal opinion. Further, legislation purporting to limit or deny solicitor-client privilege must be interpreted restrictively; this privilege cannot be abrogated by inference. "[R]ecord of the proceedings" in s. 10 of the Ontario *Judicial Review Procedure Act* does not include privileged communications from in-house counsel. Section 10 does not clearly or unequivocally express an intention to abrogate solicitor-client privilege and does not stipulate that the "record" includes legal opinions. Finally, the common interest exception to solicitor-client privilege does not apply to an administrative board with respect to the parties before it.

L'appelante a déposé devant la Commission ontarienne des droits de la personne une plainte contre son ancien employeur. Elle a par la suite demandé la révision judiciaire de la décision de la Commission de ne pas traiter la plus grande partie de sa plainte. Étant donné le refus de la Commission de produire divers documents, dont un avis juridique que lui avait remis une avocate interne, l'appelante a demandé à une juge de la Cour décisionnaire, par voie de requête, de contraindre la Commission à produire tous les documents qu'elle avait en sa possession au moment de rendre sa décision, y compris l'avis juridique. La requête a été accueillie. Dans le cadre de l'appel interjeté relativement à la seule question de la protection de l'avis juridique, une formation de trois juges de la Cour divisionnaire a confirmé la décision de la juge des requêtes. La Cour d'appel de l'Ontario a annulé les ordonnances concernant l'avis juridique, statuant que celui-ci constituait une communication privilégiée.

Arrêt : Le pourvoi est rejeté.

Le privilège avocat-client protège une vaste gamme de communications entre avocat et client; il vise tant l'avis donné à un organisme administratif par un avocat salarié que l'avis donné dans le contexte de l'exercice privé du droit. Lorsqu'un avocat salarié donne des conseils que l'on qualifierait de privilégiés, le fait qu'il est un avocat « interne » n'écarte pas l'application du privilège ni n'en modifie la nature. Vu la nature du travail d'un avocat interne, dont les fonctions sont souvent à la fois juridiques et non juridiques, chaque situation doit être évaluée individuellement pour déterminer si le privilège s'applique dans les circonstances. En l'espèce, la communication entre la Commission et son avocate interne constituait un avis juridique et était protégée par le privilège avocat-client.

L'équité procédurale n'exige pas la divulgation d'un avis juridique protégé par le privilège avocat-client et n'a pas d'incidence sur ce privilège. Les deux principes peuvent coexister sans que l'un ne nuise à l'autre. En l'espèce, l'appelante connaissait la preuve qu'elle devait réfuter. En outre, un texte législatif visant à limiter ou à écarter l'application du privilège avocat-client doit être interprété restrictivement : ce privilège ne peut être supprimé par inférence. Le « dossier de l'instance » visé à l'art. 10 de la *Loi sur la procédure de révision judiciaire* de l'Ontario ne comprend pas l'avis d'un avocat interne constituant une communication privilégiée. L'article 10 n'exprime pas clairement et sans équivoque l'intention d'écarter le privilège avocat-client ni ne précise que le « dossier » comprend les avis juridiques. Enfin, l'exception fondée sur l'intérêt commun ne permet pas d'écarter le privilège avocat-client dans le cas d'une instance administrative et des parties qui se présentent devant elle.

Cases Cited

Considered: *R. v. Campbell*, [1999] 1 S.C.R. 565; **not followed:** *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 146 N.B.R. (2d) 294; **referred to:** *Smith v. Jones*, [1999] 1 S.C.R. 455; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221; *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 15.
Employment Standards Act, R.S.O. 1990, c. E.14.
Human Rights Code, R.S.O. 1990, c. H.19, ss. 34, 37, 39(6) [ad. 1994, c. 27, s. 65(18); am. 2002, c. 18, Sch. C, s. 1(12)].
Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 10.

APPEAL from a judgment of the Ontario Court of Appeal (2003), 63 O.R. (3d) 97, 167 O.A.C. 356, 223 D.L.R. (4th) 85, 22 C.C.E.L. (3d) 201, 27 C.P.C. (5th) 223, [2003] O.J. No. 215 (QL), setting aside a judgment of the Divisional Court, [2002] O.J. No. 1169 (QL), ordering the production of a legal opinion prepared by an in-house counsel of the Ontario Human Rights Commission. Appeal dismissed.

Geri Sanson and *Mark Hart*, for the appellant.

Anthony D. Griffin and *Hart Schwartz*, for the respondent.

Christopher M. Rupar, for the intervener Attorney General of Canada.

Leslie M. McIntosh, for the intervener Attorney General of Ontario.

Andrea Wright and *Monette Maillet*, for the intervener Canadian Human Rights Commission.

Aaron L. Berg, for the intervener Manitoba Human Rights Commission.

Jurisprudence

Arrêt examiné : *R. c. Campbell*, [1999] 1 R.C.S. 565; **arrêt non suivi :** *Melanson c. Nouveau-Brunswick (Commission des accidents du travail)* (1994), 146 R.N.-B. (2e) 294; **arrêts mentionnés :** *Smith c. Jones*, [1999] 1 R.C.S. 455; *Solosky c. La Reine*, [1980] 1 R.C.S. 821; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860; *R. c. McClure*, [2001] 1 R.C.S. 445, 2001 CSC 14; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, [2002] 3 R.C.S. 209, 2002 CSC 61; *R. c. Dunbar* (1982), 138 D.L.R. (3d) 221; *Buttes Gas & Oil Co. c. Hammer (No. 3)*, [1980] 3 All E.R. 475.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 15.
Code des droits de la personne, L.R.O. 1990, ch. H.19, art. 34, 37, 39(6) [aj. 1994, ch. 27, art. 65(18); mod. 2002, ch. 18, ann. C, art. 1(12)].
Loi sur la procédure de révision judiciaire, L.R.O. 1990, ch. J.1, art. 10.
Loi sur les normes d'emploi, L.R.O. 1990, ch. E.14.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (2003), 63 O.R. (3d) 97, 167 O.A.C. 356, 223 D.L.R. (4th) 85, 22 C.C.E.L. (3d) 201, 27 C.P.C. (5th) 223, [2003] O.J. No. 215 (QL), qui a annulé un jugement de la Cour divisionnaire, [2002] O.J. No. 1169 (QL), ordonnant la production d'un avis juridique établi par une avocate interne de la Commission ontarienne des droits de la personne. Pourvoi rejeté.

Geri Sanson et *Mark Hart*, pour l'appelante.

Anthony D. Griffin et *Hart Schwartz*, pour l'intimée.

Christopher M. Rupar, pour l'intervenant le procureur général du Canada.

Leslie M. McIntosh, pour l'intervenant le procureur général de l'Ontario.

Andrea Wright et *Monette Maillet*, pour l'intervenante la Commission canadienne des droits de la personne.

Aaron L. Berg, pour l'intervenante la Commission des droits de la personne du Manitoba.

The judgment of the Court was delivered by

MAJOR J. —

I. Introduction

1 The appellant, Ms. Colleen Pritchard, filed a human rights complaint with the respondent Ontario Human Rights Commission, against her former employer Sears Canada Inc., alleging gender discrimination, sexual harassment and reprisal. The Commission decided, pursuant to s. 34(1)(b) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 ("Code"), not to deal with her complaint. The appellant sought judicial review and brought a motion for production of all documents that were before the Commission when it made its decision, including a legal opinion provided to the Commission by in-house counsel.

2 The motions judge, MacFarland J. of the Divisional Court, ordered production and a three-judge panel of that court later upheld that decision. The Ontario Court of Appeal overturned the decision, holding instead that the opinion was privileged. The appeal was dismissed with reasons to follow.

II. Factual Background

3 The appellant's employment with Sears was terminated on July 19, 1996. In January 1997 she filed a human rights complaint alleging that she had been subjected to gender discrimination, sexual harassment and reprisal. With regard to reprisal, the complaint alleged that the appellant was denied re-employment for an advertised position in December 1996 because of earlier complaints she made to the Commission (in 1994) regarding sexual harassment and discrimination, and Sears' failure to deal with the issues she raised appropriately.

4 On January 20, 1998, the Commission decided, pursuant to s. 34(1)(b) of the Code, not to deal with

Version française du jugement de la Cour rendu par

LE JUGE MAJOR —

I. Introduction

L'appelante, M^me^ Colleen Pritchard, a déposé devant l'intimée, la Commission ontarienne des droits de la personne, une plainte contre son ancien employeur, Sears Canada Inc., alléguant avoir été victime de discrimination fondée sur le sexe, de harcèlement sexuel et de représailles. En application de l'al. 34(1)b) du *Code des droits de la personne* de l'Ontario, L.R.O. 1990, ch. H.19 (le « Code »), la Commission a décidé de ne pas traiter la plainte. L'appelante a demandé la révision judiciaire de cette décision et présenté une requête pour contraindre la Commission à produire tous les documents qu'elle avait en sa possession au moment de rendre sa décision, y compris l'avis juridique de son avocate interne.

À l'audience, la juge des requêtes MacFarland, de la Cour divisionnaire, a ordonné la production des documents demandés, ordonnance qu'une formation de trois juges de cette cour a ultérieurement confirmée. La Cour d'appel de l'Ontario a infirmé la décision, estimant plutôt que l'avis juridique était une communication privilégiée. L'appel a été rejeté, avec motifs à suivre.

II. Contexte factuel

Le 19 juillet 1996, Sears a mis fin à l'emploi de l'appelante. En janvier 1997, cette dernière a saisi la Commission d'une plainte dans laquelle elle alléguait avoir fait l'objet de discrimination fondée sur le sexe, de harcèlement sexuel et de représailles. En ce qui concerne les représailles, l'appelante soutenait que Sears avait refusé de la reprendre dans un poste annoncé en décembre 1996 en raison de plaintes déposées à la Commission en 1994 pour harcèlement sexuel et discrimination, et omission de l'employeur de prendre des mesures à l'égard des problèmes qu'elle avait signalés à bon droit.

Le 20 janvier 1998, en application de l'al. 34(1)b) du Code, la Commission a refusé de traiter

most of the appellant's complaint. The Commission was of the view that the appellant had acted in bad faith in bringing the complaint because she had previously signed a release which expressly released Sears from any claims under the Code.

In particular, it stated that she released Sears from any claims relating to her employment including "any claims for severance or termination pay under the *Employment Standards Act* or claims under the *Human Rights Code*". In exchange for the release, the appellant was paid her statutory entitlement under the *Employment Standards Act*, R.S.O. 1990, c. E.14, plus two weeks salary.

On June 23, 1998, the Commission decided, pursuant to an application by the appellant for reconsideration under s. 37 of the Code, not to deal with the termination issues; in essence, they upheld the January 20 decision not to address most of the complaint.

On October 28, 1998, the appellant commenced an application for judicial review of the Commission's decisions. The Commission did not defend the application. Instead, it provided the court and the appellant with a letter from its legal counsel setting out the reasons why it would not defend the application and why the entire complaint should be remitted for investigation. The Commission also offered to settle the matter, over the objections of Sears. The Superior Court of Justice, Divisional Court, quashed the Commission's decisions, finding that the Commission had misinterpreted the meaning of "bad faith", and had applied the wrong criteria in its reconsideration ((1999), 45 O.R. (3d) 97). The matter was remitted back to the Commission for a redetermination under s. 34 of the Code. An appeal by Sears was dismissed.

In its consideration of the complaint anew, the Commission again exercised its discretion under s. 34(1)(b) of the Code not to deal with most of the appellant's complaint. On December 20, 2000, the

la majeure partie de la plainte de l'appelante. Elle estimait que l'appelante avait agi de mauvaise foi en présentant une plainte puisque, auparavant, elle avait expressément renoncé à toute demande fondée sur le Code.

5 Plus particulièrement, le document signé par l'appelante précisait qu'elle renonçait à exercer tout recours contre Sears relativement à son emploi, y compris [TRADUCTION] « une demande d'indemnité de cessation d'emploi ou de licenciement sous le régime de la *Loi sur les normes d'emploi* et une demande fondée sur le *Code des droits de la personne* ». En contrepartie, l'appelante avait touché les sommes auxquelles elle avait droit en vertu de la *Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14, plus deux semaines de salaire.

6 Le 23 juin 1998, saisie d'une demande de réexamen présentée par l'appelante en application de l'art. 37 du Code, la Commission a refusé d'examiner les questions se rapportant à la cessation d'emploi; elle a en substance confirmé la décision du 20 janvier de ne pas traiter la plupart des éléments de la plainte.

7 Le 28 octobre 1998, l'appelante a demandé la révision judiciaire des décisions. La Commission n'a pas contesté la demande. Elle a plutôt remis à la cour et à l'appelante une lettre de son avocate expliquant pourquoi elle ne contestait pas la demande et pourquoi l'ensemble de la plainte devait lui être renvoyé pour enquête. Malgré l'opposition de Sears, la Commission a même offert de régler le litige. Après avoir conclu que la Commission avait mal interprété la notion de « mauvaise foi » et qu'elle n'avait pas appliqué le bon critère dans le cadre du réexamen, la Cour supérieure de justice, Cour divisionnaire, a annulé les décisions de la Commission ((1999), 45 O.R. (3d) 97). L'affaire a été renvoyée à la Commission pour qu'elle rende une nouvelle décision sur le fondement de l'art. 34 du Code. L'appel interjeté par Sears a été rejeté.

8 Dans le cadre du nouvel examen, la Commission s'est encore une fois prévalu du pouvoir discrétionnaire, conféré à l'al. 34(1)b) du Code, de ne pas traiter la plus grande partie de la plainte. Dans

Commission issued its decision not to deal with it based on a set of reasons that were strikingly similar to the first, again claiming that the appellant acted in bad faith. On January 11, 2001, the appellant brought a second application for judicial review. The notice sought to quash the Commission's second decision on the basis of jurisdictional error, including excess of jurisdiction, denial of procedural fairness, and violations of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

9 In the context of this second judicial review application, the appellant requested production of various documents including a legal opinion provided to the Commissioners. The Commission refused the request for documents, and the appellant brought a motion before MacFarland J. of the Superior Court of Justice requesting "all information — both oral and written — which was placed before the Commission for its consideration of her complaint which resulted in the Commission's decision under s. 34(1)(b) of the Code".

III. Judicial History

10 On July 6, 2001, MacFarland J., of the Superior Court of Justice, Divisional Court, granted the appellant's motion and ordered production of all the documents, including the legal opinion which had been prepared by in-house counsel for the Commission ((2001), 148 O.A.C. 260). Six months later, on January 10, 2002, a three-judge panel of the Divisional Court ([2002] O.J. No. 1169 (QL)) heard the expedited appeal on the sole issue of the production of the legal opinion, and confirmed MacFarland J.'s order. Neither of the lower courts was provided with a copy of the legal opinion at issue.

11 On January 29, 2003, the Ontario Court of Appeal allowed the appeal, set aside the lower court orders pertaining to the legal opinion, and ordered that the copies of the legal opinion which had been filed with the appellate court be sealed ((2003), 63 O.R. (3d) 97).

sa décision du 20 décembre 2000, elle a invoqué des motifs qui sont d'une frappante ressemblance avec ceux de sa première décision. Elle a soutenu à nouveau que l'appelante avait agi de mauvaise foi. Le 11 janvier 2001, l'appelante a demandé une deuxième révision judiciaire. Dans l'avis de requête, elle sollicitait l'annulation de la deuxième décision de la Commission, alléguant l'erreur dans l'exercice de la compétence, y compris l'excès de compétence, le non-respect de l'équité procédurale, ainsi que la violation des art. 7 et 15 de la *Charte canadienne des droits et libertés*.

Dans le cadre de cette deuxième révision judiciaire, l'appelante a demandé la production de divers documents, dont un avis juridique remis aux membres de la Commission. Cette dernière a refusé de produire les documents, et l'appelante a demandé à la juge MacFarland, de la Cour supérieure de justice, d'ordonner la production de [TRADUCTION] « tous les éléments d'information — tant oraux qu'écrits — dont avait disposé la Commission pour procéder à l'examen à l'issue duquel elle avait rendu sa décision en application de l'al. 34(1)b) du Code ».

III. Historique judiciaire

Le 6 juillet 2001, la juge MacFarland, de la Cour supérieure de justice, Cour divisionnaire, a accueilli la requête de l'appelante et ordonné la production de tous les documents, y compris l'avis juridique de l'avocate de la Commission ((2001), 148 O.A.C. 260). Six mois plus tard, soit le 10 janvier 2002, une formation de trois juges de la Cour divisionnaire ([2002] O.J. No. 1169 (QL)) a entendu l'appel accéléré relativement à la seule question de la production de l'avis juridique et confirmé l'ordonnance de la juge MacFarland. Aucun des tribunaux inférieurs n'a obtenu copie de l'avis juridique en cause.

Le 29 janvier 2003, la Cour d'appel de l'Ontario a accueilli l'appel, annulé les ordonnances des tribunaux inférieurs concernant l'avis juridique et ordonné que les copies de l'avis juridique versées à son dossier soit mises sous scellés ((2003), 63 O.R. (3d) 97).

IV. Relevant Statutory Provisions

While this appeal can be decided on the basis of case law alone, ss. 34, 37 and 39(6) of the Code provide the context in which the Commission made its decisions. For convenience, these sections are reproduced below.

34.—(1) Where it appears to the Commission that,

(a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;

(b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;

(c) the complaint is not within the jurisdiction of the Commission; or

(d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,

the Commission may, in its discretion, decide to not deal with the complaint.

(2) Where the Commission decides to not deal with a complaint, it shall advise the complainant in writing of the decision and the reasons therefor and of the procedure under section 37 for having the decision reconsidered.

37.—(1) Within a period of fifteen days of the date of mailing the decision and reasons therefor mentioned in subsection 34(2) or subsection 36(2), or such longer period as the Commission may for special reasons allow, a complainant may request the Commission to reconsider its decision by filing an application for reconsideration containing a concise statement of the material facts upon which the application is based.

(2) Upon receipt of an application for reconsideration the Commission shall as soon as is practicable notify the person complained against of the application and afford the person an opportunity to make written submissions with respect thereto within such time as the Commission specifies.

(3) Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final.

IV. Dispositions législatives applicables

12 Il est possible de statuer sur le présent pourvoi à partir de la seule jurisprudence, mais les art. 34, 37 et 39(6) du Code établissent le contexte dans lequel la Commission a rendu ses décisions. En voici le libellé :

34 (1) S'il appert à la Commission que, selon le cas :

a) la plainte pourrait ou devrait plutôt être traitée en vertu d'une autre loi;

b) la plainte est futile, frivole, vexatoire ou faite de mauvaise foi;

c) la plainte n'est pas de son ressort;

d) les faits sur lesquels la plainte est fondée se sont produits plus de six mois avant son dépôt, à moins que la Commission ne soit convaincue que le retard s'est produit de bonne foi et qu'il ne causera de préjudice important à personne,

la Commission peut, à sa discrétion, décider de ne pas traiter la plainte.

(2) Si la Commission décide de ne pas traiter une plainte, elle communique par écrit au plaignant sa décision motivée et l'informe de la marche à suivre, aux termes de l'article 37, pour demander un réexamen de la décision.

37 (1) Dans les quinze jours qui suivent la date de la mise à la poste de la décision motivée visée au paragraphe 34(2) ou 36(2), ou dans un délai plus long, selon ce que la Commission peut autoriser pour des raisons particulières, un plaignant peut demander à la Commission de réexaminer sa décision en déposant une demande de réexamen contenant un énoncé concis des faits substantiels à l'appui de la demande.

(2) À la réception d'une demande de réexamen, la Commission en informe la personne qui fait l'objet de la plainte le plus tôt possible et lui donne la possibilité de faire des observations écrites à ce sujet dans le délai que la Commission lui impartit.

(3) Toute décision motivée de la Commission quant à une demande de réexamen est consignée et immédiatement communiquée au plaignant et à la personne qui fait l'objet de la plainte. La décision est définitive.

39. . . .

(6) A member of the Tribunal hearing a complaint must not have taken part in any investigation or consideration of the subject-matter of the inquiry before the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the inquiry with any person or with any party or any party's representative except upon notice to and opportunity for all parties to participate, but the Tribunal may seek legal advice from an advisor independent of the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

39 . . .

(6) Les membres du tribunal qui entendent une plainte ne doivent pas avoir pris part avant l'audience à une enquête ni à une étude de la question faisant l'objet de l'enquête. Ils ne doivent communiquer directement ou indirectement avec personne, notamment une partie ou son représentant, au sujet de la question faisant l'objet de l'enquête, si ce n'est après en avoir avisé les parties et leur avoir fourni l'occasion de participer. Toutefois, la commission d'enquête peut solliciter les conseils juridiques d'un expert indépendant des parties, auquel cas la teneur des conseils donnés est communiquée aux parties pour qu'elles puissent présenter des observations quant au droit applicable.

V. Issues

13 The sole issue in this appeal is whether the Court of Appeal erred in overturning the decision of the motions judge ordering production of the legal opinion. The question is whether a legal opinion, prepared for the Ontario Human Rights Commission by its in-house counsel, is protected by solicitor-client privilege in the same way as it is privileged if prepared by outside counsel retained for that purpose.

V. Questions en litige

La seule question que soulève le présent pourvoi est de savoir si la Cour d'appel a commis une erreur en infirmant la décision de la juge des requêtes ordonnant la production de l'avis juridique. Rédigé pour la Commission par son avocate interne, l'avis juridique bénéficie-t-il du privilège avocat-client de la même manière que l'opinion donnée par un avocat externe mandaté à cette fin?

VI. Analysis

A. *Solicitor-Client Privilege Defined*

14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46.

15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation

VI. Analyse

A. *Définition du privilège avocat-client*

Le privilège avocat-client s'entend du lien privilégié existant entre un client et son avocat. Lorsqu'il consulte son avocat, le client doit sentir qu'il peut s'exprimer librement et en toute franchise au sujet de ce qui le préoccupe et qu'il bénéficie d'une protection à cet égard, de façon que, comme notre Cour l'a reconnu, le système de justice puisse bien fonctionner : voir *Smith c. Jones*, [1999] 1 R.C.S. 455, par. 46.

Dans *Solosky c. La Reine*, [1980] 1 R.C.S. 821, p. 837, le juge Dickson a énoncé les critères permettant d'établir l'existence du privilège avocat-client. Il doit s'agir d'« (i) une communication entre un avocat et son client; (ii) qui comporte une consultation ou un avis juridiques; et (iii) que les parties considèrent de nature confidentielle ». À une certaine époque, le privilège ne s'appliquait qu'aux communications intervenues au cours d'un

for legal advice, whether litigious or not: see *Solosky*, at p. 834.

Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see *Solosky*, *supra*, at p. 835.

As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:

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

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*:

litige, mais il s'est ensuite appliqué à toute consultation juridique sur une question litigieuse ou non : voir *Solosky*, p. 834.

16 Généralement, le privilège avocat-client s'applique dans la mesure où la communication s'inscrit dans le cadre habituel et ordinaire de la relation professionnelle. Une fois son existence établie, le privilège a une portée particulièrement large et générale. Dans *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, p. 893, notre Cour a statué que le privilège s'attachait « à toutes les communications faites dans le cadre de la relation client-avocat, laquelle prend naissance dès les premières démarches du client virtuel, donc avant même la formation du mandat formel ». Le privilège ne s'étend pas aux communications : (1) qui n'ont trait ni à la consultation juridique ni à l'avis donné, (2) qui ne sont pas censées être confidentielles ou (3) qui visent à faciliter un comportement illégal : voir *Solosky*, précité, p. 835.

17 Comme l'a écrit notre Cour dans *R. c. McClure*, [2001] 1 R.C.S. 445, 2001 CSC 14, par. 2 :

> Le secret professionnel de l'avocat [le privilège avocat-client] s'entend du privilège qui existe entre un client et son avocat et qui est fondamental pour le système de justice canadien. Le droit est un écheveau complexe d'intérêts, de rapports et de règles. L'intégrité de l'administration de la justice repose sur le rôle unique de l'avocat qui donne des conseils juridiques à des clients au sein de ce système complexe. La notion selon laquelle une personne doit pouvoir parler franchement à son avocat pour qu'il soit en mesure de la représenter pleinement est au cœur de ce privilège.

Le privilège est jalousement protégé et ne doit être levé que dans les circonstances les plus exceptionnelles, notamment en cas de risque véritable qu'une déclaration de culpabilité soit prononcée à tort.

18 Dans *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, [2002] 3 R.C.S. 209, 2002 CSC 61, notre Cour a confirmé que le privilège avocat-client doit être quasi absolu et ne doit souffrir que de rares exceptions. S'exprimant au nom de notre Cour à ce sujet, la juge Arbour a rappelé les principes énoncés dans *McClure* :

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

(Arbour J. in *Lavallee*, *supra*, at para. 36, citing Major J. in *McClure*, at para. 35.)

19 Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 49. In *Campbell*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.

20 Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Campbell*, *supra*, at para. 50.

21 Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it

. . . le secret professionnel de l'avocat [le privilège avocat-client] doit être aussi absolu que possible pour assurer la confiance du public et demeurer pertinent. Par conséquent, il ne cède le pas que dans certaines circonstances bien définies et ne nécessite pas une évaluation des intérêts dans chaque cas. [Souligné dans l'original.]

(La juge Arbour dans *Lavallee*, précité, par. 36, citant le juge Major dans *McClure*, par. 35.)

Selon notre Cour, le privilège avocat-client s'applique lorsqu'un avocat salarié de l'État donne un avis juridique à son client, l'organisme gouvernemental : voir *R. c. Campbell*, [1999] 1 R.C.S. 565, par. 49. Dans cette affaire, les policiers appelants tentaient d'obtenir l'avis juridique que le ministère de la Justice avait fourni à la GRC et auquel cette dernière affirmait s'être fiée de bonne foi. Pour circonscrire le privilège avocat-client applicable à un avocat de l'État, le juge Binnie a comparé les fonctions qu'il exerce au sein d'un organisme gouvernemental à celles de l'avocat salarié d'une entreprise. Il a expliqué que le privilège avocat-client s'applique lorsque l'avocat du gouvernement donne au « ministère client » des conseils juridiques qui seraient habituellement protégés. Toutefois, à l'instar des conseils donnés par un avocat d'affaires à titre de gestionnaire ou autrement qu'en qualité de juriste, les conseils donnés par un avocat du gouvernement au sujet de questions de politique générale qui n'ont rien à voir avec les compétences en droit de l'intéressé ne jouissent pas de la protection du privilège.

Vu la nature du travail d'un avocat interne, dont les fonctions sont souvent à la fois juridiques et non juridiques, chaque situation doit être évaluée individuellement pour déterminer si les circonstances justifient l'application du privilège. Ce dernier s'appliquera ou non selon la nature de la relation, l'objet de l'avis et les circonstances dans lesquelles il est demandé et fourni : *Campbell*, précité, par. 50.

Comme je l'indique précédemment, lorsqu'il s'applique, le privilège avocat-client protège une vaste gamme de communications entre avocat et client. Il vise tant l'avis donné à un organisme administratif par un avocat salarié que l'avis

does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

B. *The Common Interest Exception*

The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a "joint interest" with the client in the subject-matter of the communication. This "common interest", or "joint interest" exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.

The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A., at p. 245:

> The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication. . . .

The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary

donné dans le contexte de l'exercice privé du droit. Lorsqu'un avocat salarié donne des conseils que l'on qualifierait de privilégiés, le fait qu'il est un avocat « interne » n'écarte pas l'application du privilège ni n'en modifie la nature.

B. *L'exception fondée sur un intérêt commun*

22 L'appelante prétend que le privilège avocat-client ne peut empêcher la divulgation d'une communication à une personne ayant, avec le client en question, un « intérêt commun » quant à l'objet de la communication. L'exception fondée sur l'« intérêt commun » ne s'applique pas à la Commission puisque ses intérêts ne coïncident pas avec ceux des personnes qui se présentent devant elle. Le rôle de la Commission, à l'égard des plaintes relatives aux droits de la personne, demeure celui d'un gardien impartial, et par définition, elle n'a pas d'intérêt dans le dénouement d'une affaire.

23 L'exception fondée sur l'intérêt commun a été invoquée à l'encontre du privilège avocat-client dans une affaire où les deux parties avaient consulté ensemble un avocat. Voir *R. c. Dunbar* (1982), 138 D.L.R. (3d) 221 (C.A. Ont.), le juge Martin, p. 245 :

> [TRADUCTION] Il ressort de la jurisprudence que lorsqu'une question présente un intérêt pour deux personnes ou plus qui consultent de concert un avocat, leurs communications confidentielles avec l'avocat, même si elles leur sont connues, bénéficient d'un privilège vis-à-vis des tiers. Toutefois, en ce qui concerne les rapports entre les parties, toutes deux sont censées prendre part à toutes les communications intervenant entre elles et leur avocat et en être informées. Par conséquent, si une controverse ou un différend vient à les opposer, le privilège ne s'applique pas, et l'une ou l'autre peut exiger la divulgation de la communication. . .

24 L'exception fondée sur l'intérêt commun est apparue dans un contexte où des parties visant un même objectif ou cherchant à obtenir un même résultat possédaient [TRADUCTION] un « même intérêt », pour reprendre l'expression employée par le maître des rôles lord Denning dans *Buttes Gas & Oil Co. c. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), p. 483. La portée de cette exception a été quelque peu élargie. En effet, elle s'applique désormais lorsqu'une obligation fiduciaire ou

aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.

25 The Commission neither has a trust relationship with, nor owes a fiduciary duty to, the parties appearing before it. The Commission is a statutory decision-maker. The cases relied on by the appellant related to trusts, fiduciary duty, and contractual obligations. These cases are readily distinguishable and do not support the position advanced by the appellant. The common interest exception does not apply to an administrative board with respect to the parties before it.

26 The appellant relied heavily on the decision of the New Brunswick Court of Appeal in *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 146 N.B.R. (2d) 294. In that case, the court ordered a new hearing based on a failure by the Workers' Compensation Board to observe procedural fairness in the processing of the appellant's claim. The court held that several significant errors were made at the review committee level, negating the review committee's duty to act fairly. Among these errors were the failure to provide the appellant with its first decision, the decision to turn the appellant's claim into a test case without her knowledge and partly at her expense, and the introduction of new evidence not disclosed to the appellant. For these reasons the court, in its *ratio*, concluded that "the taint at the intermediate level of the Review Committee has irrevocably blemished the proceedings" (para. 31). Other comments made by the Court of Appeal, pertaining to the production of legal opinions, were *obiter dicta*. The proper approach to legal opinions is to determine if they are of such a kind as would fall into the privileged class. If so, they are privileged. To the extent that *Melanson* is otherwise relied on is error.

apparentée existant entre les parties a fait naître un intérêt commun. Cela comprend les relations fiduciaire-bénéficiaire, celles entre l'État et les autochtones et certains types de rapports contractuels ou de rapports mandant-mandataire.

Il n'y a ni lien fiduciaire entre la Commission et les parties qui se présentent devant elle, ni obligation fiduciaire de la Commission envers ces parties. La Commission est un organe décisionnel établi par la loi. La jurisprudence invoquée par l'appelante se rapporte aux fiducies, à l'obligation fiduciaire et aux obligations contractuelles. Une distinction peut alors aisément être faite d'avec la présente affaire, et les décisions citées n'appuient pas la prétention de l'appelante. L'exception fondée sur l'intérêt commun ne s'applique pas à une instance administrative et aux parties qui se présentent devant elle.

L'appelante s'est en grande partie appuyée sur l'arrêt *Melanson c. Nouveau-Brunswick (Commission des accidents du travail)* (1994), 146 R.N.-B. (2e) 294, de la Cour d'appel du Nouveau-Brunswick. Dans cette affaire, la Cour d'appel a ordonné la tenue d'une nouvelle audience au motif que la Commission des accidents du travail n'avait pas respecté l'équité procédurale dans le traitement de la demande présentée par l'appelante. Elle a conclu que le comité de révision avait commis plusieurs erreurs importantes, contrairement à son obligation d'agir équitablement. Au nombre de ces erreurs figuraient l'omission d'informer l'appelante de sa première décision, le choix de faire de la demande de l'appelante une cause type et ce, à son insu et en partie à ses dépens, et la production de nouveaux éléments de preuve qui n'avaient pas été communiqués à l'appelante. Pour ces motifs, la Cour d'appel a conclu dans la *ratio decidendi* que « le vice qui a entaché le niveau intermédiaire, soit le comité de révision, a de façon irrévocable terni les procédures » (par. 31). Ses autres observations concernant la production d'un avis juridique constituaient des remarques incidentes. Pour décider si un avis juridique doit être produit, il convient de déterminer si, par sa nature, il entre dans la catégorie des communications privilégiées. Dans l'affirmative, le privilège s'applique. L'appelante commet une erreur en s'appuyant ainsi sur l'arrêt *Melanson*.

C. *Application to the Case at Bar*

As stated, the communication between the Commission and its in-house counsel was protected by solicitor-client privilege.

The opinion provided to the Commission by staff counsel was a legal opinion. It was provided to the Commission by in-house or "staff" counsel to be considered or not considered at their discretion. It is a communication that falls within the class of communications protected by solicitor-client privilege. The fact that it was provided by in-house counsel does not alter the nature of the communication or the privilege.

There is no applicable exception that can remove the communication from the privileged class. There is no common interest between this Commission and the parties before it that could justify disclosure; nor is this Court prepared to create a new common law exception on these facts.

With respect, the motions judge erred in following the comments made by the New Brunswick Court of Appeal in *obiter dicta* in *Melanson* and in ordering production of the legal opinion.

Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may co-exist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, provides:

10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

C. *Application à la présente espèce*

27 Comme je l'ai indiqué précédemment, la communication entre la Commission et son avocate interne était protégée par le privilège avocat-client.

28 L'avis que l'avocate a fourni à la Commission était un avis juridique. La Commission pouvait à son gré tenir compte ou non de cet avis établi par son avocate interne ou salariée. Il entre dans la catégorie des communications protégées par le privilège avocat-client. Le fait qu'il a été fourni par une avocate interne ne change pas la nature de la communication ni celle du privilège.

29 Aucune exception ne soustrait la communication à l'application du privilège. Il n'existe entre la Commission et les parties qui se présentent devant elle aucun intérêt commun susceptible de justifier la divulgation. Notre Cour n'est pas non plus disposée à créer une nouvelle exception de common law à partir des faits de l'espèce.

30 Avec déférence, la juge des requêtes a eu tort de se fonder sur les remarques incidentes de la Cour d'appel du Nouveau-Brunswick dans *Melanson* et d'ordonner la production de l'avis juridique.

31 L'équité procédurale n'exige pas la divulgation d'un avis juridique protégé par le privilège avocat-client. Son respect s'impose dans le cadre d'une instance tant judiciaire qu'administrative. Elle ne compromet pas l'application du privilège avocat-client; les deux principes peuvent coexister sans que l'un ne nuise à l'autre. De plus, même si l'avis juridique n'a pas été produit, l'appelante connaissait la preuve qu'elle devait réfuter. La notion d'équité imprègne tous les aspects du système de justice, et l'un de ses aspects fondamentaux est le privilège avocat-client.

32 L'article 10 de la *Loi sur la procédure de révision judiciaire*, L.R.O. 1990, ch. J.1, dispose :

10 Lorsqu'un avis d'une requête en révision judiciaire d'une décision rendue dans l'exercice réel ou prétendu d'une compétence légale de décision est signifié à la personne qui a rendu la décision, celle-ci dépose sans délai au greffe, aux fins de la requête, le dossier de l'instance d'où émane la décision.

33 Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively: see *Lavallee*, *supra*, at para. 18. Solicitor-client privilege cannot be abrogated by inference. While administrative boards have the delegated authority to determine their own procedure, the exercise of that authority must be in accordance with natural justice and the common law.

34 Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the "whole of the record" includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality. Beyond that, whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise in this appeal.

35 Section 10 of the *Judicial Review Procedure Act*, in any event, does not clearly or unequivocally express an intention to abrogate solicitor-client privilege, nor does it stipulate that the "record" includes legal opinions. As such, "record of the proceedings" should not be read to include privileged communications from Commission counsel to the Commission.

VII. Disposition

36 The communication between the Ontario Human Rights Commission and its in-house counsel is protected by solicitor-client privilege. It was a communication from a professional legal advisor, the Commission's in-house counsel, in her capacity as such, made in confidence to her client, the Commission. Accordingly, this appeal is dismissed and the decision of the Ontario Court of Appeal is confirmed. There is no order for costs as against the parties before this Court. Any order of costs pertaining to the judicial review should properly be considered by the Divisional Court undertaking the review.

Un texte législatif visant à limiter ou à écarter l'application du privilège avocat-client sera interprété restrictivement : voir *Lavallee*, précité, par. 18. Le privilège avocat-client ne peut être supprimé par inférence. Si, en vertu des pouvoirs qui lui sont conférés, un organisme administratif est maître de sa procédure, il reste que ces pouvoirs doivent être exercés conformément aux règles de justice naturelle et à la common law.

Lorsque le législateur exige d'un organisme administratif qu'il communique aux parties à une procédure relevant de sa compétence l'ensemble du dossier, et qu'il est précisé que « l'ensemble du dossier » comprend les avis obtenus par l'organisme administratif, le privilège ne pourra être invoqué vu l'absence d'attentes en matière de confidentialité. La question de savoir si, par ailleurs, le législateur peut écarter expressément le privilège avocat-client est matière à controverse et ne fait pas l'objet du présent pourvoi.

Quoi qu'il en soit, l'art. 10 de la *Loi sur la procédure de révision judiciaire* n'exprime pas clairement et sans équivoque l'intention d'écarter le privilège avocat-client ni ne précise que le « dossier » comprend les avis juridiques. L'on ne saurait donc interpréter l'expression « dossier de l'instance » comme englobant les communications privilégiées entre la Commission et son avocate.

VII. Dispositif

La communication intervenue entre la Commission et son avocate interne est protégée par le privilège avocat-client. Il s'agissait de l'avis d'une conseillère juridique professionnelle — l'avocate interne de la Commission — donné en cette qualité et à titre confidentiel à la cliente, la Commission. Par conséquent, le pourvoi est rejeté, et la décision de la Cour d'appel de l'Ontario est confirmée. Aucune ordonnance n'est rendue à l'égard des dépens devant notre Cour. Il incombera à la Cour divisionnaire de rendre toute ordonnance qu'elle jugera appropriée en ce qui concerne les dépens afférents à la révision judiciaire dont elle sera saisie.

Appeal dismissed.

Solicitors for the appellant: Sanson & Hart, Toronto.

Solicitor for the respondent: Ontario Human Rights Commission, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Manitoba Human Rights Commission: Manitoba Human Rights Commission, Winnipeg.

Pourvoi rejeté.

Procureurs de l'appelante : Sanson & Hart, Toronto.

Procureur de l'intimée : Commission ontarienne des droits de la personne, Toronto.

Procureur de l'intervenant le procureur général du Canada : Sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Ministère du Procureur général de l'Ontario, Toronto.

Procureur de l'intervenante la Commission canadienne des droits de la personne : Commission canadienne des droits de la personne, Ottawa.

Procureur de l'intervenante la Commission des droits de la personne du Manitoba : Commission des droits de la personne du Manitoba, Winnipeg.

Court of Queen's Bench of Alberta

Citation: NEP Canada ULC v MEC Op LLC, 2016 ABQB 186

Date: 20160330
Docket: 1201 09690
Registry: Calgary

Between:

NEP Canada ULC

Plaintiff

- and -

MEC Op LLC, MEC Op Transaction 1 ULC and Merit Energy Company LLC

Defendants

Memorandum of Oral Decision of J. Farrington, Master in Chambers

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[1] The following are oral reasons which I delivered on March 11, 2016. They have been edited for form and grammar, but are otherwise as delivered.

[2] This is an application by the defendants MEC Op LLC, MEC Op Transaction 1 ULC and Merit Energy Company LLC (collectively "MEC") to compel further document production and questioning responses from the plaintiff NEP Canada ULC, which I will refer to as "NEP". The action is a large action framed primarily in deceit and alleged misrepresentation in a contractual context in a circumstance where the defendant sold shares in MEC Op LLC to the plaintiff. The plaintiff alleges that substantial regulatory irregularities were not disclosed in the context of the transaction and the closing process, and that there was deceit and misrepresentation in relation to the transaction.

[3] For the reasons which follow, I find primarily in favour of the plaintiff NEP on the issues pertaining to document disclosure, and primarily in favour of the defendants on the issues pertaining to questioning.

[4] Notwithstanding the size of the litigation, and the volume of the document productions and questioning undertaken, this application can largely be decided by reference to basic principles.

[5] Rule 5.1 provides:

> 5.1 (1) Within the context of rule 1.2, the purpose of this Part is:
>
> (a) to obtain evidence that will be relied on in the action,
>
> (b) to narrow and define the issues between parties,
>
> (c) to encourage early disclosure of facts and records,
>
> (d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and
>
> (e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.
>
> (2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

[6] Many of these purposes apply here.

[7] Rule 5.6 deals with a party's obligations in relation to document and record production:

> 5.6(1) An affidavit of records must
>
> (a) be in Form 26, and
>
> (b) disclose all records that
>
> (i) are relevant and material to the issues in the action, and
>
> (ii) are or have been under the party's control.

[8] Finally, Rule 5.10 deals with documents arising after the original production:

> 5.10 If, after a party has served an affidavit of records on other parties, the first party finds, creates or obtains control of a relevant and material record not previously disclosed, the first party must
>
> (a) immediately give notice of it to each of the other parties,
>
> (b) on written request and on payment of reasonable copying expenses, supply each of the other parties with a copy of it, and
>
> (c) prior to scheduling a date for trial, serve a supplementary affidavit of records on each of the other parties.

[9] The obligation of a party to produce documents and records can be simply put as an obligation to produce relevant and material documents and records that exist, whether they help a party's case or hurt a party's case, subject to exceptions such as claims of privilege.

[10] The point of an affidavit of records is to confirm that a party has complied with its production obligations and to make certain that there is someone who has taken responsibility for doing so. The affidavit of records is not only about confirming what documents exist by virtue of, in this case, extensive lists. It is also about confirming that production obligations have been met.

[11] Counsel play an important role in the production process. One of the elements of that role is to make certain that the client clearly understands its production obligations. Another element of the role is to review documents and assist the client with making appropriate production decisions. This involves both legal and ethical considerations.

[12] In this application all parties have extremely experienced and capable counsel who well understand their obligations.

[13] The plaintiff's production is large. Damages in excess of $150 million are sought. The damage claim to a large extent arises from what the plaintiff says is the remediation of nondisclosed pipeline and well deficiencies, including regulatory deficiencies. The plaintiff says that the remediation process will go on until at least 2019. This raises special production challenges because the production obligations are a moving target.

[14] The normal production challenge is to produce that which exists, subject to identified exclusions for privilege and the like. The obligation is not to create documents. It is to produce that which exists and that which they choose to create and rely upon.

[15] In this case, the initial production is done. Although there were some glitches, the evidence satisfies me that such glitches were innocent, and that when the plaintiff became aware of any issues they were remedied. Without question, on a production of this size, future such issues are also inevitable.

[16] The production of the plaintiff is now in the phase of producing remediation source documents as they are incurred, and secondary documents in the nature of collations and summaries of damages.

[17] The defendant seeks documents which roughly fall into three categories. The first are unredacted portions of the notebook of a key witness Ms. Hall. The second is further proof of damages documents and summaries relating to those damages as well as what they term to be "unlocked" spreadsheets showing the mechanisms and formulae used in the calculations. The final category consists of documents which the defendant says are required by its expert in damages calculations. These include items such as monthly internal financial statements and income tax returns of the plaintiff.

[18] With respect to the request for unredacted portions of Ms. Hall's diaries, I decline to order any further production. There is no evidence to suggest that any relevant and material portions have been omitted and I decline to order production simply on the basis of a "let's see what we find" request. As I indicated earlier, the litigation production system relies heavily upon counsel and the plaintiff has experienced counsel who are well aware of production obligations, and are well able to advise the plaintiff accordingly with respect to production obligations and there is simply no evidence to suggest that anything inappropriate has taken place with respect to the production of the diaries. In an appropriate case I could review the diaries, but there is no *prima facie* evidence to suggest that any mischief has occurred with respect to the diaries.

[19] With respect to the damages documents, I also decline to make any further order with respect to production. The plaintiff well understands its continuing production obligations and the rule clearly describes the necessity of swearing a further affidavit of records in due course. The rule simply needs to be followed and there is no suggestion that the plaintiff is not following the rule.

[20] The defendant also requested what it referred to as "pinpointing" and "unlocked" spreadsheets pertaining to the damages documents request and particularly the summary documents. I am not prepared to order that those be provided. Summary documents and charts are secondary in the sense that they summarize material which already exists and attempt to present it in a form that a party likely wishes to present at trial. A party uses its skill and judgment and the skill and judgment of its advisors in choosing how it will present its evidence. Of course, if a party chooses to create documents to be relied upon during the course of the litigation process they would be obliged to produce those documents and that is being done here.

[21] A party is not obliged to create a documentary underlying theory and roadmap for its documents. A party chooses what it wishes to present with respect to such secondary documents. There can certainly be questioning about the underlying methods pertaining to such secondary documents, but there is no obligation in my view to create pinpointing and unlocked spreadsheets which go further than illustrating the finished product as presented by the documents. Doing so, in my view would be a slippery slope. The next application may well be for better explanations in the documents, or alternatively, complaints about how a party was misled or deceived in the pinpointing. This is not a case which requires travel of those roads.

[22] There are two distinct steps in the "exchange of information" process. One is document production, and one is questioning. The place for explanations is in the questioning phase.

[23] I would add that in many respects, the requests for OCR (optical character recognition) scanning at a level or technique not presently being used by the plaintiff, and the request for pinpointing is are issues about cost. The plaintiff says that its material is searchable in its hands. The defendants say that they cannot search the material. It may well be that the parties are using different technologies, programs, or equipment. I have no evidence before me of any of that information. The parties were quite properly talking about having their technical departments discuss the issue and that seems reasonable.

[24] Going further than that, however, clearly requires additional effort in the form of the costs associated with increasing organization and entropy. By all accounts, the plaintiff seems to have organized its materials in progressive and modern ways that work well for its purposes. The defendants want them to go further. I have no evidentiary basis before me for knowing exactly what would be involved in meeting the standards sought by the defendants. I am not prepared to order further organizational and presentation efforts without a proper evidentiary foundation as to what would be involved.

[25] The plaintiff has been providing damages documents at regular intervals, and I see no reason on the materials before me to mandate specific time frames. I defer to the wisdom of the learned case management justice who will of course provide timing directions as needed, armed with a better understanding of the overall progress and components of the action. The variable is the incurring of the damages and that would seem to be the largest factor in the production of additional documentation.

[26] In addition, the defendant seeks documents such as internal financial statements and tax returns of the plaintiff on the basis that the defendant's damages expert "needs them". There is no evidence from the defendant's damages expert of a first-hand nature that they are needed or why they are needed. It is simply a request that is passed on by the defendant's counsel. The plaintiff has already produced audited financial statements upon request. There is no specific probative argument made as to why particular documents are needed in the context of the damage calculation, either by the expert in requesting them, or by defendant's counsel during argument. The argument essentially amounts to a request to produce them because the expert says so. In my view, in order to satisfy the relevance and materiality test it is reasonable to require that an argument be articulated as to exactly what facts the records requested would tend to prove or disprove. That is consistent with the Rules.

[27] Furthermore, the plaintiff has not yet provided any expert evidence with respect to its damages, and based upon the fact that remediation is ongoing that is not surprising. It may be that as part of that process certain documents which formerly did not seem relevant and material gather those characteristics when placed into the context of the damages and methods claimed by the plaintiff. I decline to order any further production of those documents at this stage.

[28] The plaintiff says in argument that if it becomes apparent at a later stage that certain documents are relevant and material they will certainly be produced subject to any privilege arguments and the like. That sounds reasonable and there is no reason to doubt the *bona fides* of that representation to other counsel and to the Court.

[29] With respect to questioning matters I find primarily in favour of the defendant.

[30] In general terms, I have reviewed the passages which caused the defendant to bring this application and I find for the most part that counsel for the plaintiffs was, in many cases, overly obstructive during the course of questioning.

[31] As a starting point, Master Funduk reminds in ***Canalta Concrete Contractors v. Camrose***, 1985 CanLII 1169 at paragraphs 69 to 71:

> The counsel asking the questions has the right to phrase them as he considers appropriate. Opposing counsel has no right to dictate to the cross-examining counsel the phraseology he is to use. If the witness has difficulty understanding the question he, not counsel, must say so.
>
> If a witness does not understand a question he can say so. Counsel should not assume that a witness's level of comprehension does not exceed their own.
>
> Counsel should never, in whatever manner, attempt to feed an answer to a witness.

[32] Rule 5.25 deals with objections.

[33] It is fundamental to our system that questioning by a party adverse in interest be permitted to continue without interruption within reason for the purpose of discerning the facts in the litigation. That is the nature of the adversary system.

[34] Paragraph 19 of the Amended Statement of Claim alleges:

> 19. Despite the trust placed in Merit and its obligations, both at common law and under the Purchase Agreement, Merit was not truthful in making the Representations. To

> the contrary, as set out with particularity below, many of the Representations were false and were either known by the mind and management of Merit to be false or Merit had no belief in the truth of the Representations. Merit was reckless or willfully blind as to the falsity of the Representations and concealed the falsity of the representations from NEP.

[35] The following exchange took place in the questioning of Mr. Newton in relation to Paragraph 19 on July 30, 2015 at p. 918 ll 12-27 and p. 919 ll. 1-7:

> Q: Can you please tell me all the facts about the allegation that Merit was not truthful in making the representations which you know or must properly inform yourself of?
>
> Plaintiff's counsel: I don't think that's a proper question, because now that you have introduced the element of truth, you are now introducing an opinion or what will ultimately be a finding of fact for the trial judge, but I don't think it's a fact this witness can properly answer or should be required to properly answer questions on.
>
> Q: Can you tell me, Mr. Newton, who the mind and management of Merit is, as referred to in this allegation?
>
> Plaintiff's counsel: Well, I don't know that he's got to interpret the claim in that way.

[36] In my view, the initial questions were appropriate. When one pleads in the statement of claim that certain things that were said were untruthful, it is not surprising that the pleading party would be asked about those things. It was argued that these are improper questions because they are matters of opinion. It was also argued that the appropriate place to obtain those details is in a request for particulars. I disagree. The allegedly untruthful representations are fundamental to the action, and the defendant is entitled to ask about them.

[37] In my view the questions are factual ones. They are not questions of opinion as suggested by counsel for the plaintiffs during argument. They are appropriate compendium questions as contemplated by Mr. Justice Cote in ***Can-Air Services Ltd. v. British Aviation Insurance Co.*** [1988] AJ No. 1022 (CA).

[38] In addition, the plaintiff alleges that the mind and management of Merit had certain knowledge. Surely the defendants are entitled to know who the plaintiffs are alleging at Merit had the knowledge in question. If not, rebutting the allegation would require Merit to prove that none of their employees had that knowledge. The plaintiff chose to make a specific allegation about the mind and management of Merit in its pleading. Surely the defendants are entitled to know the factual basis for the allegation and who the plaintiff considers that mind and management to be. The plaintiff's officer cannot, and should not, be shielded from those questions.

[39] There are other examples of interruption such as the so called "PLIMP example" at p. 87 of Mr. Newton's questioning of August 11, 2014 at ll 23-27 and p. 88 ll 1-22:

> Q: What was your understanding of PLIMP?
>
> A: My understanding of PLIMP, it was a pipeline manual.
>
> Q: I see. Is PLIMP an acronym for something?

A: Yes.

Q: What it is an acronym for?

Plaintiff's counsel: Are you talking about his knowledge today? That's part of the problem. What is it, you're saying, what is it.

Q: What was your understanding of PLIMP at the time, sir? You did tell me that you thought it was a manual, and I asked you what you thought the acronym stood for. So did you have an understanding of the acronym at that time?

Plaintiff's counsel: Before you answer the question, you know, Mr. Smith, full well, that that word is defined in the schedule.

Defendants' counsel: [Plaintiff's counsel], this is a fairly important aspect of the case—

Plaintiff's counsel: I get it, but be fair—

Defendants' counsel:--and you shouldn't be as interruptive as you are. So—

Plaintiff's counsel: I'm not being interruptive—if you're going to ask a fair answer, fair ball, but you know, you, as a lawyer, know that the word, "acronym" is defined in the document, which—ask if he had it with him

[40] The understanding of the term PLIMP is an important term in the litigation. There is no question that the term is defined term in the agreement, but the understanding of the witness of the term and the acronym is also an important part of the litigation. Counsel for the defendant was entitled to test that understanding freely and without interruption by counsel for the plaintiffs. If counsel for the plaintiffs had simply left the interruption to reminding that the term was defined in the agreement, that would have been one thing, but the interruption was broader and more comprehensive and it bordered on coaching the witness to fall back on the definition in the agreement and avoid answering questions based upon his understanding.

[41] In other questioning instances, counsel for the plaintiff even rephrased questions and posed them to their own witness.

[42] It is difficult to rule on all of the objections individually because there were so many of them, but I do find that in most cases the complaints of counsel for the defendants were well-founded. The interruptions interfered with the flow of the questioning. Counsel for the defendants are entitled to continue with their examinations sought free of interruption.

[43] Another example of an objection or interruption on an important point was at p. 60 ll. 13-25 of Mr. Newton's questioning of August 11, 2014:

Q: All right. And we'll get to the discussions between Mr. Carnahan and Mr. Carr later, but what you're telling me now is that that assessment that Mr. Carnahan performed did not influence your decisions; is that correct?

A: What decisions?

Q: To proceed with the transaction or not? The economic impact of non-compliance identified by Mr. Carnahan, I think you said, did not trigger a threshold?

Plaintiff's counsel: Well, that's not –like, influence a decision. I mean, if the number is lower than or it's a low number, then the question would reasonably be, did that give you

> comfort, which indeed might influence your decision, and that's the problem with the work "influence" Mr. Smith.

[44] Counsel for the defendants was exploring the important point of reliance and counsel for the plaintiff interrupted.

[45] There is yet another example:

> Q: United Hunter is a pipeline noncompliance issue?
>
> Plaintiff's counsel: That may be true in part. It's more than that.
>
> Defendants' counsel: Let her answer the question please.
>
> Plaintiff's counsel: No. No. Don't phrase it in a way, the way you want to phrase it, that may be mischaracterizing it.
>
> Q: Was the United Hunter a pipeline noncompliance issue? Yes or no?
>
> Plaintiff's counsel: Did you know at that time?
>
> A: I understood it to be a contractual issue that also had a pipeline noncompliance issue associated with it.

[46] In the foregoing sequence plaintiff's counsel actually answers the first question posed.

[47] In many cases the reasons cited for the objections in the transcript were different from those argued before me. That is not troubling on occasional instances, as a question must still be proper whether the objection is characterized properly or not, but in this case the objections in many instances were argued upon entirely different grounds leaving an appearance of objecting in the moment, while hoping to think up a reason that will stand for the objection later.

[48] This is not meant to say that counsel for the plaintiff cannot interrupt or object. Counsel for the plaintiff may interrupt for reasons of legitimate objection. Those objections should be measured and only made, however, when necessary. They went much further in this case and they interfered with the questioning.

[49] There were also objections based upon litigation privilege. Of course, the dominant purpose test applies to litigation privilege. A party seeking to assert privilege must prove entitlement to the privilege. While litigation privilege was argued in a vague way here, no attempt was made to show an evidentiary basis for the privilege and actually demonstrate the dominant purpose for the creation of the material in question.

[50] In addition, as held in ***Global Petroleum Corp. v. CBI Industries Inc.***, 1998 CanLII 2609 (NSCA):

> It is beyond dispute that privilege cannot be used to protect facts from disclosure if those facts are relied on by a party in support of its case. It is immaterial that the fact was discovered through the solicitor or as the result of the solicitor's direction. If it is relied on it must be disclosed. See ***Metlege v. Halifax Insurance Company*** (1998), N.S.J. No. 309 per Pugsley, J.A. at paragraph 31. See also ***Soke Farm Equipment Limited v. New Holland of Canada Limited***, supra, at p. 765; ***Wigmore on Evidence***, Third Edition, (1940), Volume 1, page 3; Manes and Silver, ***Solicitor-Client Privilege in Canadian Law*** (1993), p. 133, note 24; ***CMHC v. Foundation Co. of Canada et al.*** (1984), 63 N.S.R. (2d) 402 at 405 (N.S.S.C.T.D.).

[51] The questioning party is entitled to have a useful transcript. The objections, most of which were unfounded, were so frequent and intrusive in this case that they interfered with that right.

[52] There has been a movement in some large cases to deal with objection hearings in a more pragmatic way. For example, some justices have commenced objection hearings with a direction that each individual question will be subject to a specific cost award (say $500 for example). That approach serves a number of purposes. It focuses attention on specific questions because the costs consequences can add up quickly. It also has proven to be effective at promoting settlement of objection issues for the same reason. If the difficulties persist, that might be an appropriate approach in this matter, but hopefully that does not become necessary after continued questioning.

[53] Finally, I am aware that it may appear somewhat ironic that my reasons place a great deal of confidence in plaintiff's counsel on the documents portion of the application given my findings on the questioning portion of the application. I want to emphasize that I am satisfied that any difficulties on the questioning aspects were as a result of perhaps excessive zeal in the various moments, rather than any intention, and I am confident that there will be no difficulties moving forward. I compliment all counsel on their cooperation that was apparent during argument on a file of this size and complexity.

[54] Counsel for the defendants provided me with a draft order for his application. Based upon these reasons, I am going to comment on the various provisions of the order and make my formal direction insofar as an Order is concerned.

[55] (Those comments were provided orally to the parties in relation to a specific draft order that was before the parties for discussion purposes and are not reproduced here).

[56] Thank you very much to counsel for their able and well presented submissions during argument. While the submissions extended into three afternoons, the breadth of the material covered was large. As to costs, there was very mixed success. The plaintiff was primarily successful on the documents issues, and the defendants were primarily successful on the questioning issues. Costs of this application will be in the cause on the same scale and multiplier or method of fixation as is ultimately chosen by the trial justice in this matter for the trial.

Heard on the February 1, 8, 29 and Oral Decision delivered March 11, 2106.
Dated at the City of Calgary, Alberta this 30th day of March, 2016.

J. Farrington
M.C.C.Q.B.A.

Appearances:

Lenard Sali and Michael Mysak
for the Plaintiff NEP Canada ULC

Roger Smith Kelly Moffet-Burima and Robert Beeman
for the Defendants MEC Op LLC, MEC Op Transaction 1 ULC and Merit Energy Company LLC

John Campbell and Salvatore Shirose *Appellants*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* CAMPBELL

File No.: 25780.

1998: May 28; 1999: April 22.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Abuse of process — Stay of proceedings — Reverse sting operation involving police "sale" of illegal drugs to drug organization executives — Whether reverse sting operation abuse of process — Narcotic Control Act, R.S.C., 1985, c. N-1, ss. 2 "traffic", 4 — Narcotic Control Regulations, C.R.C., c. 1041, s. 3(1) — Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, s. 37.

Evidence — Privilege — Solicitor-client privilege — Reverse sting operation involving police "sale" of illegal drugs to drug organization executives — RCMP officer consulting Department of Justice lawyer as to legality of planned reverse sting operation — Claim made that reverse sting operation predicated on its being considered legal — Defence wanting to test disclosure of legal advice received by RCMP — Whether communications between RCMP and Department of Justice lawyer should be disclosed.

The RCMP were alleged to have violated the *Narcotic Control Act* by selling a large quantity of hashish to senior "executives" in a drug trafficking organization as part of a reverse sting operation. The appellants, as purchasers, were charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose. The trial judge found the appellants guilty as charged but, before sentencing, heard their motion for a stay of any further steps in the proceeding. The appellants argued that the reverse sting constituted illegal police conduct which "shocks the conscience of the community and is so detrimental to the proper adminis-

John Campbell et Salvatore Shirose *Appelants*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: R. *c.* CAMPBELL

N° du greffe: 25780.

1998: 28 mai; 1999: 22 avril.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Abus de procédure — Arrêt des procédures — Opération policière de «vente surveillée» de drogues illégales à des dirigeants d'une organisation de trafic de drogue — L'opération de vente surveillée est-elle un abus de procédure? — Loi sur les stupéfiants, L.R.C. (1985), ch. N-1, art. 2 «faire le trafic», 4 — Règlement sur les stupéfiants, C.R.C., ch. 1041, art. 3(1) — Loi sur la Gendarmerie royale du Canada, L.R.C. (1985), ch. R-10, art. 37.

Preuve — Secret professionnel de l'avocat — Opération policière de vente surveillée de drogues illégales à des dirigeants d'une organisation de trafic de drogue — Consultation d'un avocat du ministère de la Justice par un agent de la GRC au sujet de la légalité de l'opération de vente surveillée projetée — Il est allégué que l'opération de vente surveillée était fondée sur la croyance dans sa légalité — La défense veut vérifier la teneur de l'avis juridique obtenu par la GRC — Les communications entre la GRC et l'avocat du ministère de la Justice doivent-elles être divulguées?

Il a été allégué que la GRC a contrevenu à la *Loi sur les stupéfiants* en vendant une importante quantité de haschisch à de hauts «dirigeants» d'une organisation de trafic de drogue, dans le cadre d'une opération de vente surveillée. En tant qu'acheteurs, les appelants ont été inculpés de complot en vue de faire le trafic de résine de cannabis et de complot en vue de posséder de la résine de cannabis pour en faire le trafic. Le juge du procès a déclaré les appelants coupables des infractions reprochées, mais, avant de prononcer la peine, il a entendu leur requête en arrêt des procédures. Les appelants ont soutenu que la vente surveillée est une activité policière

tration of justice that it warrants judicial intervention". The stay was refused by the courts below.

As part of their case for a stay the appellants sought, but were denied, access to the legal advice provided to the police by the Department of Justice on which the police claimed to have placed good faith reliance. The Crown's position implied that the RCMP acted in accordance with legal advice.

At issue here is the effect, in the context of the "war on drugs", of alleged police illegality on the grant of a judicial stay of proceedings, and related issues regarding the solicitor-client privilege invoked by the RCMP and pre-trial disclosure of solicitor-client communications to which privilege has been waived.

Held: The appeal should be allowed in part.

At this stage of the proceedings, the door is finally and firmly closed against both appellants on the question of guilt or innocence notwithstanding the contention of one appellant that the conspiracy alleged by the Crown, and encompassed in the indictment, was a larger agreement than his demonstrated involvement. The appellant was clearly able to ascertain the conspiracy alleged against him from a plain reading of the indictment as was required by the jurisprudence.

The effect of police illegality on an application for a stay of proceedings depends very much on the facts of a particular case. This case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation. Here, the RCMP acted in a manner facially prohibited by the *Narcotic Control Act*. Their motive in doing so does not matter because, while motive may be relevant for some purposes, it is intent, not motive, that is an element of a full *mens rea* offence.

A police officer investigating a crime occupies a public office initially defined by the common law and subsequently set out in various statutes and is not acting as a government functionary or as an agent. Here, the only issue was the status of an RCMP officer in the course of a criminal investigation and in that regard the police are independent of the control of the executive government.

illégale qui «choque la conscience de la collectivité et porte préjudice à l'administration régulière de la justice au point qu'[elle] justifie une intervention des tribunaux». Les tribunaux d'instance inférieure ont refusé l'arrêt des procédures.

Dans le cadre de leur requête en arrêt des procédures, les appelants ont tenté en vain d'obtenir l'avis juridique que le ministère de la Justice avait fourni à la police et sur lequel cette dernière a affirmé s'être fondée de bonne foi. La position du ministère public donnait à croire que la GRC avait agi conformément à un avis juridique.

Il s'agit en l'espèce d'examiner, dans le contexte de la «guerre contre la drogue», l'effet de l'illégalité policière alléguée relativement à l'arrêt des procédures et aux questions connexes du secret professionnel de l'avocat invoqué par la GRC et de la divulgation avant procès de communications entre avocat et client dans le cas où le secret professionnel est levé.

Arrêt: Le pourvoi est accueilli en partie.

À cette étape des procédures, la question de la culpabilité ou de l'innocence des appelants est définitivement et fermement réglée malgré la prétention de l'un des appelants que le complot allégué par le ministère public et visé par l'acte d'accusation consistait en une entente plus globale que ce qui a été démontré relativement à sa participation. Il est clair que, comme l'exige la jurisprudence, la simple lecture de l'acte d'accusation permettait à l'appelant de déterminer le complot qui lui était reproché.

L'incidence de l'illégalité commise par la police sur une demande d'arrêt des procédures dépend beaucoup des faits d'une affaire donnée. Il faut procéder au cas par cas afin de soupeser les facteurs particuliers de chaque situation factuelle. En l'espèce, les agents de la GRC ont agi d'une manière en apparence interdite par la *Loi sur les stupéfiants*. Leur mobile n'a aucune importance parce que, bien que le mobile puisse être pertinent à certaines fins, c'est l'intention, et non le mobile, qui constitue l'élément d'une infraction de *mens rea* complète.

Un policier qui enquête sur un crime occupe une charge publique définie à l'origine par la common law et établie par la suite dans différentes lois et n'agit ni en tant que fonctionnaire ni en tant que mandataire de qui que ce soit. En l'espèce, la seule question était le statut d'un agent de la GRC agissant dans le cadre d'une enquête criminelle, et, à cet égard, la police n'est pas sous le contrôle de la branche exécutive du gouvernement.

Even if the police could be considered agents of the Crown for some purposes, and even if the Crown itself were not bound by the *Narcotic Control Act*, in this case the police stepped outside the lawful ambit of their agency, and whatever immunity was associated with that agency was lost. Parliament made it clear that the RCMP must act "in accordance with the law" and that illegality by the RCMP is neither part of any valid public purpose nor necessarily "incidental" to its achievement. If some form of public interest immunity is to be extended to the police to assist in the "war on drugs", it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available.

Même si les policiers pouvaient être considérés comme des mandataires de l'État dans certains cas et que ce dernier n'était pas lié par la *Loi sur les stupéfiants*, les policiers en l'espèce ont outrepassé les limites légales de leur mandat et, si ce dernier comportait une immunité, celle-ci a été perdue. Le Parlement a bien précisé que la GRC doit agir «conformément au droit» et qu'une illégalité commise par la GRC n'entre dans le cadre d'aucune fin d'intérêt public valide et n'est pas nécessairement «accessoire» à sa réalisation. S'il y a lieu de conférer à la police une certaine forme d'immunité d'intérêt public pour l'aider dans la «guerre contre la drogue», il revient au Parlement de circonscrire la nature et la portée de l'immunité ainsi que les faits qui y donnent ouverture.

Even if it should turn out here that the police acted contrary to the legal advice provided by the Department of Justice, there would still be no right to an automatic stay. The trial judge would still have to consider any other information or explanatory circumstances that emerge during the inquiry into whether the police or prosecutorial conduct "shocks the conscience of the community". A police force that chooses to operate outside the law is not the same thing as a police force that made an honest mistake on the basis of erroneous advice. There was no reason to think the RCMP ignored the advice it was given, but as the RCMP did make an issue of the legal advice it received in response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated.

Même s'il s'avérait que les actes de la police allaient à l'encontre des conseils juridiques reçus du ministère de la Justice, cela ne donnerait pas lieu automatiquement à un arrêt. Le juge du procès devrait encore prendre en considération tout autre renseignement ou circonstance explicative qui se dégage de l'examen de la question de savoir si la conduite de la police ou de la poursuite «choque la conscience de la collectivité». Une force policière qui choisit d'agir hors la loi n'est pas la même chose qu'une force policière qui a commis une erreur de bonne foi fondée sur un avis erroné. Il n'y a aucune raison de penser que la GRC a écarté l'avis reçu, mais, puisque la GRC l'a invoqué en réponse à la demande d'arrêt des procédures, les appelants avaient droit à ce que la teneur de cet avis soit corroborée.

The RCMP must be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Here, the officer's consultation with the Department of Justice lawyer fell squarely within this functional definition, and the fact that the lawyer worked for an "in-house" government legal service did not affect the creation or character of the privilege. Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

Il faut que la GRC soit capable d'obtenir des conseils juridiques professionnels relativement à des enquêtes criminelles sans devoir subir l'effet paralysant de la divulgation potentielle de confidences à l'occasion de procédures ultérieures. En l'espèce, la consultation donnée à l'agent par l'avocat du ministère de la Justice cadre parfaitement avec cette définition fonctionnelle, et le fait que l'avocat soit à l'emploi d'un service juridique gouvernemental «interne» ne change rien à l'égard de la création ou de la nature du privilège. Le secret professionnel de l'avocat s'appliquera ou non à ces situations selon la nature de la relation, l'objet de l'avis et les circonstances dans lesquelles il est demandé et fourni.

An exception to the principle of confidentiality of solicitor-client communications exists where those communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime. Here, the officer sought advice as to whether or not the operation he had in mind was lawful. The privilege is not automatically destroyed if the transaction turns out to be illegal.

Une exception au principe de la confidentialité des communications avocat-client existe dans les cas où ces communications sont de nature criminelle ou qu'elles visent à obtenir un avis juridique pour faciliter la perpétration d'un crime. En l'espèce, l'agent a demandé un avis sur légalité de l'opération qu'il projetait. Le privilège n'est pas automatiquement écarté si l'opération se révèle illégale.

Destruction of the solicitor-client privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator". The RCMP, by adopting the position that the decision to proceed with the reverse sting had been taken with the participation and agreement of the Department of Justice, belatedly brought itself within the "future crimes" exception and put in question the continued existence of its privilege.

Another exception to the rule of confidentiality of solicitor-client privilege may arise where adherence to that rule would have the effect of preventing the accused from making full answer and defence. Although the entire jeopardy of the appellants remained an open issue until disposition of the stay application, the appellants were not providing "full answer and defence" to the stay application. They were the moving parties of an application being defended by the Crown. The appellants' initiative in launching a stay application does not, of itself, authorize a fishing expedition into solicitor-client communications to which the Crown is a party.

The RCMP put the officer's good faith belief in the legality of the reverse sting in issue, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP thus waived the right to shelter the contents of that advice behind solicitor-client privilege. It is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communications of which it forms a part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. Non-disclosure of information clearly relevant to the good faith reliance issue here cannot properly be disposed of by adverse inferences. The appellants were entitled to disclosure of legal advice with respect to: (1) the legality of the police posing as sellers of drugs to persons believed to be distributors of drugs; (2) the legality of the police offering drugs for sale to persons believed to be distributors of drugs; and (3) the possible consequences to the members of the RCMP who engaged in one or both of the above, including the likelihood of prosecution. If there is a dispute concerning the adequacy of disclosure, the disputed documents or information should be provided by the Crown to the trial judge for an initial determination

La levée du privilège exige plus que la preuve de l'existence d'un crime et de la consultation préalable d'un avocat. Il faut quelque élément tendant à établir que l'avis a facilité le crime ou que l'avocat est devenu «dupe ou comploteur». En soutenant que la décision d'exécuter l'opération de vente surveillée a été prise avec la participation et l'accord du ministère de la Justice, la GRC s'est placée en fin de compte dans le cadre de l'exception de «crime projeté» et a mis en question le maintien du privilège.

Une autre exception au principe du secret professionnel de l'avocat peut prendre naissance lorsque le respect de ce principe aurait pour effet d'empêcher l'accusé de faire valoir une défense pleine et entière. Bien que le sort entier des appelants demeure non réglé jusqu'à ce que la demande d'arrêt des procédures soit tranchée, les appelants ne faisaient pas valoir une «défense pleine et entière» à la demande d'arrêt des procédures. Ce sont eux qui ont présenté cette demande à laquelle le ministère public s'oppose en défense. La décision des appelants de demander l'arrêt des procédures n'autorise pas en soi une recherche à l'aveuglette dans les communications entre avocat et client auxquelles le ministère public a pris part.

La GRC a fait valoir la croyance de bonne foi de l'agent dans la légalité de l'opération de vente surveillée et elle a affirmé s'être fiée aux consultations qu'il avait eues avec le ministère de la Justice afin d'étayer cet argument. La GRC a donc renoncé au droit d'abriter le contenu de cet avis derrière le secret professionnel de l'avocat. Il n'est pas toujours nécessaire que le client divulgue effectivement une part du contenu de l'avis juridique pour qu'il y ait renonciation au privilège protégeant les communications pertinentes dont l'avis fait partie. En l'espèce, il était suffisant que la GRC appuie son argument de la bonne foi sur l'avis non divulgué de l'avocat alors que l'existence ou la non-existence de la bonne foi invoquée dépendait du contenu de cet avis. On ne peut pas en l'espèce régler par inférences défavorables la question de l'absence de divulgation de renseignements manifestement pertinents à l'égard du moyen de l'avis suivi de bonne foi. Les appelants ont droit à ce que leur soient divulgués les avis juridiques concernant (1) la légalité du fait que des policiers prétendent être des vendeurs de drogue auprès de personnes soupçonnées d'être des distributeurs de drogue; (2) la légalité du fait que des policiers offrent de vendre de la drogue à des personnes soupçonnées d'être des distributeurs de drogue; (3) les conséquences possibles pour les membres de la GRC qui se livrent à l'une des activités susmentionnées, ou aux deux, y compris la possibilité de

whether this direction has been complied with. The trial judge should then determine what, if any, additional disclosure should be made to the appellants.

poursuites. En cas de conflit au sujet du caractère suffisant de la divulgation, les documents ou renseignements contestés doivent être remis par le ministère public au juge du procès qui décidera d'abord si la présente ordonnance a été respectée. Le juge du procès devra alors décider quelle information supplémentaire, s'il en est, devrait être divulguée aux appelants.

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APPEAL from a judgment of the Ontario Court of Appeal (1997), 32 O.R. (3d) 181, 96 O.A.C. 372, 115 C.C.C (3d) 310, 5 C.R. (5th) 391, [1997] O.J. No. 120 (QL), affirming a judgment of the Ontario Court (General Division), [1995] O.J. No. 431 (QL), denying the appellants' application for a stay of proceedings. Appeal allowed in part.

Alan D. Gold, for the appellant John Campbell.

Irwin Koziebrocki, for the appellant Salvatore Shirose.

Robert W. Hubbard, *Fergus C. O'Donnell* and *John North*, for the respondent.

The judgment of the Court was delivered by

BINNIE J. — In this appeal the Court is asked to consider some implications of the constitutional principle that everyone from the highest officers of the state to the constable on the beat is subject to the ordinary law of the land. Here the police were alleged to have violated the *Narcotic Control Act*, R.S.C., 1985, c. N-1, by selling a large quantity of hashish (cannabis resin) to senior "executives" in a drug trafficking organization as part of what counsel called a "reverse sting" operation. The appellants, as purchasers, were charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose. The trial judge found the appellants guilty as charged but, before sentencing, heard the appellants' motion for a stay of any further steps in the proceeding. The appellants argued that the reverse sting constituted illegal police conduct which "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention" (see *R. v. Power*, [1994] 1

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1997), 32 O.R. (3d) 181, 96 O.A.C. 372, 115 C.C.C (3d) 310, 5 C.R. (5th) 391, [1997] O.J. No. 120 (QL), qui a confirmé un jugement de la Cour de l'Ontario (Division générale), [1995] O.J. No. 431 (QL), rejetant la demande des appelants en vue d'un arrêt des procédures. Pourvoi accueilli en partie.

Alan D. Gold, pour l'appelant John Campbell.

Irwin Koziebrocki, pour l'appelant Salvatore Shirose.

Robert W. Hubbard, *Fergus C. O'Donnell* et *John North*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — Dans le cadre du présent pourvoi, notre Cour est appelée à examiner certaines incidences du principe constitutionnel que tous, du plus haut fonctionnaire de l'État au simple patrouilleur, sont soumis au droit commun du pays. En l'espèce, il est allégué que la police a contrevenu à la *Loi sur les stupéfiants*, L.R.C. (1985), ch. N-1, en vendant une importante quantité de haschisch (résine de cannabis) à de hauts «dirigeants» d'une organisation de trafic de drogue, dans le cadre de ce que les avocats appellent une opération de «vente par des agents d'infiltration» ou «vente surveillée». En tant qu'acheteurs, les appelants ont été inculpés de complot en vue de faire le trafic de résine de cannabis et de complot en vue de posséder de la résine de cannabis pour en faire le trafic. Le juge du procès a déclaré les appelants coupables des infractions reprochées, mais, avant de prononcer la peine, il a entendu leur requête en arrêt des procédures. Les appelants ont soutenu que la vente surveillée est

S.C.R. 601, at p. 615). The stay was refused by the courts below.

2 As part of their case for a stay the appellants sought, but were denied, access to the legal advice provided to the police by the Department of Justice on which the police claimed to have placed good faith reliance. The Crown indicated that the undisclosed advice assured the police, rightly or wrongly, that sale of cannabis resin in the circumstances of a reverse sting was lawful. The appellants argue that the truth of this assertion can only be tested by a review of the otherwise privileged communications.

3 We are therefore required to consider in the context of the "war on drugs", the effect of alleged police illegality on the grant of a judicial stay of proceedings, and related issues regarding the solicitor-client privilege invoked by the RCMP and pretrial disclosure of solicitor-client communications to which privilege has been waived.

Facts

4 In the autumn of 1991, the RCMP initiated a reverse sting operation involving undercover officers posing as large-scale hashish vendors. This operation was undertaken after Corporal Richard Reynolds of the RCMP became aware of the decision of the Quebec Superior Court in *R. v. Lore* (an unreported decision of Pinard J., March 8, 1991, No. 500-01-013926-891) which, in Cpl. Reynolds' view, gave implicit approval to a reverse sting operation in which police offered to sell narcotics to suspected drug traffickers. Cpl. Reynolds contacted Mr. James Leising, an experienced senior lawyer employed by the Department of Justice in Toronto, to obtain professional advice as to the legality of a reverse sting operation. Seven or eight meetings were held between Cpl. Reynolds and the Department of Justice lawyer in

une activité policière illégale qui «choque la conscience de la collectivité et porte préjudice à l'administration régulière de la justice au point qu'[elle] justifie une intervention des tribunaux» (voir *R. c. Power*, [1994] 1 R.C.S. 601, à la p. 615). Les tribunaux d'instance inférieure ont refusé l'arrêt des procédures.

Dans le cadre de leur demande, les appelants ont tenté en vain d'obtenir l'avis juridique que le ministère de la Justice avait fourni à la police et sur lequel cette dernière a affirmé s'être fondée de bonne foi. Le ministère public a indiqué que cet avis non divulgué confirmait à la police, à tort ou à raison, que la vente de résine de cannabis par des agents d'infiltration était légale. Les appelants prétendent que la véracité de cette affirmation peut être vérifiée uniquement par l'examen des communications qui, dans d'autres circonstances, seraient privilégiées.

Il incombe donc à notre Cour d'examiner, dans le contexte de la «guerre contre la drogue», l'effet de l'illégalité policière alléguée relativement à l'arrêt des procédures et aux questions connexes du secret professionnel de l'avocat invoqué par la GRC et de la divulgation avant procès de communications entre avocat et client dans le cas où le secret professionnel est levé.

Les faits

À l'automne 1991, la GRC a entrepris une opération de vente surveillée au moyen d'agents d'infiltration prétendant être des vendeurs de grandes quantités de haschisch. Cette opération a été entreprise après que le capl. Richard Reynolds de la GRC ait pris connaissance de la décision rendue par la Cour supérieure du Québec dans *R. c. Lore* (décision inédite rendue par le juge Pinard le 8 mars 1991, nº 500-01-013926-891) qui, selon lui, approuvait implicitement les opérations de ce genre, dans lesquelles des policiers offrent de vendre des stupéfiants à de présumés trafiquants de drogue. Le caporal Reynolds a communiqué avec M. James Leising, qui est un avocat principal d'expérience du ministère de la Justice à Toronto, afin d'obtenir un avis juridique concernant la légalité d'une opération de vente par des agents d'infiltra-

relation to the proposed operation. In September of 1991, approval by senior RCMP officers was given to initiate the reverse sting. Using the help of a police informant, the police contacted two groups of potential purchasers through the appellant Shirose. Negotiations with these groups included showing the hashish to prospective purchasers. However, the RCMP was careful not to provide any samples, despite requests to do so. The hashish remained under the control of the RCMP at all times. The appellant Campbell eventually participated in the negotiations as a financier for one of the two groups and in January 1992, the appellant Campbell, with the help of the appellant Shirose, agreed to pay $270,000 for 50 kilograms of cannabis resin. The retail value of these drugs at street level, as found by the trial judge, was close to $1 million. Instead of receiving the expected 50 kilograms of cannabis resin in exchange for payment, however, the appellants were arrested and charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for the purpose of trafficking.

In advance of the trial, to support their submission that if convicted, the proceedings should be stayed, the appellants sought to subpoena Mr. Leising from the Department of Justice to testify about the communications that had occurred with Cpl. Reynolds with respect to the legality of the reverse sting operation. The trial judge quashed the subpoena on the grounds that the communications were protected by solicitor-client privilege and did not fall within one of the recognized exceptions. Subsequently, during the application to stay the proceedings, counsel for the appellants sought to examine Cpl. Reynolds on the content of his communications with the Department of Justice. Again the trial judge upheld the assertion of solicitor-client privilege and denied the appellants' application to force disclosure of these communications. Based on the admissible evidence, the trial judge then dismissed the stay of proceedings application. The appellant Shirose was sentenced to six years in penitentiary. The appellant Campbell was

tion. Le caporal Reynolds et l'avocat du ministère de la Justice se sont rencontrés sept ou huit fois au sujet de l'opération projetée. En septembre 1991, sa mise en œuvre a été approuvée par des officiers supérieurs de la GRC. Avec l'aide d'un indicateur de police, des policiers ont communiqué avec deux groupes d'acheteurs potentiels par l'entremise de l'appelant Shirose. Dans le cadre des négociations avec ces groupes, du haschisch a été montré à des acheteurs potentiels. Toutefois la GRC a pris soin de ne pas fournir d'échantillon, bien qu'on lui en ait demandé. La drogue est toujours demeurée en la possession de la GRC. L'appelant Campbell s'est ensuite joint aux négociations en tant que financier pour l'un des deux groupes et, en janvier 1992, avec l'aide de l'appelant Shirose, il a convenu de payer 270 000 $ pour 50 kg de résine de cannabis. Le juge du procès a conclu que la valeur de détail de la drogue dans la rue se situait à près de un million de dollars. Toutefois, plutôt que de recevoir les 50 kg de résine de cannabis prévus en contrepartie du paiement, les appelants ont été arrêtés et inculpés de complot en vue de faire le trafic de résine de cannabis et de complot en vue de posséder de la résine de cannabis pour en faire le trafic.

Avant le procès, pour appuyer leur argument qu'en cas de déclaration de culpabilité, il devrait y avoir arrêt des procédures, les appelants ont cherché à assigner M. Leising, du ministère de la Justice, à témoigner relativement aux communications avec le capl. Reynolds concernant la légalité de l'opération de vente surveillée. Le juge du procès a annulé le subpoena aux motifs que les communications étaient protégées par le secret professionnel de l'avocat et qu'elles ne faisaient pas l'objet de l'une des exceptions reconnues. Par la suite, au cours de l'audition de la demande d'arrêt des procédures, les avocats des appelants ont voulu interroger le capl. Reynolds sur le contenu de ses communications avec le ministère de la Justice. De la même façon, le juge du procès a accepté l'argument qu'elles étaient protégées par le secret professionnel de l'avocat et il a rejeté la demande des appelants, qui visait à obtenir la divulgation de ces communications. Se fondant sur la preuve admissible, le juge du procès a alors rejeté la demande

sentenced to nine years in penitentiary, plus forfeiture of the purchase price paid to the police. The Court of Appeal dismissed the appellants' appeal except to remit the issue of forfeiture to the trial judge to await an application by the Attorney General, if he sees fit to make it, for forfeiture of the purchase price under s. 462.37 of the *Criminal Code*, R.S.C., 1985, c. C-46.

d'arrêt des procédures. L'appelant Shirose a reçu une peine de six ans de pénitencier et l'appelant Campbell une peine de neuf ans de pénitencier en sus de la confiscation du prix d'achat payé à la police. La Cour d'appel a rejeté leur appel en renvoyant toutefois la question de la confiscation au juge du procès afin d'attendre que le procureur général, s'il l'estime approprié, présente une demande de confiscation du prix d'achat en vertu de l'art. 462.37 du *Code criminel*, L.R.C. (1985), ch. C-46.

Evidence of Police "Good Faith"

La preuve de la «bonne foi» de la police

6 On the return of the stay motion, the Crown set out to establish that the police had at all stages acted in good faith and in the belief that the reverse sting was legal. At the application for a stay of proceedings hearing, counsel for the Crown questioned Cpl. Reynolds as follows:

À l'audition de la requête en arrêt des procédures, le ministère public a tenté de démontrer que, tout au long de l'opération, la conduite de la police avait été dictée par la bonne foi et par la croyance que la vente surveillée était légale. L'avocat du ministère public a posé les questions suivantes au capl. Reynolds:

[TRADUCTION]

Q. Was your project [the reverse sting operation] tailored on the outlines of the project or [*sic*] the *Lore* case?

Q. Votre projet [de vente surveillée] était-il conçu de la même façon que celui de l'affaire *Lore*?

A. Yes, sir.

A. Oui, monsieur.

Q. And it was your understanding as a result of the *Lore* case that that was lawful behaviour?

Q. Et vous aviez déduit de l'affaire *Lore* que cette façon de faire était légale?

A. Yes, sir.

A. Oui, monsieur.

It emerged that Cpl. Reynolds had consulted the Department of Justice about the legality of the reverse sting. Appellants' counsel pursued this issue with Cpl. Reynolds as follows:

Il est ressorti que le capl. Reynolds avait consulté le ministère de la Justice au sujet de la légalité de la vente surveillée. L'avocat d'un des appelants a poursuivi dans cette veine lorsqu'il a interrogé le capl. Reynolds:

[TRADUCTION]

Q. So to return then, based upon this [*Lore*] decision coming to your attention, did you also obtain any other advice regarding any concerns you might have had about this type of an operation?

Q. Alors, pour revenir à cela, après avoir pris connaissance de cette affaire [*Lore*], avez-vous obtenu d'autres opinions sur des préoccupations que vous pouviez avoir au sujet de ce genre d'opération?

A. Sought legal advice.

A. J'ai demandé un avis juridique.

Q. And from whom did you seek legal advice?

Q. Et, à qui l'avez-vous demandé?

A. The Department of Justice, Toronto.

A. Au ministère de la Justice à Toronto.

Q. And was it one individual or more than one individual?

Q. Et, à une ou à plusieurs personnes?

A. One individual.

Q. And who was that?

A. Mr. Leising.

The precise purpose of obtaining this legal advice came out under further questioning from appellants' counsel, as follows:

Q. Now that you know what I am reading from sir, what I asked was, "The issues for which advice was sought concerned the propriety of the police posing as sellers of drugs to persons believed to be distributors of drugs." Is that accurate?

A. That's correct.

Q. "The propriety of the police offering hashish for sale to persons believed to be distributors of hashish." Is that correct?

A. Yes, sir.

Q. "The release of a sample of hashish to certain of those persons." Is that correct?

A. Yes, sir.

Q. "The possible consequences to the members who engaged in such conduct." Is that correct?

A. Yes, sir.

. . .

Q. When you went to Mr. Leising, were you concerned about any of the members of your force who did engage in this operation, being prosecuted?

A. That would have been one of the issues.

Q. And then to return to Officer Plomp's certificate, the last thing he said is, "and the issue of entrapment." Was that one of the items on the agenda with Mr. Leising?

A. Yes, sir.

The Crown successfully objected to counsel for the appellants questioning Cpl. Reynolds with respect to the actual advice given because of the claim of solicitor-client privilege. The appellants' counsel then attempted to use this objection to narrow the

A. Une personne.

Q. Et, qui était cette personne?

A. M. Leising.

Le but précis de l'obtention de l'avis juridique ressort de questions posées ultérieurement par l'avocat d'un des appelants:

[TRADUCTION]

Q. Maintenant que vous savez de quel document je fais lecture, ma question était: «Les questions sur lesquelles l'avis était demandé étaient de savoir s'il était approprié que des policiers se fassent passer pour des vendeurs de drogue vis-à-vis de personnes soupçonnées d'être des distributeurs de drogue». Est-ce exact?

A. C'est exact.

Q. «La question de savoir s'il était approprié que des policiers offrent de vendre du haschisch à des personnes soupçonnées d'être des distributeurs de haschisch». Est-ce exact?

A. Oui, monsieur.

Q. «Le fait de donner un échantillon de haschisch à certaines de ces personnes». Est-ce exact?

A. Oui, monsieur.

Q. «Les conséquences possibles pour les agents qui se livraient à de telles activités». Est-ce exact?

A. Oui, monsieur.

. . .

Q. Lorsque vous avez rencontré M. Leising, étiez-vous préoccupé par la possibilité que l'un des agents de votre force qui participaient à l'opération puisse être poursuivi?

A. C'était une des questions.

Q. Et, pour revenir maintenant au certificat de l'agent Plomp, la dernière chose qu'il a dite est: «et la question de la provocation policière». S'agissait-il d'une des questions discutées avec M. Leising?

A. Oui, monsieur.

Le ministère public a fait objection, en vertu du secret professionnel, à ce que les avocats des appelants interrogent le capl. Reynolds sur le contenu de l'avis qui lui avait été fourni et son objection a été acceptée. L'avocat d'un des appelants a alors

potential ambit of the Crown's "good faith" argument:

So it is my respectful submission that the Crown certainly cannot argue that the police acted in good faith because they acted on legal advice, because we don't know what legal advice they got. We don't know what qualifications or conditions were attached. We don't know whether they were told, 'This is going to be illegal and you're on your own. You're at risk.' We don't know if they were told, 'It's illegal but don't worry, we'll never prosecute you.'

So, with respect, I certainly don't want to hear the argument that, 'Oh well, the police acted in good faith because they acted on legal advice.' because then I would like to know what that advice was so I can see whether that's true or not. So in my submission, if they are going to rely on solicitor/client privilege, then that issue has to drop completely out of the case.

THE COURT: Well I am sure the Crown will have something to say about that.

MR. GOLD: Well my suspicion is that they probably won't because they might be aware that that might open the door to further proceedings to an argument for disclosure of it, but I guess I will have to wait and see Your Honour. [Emphasis added.]

Judgments

Ontario Court (General Division), [1995] O.J. No. 431 (QL)

Ruling on Application for Stay of Proceedings

7 Caswell J. divided her analysis of the stay application into two parts. In the first part, she dealt with the issue of entrapment as a sub-issue of the abuse of process doctrine. In the second part, she dealt with prosecutorial conduct more generally as giving rise to potential abuses of process.

8 In discussing entrapment, Caswell J. considered the judgment of this Court in *R. v. Mack*, [1988] 2

tenté d'utiliser cette objection pour affaiblir la portée de l'argument de «bonne foi» du ministère public:

[TRADUCTION] Je soutiens donc respectueusement que le ministère public ne peut certainement pas prétendre que les policiers ont agi de bonne foi en se fondant sur un avis juridique, parce que nous ne connaissons pas le contenu de l'avis juridique qu'ils ont reçu. Nous ne connaissons pas la nature des réserves et des conditions qui y étaient attachées. Nous ne savons pas s'ils se sont fait dire: «C'est illégal et vous le ferez à vos propres risques et périls. Vous prenez un risque». Nous ne savons pas s'ils se sont fait dire: «C'est illégal, mais ne vous inquiétez pas; nous ne vous poursuivrons jamais».

Donc, avec égards, je ne veux certainement pas entendre l'argument que: «Et bien, les policiers ont agi de bonne foi parce qu'ils se sont fondés sur un avis juridique», parce qu'à ce moment-là, je voudrais bien connaître le contenu de cet avis pour savoir si c'est vrai ou non. Je soutiens donc que s'ils décident d'invoquer le secret professionnel de l'avocat, il faut alors que cette question soit complètement écartée de l'affaire.

LA COUR: Bien, je suis convaincue que le ministère public aura quelque chose à dire à ce sujet.

M. GOLD: Bien, j'ai plutôt l'impression qu'ils ne diront rien parce qu'ils doivent savoir que cela pourrait ouvrir la porte à d'autres procédures, à une demande de divulgation de l'avis, mais je suppose que je dois attendre et voir ce qui va se passer, madame le juge. [Je souligne.]

Les jugements antérieurs

La Cour de l'Ontario (Division générale), [1995] O.J. No. 431 (QL)

La décision sur la demande d'arrêt des procédures

Le juge Caswell a séparé en deux parties son examen de la demande d'arrêt des procédures. Dans la première, elle a examiné la provocation policière en tant que sous-question de la théorie de l'abus de procédure. Dans la deuxième, elle s'est penchée, de façon générale, sur le type de conduite de la poursuite susceptible de donner naissance à des abus de procédure.

Dans son analyse de la provocation policière, le juge Caswell a examiné l'arrêt de notre Cour

S.C.R. 903, in which Lamer J. (as he then was) pointed out that a stay of proceedings is not to be considered as a method of disciplining the police or the prosecution, but rather, that the Court is concerned with the larger issue of maintenance of public confidence in the judicial process. The trial judge noted that entrapment may be established where (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides*, or (b) having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing a mere opportunity and actually induce the commission of an offence. Caswell J. held that the police had acted with reasonable suspicion with respect to both appellants. She noted that the appellant Shirose had been involved in a search for a large-scale supplier of hashish long before the RCMP began its operation. She considered that the appellant Campbell volunteered himself "out of the woodwork" and joined the conspiracy completely on his own initiative. As to the allegation that the RCMP had induced the commission of the offences, Caswell J. concluded, based on the criteria set out in *Mack*, that the police conduct had not induced the offence or otherwise gone beyond "the limits that society deems proper". Accordingly, there was no entrapment on the facts of this case.

R. c. Mack, [1988] 2 R.C.S. 903, dans lequel le juge Lamer (alors juge puîné) soulignait que l'arrêt des procédures ne devait pas être considéré comme une façon de discipliner la police ou la poursuite, mais que la Cour s'intéressait à la question plus large du maintien de la confiance du public dans le processus judiciaire. Le juge du procès a souligné que la provocation policière peut être établie lorsque: a) les autorités fournissent à quelqu'un l'occasion de commettre une infraction en l'absence de soupçon raisonnable ou en agissant de mauvaise foi; ou, b) ayant des soupçons raisonnables ou au cours d'une véritable enquête, elles ne se contentent pas de fournir une occasion de commettre une infraction mais incitent réellement à la commettre. Le juge Caswell a conclu que la police avait agi sur la foi d'un soupçon raisonnable à l'égard des deux appelants. Elle a fait remarquer que l'appelant Shirose avait été impliqué dans la recherche d'un important fournisseur de haschisch bien avant que la GRC ne débute son opération. Elle a conclu que l'appelant Campbell était «sorti de nulle part» et avait pris part au complot entièrement de son propre chef. Quant à l'allégation selon laquelle la GRC avait provoqué la perpétration des infractions reprochées, le juge Caswell s'est fondée sur les critères énoncés dans l'arrêt *Mack* pour conclure que la conduite de la police n'était pas à l'origine de l'infraction et que les policiers n'avaient pas outrepassé [TRADUCTION] «les limites que la société juge acceptables». Les faits de la présente affaire indiquaient donc l'absence de provocation policière.

In considering the broader aspects of the doctrine of abuse of process, Caswell J. concluded that it was not necessary for her to decide whether or not the reverse sting operation was illegal. Instead, she posed the question whether this is one of the "clearest cases" in which the proceedings are so overwhelmingly unfair that to proceed would be contrary to the interests of justice. After reviewing various cases involving police conduct that did not result in stays of proceedings, and measuring the conduct of the police and Crown counsel in this case against the criteria set out in *Mack*, *supra*, *R. v. Conway*, [1989] 1 S.C.R. 1659, *R. v. Showman*, [1988] 2 S.C.R. 893, and *Power*, *supra*, Caswell J.

9

Après avoir examiné les aspects généraux de la théorie de l'abus de procédure, le juge Caswell a conclu qu'elle n'avait pas à décider si l'opération de vente surveillée était illégale. Elle s'est plutôt demandé s'il s'agissait de l'un des «cas les plus manifestes», où les procédures sont tellement injustes que leur poursuite serait contraire à l'intérêt de la justice. Après avoir passé en revue différentes affaires qui portaient sur la conduite de la police et qui n'avaient pas donné lieu à l'arrêt des procédures, et après avoir évalué la conduite de la police et de l'avocat du ministère public en l'espèce à la lumière du critère énoncé dans *Mack*, précité, *R. c. Conway*, [1989] 1 R.C.S. 1659, *R. c.*

concluded that it was in the interest of justice to proceed to enter the conviction and impose sentence. In her view, society would not be offended by the acts of the prosecution. Society would be offended by the imposition of a stay.

Showman, [1988] 2 R.C.S. 893, et *Power*, précité, le juge Caswell a conclu qu'il était dans l'intérêt de la justice de prononcer la déclaration de culpabilité et d'infliger la peine. Elle était d'avis que les actes de la poursuite n'étaient pas de nature à offenser la société, mais que celle-ci serait offensée par une ordonnance d'arrêt des procédures.

Court of Appeal for Ontario (1997), 32 O.R. (3d) 181

La Cour d'appel (1997), 32 O.R. (3d) 181

10 Carthy J.A. disagreed with the conclusion of the trial judge that it was not necessary to determine the legality of the police conduct. Also basing himself on the judgment of Lamer J. in *Mack*, *supra*, Carthy J.A. considered that police illegality was an important factor to be weighed in evaluating an accused's claim of abuse of process and, indeed, he considered that illegality may in certain instances be determinative.

Le juge Carthy était en désaccord avec la conclusion du juge du procès selon laquelle il n'était pas nécessaire de déterminer la légalité de la conduite de la police. Se fondant également sur les motifs rédigés par le juge Lamer dans *Mack*, précité, le juge Carthy a estimé que l'illégalité commise par la police était un facteur important dans l'analyse de l'abus de procédure invoqué par un accusé et qu'en fait cette illégalité pouvait être déterminante dans certains cas.

11 After setting out the relevant portions of the *Narcotic Control Act*, Carthy J.A. noted that the *Narcotic Control Regulations*, C.R.C., c. 1041, s. 3(1), saves the police harmless where possession of a narcotic results from sting operations. There is no corresponding regulation giving the police immunity when they are offering to sell a narcotic. Carthy J.A. concluded that the RCMP's offer to sell a narcotic to the appellants constituted trafficking, and that it was irrelevant that the RCMP had no intention of completing the sale. Therefore, on the face of the statute, the conduct of the RCMP in this case was, in Carthy J.A.'s view, illegal.

Après avoir reproduit les parties pertinentes de la *Loi sur les stupéfiants*, le juge Carthy a souligné que le par. 3(1) du *Règlement sur les stupéfiants*, C.R.C., ch. 1041, exonère la police lorsque des opérations d'infiltration entraînent la possession d'un stupéfiant. Aucune disposition réglementaire équivalente ne confère l'immunité aux policiers lorsqu'ils offrent de vendre un stupéfiant. Le juge Carthy a estimé que l'offre de la GRC de vendre un stupéfiant aux appelants constituait du trafic et que le fait que la GRC n'avait pas l'intention de réaliser la vente était sans pertinence. Il a donc conclu qu'au vu du libellé de la loi, la conduite de la GRC en l'espèce était illégale.

12 Carthy J.A. then considered the Crown's arguments about extending public interest immunity to the RCMP and concluded that the Crown does not exercise sufficient *de jure* control over the activities of RCMP members to justify such immunity from prosecution for breach of the criminal law as it relates to narcotics. As to the related concept of immunity derived from Crown agency, Carthy J.A. considered that, while members of the RCMP are entitled to seek out criminality through a variety of different methods, this mandate does not extend to methods that would be illegal if done by any other

Le juge Carthy s'est alors penché sur l'argument du ministère public selon lequel l'immunité d'intérêt public devrait être étendue à la GRC, et il a conclu que l'État n'exerçait pas un contrôle suffisant, en droit, sur les activités des membres de la GRC pour justifier l'immunité contre des poursuites en vertu des dispositions de droit criminel relatives aux stupéfiants. En ce qui concerne la notion connexe d'immunité découlant du statut de mandataire de l'État, le juge Carthy a conclu que, bien que les membres de la GRC aient le droit de faire échec à la criminalité au moyen de différentes

person. Carthy J.A. examined *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. When Crown agents act within the scope of the public purposes they are statutorily empowered to pursue, they may be entitled to claim Crown immunity, he held, but in this case the RCMP officers had stepped outside the scope of any agency relationship that may have existed.

méthodes, ce mandat ne couvre pas les méthodes qui seraient illégales si elles étaient employées par toute autre personne. Le juge Carthy a analysé l'arrêt *R. c. Eldorado Nucléaire Ltée*, [1983] 2 R.C.S. 551, et a conclu que lorsque des mandataires de l'État agissent dans le cadre des fins d'intérêt public que la loi les autorise à poursuivre, ils peuvent réclamer l'immunité de l'État, mais que, en l'espèce, les agents de la GRC avaient agi hors du cadre de toute relation mandant-mandataire susceptible d'avoir existé.

Carthy J.A. agreed with the trial judge that there was no entrapment. He went on, however, to consider whether the RCMP conduct amounted to an abuse of process for reasons other than entrapment. He noted that the illegal conduct of the RCMP did not involve a trifling amount of drugs. Further, he noted that the illegal conduct was authorized at all levels of the RCMP. He was prepared to infer that the reverse sting was considered lawful by the Department of Justice, and he treated this as an aggravating factor because "the full might of the Crown resources were set upon the task of illegal conduct" (p. 197). Carthy J.A. noted an alternate possibility that the police were acting on their own as "mavericks" contrary to legal advice. While he doubted that this was in fact the case, Carthy J.A. at p. 197 considered this would be

13 Le juge Carthy s'est dit d'accord avec le juge du procès sur le fait qu'il n'y avait pas de provocation policière. Il a toutefois examiné ensuite si la conduite de la GRC équivalait à un abus de procédure pour des motifs autres que la provocation policière. Il a souligné que la conduite illégale de la GRC portait sur une quantité non négligeable de drogue. Il a de plus fait remarquer que cette conduite illégale avait été autorisée à tous les échelons de la GRC. Il était prêt à inférer que la vente surveillée était considérée légale par le ministère de la Justice, ce qu'il estimait être une circonstance aggravante parce que [TRADUCTION] «l'État a utilisé toute la puissance de ses ressources à l'accomplissement d'une tâche illégale» (p. 197). Le juge Carthy a mentionné aussi la possibilité que les policiers aient agi de leur propre chef comme des «rebelles», contrairement à l'avis juridique. Bien que doutant que cela fût réellement le cas, le juge Carthy a estimé à la p. 197 que cela constituerait

> . . . an aggravating factor against the Crown of about equal weight to the first assumption [i.e., of equal weight to the assumption that the RCMP did follow the legal advice].

> [TRADUCTION] . . . une circonstance aggravante contre le ministère public d'un poids à peu près équivalent à celui de la première hypothèse [c.-à-d., l'hypothèse que la GRC a effectivement suivi l'avis juridique].

A third possibility, he considered, was that the RCMP had been advised that the reverse sting would be legal provided no drugs were passed to the appellants as part of a "sale". If so, the RCMP had complied with the advice rendered, even though failure to complete the transaction did not change its illegality. Carthy J.A. recognized that all three scenarios were necessarily speculative on his part. He said, at p. 200, that had he been the trial judge he "would have directed production of the documents and evidence of the Crown law

14 La troisième possibilité qu'il a examinée était que l'avis donné à la GRC disait que la vente surveillée serait légale tant qu'aucune drogue n'était remise aux appelants dans le cadre d'une vente. Si tel était le cas, la GRC s'était conformée à l'avis fourni, bien que le fait de ne pas avoir finalisé l'opération ne change rien à son illégalité. Le juge Carthy a reconnu que ces trois scénarios n'étaient nécessairement que des conjectures de sa part. Il a dit que, s'il avait été à la place du juge du procès, [TRADUCTION] «il aurait ordonné le dépôt des

officer". However, while "[i]t obviously would have been better if the [Department of Justice] information had been conveyed [to the appellants] at trial" (p. 200), no miscarriage of justice occurred because even assuming "the worst" against the Crown no stay could be justified in the circumstances of this case. It was not one of the clearest cases, nor did it involve conduct that would cause the public conscience to be shocked if the convictions were permitted to stand. He concluded, at pp. 198-99, that "[h]aving condemned the actions of the R.C.M.P. and having held up [his] hand against repetition, it would, in [his] view, be sanctimonious to say that the rule of law ha[d] been eroded by these convictions and sentences". The Court of Appeal dismissed the other grounds of appeal, save for the technical variation in the order for forfeiture previously mentioned.

documents et le témoignage du conseiller juridique» (p. 200); toutefois, bien qu'[TRADUCTION] «[i]l aurait évidemment été préférable que les renseignements fournis par le ministère de la Justice soient transmis aux appelants lors du procès» (p. 200), il ne s'était produit aucun déni de justice car, même en supposant «le pire» de la part du ministère public, les faits de la présente affaire ne pouvaient justifier l'arrêt des procédures; il ne s'agissait pas de l'un des cas les plus manifestes ni d'une conduite qui choquerait la conscience du public si les déclarations de culpabilité étaient maintenues. Il a conclu aux pp. 198 et 199 qu'[TRADUCTION] «[a]près avoir condamné les actes de la GRC et servi un avertissement à leur égard, il serait moralisateur, à [son] avis, de dire que la primauté du droit a été affaiblie par ces déclarations de culpabilité et par l'imposition de ces peines». La Cour d'appel a rejeté les autres moyens d'appel, à l'exception de la modification de forme apportée à l'ordonnance de confiscation qui a été mentionnée précédemment.

Analysis

Reverse Sting Operations

15 There is a general recognition that "[i]f the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police" (*Mack*, *supra*, *per* Lamer J., at p. 916). In a "sting" operation, the police pose as willing purchasers of narcotics to obtain evidence against traffickers. The *Narcotic Control Regulations* accept the legitimacy of this technique by deeming police possession in these circumstances to be authorized under that Act. The problem is that traffickers caught by ordinary "sting" purchases are generally minor street level personnel whose conviction has little deterrence effect on the day-to-day operations of the drug organization as a whole. As pointed out by Cpl. Reynolds in this case, the "executives" up the chain of command of large-scale drug organizations are able to insulate themselves from sting operations. The street level pushers apprehended by the police are easily sacrificed and easily replaced. For the purpose of more effective law enforcement, the police therefore devised what counsel referred to as "reverse sting" operations

Analyse

Opérations de vente surveillée

Il est largement reconnu que «[s]i l'on veut vaincre le crime, l'ingéniosité des criminels doit se heurter à celle de la police» (*Mack*, précité, le juge Lamer, à la p. 916). Dans le cadre d'une opération d'«achat surveillé», les policiers prétendent être de véritables acheteurs de stupéfiants afin de réunir des éléments de preuve contre des trafiquants. Le *Règlement sur les stupéfiants* confirme la légitimité de cette technique en édictant que la possession par la police dans de tels cas est autorisée en vertu de cette loi. Le problème réside dans le fait que les trafiquants pris à la suite d'achats effectués dans une opération d'infiltration sont souvent de petits revendeurs travaillant dans la rue dont la condamnation a un effet de dissuasion minime sur les opérations quotidiennes de l'ensemble du trafic organisé de drogue. Comme le capl. Reynolds l'a fait remarquer en l'espèce, les hauts «dirigeants» des grandes organisations de trafic de drogue peuvent se mettre à l'abri des opérations d'achats surveillés. Il est facile de sacrifier et de remplacer les revendeurs de drogue de la rue. Dans le but

whereby the police became vendors rather than purchasers, i.e., the roles of vendor and purchaser were reversed within the sting operation. Because of the amount and value of drugs involved, reverse sting operations brought the police "vendors" into direct contact with the executive purchasers in the large drug organizations. It has proved to be an effective technique. It also, however, brought the police into conflict with the very law that they were attempting to enforce. Neither the *Narcotic Control Act* nor its regulations authorize the police to sell drugs. The appellants, as stated, purport to be shocked at the illegality of police conduct, and ask the Court to hold that the conduct so violates the community's fundamental sense of decency and values that it should result in a stay of proceedings against them.

d'accroître l'efficacité de l'action policière, la police a donc mis sur pied ce que les avocats appellent des opérations de «vente surveillée», dans lesquelles les policiers, à l'inverse d'un «achat surveillé», jouent le rôle de vendeurs plutôt que celui d'acheteurs. En raison de la quantité et de la valeur des drogues en jeu, les opérations de vente surveillée ont permis aux «vendeurs» de la police d'entrer en contact direct avec les principaux acheteurs de grandes organisations de trafic de drogue. La méthode s'est révélée efficace. Toutefois, elle a aussi amené les policiers à contrevenir à la loi même qu'ils tentaient de faire respecter. Ni la *Loi sur les stupéfiants* et ni ses règlements n'autorisent la police à vendre de la drogue. Les appelants se sont déclarés choqués par l'illégalité de la conduite de la police, et ils demandent à notre Cour de conclure que cette conduite viole le sens fondamental de la décence et des valeurs de la collectivité au point de justifier l'arrêt des procédures.

Guilt or Innocence of the Appellants

La culpabilité ou l'innocence des appelants

This appeal was directed almost entirely at the conduct of the abuse of process application following the finding of the trial judge that the appellants were guilty as charged. The only surviving issue on the issue of guilt or innocence is the contention of the appellant Campbell that the conspiracy alleged by the Crown, and encompassed in the indictment, was a larger agreement, different in time and place, than his demonstrated involvement. The counts in the indictment span the period November 1, 1990 to January 15, 1992, whereas it appears Campbell first became involved on November 21, 1991. The counts in the indictment refer to activity in Windsor, London, Mississauga, Toronto, and elsewhere in Ontario, whereas Campbell's demonstrated involvement took place only in Mississauga. Campbell further contends that the evidence shows that he and Shirose were not related co-conspirators, because they were members of separate and distinct groups, acting without a common purpose or enterprise. I think the Crown is correct that the decision of this Court in *R. v. Douglas*, [1991] 1 S.C.R. 301, is fatal to this objection. After noting at pp. 315-16 that "[w]hile the offence of conspiracy is inherently

16 Le présent pourvoi porte presque exclusivement sur l'audition de la demande relative à l'abus de procédure qui a fait suite à la conclusion du juge du procès selon laquelle les appelants étaient coupables des infractions reprochées. La seule question restante quant à la culpabilité ou l'innocence concerne la prétention de l'appelant Campbell que le complot allégué par le ministère public et visé par l'acte d'accusation consistait en une entente plus globale, et différente quant à l'époque et au lieu, par rapport à ce qui a été démontré relativement à sa participation. Les chefs d'accusation couvrent la période allant du 1er novembre 1990 au 15 janvier 1992, alors que Campbell n'est apparemment impliqué qu'à partir du 21 novembre 1991. Les chefs d'accusation portent sur des actes commis à Windsor, London, Mississauga, Toronto, et ailleurs en Ontario, alors que la preuve indique une participation de Campbell à Mississauga seulement. Campbell ajoute que la preuve indique que Shirose et lui n'avaient pas comploté ensemble, car ils étaient membres de groupes distincts et n'agissaient pas en vue d'un but commun ou dans le cadre d'une entreprise commune. Je pense que le ministère a raison de soutenir que l'arrêt de notre

difficult to frame, the indictment must be set forth with such reasonable precision as to inform the accused of the fundamental nature of the conspiracy charged". Cory J. nevertheless concluded, at p. 322, that:

> . . . it is not incumbent upon the Crown to prove the involvement of every member alleged to be part of the conspiracy. . . . If the conspiracy proven includes fewer members than the number of accused or extends over only part of the period alleged, then the conspiracy proven can still be said to be the same conspiracy as that charged in the indictment. In order to find that a specific conspiracy lies within the scope of the indictment, it is sufficient if the evidence adduced demonstrates that the conspiracy proven included some of the accused, establishes that it occurred at some time within the time frame alleged in the indictment, and had as its object the type of crime alleged.

The appellant was clearly able to ascertain the conspiracy alleged against him from a plain reading of the indictment and, in accordance with this Court's decision in *Douglas*, this ground of appeal must be dismissed.

17 For reasons to be discussed, it is important to note that, at this stage of the proceedings, the door is finally and firmly closed against both appellants on the question of guilt or innocence. The remaining issue is whether, notwithstanding the guilt of the appellants, the proceedings against them should be stayed because of abuse of process.

The Rule of Law

18 It is one of the proud accomplishments of the common law that everybody is subject to the ordinary law of the land regardless of public prominence or governmental status. As we explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at p. 240, the rule of law is one of the "fundamental and organizing principles of the Constitution", and at p. 258, it was further emphasized that a crucial element of the rule of law is that "[t]here is . . . one law for all". Thus a provincial premier was held to have no immunity against a claim in

Cour *R. c. Douglas*, [1991] 1 R.C.S. 301, règle définitivement le sort de cet argument. Soulignant d'abord, aux pp. 315 et 316, que «[l]'infraction de complot est en soi difficile à décrire, mais l'acte d'accusation doit être rédigé avec une précision suffisante pour renseigner l'accusé sur la nature fondamentale du complot qui lui est imputé», le juge Cory n'en a pas moins conclu, à la p. 322, que:

> . . . il n'incombe pas au ministère public de prouver la participation de chacun des comploteurs [. . .] Si le complot dont la preuve est faite met en cause un nombre de personnes inférieur au nombre des accusés ou ne s'est produit que durant une partie seulement de la période indiquée, dans ce cas le complot prouvé peut tout de même être assimilé à celui imputé dans l'acte d'accusation. Pour conclure qu'un complot donné est visé par l'acte d'accusation, il suffit que la preuve produite démontre que le complot prouvé met en cause certains des accusés; qu'il a eu lieu au cours de la période indiquée dans l'acte d'accusation; que son objet était le type d'infraction imputé.

Il était clair que la simple lecture de l'acte d'accusation permettait à l'appelant de déterminer le complot qui lui était reproché de sorte que, vu la décision rendue par notre Cour dans *Douglas*, ce moyen d'appel doit être rejeté.

Pour les motifs qui suivent, il est important de souligner qu'à cette étape des procédures, la question de la culpabilité ou de l'innocence des appelants est définitivement et fermement réglée. Il ne reste qu'à déterminer si, malgré la culpabilité des appelants, il devrait y avoir arrêt des procédures prises contre eux pour cause d'abus de procédure.

La primauté du droit

Une des réalisations importantes de la common law est que toute personne est soumise au droit commun du pays indépendamment de sa position publique ou de son statut au sein du gouvernement. Comme nous l'avons expliqué dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, à la p. 240, la primauté du droit est l'un des «principes constitutionnels directeurs fondamentaux» et, à la p. 258, il a été également souligné que l'un des aspects cruciaux de la primauté du droit est qu'«il y a une seule loi pour tous». Ainsi, il a été jugé

damages when he caused injury to a private citizen through wrongful interference with the exercise of statutory powers by a provincial liquor commission: *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Professor F. R. Scott, who was counsel for the successful plaintiff, Roncarelli, in that case, subsequently observed in *Civil Liberties & Canadian Federalism* (1959), at p. 48:

> . . . it is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law.

The principle was famously enunciated by Professor A. V. Dicey in *Introduction to the Study of the Law of the Constitution* (8th ed. 1927) as the second aspect of the "rule of law". This principle was noted with approval in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, at p. 1366:

> It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

The argument of the appellants is that not only are the police subject to prosecution for their participation in the very transaction that gave rise to the charges on which the appellants have been found guilty, but (more importantly from their perspective) police illegality should deprive the state of the benefit of a conviction against them. It is relevant that in s. 37 of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, Parliament has specifically imposed on RCMP officers the duty to stay within the law, as follows:

> **37.** It is incumbent on every member
>
> (*a*) to respect the rights of all persons;

qu'un premier ministre provincial n'avait aucune immunité contre une demande de dommages-intérêts pour avoir causé un préjudice à un citoyen ordinaire en raison de son intervention fautive dans l'exercice des pouvoirs conférés par la loi à une commission des liqueurs provinciale: *Roncarelli c. Duplessis*, [1959] R.C.S. 121. Le professeur F. R. Scott, qui a représenté avec succès le demandeur Roncarelli dans cette affaire, a commenté par la suite dans *Civil Liberties & Canadian Federalism* (1959), à la p. 48:

> [TRADUCTION] . . . c'est toujours une victoire du droit lorsqu'il est démontré qu'il s'applique également à tous, sans crainte ni promesse. C'est ce que nous voulons dire lorsque nous affirmons que tous sont égaux devant la loi.

Le principe a été présenté de façon remarquée par le professeur A. V. Dicey, dans son ouvrage *Introduction to the Study of the Law of the Constitution* (8e éd. 1927), comme étant la seconde facette de la «primauté du droit». Ce principe a été cité et approuvé dans l'arrêt *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349, à la p. 1366:

> [TRADUCTION] Un autre sens est celui d'égalité devant la loi ou d'assujettissement égal de toutes les classes au droit commun du pays appliqué par les tribunaux ordinaires; le «règne du droit», dans ce sens, exclut l'idée d'une exemption de fonctionnaires ou d'autres personnes du devoir d'obéissance à la loi auquel sont assujettis les autres citoyens, ou de la compétence des tribunaux ordinaires.

19 Les appelants soutiennent que, outre le fait que les policiers sont passibles de poursuites pour leur participation à l'opération qui a donné naissance aux accusations dont les appelants ont été déclarés coupables, l'illégalité commise par la police prive l'État de l'avantage d'avoir obtenu une déclaration de culpabilité contre eux (ce qui revêt une plus grande importance de leur point de vue). Il faut souligner que, à l'art. 37 de la *Loi sur la Gendarmerie royale du Canada*, L.R.C. (1985), ch. R-10, le Parlement a expressément imposé aux agents de la GRC l'obligation de se conformer à la loi:

> **37.** Il incombe à chaque membre:
>
> *a*) de respecter les droits de toutes personnes;

(*b*) to maintain the integrity of the law, law enforcement and the administration of justice;

(*c*) to perform the member's duties promptly, impartially and diligently, in accordance with the law and without abusing the member's authority;

. . .

(*e*) to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue. . . . [Emphasis added.]

b) de maintenir l'intégrité du droit et de son application ainsi que de l'administration de la justice;

c) de remplir ses fonctions avec promptitude, impartialité et diligence, conformément au droit et sans abuser de son autorité;

. . .

e) de veiller à ce que l'inconduite des membres ne soit pas cachée ou ne se répète pas. . . [Je souligne.]

It is recognized, of course, that police officers gain nothing personally from conduct committed in good faith efforts to suppress crime that incidentally violates the law the police are attempting to enforce. Nevertheless, the seeming paradox of breaking a law in order to better enforce it has important ramifications for the rule of law.

Il est naturellement reconnu que les policiers ne retirent aucun gain personnel d'actes qui sont commis dans le cadre d'efforts déployés de bonne foi pour éliminer le crime et qui, par incidence, contreviennent à la loi qu'ils tentent de faire respecter. Néanmoins, le paradoxe apparent de contrevenir à une loi afin de mieux la faire respecter a des répercussions importantes sur la règle de la primauté du droit.

Test for Abuse of Process

Le critère de l'abus de procédure

20 In *R. v. Jewitt*, [1985] 2 S.C.R. 128, the Court set down what has since become the standard formulation of the test for abuse of process, *per* Dickson C.J., at pp. 136-37:

Dans l'arrêt *R. c. Jewitt*, [1985] 2 R.C.S. 128, notre Cour a établi ce qui est maintenant la formulation-type du critère relatif à l'abus de procédure, ainsi énoncé par le juge en chef Dickson, aux pp. 136 et 137:

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young* [(1984), 40 C.R. (3d) 289], and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

Je fais mienne la conclusion de la Cour d'appel de l'Ontario dans son arrêt *R. v. Young* [(1984), 40 C.R. (3d) 289], et j'affirme que «le juge du procès a un pouvoir discrétionnaire résiduel de suspendre l'instance lorsque forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent le sens du franc-jeu et de la décence qu'a la société, ainsi que d'empêcher l'abus des procédures de la cour par une procédure oppressive ou vexatoire». J'adopte aussi la mise en garde que fait la cour dans l'arrêt *Young*, portant que c'est là un pouvoir qui ne peut être exercé que dans les «cas les plus manifestes».

This general test for abuse of process has been repeatedly affirmed: see *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59; *Mack*, *supra*, at p. 941; *Conway*, *supra*, at p. 1667; *R. v. Scott*, [1990] 3 S.C.R. 979, at pp. 992-93; *Power*, *supra*, at pp. 612-15; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 762-63; *R. v. Potvin*, [1993] 2 S.C.R. 880, at

Ce critère général de l'abus de procédure a été confirmé à de nombreuses reprises: voir *R. c. Keyowski*, [1988] 1 R.C.S. 657, aux pp. 658 et 659; *Mack*, précité, à la p. 941; *Conway*, précité, à la p. 1667; *R. c. Scott*, [1990] 3 R.C.S. 979, aux pp. 992 et 993; *Power*, précité, aux pp. 612 à 615; *R. c. T. (V.)*, [1992] 1 R.C.S. 749, aux pp. 762 et

p. 915; and most recently in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at p. 455.

Entrapment is simply an application of the abuse of process doctrine. Lamer J., in *Mack*, *supra*, set out the applicable test as follows, at pp. 964-65:

> . . . there is entrapment when,
>
> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry;
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.

The trial judge concluded that she was "satisfied that the police acted on reasonable suspicion. That being so, the police were fully entitled to provide both accused with opportunities to commit the offences". There was ample evidence to support her finding. She also found that the police had not crossed the boundary line from providing opportunity to commit the offence into the forbidden territory of inducing commission of the offence. The appellants needed no inducement. Once the opportunity presented itself, they, not the police, were the driving force behind the making of the deal.

In the absence of any plausible case for entrapment, the appellants can only succeed on the more general ground of a serious violation of "[the community's sense of] fair play and decency . . . disproportionate to the societal interest in the effective prosecution of criminal cases" (*Conway*, *supra*, at p. 1667). In this regard, the centrepiece of the appellants' argument, as stated, is the allegation of police illegality, and the refusal of the courts below to order disclosure of what the appellants consider to be relevant communications between Cpl. Reynolds and Mr. Leising of the

763; *R. c. Potvin*, [1993] 2 R.C.S. 880, à la p. 915; et, plus récemment, *R. c. O'Connor*, [1995] 4 R.C.S. 411, à la p. 455.

21 La notion de provocation policière est simplement une application de la théorie de l'abus de procédure. Dans l'arrêt *Mack*, précité, le juge Lamer a énoncé ainsi le critère applicable, aux pp. 964 et 965:

> . . . il y a provocation policière quand:
>
> a) les autorités fournissent à une personne l'occasion de commettre une infraction sans pouvoir raisonnablement soupçonner que cette personne est déjà engagée dans une activité criminelle, ni se fonder sur une véritable enquête;
>
> b) quoi qu'elles aient ce soupçon raisonnable ou qu'elles agissent au cours d'une véritable enquête, les autorités font plus que fournir une occasion et incitent à perpétrer une infraction.

Le juge du procès a conclu que [TRADUCTION] «la police avait agi sur la foi d'un soupçon raisonnable. Cela étant, la police était entièrement justifiée de fournir aux deux accusés l'occasion de commettre les infractions». La preuve était suffisamment forte pour soutenir sa conclusion. Elle a également conclu que la police n'avait pas franchi la ligne de démarcation entre le fait de fournir l'occasion de perpétrer l'infraction et le territoire défendu d'inciter à la perpétration de l'infraction. Les appelants n'avaient pas besoin d'incitation. Dès que l'occasion s'est présentée, ce sont eux, et non la police, qui ont été les instigateurs de l'entente.

22 En l'absence de motifs plausibles leur permettant d'invoquer la provocation policière, les appelants ne peuvent avoir gain de cause qu'en s'appuyant sur le moyen plus général d'une violation grave du «[sens du] franc-jeu et de la décence qu'a la société [. . .], disproportionnée à l'intérêt de la société d'assurer que les infractions criminelles soient efficacement poursuivies» (*Conway*, précité, à la p. 1667). À cet égard, l'argument central des appelants est l'allégation que la police a commis des actes illégaux et le refus des tribunaux d'instance inférieure d'ordonner la divulgation de ce que les appelants jugent être des communications pertinentes entre le capl. Reynolds et M. Leising,

Department of Justice relied on by the police to establish their "good faith".

du ministère de la Justice, sur lesquelles les policiers se sont fondés pour établir leur «bonne foi».

The Issue of Police Illegality

La question de l'illégalité commise par la police

23 The allegation that the police have put themselves above the law is very serious, with constitutional ramifications beyond the boundaries of the criminal law. This was not a trivial breach. In the end, the transaction was for 50 kilograms, but at the outset the police were trying to organize the sale of over a ton of cannabis resin. The failure of the police to make a deal on that scale was not for want of trying.

L'allégation que les policiers se sont placés au-dessus de la loi est très grave et comporte des incidences en matière constitutionnelle bien au-delà des limites du droit criminel. Il ne s'agissait pas d'une contravention mineure. L'opération a porté en définitive sur 50 kg, mais, à l'origine, les policiers tentaient d'organiser la vente de plus d'une tonne de résine de cannabis. Ce n'est pas faute d'avoir essayé que les policiers n'ont pas réussi à conclure une entente de cette envergure.

24 The effect of police illegality on an application for a stay of proceedings depends very much on the facts of a particular case. This case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation. The problem confronting the police was well described by the Alberta Court of Appeal in *R. v. Bond* (1993), 135 A.R. 329 (leave to appeal refused, [1993] 3 S.C.R. v), at p. 333:

> Illegal conduct by the police during an investigation, while wholly relevant to the issue of abuse of the court's processes, is not per se fatal to prosecutions which may follow: *Mack*; supra at 558. Frequently it will be, but situational police illegality happens. Police involve themselves in high speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess, and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary but, patently illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotelroom transoms and keyholes or waiting patiently at police headquarters to receive the confessions of penitent drug-traffickers.

L'incidence de l'illégalité commise par la police sur une demande d'arrêt des procédures dépend beaucoup des faits d'une affaire donnée. Il faut procéder au cas par cas afin de soupeser les facteurs particuliers de chaque situation factuelle. La difficulté à laquelle fait face la police a été bien décrite par la Cour d'appel de l'Alberta dans *R. c. Bond* (1993), 135 A.R. 329 (autorisation d'appel refusée, [1993] 3 R.C.S. v), à la p. 333:

> [TRADUCTION] Bien qu'elle soit d'une grande pertinence relativement à la question de l'abus des procédures judiciaires, la conduite illégale de la police au cours d'une enquête n'est pas fatale, en soi, aux fins des poursuites qui peuvent s'ensuivre: *Mack*, précité, p. 558. Cela sera souvent le cas, mais des illégalités circonstancielles commises par la police peuvent se produire. Les policiers se livrent à des poursuites à grande vitesse, conduisant au-delà des limites de vitesse permises. Les policiers se font passer pour des prostitués et communiquent à cet effet afin de recueillir des preuves. Les policiers achètent, possèdent et transportent des drogues illégales quotidiennement au cours d'opérations d'infiltration. Dans un monde idéal, cela ne serait pas nécessaire, mais on ne peut enquêter sur le commerce hautement illégal de la drogue ni l'empêcher au moyen de policiers en uniforme qui scruteraient les chambres d'hôtel par les trous de serrures ou qui attendraient patiemment au poste de police de recevoir les confessions de trafiquants de drogue repentis.

The Crown contends, as it did in the courts below, that the police did not violate the *Narcotic Control*

Comme il l'a fait devant les instances inférieures, le ministère public fait valoir que la police n'a pas

Act which at the time the reverse sting was initiated provided in s. 4 as follows:

4. (1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.

(2) No person shall have in his possession any narcotic for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for life.

"Traffic" is defined in the *Narcotic Control Act* as follows:

2. In this Act,

. . .

"traffic" means

(*a*) to manufacture, sell, give, administer, transport, send, deliver or distribute, or

(*b*) to offer to do anything referred to in paragraph (*a*)

otherwise than under the authority of this Act or the regulations. [Emphasis added.]

contrevenu à la *Loi sur les stupéfiants* qui, à l'époque de la vente surveillée, prévoyait à son art. 4:

4. (1) Le trafic de stupéfiant est interdit, y compris dans le cas de toute substance que le trafiquant prétend ou estime être tel.

(2) La possession de stupéfiant en vue d'en faire le trafic est interdite.

(3) Quiconque enfreint le paragraphe (1) ou (2) commet un acte criminel et encourt l'emprisonnement à perpétuité.

«Faire le trafic» est défini ainsi dans la *Loi sur les stupéfiants*:

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

«faire le trafic» Le fait de fabriquer, vendre, donner, administrer, transporter, expédier, livrer ou distribuer un stupéfiant — ou encore de proposer l'une de ces opérations — en dehors du cadre prévu par la présente loi et ses règlements. [Je souligne.]

The conclusion that the RCMP acted in a manner facially prohibited by the Act is inescapable. Their motive in doing so does not matter because, while motive may be relevant for some purposes, it is intent, not motive, that is an element of a full *mens rea* offence: see *Lewis v. The Queen*, [1979] 2 S.C.R. 821, at p. 831. The *actus reus* of the offence of trafficking is the making of an offer, and when accompanied by intent to do so, the necessary *mens rea* is made out: see *R. v. Mancuso* (1989), 51 C.C.C. (3d) 380 (Que. C.A.), at p. 390, leave to appeal refused, [1990] 2 S.C.R. viii. There is no need to prove both the intent to make the offer to sell and the intent to carry out the offer: see *R. v. Mamchur*, [1978] 4 W.W.R. 481 (Sask. C.A.). See also, e.g., *R. v. Sherman* (1977), 36 C.C.C. (2d) 207 (B.C.C.A.), at p. 208, upholding a conviction where there was evidence that the accused had offered to sell heroin to a person he knew was an undercover police officer, with a view to "rip off" the officer and not complete the sale. *Sherman* was later followed on this point in

25 On ne peut faire autrement que de conclure que les agents de la GRC ont agi d'une manière en apparence interdite par la Loi. Leur mobile n'a aucune importance parce que, bien que le mobile puisse être pertinent à certaines fins, c'est l'intention, et non le mobile, qui constitue l'élément d'une infraction de *mens rea* complète: voir *Lewis c. La Reine*, [1979] 2 R.C.S. 821, à la p. 831. L'*actus reus* de l'infraction de trafic consiste à faire une offre, et s'il s'accompagne de l'intention de le faire, la *mens rea* requise est établie: voir *R. c. Mancuso* (1989), 51 C.C.C. (3d) 380 (C.A. Qué.), à la p. 390, autorisation d'appel refusée, [1990] 2 R.C.S. viii. Il n'est pas nécessaire de prouver à la fois l'intention de faire l'offre de vente et l'intention de mener l'offre à terme: *R. c. Mamchur*, [1978] 4 W.W.R. 481 (C.A. Sask.). Voir également, p. ex., *R. c. Sherman* (1977), 36 C.C.C. (2d) 207 (C.A.C.-B.), à la p. 208, confirmant une déclaration de culpabilité dans un cas où la preuve indiquait que l'accusé avait offert de vendre de l'héroïne à une personne qu'il savait être un agent

Mancuso, supra, at pp. 389-90, where the accused argued unsuccessfully that he did not intend actually to sell narcotics to a police informer, but really wished to steal his money.

d'infiltration en vue de le «rouler» et de ne pas réaliser la vente. L'arrêt *Sherman* a été suivi par la suite sur cette question dans *Mancuso*, précité, aux pp. 389 et 390, qui a rejeté l'argumentation de l'accusé selon laquelle il n'avait pas réellement l'intention de vendre des stupéfiants à un indicateur de police, mais qu'il espérait plutôt lui voler son argent.

Public Interest Immunity

26 The Crown submits that even if the conduct of the RCMP was facially prohibited by the terms of the *Narcotic Control Act*, no offence was committed because members of the RCMP are either part of the Crown or are agents of the Crown and as such partake of the Crown's public interest immunity. Such an argument is difficult to square with s. 3(1) of the *Narcotic Control Regulations* which authorizes the police to possess narcotics that come to them from "sting" operations:

> 3. (1) A person is authorized to have a narcotic in his possession where that person has obtained the narcotic pursuant to these Regulations and
>
> . . .
>
> (*g*) is employed as an inspector, a member of the Royal Canadian Mounted Police, a police constable, [or] peace officer . . . and such possession is for the purposes of and in connection with such employment. . . .

Even though the authority is contained in a regulation rather than the Act itself, it is clear that the Regulation would be entirely unnecessary and superfluous if the Act did not apply to the police in the first place.

L'immunité d'intérêt public

Le ministère public soutient que, même si la conduite de la GRC était en apparence interdite par la *Loi sur les stupéfiants*, aucune infraction n'a été commise parce que les membres de la GRC font partie de l'État ou sont des mandataires de l'État et, qu'à ce titre, ils bénéficient de la protection offerte par l'immunité d'intérêt public de l'État. Cet argument cadre difficilement avec le par. 3(1) du *Règlement sur les stupéfiants* qui autorise les policiers à posséder les stupéfiants qu'ils recueillent par suite des opérations «d'achats surveillés»:

> 3. (1) Une personne est autorisée à avoir un stupéfiant en sa possession lorsqu'elle a obtenu ledit stupéfiant conformément au présent règlement et
>
> . . .
>
> *g*) qu'elle est employée à titre d'inspecteur, de membre de la Gendarmerie royale du Canada, d'agent de police [ou] d'agent de la paix [. . .] et qu'elle a le stupéfiant en sa possession aux fins de ses fonctions ou en rapport avec elles. . .

Même si ce pouvoir est conféré par un règlement plutôt que par la loi elle-même, il est évident que le règlement serait parfaitement inutile si la loi ne s'appliquait pas au départ à la police.

The Status of the Police

27 The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and

Le statut de la police

La tentative du ministère public d'assimiler la GRC à l'État pour des fins d'immunité dénote une conception erronée de la relation entre la police et la branche exécutive du gouvernement lorsque les policiers exercent des activités liées à l'exécution de la loi. Un policier qui enquête sur un crime n'agit ni en tant que fonctionnaire ni en tant que mandataire de qui que ce soit. Il occupe une charge

subsequently set out in various statutes. In the case of the RCMP, one of the relevant statutes is now the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.

Under the authority of that Act, it is true, RCMP officers perform a myriad of functions apart from the investigation of crimes. These include, by way of examples, purely ceremonial duties, the protection of Canadian dignitaries and foreign diplomats and activities associated with crime prevention. Some of these functions bring the RCMP into a closer relationship to the Crown than others. The *Department of the Solicitor General Act*, R.S.C., 1985, c. S-13, provides that the Solicitor General's powers, duties and functions extend to matters relating to the RCMP over which Parliament has jurisdiction, and that have not been assigned to another department. Section 5 of the *Royal Canadian Mounted Police Act* provides for the governance of the RCMP as follows:

5. (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the [Solicitor General], has the control and management of the Force and all matters connected therewith.

It is therefore possible that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown. In this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law, was recognized by this Court in relation to municipal forces as long ago as *McCleave v. City of Moncton* (1902), 32 S.C.R. 106. That was a civil case, having to do with potential municipal liability for police negligence, but in the course of his judgment Strong C.J. cited with approval the following proposition, at pp. 108-9:

Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public

publique qui a été définie à l'origine par la common law et qui a été établie par la suite dans différentes lois. Dans le cas de la GRC, l'une de ces lois pertinentes est maintenant la *Loi sur la Gendarmerie royale du Canada*, L.R.C. (1985), ch. R-10.

28 Il est vrai qu'en vertu des pouvoirs conférés par cette loi, les agents de la GRC accomplissent une multitude de tâches en plus des enquêtes criminelles. Ces tâches comprennent notamment des fonctions purement cérémoniales, la protection de dignitaires canadiens et de diplomates étrangers, ainsi que des activités liées à la prévention du crime. Certaines de ces tâches créent des liens plus étroits avec l'État que d'autres. La *Loi sur le ministère du Solliciteur général*, L.R.C. (1985), ch. S-13, prévoit que les pouvoirs et fonctions du Solliciteur général s'étendent aux domaines relatifs à la GRC pour lesquels le Parlement a compétence et qui n'ont pas été attribués à un autre ministère. L'article 5 de la *Loi sur la Gendarmerie royale du Canada* prévoit ceci pour la direction de la GRC:

5. (1) Le gouverneur en conseil peut nommer un officier, appelé commissaire de la Gendarmerie royale du Canada, qui, sous la direction du [Solliciteur général], a pleine autorité sur la Gendarmerie et tout ce qui s'y rapporte.

29 Il est donc possible que, dans l'exercice de l'un ou de l'autre de ses rôles, la GRC agisse en tant que mandataire de l'État. Le présent pourvoi ne soulève toutefois que la question du statut d'un agent de la GRC agissant dans le cadre d'une enquête criminelle, et, à cet égard, la police n'est pas sous le contrôle de la branche exécutive du gouvernement. L'importance de ce principe, qui est lui-même à la base de la primauté du droit, a été reconnu par notre Cour relativement aux forces policières municipales dans un arrêt aussi ancien que *McCleave c. City of Moncton* (1902), 32 R.C.S. 106. Il s'agissait d'une affaire civile portant sur la responsabilité municipale éventuelle pour cause de négligence policière, mais, dans le cadre de ses motifs, le juge en chef Strong a approuvé la proposition suivante, aux pp. 108 et 109:

[TRADUCTION] Les policiers ne peuvent aucunement être considérés comme des mandataires ou des fonction-

nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.

naires de la ville. Leurs fonctions sont publiques par nature. Le pouvoir de les nommer est transféré par la législature aux cités et villes car il s'agit d'un moyen pratique d'exercer une fonction gouvernementale, mais cela ne les rend pas responsables des actes illégaux ou négligents qu'ils commettent. Le dépistage et l'arrestation des auteurs d'infractions, le maintien de la paix publique, l'exécution des lois ainsi que les autres fonctions similaires conférées aux policiers découlent de la loi, et ne proviennent pas de la cité ou de la ville qui les a nommés.

30 At about the same time, the High Court of Australia rejected the notion that a police constable was an agent of the Crown so as to enjoy immunity against a civil action for wrongful arrest. Griffith C.J. had this to say in *Enever v. The King* (1906), 3 C.L.R. 969, at p. 977:

Vers la même époque, la Haute Cour de l'Australie a rejeté la notion selon laquelle un policier était un mandataire de l'État et, qu'à ce titre, il jouissait de l'immunité contre une action civile pour cause d'arrestation illégale. Le juge en chef Griffith dit ceci dans *Enever c. The King* (1906), 3 C.L.R. 969, à la p. 977:

Now, the powers of a constable, *quâ* peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him. If he arrests in a case in which the arrest may be made on view, the view must be his view, not that of someone else. . . . A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.

[TRADUCTION] Ainsi, qu'ils lui soient conférés par la common law ou par loi, les pouvoirs que détient un policier, à titre d'agent de la paix, sont exercés par lui en vertu de sa charge et ne peuvent être exercés sous la responsabilité de quiconque, sauf la sienne. S'il procède à une arrestation fondée sur le soupçon qu'un délit a été commis, ce soupçon doit être le sien et doit être raisonnable de son point de vue. S'il procède à une arrestation dans un cas où il peut arrêter quelqu'un à vue, c'est lui, et non quelqu'un d'autre, qui doit avoir vu. [. . .] Un policier agissant à titre d'agent de la paix n'exerce donc pas un pouvoir délégué, mais son propre pouvoir, de sorte que le droit commun en matière de mandat ne s'applique pas.

31 Over 70 years later, Laskin C.J. in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at p. 322, speaking with reference to the status of a probationary police constable, affirmed that "we are dealing with the holder of a public office, engaged in duties connected with the maintenance of public order and preservation of the peace, important values in any society" (emphasis added). See also *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), at p. 65.

Au-delà de 70 ans plus tard, parlant du statut d'un policier en stage, le juge en chef Laskin a affirmé, dans l'arrêt *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, à la p. 322, qu'«il est question [. . .] du titulaire d'une charge publique, dont les devoirs sont liés au maintien de l'ordre public et de la paix, valeurs importantes dans toute société» (je souligne). Voir également *Ridge c. Baldwin*, [1964] A.C. 40 (H.L.), à la p. 65.

32 Similar sentiments were expressed by the Judicial Committee of the Privy Council in *Attorney-General for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457 (P.C.), another civil case

Une opinion similaire a été exprimée par le Comité judiciaire du Conseil privé dans *Attorney-General for New South Wales c. Perpetual Trustee Co.*, [1955] A.C. 457 (C.P.), qui était une autre

dealing with the vicarious liability of the Crown, in which Viscount Simonds stated, at pp. 489-90:

> [A constable's] authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master.

While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. As Lord Denning put it in relation to the Commissioner of Police in *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769:

> I have no hesitation, however, in holding that, like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [Emphasis added.]

To the same effect, see the more recent Canadian cases of *R. v. Creswell*, [1998] B.C.J.

affaire civile portant sur la responsabilité civile de l'État, et où vicomte Simonds a dit, aux pp. 489 et 490:

> [TRADUCTION] Le pouvoir détenu par [un policier] est le sien, non pas un pouvoir délégué, et ce pouvoir est exercé de la façon dont il l'entend en vertu de sa charge: il est un agent ministériel qui exerce les droits que lui confère la loi, malgré l'existence d'un contrat. La différence essentielle se reflète dans le fait que, dans le langage courant, sa relation avec le gouvernement n'est pas décrite comme étant une relation maître-préposé.

33 Bien qu'à certaines fins, le Commissaire de la GRC rende compte au Solliciteur général, il ne faut pas le considérer comme un préposé ou un mandataire du gouvernement lorsqu'il effectue des enquêtes criminelles. Le Commissaire n'est soumis à aucune directive politique. Comme tout autre agent de police dans la même situation, il est redevable devant la loi et, sans aucun doute, devant sa conscience. Comme lord Denning l'a dit relativement au commissaire de police dans *R. c. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), à la p. 769:

> [TRADUCTION] Je n'ai toutefois aucune hésitation à conclure que, comme tous les policiers du pays, il [le commissaire de police] devrait être indépendant de l'exécutif, et qu'il l'est effectivement. Il n'est pas soumis aux ordres du Secrétaire d'État, à l'exception du fait que, en vertu de la Police Act 1964, ce dernier peut lui demander de produire un rapport et de quitter ses fonctions dans l'intérêt de la bonne administration. Je considère qu'il est du devoir du commissaire de police, et de tout chef de police, de faire respecter les lois du pays. Il doit affecter ses hommes de manière à résoudre les crimes pour que les honnêtes citoyens puissent vaquer à leurs occupations en paix. Il doit décider si des suspects seront poursuivis ou non; et, s'il le faut, porter des accusations ou faire en sorte qu'elles soient portées; mais, dans tout cela, il n'est le serviteur de personne, sauf de la loi elle-même. Aucun ministre de la Couronne ne peut lui ordonner de surveiller ou de ne pas surveiller tel endroit, ou lui ordonner de poursuivre ou de ne pas poursuivre une personne. Aucune autorité policière ne peut non plus lui donner un tel ordre. C'est à lui qu'il incombe de faire respecter la loi. Il est redevable envers la loi, et seulement envers elle. [Je souligne.]

34 Voir, au même effet, les décisions canadiennes plus récentes *R. c. Creswell*, [1998] B.C.J.

No. 1090 (QL), (S.C.), which involves facts closer to those in the present appeal; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1989), 58 D.L.R. (4th) 396 (Ont. H.C.), affirmed (1990), 74 O.R. (2d) 225 (Div. Ct.); and *Perrier v. Sorgat* (1979), 25 O.R. (2d) 645 (Co. Ct.). A contrary conclusion was reached by Bielby J. of the Alberta Court of Queen's Bench in *Rutherford v. Swanson*, [1993] 6 W.W.R. 126, but her decision, I think, suffers from the frailty of failing to differentiate the different functions the RCMP perform, and the potentially different relationship of the RCMP to the Crown in the exercise of those different functions.

No. 1090 (QL) (C.S.), où les faits se rapprochent de ceux du présent pourvoi; *Doe c. Metropolitan Toronto (Municipality) Commissioners of Police* (1989), 58 D.L.R. (4th) 396 (H.C. Ont.), confirmé par (1990), 74 O.R. (2d) 225 (C. div.); et *Perrier c. Sorgat* (1979), 25 O.R. (2d) 645 (C. cté). Le juge Bielby de la Cour du Banc de la Reine de l'Alberta a tiré une conclusion contraire dans *Rutherford c. Swanson*, [1993] 6 W.W.R. 126, mais j'estime que sa décision est affaiblie par l'omission de tenir compte des distinctions entre les diverses fonctions exercées par la GRC et de la différence potentielle des relations entre la GRC et l'État dans le cadre de l'exercice de ces fonctions.

35 While these cases generally examine the relationship between the police and various governments in terms of civil liability, the statements made are of much broader import. It would make no sense in either law or policy to hold the police to be agents of the Crown for the purposes of allowing the Crown to shelter the police under its immunity in criminal matters, but to hold the police not to be Crown agents in civil matters to enable the government to resile from liability for police misconduct. The Crown cannot have it both ways.

Bien que ces affaires portent généralement sur la relation entre la police et divers gouvernements en matière de responsabilité civile, les énoncés de principe auxquels elles donnent lieu sont d'une application beaucoup plus large. Il serait illogique, tant au niveau juridique qu'au niveau des principes, de considérer les policiers comme des mandataires de l'État afin de permettre à ce dernier de couvrir les policiers de son immunité en matière criminelle, mais de ne pas les considérer comme tels en matière civile afin de permettre au gouvernement d'écarter sa responsabilité à l'égard des fautes commises par la police. L'État ne peut pas gagner sur les deux tableaux.

36 Parenthetically, it should be noted that Parliament has provided in the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50, s. 36, that:

Incidemment, il faut souligner que le Parlement a prévu à l'art. 36 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*, L.R.C. (1985), ch. C-50, que:

36. For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown. [Emphasis added.]

36. Pour la détermination des questions de responsabilité dans toute action ou autre procédure engagée par ou contre l'État, quiconque était lors des faits en cause membre des Forces canadiennes ou de la Gendarmerie royale du Canada est assimilé à un préposé de l'État. [Je souligne.]

A "deeming" section would not be necessary if it were the case that, at law, an RCMP officer was in any event a Crown servant for all purposes.

Il ne serait pas nécessaire qu'un article établisse une présomption s'il était vrai qu'en droit, un agent de la GRC est un préposé de l'État dans tous les cas.

The Limitations on Crown Agency Expressed in R. v. Eldorado Nuclear Ltd.

Even if the police could be considered agents of the Crown for some purposes, and even if the Crown itself were not bound by the *Narcotic Control Act*, I agree with the Ontario Court of Appeal that in this case the police stepped outside the lawful ambit of their agency, and whatever immunity was associated with that agency was lost. This principle was elaborated upon by this Court in two cases decided in 1983, namely *Eldorado Nuclear*, *supra*, and *Canadian Broadcasting Corp. v. The Queen*, [1983] 1 S.C.R. 339. In the latter case, the CBC, which by its enabling statute is expressly constituted a Crown corporation, was nevertheless held subject to prosecution for broadcasting an obscene film. This Court held that the CBC's conduct put it outside the scope of its agency, *per* Estey J., at p. 351:

> . . . even if Crown immunity may be attributed to the appellant [CBC] in some circumstances, and the actions of the appellant in such circumstances attributed to the Crown, it does not necessarily follow that the immunities attendant upon the status of Crown agency will flow through to the benefit and protection of the appellant in all circumstances.

In *Eldorado Nuclear*, on the other hand, the Court concluded that two Crown corporations, namely Eldorado Nuclear Limited and Uranium Canada Limited, who were accused of being parties to an unlawful uranium cartel, could not be prosecuted under the *Combines Investigation Act*. They were acting pursuant to their corporate objects set out by Parliament in their respective constitutive statutes, and, in respect of acts done in furtherance of their statutory objects, the *Combines Investigation Act* had no application to them.

While it may be convenient and expeditious for the police to enforce the *Narcotic Control Act* by breaking it themselves under "controlled circumstances", such a strategy in the present case was not necessary to accomplish the RCMP's statutory mandate (*Eldorado Nuclear, supra*, at p. 568). Parliament made it clear in s. 37 of the *Royal Canadian Mounted Police Act*, that the RCMP must act

Les limites de l'immunité du mandataire de l'État selon R. c. Eldorado Nucléaire Ltée

37 Même si les policiers pouvaient être considérés comme des mandataires de l'État dans certains cas et que ce dernier n'était pas lié par la *Loi sur les stupéfiants*, je partage l'avis de la Cour d'appel de l'Ontario que, dans la présente affaire, les policiers ont outrepassé les limites légales de leur mandat et que, si ce dernier comportait une quelconque immunité, celle-ci a été perdue. Notre Cour a approfondi ce principe dans deux décisions de 1983, les arrêts *Eldorado Nucléaire*, précité, et *Société Radio-Canada c. La Reine*, [1983] 1 R.C.S. 339. Dans cette dernière affaire, la SRC, dont la loi habilitante prévoit qu'elle est une société d'État, a néanmoins été jugée susceptible de faire l'objet de poursuites pour avoir diffusé un film obscène. Notre Cour, par les motifs du juge Estey, a conclu que la conduite de la SRC n'était pas protégée par son immunité, à la p. 351:

> . . . même si l'immunité de l'État peut être attribuée à l'appelante [SRC] dans certaines circonstances et que les actes de l'appelante peuvent alors être attribués à l'État, il ne s'ensuit pas nécessairement que l'immunité qui accompagne le statut de mandataire de l'État passera dans tous les cas à l'appelante à son avantage et pour sa protection.

38 Par contre, dans *Eldorado Nucléaire*, notre Cour a conclu que deux sociétés d'État, soit Eldorado Nucléaire Limitée et Uranium Canada Limitée, qui étaient accusées de faire partie d'un cartel illégal d'uranium, ne pouvaient pas être poursuivies en vertu de la *Loi relative aux enquêtes sur les coalitions*. Elles agissaient conformément à la mission que leur avait attribuée le Parlement dans leur loi habilitante respective, et, lorsqu'elles agissaient dans ce cadre, la *Loi relative aux enquêtes sur les coalitions* ne s'appliquait pas à elles.

39 Bien qu'il puisse être commode et efficace pour les policiers d'exécuter la *Loi sur les stupéfiants* en y contrevenant eux-mêmes dans «une situation contrôlée», une telle stratégie en l'espèce n'était pas nécessaire à la réalisation du mandat légal de la GRC (*Eldorado Nucléaire*, précité, à la p. 568). Par l'article 37 de la *Loi sur la Gendarmerie royale du Canada*, le Parlement a indiqué claire-

"in accordance with the law". Parliament has made it clear that illegality by the RCMP is neither part of any valid public purpose nor necessarily "incidental" to its achievement. If some form of public interest immunity is to be extended to the police to assist in the "war on drugs", it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available, as indeed was done in 1996, after the events in question here, in s. 8 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

ment que la GRC devait agir «conformément au droit». Le Parlement a indiqué clairement qu'une illégalité commise par la GRC n'entre dans le cadre d'aucune fin d'intérêt public valide et n'est pas nécessairement «accessoire» à sa réalisation. S'il y a lieu de conférer à la police une certaine forme d'immunité d'intérêt public pour l'aider à gagner la «guerre contre la drogue», il revient au Parlement de circonscrire la nature et la portée de l'immunité ainsi que les faits qui y donnent ouverture, comme cela a d'ailleurs été fait en 1996, après la survenance des événements en cause en l'espèce, au moyen de l'art. 8 de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19.

40 The respondent raises one further argument concerning the legality of the RCMP's conduct in engaging in the reverse sting operation. This argument consists of the bald assertion that the police have available to them a so-called "necessity" justification or defence as that term was used in *R. v. Salvador* (1981), 59 C.C.C. (2d) 521 (N.S.C.A.), *per* Macdonald J.A., at p. 542:

> Generally speaking, the defence of necessity covers all cases where non-compliance with law is excused by an emergency or justified by the pursuit of some greater good.

L'intimée soulève un argument supplémentaire relativement à la légalité de la conduite de la GRC lorsqu'elle s'est livrée à l'opération de vente surveillée. Cet argument consiste en la simple affirmation que la police peut invoquer ce qui est appelé une défense ou excuse «de nécessité», dans le sens où ce terme a été utilisé dans l'arrêt *R. c. Salvador* (1981), 59 C.C.C. (2d) 521 (C.A.N.-É.), le juge Macdonald, à la p. 542:

> [TRADUCTION] En général, la défense de nécessité s'applique à toutes les situations où le non-respect de la loi est justifié par une urgence ou par la recherche d'un plus grand bien.

It is not alleged that the RCMP conduct is such that it could be said to fall within one of the established "justification" defences (e.g., self-defence or defence of third parties) and the Crown offers no authority for the proposition that there exists (or should exist) in Canada a so-called "law enforcement" justification defence generally. The United States experience is mixed: see G. Greaney, "Crossing the Constitutional Line: Due Process and the Law Enforcement Justification" (1992), 67 *Notre Dame L. Rev.* 745. In any event, the author points out that the law justification defence "only applies if the 'conduct is within the reasonable exercise of the policeman's duty . . . '" (p. 784) and ". . . courts also look to an officer's adherence to state and federal laws when examining the reasonableness of the officer's conduct" (p. 787). The law enforcement justification is frequently raised in the United States in the context of federal law

On ne prétend pas que la conduite de la GRC est de nature à donner lieu à l'une des défenses de «justification» établies (p. ex., la légitime défense ou la défense d'autres personnes) et le ministère public n'invoque aucune décision à l'appui de la proposition qu'il existe (ou qu'il devrait exister) au Canada ce qu'on appelle une défense générale de justification pour cause d'«exécution de la loi». La jurisprudence américaine demeure variable: voir G. Greaney, «Crossing the Constitutional Line: Due Process and the Law Enforcement Justification» (1992), 67 *Notre Dame L. Rev.* 745. De toute manière, l'auteur souligne que la défense de justification [TRADUCTION] «ne s'applique que si la "conduite se situe dans le cadre de l'exercice raisonnable des fonctions du policier . . ."» (p. 784), et «. . . les tribunaux vérifient également si le policier a respecté les lois fédérales et les lois des États lorsqu'ils analysent le caractère raisonnable de sa

enforcement activity that complies with federal laws but breaches state laws. In such cases, the United States Supreme Court held in *In re Neagle*, 135 U.S. 1 (1890), *per* Miller J., at p. 68 and following, that the officer claiming the law enforcement justification must be performing an act that he or she is authorized by federal law to perform as part of police duties and that actions in violation of state law must be carefully circumscribed so as to do no more than is necessary and proper. See *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982), *per* Wood J., at p. 1350. It would therefore appear that in the United States a police officer would not be entitled to the law enforcement justification where, as here, the constitutive statute of the police force imposes on its members the duty to act "in accordance with the law" (*Royal Canadian Mounted Police Act*, s. 37).

conduite» (p. 787). La justification d'exécution de la loi est fréquemment invoquée aux États-Unis dans le contexte d'activités liées à l'exécution de lois fédérales conformes aux lois fédérales mais contrevenant aux lois d'un État. La Cour suprême des États-Unis a conclu, dans l'arrêt *In re Neagle*, 135 U.S. 1 (1890), le juge Miller, à la p. 68 et suiv., que, dans de tels cas, le policier qui invoque cette justification devait avoir accompli un acte qu'une loi fédérale l'autorisait à accomplir dans l'exercice de ses fonctions d'agent de police, et que les actes contrevenant aux lois de l'État devaient être conçues avec soin, de manière à ne pas faire plus que ce qui était nécessaire et approprié. Voir *Baucom c. Martin*, 677 F.2d 1346 (11th Cir. 1982), le juge Wood, à la p. 1350. Il semble donc qu'aux États-Unis, un policier ne puisse pas bénéficier de la justification d'exécution de la loi lorsque, comme en l'espèce, la loi constitutive de la force policière en cause impose à ses membres l'obligation d'agir «conformément au droit» (art. 37 de la *Loi sur la Gendarmerie royale du Canada*).

In this country, it is accepted that it is for Parliament to determine when in the context of law enforcement the end justifies means that would otherwise be unlawful. As Dickson J. (as he then was) put it in *Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 248:

41 Au Canada, il est admis qu'il revient au Parlement de décider quand, dans le contexte de l'exécution de la loi, la fin justifie des moyens qui, normalement, seraient illégaux. Comme le juge Dickson (plus tard Juge en chef) l'a dit dans l'arrêt *Perka c. La Reine*, [1984] 2 R.C.S. 232, à la p. 248:

> The *Criminal Code* has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function.

> Le *Code criminel* précise un nombre de situations distinguables où une personne est justifiée de commettre ce qui autrement constituerait une infraction criminelle. Aller plus loin et soutenir qu'on peut justifier des actes manifestement illégaux à cause des avantages qu'ils présentent aurait pour effet d'introduire un élément de subjectivité indu dans le droit criminel. Ce serait inviter les tribunaux à réévaluer rétrospectivement l'intention du législateur et à apprécier le bien-fondé relatif des politiques sociales qui sous-tendent les interdictions en matière criminelle. Ni l'un ni l'autre de ces rôles ne cadre bien avec la fonction judiciaire.

While it is true that Dickson J. was not addressing the issue of police illegality in that case, a general "law enforcement justification" would run counter to the fundamental constitutional principles outlined earlier. It should be emphasized that the

Bien qu'il soit vrai que le juge Dickson ne traitait pas de la question d'une illégalité commise par la police dans cette affaire, une justification générale d'exécution de la loi serait contraire aux principes constitutionnels fondamentaux énoncés précédem-

police in this case were not acting in an emergency or other exigent circumstances. This was a premeditated, carefully planned attempt to sell a ton of hashish. If the Crown wishes to argue for specific relief against criminal or civil liability of the police in emergency or other exigent circumstances in a future case on facts where the argument fairly arises, the issue will be more fully addressed at that time. Such arguments have no application here.

ment. Il faut souligner qu'en l'espèce, les policiers n'avaient pas affaire à une urgence ou à une autre situation pressante. Il s'agissait d'une tentative préméditée et soigneusement planifiée de vendre une tonne de haschisch. Si le ministère public désire invoquer l'existence d'une protection particulière contre la responsabilité criminelle ou civile de la police dans les cas d'urgence ou autres situations pressantes à l'occasion d'une prochaine affaire où les faits donneront véritablement ouverture à cette prétention, la question sera analysée plus en profondeur à ce moment-là. De tels arguments sont inapplicables en l'espèce.

Evidence of Police "Good Faith"

La preuve de la «bonne foi» de la police

42 The conclusion that the police conduct in undertaking a reverse sting is, on the facts of this case, illegal does not of itself amount to an abuse of process or, to take it a step further, entitle the appellants to a stay. The legality of police action is but a factor, albeit an important factor, to be considered in the determination of whether an abuse of process has taken place: see *R. v. Lore* (1997), 116 C.C.C. (3d) 255 (Que. C.A.), at p. 271; *R. v. Matthiessen* (1995), 172 A.R. 196 (Q.B.), at pp. 209-10; and *Bond*, *supra*, at p. 333. Where the courts have found that the illegality or other misconduct amounts to an abuse of process, it has by no means followed that a stay of proceedings was considered the appropriate remedy. In *R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Que. C.A.), for example, a stay was refused despite the finding that the police had participated in conduct that was said to be totally unacceptable, *per* Brossard J.A., at p. 371.

La conclusion que, selon les faits de la présente affaire, l'opération de vente surveillée menée par la police était illégale ne signifie pas, en soi, qu'il y a eu abus de procédure ou, plus avant, que les appelants ont droit à l'arrêt des procédures. Malgré son importance, la légalité de l'action policière n'est qu'un des facteurs, quoiqu'un facteur important, à examiner pour déterminer s'il y a eu abus de procédure: *R. c. Lore* (1997), 116 C.C.C. (3d) 255 (C.A. Qué.), à la p. 271; *R. c. Matthiessen* (1995), 172 A.R. 196 (B.R.), aux pp. 209 et 210; et *Bond*, précité, à la p. 333. Lorsque les tribunaux ont conclu que l'illégalité ou la faute commise équivalait à un abus de procédure, ils n'en ont pas déduit que l'arrêt des procédures était le redressement approprié. Dans *R. c. Xenos* (1991), 70 C.C.C. (3d) 362 (C.A. Qué.), p. ex., l'arrêt des procédures a été refusé malgré la conclusion que les policiers s'étaient livrés à des activités qui ont été décrites comme étant totalement inacceptables par le juge Brossard, à la p. 371.

43 I should make it clear that even if it should turn out here that the police acted contrary to the legal advice provided by the Department of Justice (and we have no reason at this stage to believe this to be the case), there would still be no right to an automatic stay. Apart from everything else, the trial judge would still have to consider any other information or explanatory circumstances that emerge during the inquiry into whether the police or prosecutorial conduct "shocks the conscience of the community". In *Mack*, *supra*, Lamer J. consid-

Je tiens à bien préciser que, même s'il s'avérait que les actes de la police allaient à l'encontre des conseils juridiques reçus du ministère de la Justice (et nous n'avons aucune raison à cette étape-ci de le croire), cela ne donnerait pas lieu automatiquement à un arrêt. Outre tout le reste, le juge du procès devrait encore prendre en considération tout autre renseignement ou circonstance explicative qui se dégage de l'examen de la question de savoir si la conduite de la police ou de la poursuite «choque la conscience de la collectivité». Dans

ered that the need to grant some leeway to law enforcement officials to combat consensual criminal offences such as drug trafficking must be weighed against the courts' concern about law enforcement techniques that involve conduct that the citizenry would not tolerate. The underlying rationale of the doctrine of abuse of process is to protect the integrity of the courts' process and the administration of justice from disrepute: see *Mack*, at pp. 938 and 940. Lamer J. stated, at p. 939, that "the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens".

Mack, précité, le juge Lamer a estimé que la nécessité de donner de la latitude à ceux qui sont chargés de faire respecter la loi pour leur permettre de lutter contre les infractions criminelles consensuelles, comme le trafic de drogue, devait être soupesée par rapport à la préoccupation des tribunaux à l'égard de méthodes d'exécution de la loi qui donnent lieu à des activités que les citoyens ne toléreraient pas. Les fondements de la théorie de l'abus de procédure sont la protection de l'intégrité du processus judiciaire et la protection de l'administration de la justice contre la déconsidération: voir *Mack*, aux pp. 938 et 940. Le juge Lamer dit, à la p. 939, que «la doctrine de l'abus de procédure est fondée sur la notion que l'État est limité dans la manière dont il peut traiter ses citoyens».

Relevance of Legislative Change

It was considered in the court below, and by the Quebec Court of Appeal in *Lore, supra,* at p. 271, that the immunity provisions of the new *Controlled Drugs and Substances Act* should be seen as confirmation that the use of reverse stings would not shock the conscience of the community in such a way as to constitute an abuse of process. The fact that Parliament has now enacted specific legislation permitting (in defined circumstances) the police to engage lawfully in the type of conduct at issue in this appeal confirms that the police conduct was not considered lawful by Parliament prior to the amendments' being made. The *Interpretation Act*, R.S.C., 1985, c. I-21, s. 10, provides that "[t]he law [is] always speaking", and Parliament's view at the relevant time was embodied in its then existing enactments. At the material time, Parliament had enacted that conduct otherwise illegal could be done lawfully "under the authority of this Act or the regulations", and under the regulations the police were authorized to possess but not to sell controlled drugs. Judicial notice can certainly be taken of continuing public concern about the drug trade, and in a general way of the difficulties of successfully employing traditional police techniques against large-scale crime organizations. There is little need in this case to resort for evidence of public concern to legislative amendments that were not made until two years after the trial.

La pertinence de la modification législative

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Le jugement antérieur en l'espèce et l'arrêt *Lore*, précité, à la p. 271, de la Cour d'appel du Québec, ont indiqué que les dispositions d'immunité contenues dans la nouvelle *Loi réglementant certaines drogues et autres substances* devraient être considérées comme la confirmation que le recours à des ventes surveillées ne choquerait pas la conscience de la collectivité au point de constituer un abus de procédure. Le fait que le Parlement a maintenant édicté des dispositions législatives particulières autorisant la police (dans des situations définies) à entreprendre légalement le genre d'activités en cause dans le présent pourvoi confirme que les actes accomplis n'étaient pas considérés licites par le Parlement avant l'adoption des modifications. L'article 10 de la *Loi d'interprétation*, L.R.C. (1985), ch. I-21, édicte que «[l]a règle de droit a vocation permanente», et l'intention du Parlement à l'époque pertinente se retrouvait dans les dispositions existant alors. À l'époque pertinente, le Parlement avait décrété que des actes autrement illégaux pouvaient être faits légalement dans le «cadre prévu par la présente loi et ses règlements» et le règlement autorisait les policiers à posséder mais non à vendre des drogues contrôlées. Il y a certainement lieu de prendre connaissance d'office du fait que le public demeure préoccupé par le trafic de drogue et, d'une manière générale, de la difficulté de lutter efficacement contre le crime orga-

Nevertheless, given that the test in *Mack* calls for a broad inquiry into the balance of public interests, I would not want to exclude the possibility that after-the-fact legislation may throw some light on community acceptance of a reverse sting operation. It was but a short step from the existing regulatory authority to possess drugs as a result of a sting to the desired regulatory authority to sell drugs in the context of a reverse sting. One of the purposes of the balancing exercise discussed by L'Heureux-Dubé J. in *O'Connor*, *supra*, at paras. 129-30, is to put misconduct by the authorities, worrisome as it may be, in a larger societal perspective.

45 The point here, however, is slightly different. Superadded to the issue of illegal conduct is the possibility of a police operation planned and executed contrary to the advice (if this turns out to be true) of the Department of Justice. The suggestion is that the RCMP, after securing the relevant legal advice, nevertheless put itself above the law in its pursuit of the appellants. The community view of the police misconduct would, I think, be influenced by knowing whether or not the police were told in advance by their legal advisers that the reverse sting was illegal. Standing by itself, therefore, the subsequent 1996 enactment addresses only part of the issue.

The Assertion of Police Good Faith Was Based in Part on Advice Received from the Department of Justice

46 Counsel for the Crown has invited the Court to evaluate the police conduct throughout the reverse sting and submits their actions do not constitute an abuse of process. One of the issues is good faith, as discussed in A. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993), at pp. 107-118. As evidence of the fact that the reverse sting was undertaken "with the purest of

nisé au moyen des méthodes policières traditionnelles. Il n'est pas nécessaire en l'espèce d'invoquer des modifications législatives qui n'ont été adoptées que deux ans après le procès. Néanmoins, puisque le critère énoncé dans l'arrêt *Mack* commande un examen général des aspects de l'intérêt public en jeu, je ne voudrais pas exclure toute possibilité que la législation adoptée après coup permette de mieux percevoir l'acceptation par la société d'une opération de vente surveillée. Un petit pas séparait le pouvoir réglementaire existant de posséder des drogues par suite d'une opération d'achat surveillé et le pouvoir réglementaire souhaité de vendre des drogues dans le cadre d'une vente surveillée. L'un des objectifs de la pondération de valeurs conflictuelles dont parle le juge L'Heureux-Dubé dans l'arrêt *O'Connor*, précité, aux par. 129 à 130, est de mettre dans une perspective sociale plus large l'inconduite des autorités, si préoccupante soit-elle.

En l'espèce cependant la question est légèrement différente. En plus de la question de la conduite illégale se pose la possibilité d'une opération policière planifiée et exécutée malgré l'avis contraire du ministère de la Justice (si la chose était avérée). Il est suggéré que la GRC, après avoir obtenu l'avis juridique pertinent, s'est néanmoins placée au-dessus de la loi pour poursuivre les appelants. Je crois que l'opinion de la collectivité sur l'inconduite policière serait également influencée par le fait que les conseillers juridiques de la police lui avaient signalé à l'avance ou non que la vente surveillée était illégale. En soi, la modification apportée par la suite en 1996 ne règle qu'une partie de la question.

L'argument de la bonne foi de la police était fondé en partie sur un avis reçu du ministère de la Justice

Le ministère public a invité notre Cour à évaluer la conduite des policiers tout au long de l'opération, et a soutenu que leurs actions ne constituaient pas un abus de procédure. Une des questions en litige est la bonne foi, dont traite A. Choo, dans *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993), aux pp. 107 à 118. Pour démontrer que la vente surveillée avait été entre-

motives", the Crown has pointed out that the reverse sting proposal went through between 9 and 14 stages of approval before finally being authorized. The reverse sting operation was carefully planned, narrowly targeted, and ensured that no hashish actually changed hands, and thus never entered the criminal black market. Most importantly for present purposes is the fact that the Crown emphasized the good faith reliance of the police on legal advice. In the factum prepared for the Ontario Court of Appeal, for example, the argument was put as follows:

> 26. The conduct of the R.C.M.P. in the present case falls far short of conduct that has hitherto received the courts' seal of approval. In the case at bar, as in the aforementioned case law, there has been no abuse of process or any conduct by the police that could "shock the conscience of the community". In particular, regard must be had to the following considerations:
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> . . .
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> (f) The R.C.M.P. based, at least in part, the legality of there [*sic*] investigatory techniques on valid case law (*R. v. Lore*, unreported, Quebec Superior Court, 26 February, 1991, Pinard, J.S.C.) and consulted with the Department of Justice with regard to any problems of illegality. [Emphasis added.]

The RCMP's reliance on legal advice was thus invoked as part of its "good faith" argument. The privilege belonged to the client, and the RCMP joined with the Crown to put forward that position. While not explicitly stated in so many words, the plain implication sought to be conveyed to the appellants and to the courts was that the RCMP accepted the legal advice they were given by the Department of Justice and acted in accordance with it. The credibility of a highly experienced departmental lawyer was invoked to assist the RCMP position in the abuse of process proceedings.

The Crown now says that the content of communications between the police and the Department of Justice could not affect the issue as to whether

prise [TRADUCTION] «avec les intentions les plus pures», le ministère public a souligné que la proposition de mettre sur pied cette opération avait passé 9 à 14 étapes d'approbation avant d'être finalement acceptée. L'opération de vente surveillée a été planifiée avec soin, étroitement délimitée et menée de manière à ce qu'aucune partie du haschisch ne change de mains, de sorte que la drogue ne s'est jamais retrouvée sur le marché noir criminel. Chose plus importante aux fins des présentes, le ministère public a insisté sur le fait que la police s'était fiée de bonne foi à l'avis juridique. Dans le mémoire qu'il a déposé devant la Cour d'appel de l'Ontario, par exemple, cet argument est formulé ainsi:

> [TRADUCTION] 26. Dans la présente affaire, la conduite de la G.R.C. est loin d'approcher le niveau de gravité d'actes qui ont déjà reçu la bénédiction des tribunaux. En l'espèce, comme dans la jurisprudence susmentionnée, il n'y a ni abus de procédure ni activité policière susceptibles de «choquer la conscience de la collectivité». En particulier, il faut tenir compte des points suivants:
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> . . .
>
> f) Pour s'assurer de la légalité de ses techniques d'enquête, la G.R.C. s'est fondée, au moins en partie, sur une jurisprudence valable (*R. c. Lore*, inédit, Cour supérieure du Québec, le 26 février 1991, le juge Pinard) et a consulté le ministère de la Justice concernant tout risque d'illégalité. [Je souligne.]

L'obtention par la GRC de l'avis juridique a donc été invoquée à l'appui de l'argument de la «bonne foi». Le privilège appartenait au client et il est clair que la GRC s'est jointe au ministère public pour faire valoir cet argument. Bien que cela n'ait pas été exprimé dans ces termes, on cherchait à indiquer aux appelants et aux tribunaux que la GRC avait accepté l'avis juridique reçu du ministère de la Justice et qu'elle avait agi en conséquence. La crédibilité d'un avocat très expérimenté du Ministère était invoquée devant les tribunaux au soutien de la position de la GRC dans les procédures relatives à l'abus de procédure.

47 Le ministère public affirme maintenant que le contenu des communications entre la police et le ministère de la Justice n'a aucune incidence sur la

the conduct of the RCMP gave rise to an abuse of process. The Crown says it does not matter what the RCMP were told as to the legality of the reverse sting operation the RCMP planned. Assuming the worst, the Crown says, no stay is warranted. On this point they rely on the analysis of the Court of Appeal, already quoted at para. 13, that if it were shown that the RCMP "moved ahead on their own as mavericks" (p. 197) despite legal advice to the contrary, it would be "of about equal weight" to a situation where the RCMP acted on a positive legal opinion that what they proposed to do would be lawful. With respect, I do not agree. A police force that chooses to operate outside the law is not the same thing as a police force that made an honest mistake on the basis of erroneous advice. We have no reason to think the RCMP ignored the advice it was given, but as the RCMP did make an issue of the legal advice it received in response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated.

48 It appears, therefore, that the only satisfactory way to resolve the issue of good faith is to order disclosure of the content of the relevant advice. This should be done (for the reasons to be discussed) on the basis of waiver by the RCMP of the solicitor-client privilege. It would be convenient, however, to address beforehand three additional contentions by the appellants. They say that disclosure of the communications between Cpl. Reynolds and the Department of Justice ought never to have been withheld in the first place because (a) no solicitor-client relationship exists between Department of Justice lawyers and police officers and therefore no privilege ever arose in this case, or, if such a relationship did exist, the communications at issue in the present case fell within either (b) the future crimes or (c) full answer and defence exceptions to the privilege.

(a) Existence of a Solicitor-Client Relationship between the RCMP Officers and Lawyers in the Department of Justice

49 The solicitor-client privilege is based on the functional needs of the administration of justice.

question de savoir si la conduite de la GRC a donné lieu à un abus de procédure. Il prétend que ce qu'on a dit à la GRC au sujet de la légalité de l'opération planifiée n'a aucune importance. Selon le ministère public, l'arrêt des procédures n'est pas justifié même si l'on suppose le pire. Sur cette question, il s'appuie sur l'analyse de la Cour d'appel, déjà citée au par. 13, selon laquelle s'il était démontré que les agents de la GRC [TRADUCTION] «ont agi de leur propre chef comme des rebelles» (p. 197) en dépit d'un avis juridique contraire, cela serait [TRADUCTION] «d'un poids à peu près équivalent» à un cas où la GRC aurait agi en se fondant sur un avis juridique affirmant la légalité des actes projetés. Avec égards, je ne suis pas d'accord. Une force policière qui choisit d'agir hors la loi n'est pas la même chose qu'une force policière qui a commis une erreur de bonne foi fondée sur un avis erroné. Nous n'avons aucune raison de penser que la GRC a écarté l'avis reçu, mais, puisque cette dernière l'a invoqué en réponse à la demande d'arrêt des procédures, les appelants avaient droit à ce que la teneur de cet avis soit corroborée.

Il ressort donc que la seule façon de régler la question de la bonne foi est d'ordonner la divulgation du contenu de l'avis pertinent. Cela doit être fait pour les raisons qui seront expliquées plus loin, au motif de la renonciation par la GRC au secret professionnel de l'avocat. Il serait utile cependant d'examiner d'abord trois prétentions supplémentaires des appelants. Ils disent que la divulgation des communications entre le capl. Reynolds et le ministère de la Justice n'aurait jamais dû être empêchée parce que: a) aucune relation avocat-client n'existe entre les avocats du ministère de la Justice et les policiers, de sorte qu'aucun privilège n'a pu prendre naissance en l'espèce, ou, si une telle relation existait, parce que les communications en question faisaient l'objet soit, b) de l'exception de crime projeté, soit c) de l'exception de défense pleine et entière.

a) L'existence d'une relation avocat-client entre les agents de la GRC et les avocats du ministère de la Justice

Le secret professionnel de l'avocat est fondé sur les besoins fonctionnels de l'administration de la

The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. As Lamer C.J. stated in *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication . . . .

See also *Smith v. Jones*, [1999] 1 S.C.R. 455, *per* Cory J., at para. 46, and *per* Major J., at para. 5. This Court had previously, in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 872, adopted Wigmore's formulation of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality (*Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), § 2292, 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. [Emphasis and numerotation deleted.]

Cpl. Reynolds' consultation with Mr. Leising of the Department of Justice falls squarely within this functional definition, and the fact that Mr. Leising works for an "in-house" government legal service does not affect the creation or character of the privilege.

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example,

justice. Vu sa complexité, le système juridique nécessite une expertise professionnelle. L'accès à la justice est mis en péril lorsqu'il est impossible d'obtenir des conseils juridiques. Il est donc extrêmement important que la GRC soit capable d'obtenir des conseils juridiques professionnels relativement à des enquêtes criminelles sans devoir subir l'effet paralysant de la divulgation potentielle de confidences à l'occasion de procédures ultérieures. Comme le juge en chef Lamer l'a dit dans l'arrêt *R. c. Gruenke*, [1991] 3 R.C.S. 263, à la p. 289:

> La protection à première vue des communications entre l'avocat et son client est fondée sur le fait que les rapports et les communications entre l'avocat et son client sont essentiels au bon fonctionnement du système juridique. Pareilles communications sont inextricablement liées au système même qui veut que la communication soit divulguée. . . .

Voir aussi *Smith c. Jones*, [1999] 1 R.C.S. 455, le juge Cory au par. 46 et le juge Major au par. 5. Notre Cour avait d'abord adopté, dans l'arrêt *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, à la p. 872, la façon dont Wigmore formulait les conditions de fond de l'existence du droit à la confidentialité des communications entre le client et l'avocat (*Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961) § 2292, à la p. 554):

> [TRADUCTION] Les communications faites par le client qui consulte un conseiller juridique ès qualité, voulues confidentielles par le client, et qui ont pour fin d'obtenir un avis juridique font l'objet à son instance d'une protection permanente contre toute divulgation par le client ou le conseiller juridique, sous réserve de la renonciation à cette protection. [Italiques et numérotation omis.]

La consultation donnée au capl. Reynolds par M. Leising du ministère de la Justice cadre parfaitement avec cette définition fonctionnelle, et le fait que M. Leising soit à l'emploi d'un service juridique gouvernemental «interne» ne change rien à l'égard de la création ou de la nature du privilège.

50 Le secret professionnel de l'avocat ne protège évidemment pas l'ensemble des services rendus par un avocat, qu'il soit au service du gouvernement ou non. Bien qu'une partie du travail des avocats du gouvernement soit semblable à celui des avocats de pratique privée, ils peuvent avoir —

participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), *per* Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:

> [I]t is not sufficient for the witness to say, "I went to a solicitor's office." . . . Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that Mr. Leising is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges. This rule is well established, as set out in *Crompton (Alfred) Amusement Machines Ltd. v.*

et ont souvent — de nombreuses autres responsabilités comme, par exemple, la participation à divers comités opérationnels de leur ministère. Les avocats du gouvernement qui œuvrent depuis des années auprès d'un ministère client peuvent être invités à donner des conseils en matière de politique qui n'ont rien à voir avec leur formation et leur expertise juridiques mais font appel à leur connaissance du ministère. Les conseils que donnent les avocats sur des matières non liées à la relation avocat-client ne sont pas protégés. Un ensemble comparable de fonctions sont exercées par les avocats d'affaires salariés au service des grandes entreprises. Les communications avocat-client entre les employés d'une société et l'avocat interne bénéficient du privilège, quoique le contexte de l'entreprise privée (comme le contexte gouvernemental) pose des problèmes particuliers: voir, par exemple, l'enquête interne sur des «paiements douteux» faits à des gouvernements étrangers qui était en cause dans l'affaire *Upjohn Co. c. United States*, 449 U.S. 383 (1981), motifs du juge Rehnquist (plus tard Juge en chef), aux pp. 394 et 395. Dans la pratique privée, certains avocats sont autant ou davantage appréciés pour leur sens inné des affaires que pour leur perspicacité juridique. Le secret professionnel de l'avocat ne s'applique pas aux conseils sur de pures questions d'affaires mêmes s'ils sont donnés par un avocat. Comme le dit lord Hanworth, M.R., dans *Minter c. Priest*, [1929] 1 K.B. 655 (C.A.), aux pp. 668 et 669:

> [TRADUCTION] [I]l ne suffit pas que le témoin dise: «Je suis allé voir un avocat.» . . . Il est permis de poser des questions pour découvrir et déterminer pour quelle raison et dans quelles circonstances le client présumé est allé voir l'avocat.

Le secret professionnel de l'avocat s'appliquera ou non à ces situations selon la nature de la relation, l'objet de l'avis et les circonstances dans lesquelles il est demandé et fourni. Une chose est claire: le fait que M. Leising soit un employé salarié n'a pas empêché la création d'une relation avocat-client et des fonctions, obligations et privilèges qui y sont rattachés. Ce principe est bien établi, comme il a été énoncé dans *Crompton (Alfred) Amusement Machines Ltd. c. Comrs. of Customs and Excise*

Comrs. of Customs and Excise (No. 2), [1972] 2 All E.R. 353 (C.A.), *per* Lord Denning, M.R., at p. 376:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges. . . . I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.

(No. 2), [1972] 2 All E.R. 353 (C.A.), lord Denning, M.R., à la p. 376:

> [TRADUCTION] Beaucoup d'avocats travaillent à plein temps à titre de conseillers juridiques pour un seul employeur. L'employeur est parfois une grande entreprise. Parfois, il s'agit d'un ministère ou d'une administration locale. Il peut même s'agir du gouvernement lui-même, comme le *Treasury Solicitor* et son personnel. Dans chaque cas, ces conseillers juridiques rendent des services juridiques uniquement à leur employeur. Ils ne reçoivent pas des honoraires selon le travail effectué, mais un salaire fixe annuel. Il ne fait aucun doute qu'ils sont des préposés ou des mandataires de leur employeur. C'est ce qui a fait penser au juge qu'ils se trouvaient dans une position différente de celle des conseillers juridiques qui exercent en pratique privée. Je ne pense pas que cela soit exact. La loi les considère en tous points de la même façon que ceux qui pratiquent à leur compte. La seule différence réside dans le fait qu'ils agissent pour un seul client, et non pas pour plusieurs. Ils doivent respecter les mêmes normes d'honneur et de bonne conduite. Ils sont soumis aux mêmes obligations envers leur client et envers la cour. Ils doivent respecter le secret professionnel de la même manière. Leurs clients et eux ont les mêmes privilèges. [. . .] J'ai toujours tenu pour acquis que les communications entre les conseillers juridiques et leur employeur (qui est leur client) font l'objet du secret professionnel, et cela n'a jamais été remis en question, à ma connaissance.

It is true that the Minister of Justice, who is *ex officio* the Attorney General of Canada, has a special legislated responsibility to ensure that "the administration of public affairs is in accordance with law", and in that respect he or she is not subject to the same client direction as private clients: see *Department of Justice Act*, R.S.C., 1985, c. J-2, s. 4. We are not, however, concerned in this case with any conflict that may arise between the Minister and one of the "client departments". Here, the Attorney General and the RCMP are united in asserting the privilege.

51 Il est vrai que la loi confère expressément au ministre de la Justice, qui est d'office Procureur général du Canada, la responsabilité de veiller «au respect de la loi dans l'administration des affaires publiques», et, qu'à ce titre, il n'est pas soumis à des directives de la même façon que s'il avait des clients privés: voir *Loi sur le ministère de la Justice*, L.R.C. (1985), ch. J-2, art. 4. La présente affaire ne porte toutefois pas sur un conflit susceptible de survenir entre le ministre et l'un de ses «ministères clients». En l'espèce, le procureur général et la GRC s'entendent pour invoquer le privilège.

In the United States, the courts have recognized that solicitor-client privilege attaches to communications between government employees and government lawyers that fulfill the *Wigmore* conditions mentioned in *Descôteaux*, *supra*. The point is

52 Aux États-Unis, les tribunaux ont reconnu que le secret professionnel de l'avocat protégeait les communications entre les employés et les avocats du gouvernement dans les cas qui satisfaisaient aux conditions de *Wigmore* citées dans *Descôteaux*,

made, for example, by the authors of the Restatement (Restatement (Third) of the Law Governing Lawyers, § 124 (Proposed Final Draft No. 1, 1996)), as follows:

> Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization . . . and of an individual officer . . . of a governmental organization.

It is possible that in the United States the application of the privilege to government counsel may be circumscribed differently than in this country owing to the structure of the United States Constitution and government: see, e.g., the discussion of the U.S. Court of Appeals, District of Columbia Circuit, in the context of an investigation of alleged criminal conduct by government officials in *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998). In this country as well, the solicitor-client privilege may operate differently in some respects because of the public interest aspect of government administration, but such differences are not relevant to this appeal.

53 In support of their assertion that no privilege exists in respect of communications between the police and Crown counsel in the course of a criminal investigation, the appellants rely upon *Re Girouard and the Queen* (1982), 68 C.C.C. (2d) 261 (S.C.B.C.), and *R. v. Ladouceur*, [1992] B.C.J. No. 2854 (QL) (S.C.). *Girouard* concerned the admissibility of the details of a conversation between Crown counsel and a police officer who was to be a Crown witness in the hallway outside the courtroom on the day of a preliminary inquiry. The conversation was overheard by defence counsel. The B.C. Supreme Court held, *inter alia*, that because the conversation had been overheard, any privilege that might have existed had been waived.

54 *Girouard* advocates the proposition that communications as to the question of identification between a police officer who is to be a Crown witness and Crown counsel are not protected by solicitor-client privilege. This seems to be based on the

précité. C'est ce qu'expliquent les auteurs du Restatement (Third) of the Law Governing Lawyers, § 124 (Proposed Final Draft No. 1, 1996):

> [TRADUCTION] À moins de disposition contraire prévue par la loi, le secret professionnel de l'avocat protège les communications d'un organisme gouvernemental [. . .] et d'un fonctionnaire d'un organisme gouvernemental.

Il est possible qu'aux États-Unis, le privilège s'applique aux avocats du gouvernement d'une façon différente qu'au Canada en raison de la structure de la Constitution et du gouvernement des États-Unis: voir, p. ex., les observations de la U.S. Court of Appeals, District of Columbia Circuit, dans le cadre d'une enquête sur des allégations de conduite criminelle contre certains fonctionnaires, dans *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998). Le secret professionnel de l'avocat peut également s'appliquer différemment au Canada à certains égards en raison de question d'intérêt public dans l'administration gouvernementale, mais ces différences ne sont pas pertinentes dans le cadre du présent pourvoi.

Pour appuyer leur argument selon lequel il n'existe aucun privilège relativement aux communications entre la police et l'avocat du ministère public dans le cadre d'une enquête criminelle, les appelants invoquent les décisions *Re Girouard and the Queen* (1982), 68 C.C.C. (2d) 261 (C.S.C.-B.), et *R. c. Ladouceur*, [1992] B.C.J. No. 2854 (QL) (C.S.). L'affaire *Girouard* portait sur l'admissibilité en preuve des propos échangés le jour d'une enquête préliminaire, dans le corridor menant à la salle d'audience, à l'occasion d'une conversation entre l'avocat du ministère public et un policier qui devait témoigner pour ce dernier. La conversation avait été surprise par l'avocat de la défense. La Cour suprême de la Colombie-Britannique a conclu, notamment, qu'en raison du fait que la conversation avait été entendue, il y avait eu renonciation à tout privilège existant.

La décision *Girouard* préconise la proposition que les communications relatives à la question de l'identification entre un policier désigné comme témoin du ministère public et l'avocat de ce dernier ne sont pas protégées par le secret profession-

Court's view that because a police officer was not an agent of the Attorney General, no solicitor-client relationship could exist between a Crown counsel and a police officer. I disagree with this analysis. The existence of an agency relationship is not essential to the creation of solicitor-client privilege. In seeking advice from a lawyer about the exercise of his original authority that "cannot be exercised on the responsibility of any person but himself" (*Enever*, *supra*, p. 977), Cpl. Reynolds satisfied the conditions precedent "to the existence of the right of the lawyer's client to confidentiality" (*Descôteaux*, *supra*, p. 872). Subject to what is said below, when Mr. Leising of the Department of Justice initially advised Cpl. Reynolds about the legality of a reverse sting operation, these communications were protected by solicitor-client privilege.

nel de l'avocat. La cour semble avoir adopté le point de vue qu'étant donné qu'un policier n'est pas un mandataire du procureur général, il ne peut y avoir aucune relation d'avocat-client entre un avocat du ministère public et un policier. Je suis en désaccord avec cette analyse. L'existence d'une relation de mandant-mandataire n'est pas essentielle à la création du secret professionnel de l'avocat. En demandant l'avis d'un avocat au sujet de l'exercice de ses pouvoirs «qui ne peuvent être exercés sous la responsabilité de quiconque, sauf la sienne» (*Enever*, précité, p. 977), le capl. Reynolds a rempli les conditions de «l'existence du droit à la confidentialité du client de l'avocat» (*Descôteaux*, précité, p. 872). Sous réserve de ce qui suit, les communications résultant de l'avis initialement donné par M. Leising du ministère de la Justice au capl. Reynolds sur la légalité d'une opération de vente surveillée étaient protégées par le secret professionnel de l'avocat.

(b) The "Future Crimes and Fraud" Exception

b) L'exception de «crime et de fraude projetés»

55 It is well established, as the appellants argue, that there is an exception to the principle of confidentiality of solicitor-client communications where those communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime. The exception was noted by Dickson J. in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 835-36:

> More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

55 Comme les appelants le soutiennent, l'existence d'une exception au principe de la confidentialité des communications avocat-client est bien établie relativement aux cas où ces communications sont de nature criminelle ou qu'elles visent à obtenir un avis juridique pour faciliter la perpétration d'un crime. L'exception a été soulignée par le juge Dickson dans *Solosky c. La Reine*, [1980] 1 R.C.S. 821, aux pp. 835 et 836:

> Plus significatif, si un client consulte un avocat pour pouvoir perpétrer plus facilement un crime ou une fraude, alors la communication n'est pas privilégiée et il importe peu que l'avocat soit une dupe ou un participant. L'arrêt classique est *R. v. Cox and Railton* [(1884), 14 Q.B.D. 153], où le juge Stephen s'exprime en ces termes (p. 167): [TRADUCTION] «Une communication faite en vue de servir un dessein criminel ne «relève pas de la portée ordinaire des secrets professionnels»».

56 The Court of Appeal concluded, at p. 200, that the "future crimes" exception applied because it was a "fair inference" from a memorandum dated June 1991 "that the lawyer was offering advice which, even given the utmost good faith, was being utilized by Corporal Reynolds in the planning of the venture". A distinction must be drawn,

56 La Cour d'appel a conclu à la p. 200 que l'exception du «crime projeté» s'appliquait, parce qu'une note de service datée de juin 1991 [TRADUCTION] «justifiait l'inférence que l'avis donné par l'avocat, même s'il a été donné avec la plus entière bonne foi, a été utilisé par le caporal Reynolds pour planifier l'opération». Il faut faire

I think, between the evidence of Cpl. Reynolds and related documents, on the one hand, and the position taken by the Crown and the RCMP before the courts in this case, on the other hand. The testimony of Cpl. Reynolds was that he did not require legal advice "to plan the venture". He already knew about reverse sting operations. Nor did he seek the advice to "facilitate" the crime. He sought advice as to whether or not the operation he had in mind was lawful. This is the sort of transaction advice sought every day from lawyers. In my view, the privilege is not automatically destroyed if the transaction turns out to be illegal. As noted above, Dickson J., in *Solosky*, at p. 835, referred to *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, as "[t]he classic case" on this point. In that case, a judgment debtor consulted a solicitor about the vulnerability of assets to seizure. The solicitor's advice was essentially that it could not be done without a *bona fide* sale of the property in question. Later, when the judgment creditor attempted to realize against the assets, they had been sold. It was alleged that the sale was fraudulent as having been entered into in an attempt to deprive the judgment creditor of the fruits of his judgment. The solicitor was called as a witness and compelled to testify about the advice he had given. Stephen J., for the court on appeal, after affirming the importance of the solicitor-client privilege, went on to discuss the limits of this doctrine as follows, at p. 168:

> In order that the rule [the solicitor-client privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. [Emphasis added.]

The court found in that case that although the solicitor was not an active part of the conspiracy to

une distinction, à mon avis, entre le témoignage du capl. Reynolds et les documents connexes, d'une part, la position adoptée en l'espèce par le ministère public et la GRC devant les tribunaux, de l'autre. Le caporal Reynolds a témoigné qu'il n'avait pas eu besoin d'avis juridique pour [TRADUCTION] «planifier l'opération». Il connaissait déjà les opérations de vente surveillée. Il n'a pas demandé d'avis pour «faciliter» le crime. Il a demandé un avis sur légalité de l'opération qu'il projetait. Ce genre d'avis sur une opération projetée est demandé quotidiennement aux avocats. À mon avis, le privilège n'est pas automatiquement écarté si l'opération se révèle illégale. Comme nous l'avons vu précédemment, le juge Dickson, dans *Solosky*, à la p. 835, a dit que *R. c. Cox and Railton* (1884), 14 Q.B.D. 153, était «[l]'arrêt classique» sur ce point. Dans cette affaire, un débiteur en vertu d'un jugement avait consulté un avocat pour savoir si des biens étaient saisissables. Pour l'essentiel, l'avocat l'a informé qu'il fallait une vente de bonne foi de ces biens. Lorsque, plus tard, le créancier a voulu réaliser sa créance, les biens avaient été vendus. Il a été allégué qu'il s'agissait d'une vente frauduleuse, conclue pour priver le créancier des fruits du jugement. L'avocat a été assigné comme témoin et contraint à témoigner au sujet de l'avis qu'il avait donné. S'exprimant au nom de la cour d'appel, le juge Stephen, après avoir insisté sur l'importance du secret professionnel de l'avocat, analyse les limites du principe, à la p. 168:

> [TRADUCTION] L'application de la règle [du secret professionnel de l'avocat] suppose, d'une part, un rapport de confidentialité professionnelle, et, d'autre part, une consultation professionnelle, mais si le client poursuit un dessein criminel en faisant des communications à son avocat, l'un de ces éléments doit nécessairement être absent. Le client doit, soit comploter avec l'avocat, soit le tromper. S'il lui fait part de son dessein criminel, le client ne consulte pas à titre professionnel, parce que la fonction de l'avocat ne peut pas être de favoriser la perpétration d'un crime. Si le client ne lui divulgue pas son dessein, il n'y a pas de confidence, car l'état de choses sur lequel repose la prétendue confidence n'existe pas. Il obtient l'avis de l'avocat par fraude. [Je souligne.]

Dans cette affaire, la cour a conclu que, bien que l'avocat n'ait pas pris une part active au complot

defraud the creditor, he had been duped by his clients, and the privilege was destroyed.

The language of the court in *Cox and Railton* (" . . . if the client has a criminal object in view in his communications with his solicitor . . . ") implied that this exception can only apply where a client is knowingly pursuing a criminal purpose, and it is so laid down by Professor Wigmore (*Wigmore on Evidence*, *supra*, § 2298, at p. 573) where he gives an affirmative answer to the question, "Must . . . the advice be sought for a *knowingly* unlawful end?" (Emphasis in original.)

Although the issue has apparently not been directly considered in the Canadian case law, the Wigmore view was subsequently espoused by the authors of "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 *Harv. L. Rev.* 730, where they state as follows, at pp. 730-31:

> The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is sought in activity that the client knows to constitute a crime or tort. [Emphasis added.]

The scope of the "future crimes" exception is circumscribed on a public policy basis, as explained at p. 731:

> The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged. Moreover, counseling against unfounded claims or illegal projects is an important part of the lawyer's function. [Emphasis added.]

This explanation is consistent with the statement of the principle of Lamer J. in *Descôteaux*, *supra*, at p. 881:

> Confidential communications, whether they relate to financial means or to the legal problem itself, lose that character if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime.

pour léser le créancier, il avait été dupé par ses clients et le privilège avait été anéanti.

57 Les termes employés dans *Cox and Railton* («. . . si le client poursuit un dessein criminel en faisant des communications à son avocat») impliquent que cette exception ne vaut que si le client poursuit sciemment un dessein criminel, et c'est précisément ce que dit le professeur Wigmore (*Wigmore on Evidence*, *op. cit.*, § 2298, à la p. 573) quand il apporte une réponse affirmative à la question: [TRADUCTION] «Le client doit-il demander l'avis sachant que la fin poursuivie est illégale?» (En italique dans l'original.)

58 Quoique la question n'ait apparemment pas été abordée directement dans la jurisprudence au Canada, le point de vue de Wigmore a été approuvé par les auteurs de «The Future Crime or Tort Exception to Communications Privileges» (1964), 77 *Harv. L. Rev.* 730, aux pp. 730 et 731:

> [TRADUCTION] Le secret professionnel de l'avocat a toujours été subordonné à cette condition: la protection des communications est écartée quand le client consulte l'avocat pour obtenir son aide, sachant que l'acte projeté constitue un crime ou un délit. [Je souligne.]

La portée de l'exception du «crime projeté» est délimitée selon des raisons de principes d'intérêt public, comme on l'explique à la p. 731:

> [TRADUCTION] La condition relative à la connaissance réduit l'effet de l'exception sur des communications légitimes; à défaut de cette condition, le risque que leur objet se révèle illégal et que le privilège soit par conséquent écarté ferait obstacle aux consultations légitimes. De plus, c'est une partie importante de la fonction de l'avocat de déconseiller les revendications sans fondement et les projets illégaux. [Je souligne.]

59 Cette explication est conforme à l'énoncé du principe par le juge Lamer dans l'arrêt *Descôteaux*, précité, à la p. 881:

> Confidentielles, qu'elles aient trait aux moyens financiers ou à la nature du problème, les communications ne le seront plus si et dans la mesure où elles ont été faites dans le but d'obtenir des avis juridiques pour faciliter la perpétration d'un crime.

The exception to the formation of the privilege was elaborated upon by Lord Parmoor in *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at p. 621:

> The third point relied on by the appellant, as an answer to the claim of professional privilege, is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle, there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud, or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. [Emphasis added.]

60 A leading U.S. case that considers this question is *State ex rel. North Pacific Lumber Co. v. Unis*, 579 P.2d 1291 (Or. 1978). In that case, it was alleged that an employer illegally eavesdropped on an employee's telephone conversations. The employer stated that before undertaking this eavesdropping, it had sought legal advice and it claimed solicitor-client privilege over these communications. The employee sought the disclosure of this advice, but disclosure was refused. The court made the following pertinent comment, at p. 1295:

> We approve of the requirement that, in order to invoke the exception to the privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper. [Emphasis added.]

61 In the present case, the only evidence of RCMP knowledge, constructive or otherwise, is the testimony of Cpl. Reynolds who insists that he believed the reverse sting operation to be lawful. In light of his prior study of the Superior Court decision in *Lore*, *supra*, it cannot fairly be said that Cpl. Reynolds "knew or should have known that

L'exception à la création du privilège a été développée par lord Parmoor dans *O'Rourke c. Darbishire*, [1920] A.C. 581 (H.L.), à la p. 621:

> [TRADUCTION] Le troisième moyen de l'appelant contre l'existence du secret professionnel invoqué est que la présente affaire est soumise au principe que ce privilège ne s'applique pas lorsqu'une fraude a été concoctée entre un avocat et son client ou lorsque l'avocat a conseillé son client de manière à lui permettre d'effectuer une opération frauduleuse. S'il est démontré que ce principe doit trouver application en l'espèce, le secret professionnel sera écarté puisque les obligations professionnelles de l'avocat excluent la planification d'une opération frauduleuse ou les conseils à un client sur la façon de commettre une fraude. On ne peut prétendre que les échanges et les communications effectuées dans ce but font l'objet du sceau de la confidentialité professionnelle rattaché à l'exercice des fonctions professionnelles. [Je souligne.]

Un arrêt de principe américain sur cette question est *State ex rel. North Pacific Lumber Co. c. Unis*, 579 P.2d 1291 (Or. 1978). Dans cette affaire, il était allégué qu'un employeur avait illégalement soumis les conversations téléphoniques d'un employé à l'écoute électronique. L'employeur a dit qu'avant de recourir à l'écoute électronique, il avait demandé un avis juridique et il a fait valoir le secret professionnel de l'avocat à l'égard de ces communications. L'employé a sollicité la divulgation de cet avis, mais celle-ci lui a été refusée. La cour fait cette observation pertinente, à la p. 1295:

> [TRADUCTION] Nous approuvons l'exigence selon laquelle, s'il veut invoquer l'exception au privilège, celui qui veut présenter la preuve doit démontrer que le client, lorsqu'il a consulté l'avocat, savait ou aurait dû savoir que l'acte projeté était illégal. Les consultations de bonne foi entre un avocat et un client qui est incertain des conséquences juridiques d'une ligne de conduite envisagée bénéficient de la protection du privilège, même si l'acte est jugé illicite par la suite. [Je souligne.]

En l'espèce, la seule preuve de la connaissance, présumée ou autre, de la GRC est le témoignage du caporal Reynolds qui maintient avoir cru que l'opération de vente surveillée était légale. Puisque le caporal Reynolds avait lu la décision *Lore*, précitée, de la Cour supérieure, on ne peut affirmer qu'au moment où il s'est adressé à M. Leising, il

the intended conduct was unlawful" at the time he approached Mr. Leising. Nor does the evidence establish that Mr. Leising was a "conspirator or a dupe". There is therefore no basis in Cpl. Reynold's evidence to suggest that in this case the solicitor-client privilege never came into existence.

The question remains whether the privilege was destroyed when the RCMP sold hashish to the appellants. It is argued by the authors of "The Future Crime or Tort Exception to Communications Privileges", *supra*, at p. 731, that a "subsequent formation of criminal intent should be held to destroy a preexisting privilege". This would suggest that proof of a crime which, except in offences of absolute liability, entails proof of intent, would automatically destroy the privilege in every case. Such a proposition could have a very broad impact, for example, in the field of regulatory crimes and offences. In my view, destruction of the privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator". The evidence of Cpl. Reynolds does not establish such things, but the formal position of the Crown, with the support of the RCMP, goes beyond his evidence. The RCMP position before the Court was that the decision to proceed with the reverse sting had been taken with the participation and agreement of the Department of Justice. By adopting this position, the RCMP belatedly brought itself within the "future crimes" exception, and put in question the continued existence of its privilege.

If there had been no waiver of privilege by the RCMP in this case, I would have taken the view that any papers documenting the legal advice (or, if there was no contemporaneous documentation, an affidavit setting out the content of the relevant advice) ought to be provided in the first instance to the trial judge. If he or she were satisfied, either on the basis of the documents themselves or on the basis of the documents supplemented by other evidence, that the documented advice could be fairly

«savait ou aurait dû savoir que l'acte projeté était illégal». Rien dans la preuve n'établit non plus que M. Leising était un «comploteur ou une dupe». Rien ne permet donc de dire à partir du témoignage du capl. Reynolds que le secret professionnel de l'avocat n'a jamais pris naissance en l'espèce.

62 Il reste à décider si le privilège a été anéanti quand la GRC a vendu du haschisch aux appelants. Les auteurs de «The Future Crime or Tort Exception to Communications Privileges», *loc. cit.*, à la p. 731, soutiennent que [TRADUCTION] «la formation ultérieure d'une intention criminelle devrait anéantir le privilège préexistant». Ceci signifierait que la preuve d'un crime, sauf dans les infractions de responsabilité absolue, qui entraîne la preuve de l'intention détruirait automatiquement le privilège dans tous les cas. Une telle proposition pourrait avoir une portée très large dans le domaine des infractions réglementaires, par exemple. À mon avis, la levée du privilège exige plus que la preuve de l'existence d'un crime et de la consultation préalable d'un avocat. Il faut quelque élément tendant à établir que l'avis a facilité le crime ou que l'avocat est devenu «dupe ou comploteur». Cela n'est pas démontré par le témoignage du capl. Reynolds, mais la position officielle du ministère public, avec l'appui de la GRC, va au-delà de ce témoignage. La GRC a soutenu devant notre Cour que la décision d'exécuter l'opération de vente surveillée a été prise avec la participation et l'accord du ministère de la Justice. En adoptant cette position, la GRC s'est placée en fin de compte dans le cadre de l'exception de «crime projeté» et a mis en question le maintien du privilège.

63 Si la GRC n'avait pas renoncé au privilège dans la présente espèce, j'aurais été d'avis que tout écrit attestant l'avis juridique (ou, faute de documentation concomitante, un affidavit exposant le contenu de l'avis pertinent) devait être présenté en tout premier lieu au juge du procès. Si celui-ci est convaincu, sur la foi des documents eux-mêmes ou des documents complétés par d'autres éléments de preuve, qu'il y a quelque raison de penser que l'avis ainsi attesté a de quelque manière facilité le

said in some way to have facilitated the crime, the documents would then be provided to the appellants. If the lawyer had merely advised about the legality of the operation, and thereby made himself neither dupe nor conspirator in the facilitation of a crime, the proper course would have been to return the papers to the RCMP.

64 In this case, however, I think the RCMP did waive the privilege, as discussed below. The relevant solicitor-client communications that came within the scope of the waiver ought therefore to be turned over directly to the appellants without the need in the first instance of a two-stage procedure involving the trial judge.

(c) Full Answer and Defence

65 Another exception to the rule of confidentiality of solicitor-client privilege may arise where adherence to that rule would have the effect of preventing the accused from making full answer and defence: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 340; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at p. 43; *R. v. Gray* (1992), 74 C.C.C. (3d) 267 (B.C.S.C.), at pp. 273-74. The Crown concedes the validity of the principle, but suggests that it is irrelevant to an abuse of process application because it applies only where "innocence is at stake", which is no longer the case in the present appeal. Where innocence is not at stake, the Crown contends, the accused's right to make full answer and defence is not engaged. In this connection, the Crown relies upon *R. v. Seaboyer*, [1991] 2 S.C.R. 577, *per* McLachlin J., at p. 607, and *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, *per* L'Heureux-Dubé J., at p. 561. I do not think these cases can be taken as deciding an issue that was not before the Court on those occasions. The Ontario Court of Appeal concluded at p. 200 that the full answer and defence exception applied because "the entire jeopardy of the appellants remained an open issue until disposition of the stay application". This may be true, but the appellants were not providing "full answer and defence" to the stay application. On the contrary, the appel-

crime, les documents doivent alors être fournis aux appelants. Si l'avocat a simplement donné son avis sur la légalité de l'opération, sans devenir dupe ou comploteur en facilitant un crime, il y a lieu alors de restituer les documents à la GRC.

En l'espèce, toutefois, je crois que la GRC a renoncé au privilège, comme je vais l'exposer plus loin, et que la GRC a elle-même argué du fait qu'elle s'était fondée de bonne foi sur l'avis en cause. Les communications pertinentes entre l'avocat et son client qui étaient visées par la renonciation doivent, par conséquent, être remises directement aux appelants sans qu'il soit nécessaire ou juge du procès de procéder au préalable à cette procédure à deux étapes.

c) La défense pleine et entière

Une autre exception au principe du secret professionnel de l'avocat peut prendre naissance lorsque le respect de ce principe aurait pour effet d'empêcher l'accusé de faire valoir une défense pleine et entière: voir *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, à la p. 340; *R. c. Dunbar* (1982), 68 C.C.C. (2d) 13 (C.A. Ont.), à la p. 43; *R. c. Gray* (1992), 74 C.C.C. (3d) 267 (C.S.C.-B.), aux pp. 273 et 274. Le ministère public admet la validité de ce principe tout en ajoutant qu'il ne s'applique pas à une demande relative à l'abus de procédure parce qu'il ne s'applique que lorsque [TRADUCTION] «la question de l'innocence est en jeu», ce qui n'est plus le cas dans le présent pourvoi. Selon le ministère public, le droit de l'accusé à une défense pleine et entière n'entre pas en jeu lorsque la question de l'innocence ne se pose pas. À cet effet, le ministère public s'appuie sur les arrêts *R. c. Seaboyer*, [1991] 2 R.C.S. 577, motifs du juge McLachlin, à la p. 607, et *A. (L.L.) c. B. (A.)*, [1995] 4 R.C.S. 536, motifs du juge L'Heureux-Dubé, à la p. 561. Je ne crois que l'on puisse dire que ces arrêts ont tranché une question dont notre Cour n'était pas saisie à ces occasions. La Cour d'appel de l'Ontario a conclu à la p. 200 que l'exception de défense pleine et entière s'appliquait parce que [TRADUCTION] «le sort entier des appelants demeurait non réglé jusqu'à ce que la

lants are the moving parties. The application is being defended by the Crown. The appellants' initiative in launching a stay application does not, of itself, authorize a fishing expedition into solicitor-client communications to which the Crown is a party.

demande d'arrêt des procédures soit tranchée». Cela est peut-être exact, mais les appelants ne faisaient pas valoir une «défense pleine et entière» à la demande d'arrêt des procédures. Ce sont eux qui, au contraire, ont présenté cette demande. Le ministère public s'y oppose en défense. La décision des appelants de demander l'arrêt des procédures n'autorise pas en soi une recherche à l'aveuglette dans des communications entre avocat et client auxquelles le ministère public a pris part.

As stated, the present appeal is decided on the basis of waiver of solicitor-client privilege and I leave for another day the decision whether, in the absence of waiver, full answer and defence considerations may themselves operate to compel the disclosure of solicitor-client privilege of communications in an abuse of process proceeding and, if so, in what circumstances.

66 Comme je l'ai déjà mentionné, l'issue du présent pourvoi repose sur la renonciation au secret professionnel de l'avocat, et je ne me prononce pas en l'espèce sur la question de savoir si, en l'absence de renonciation, des considérations relatives à la défense pleine et entière peuvent elles-mêmes avoir pour effet de forcer la divulgation de communications faisant l'objet du secret professionnel dans le cadre d'une action en abus de procédure et, si tel est le cas, dans quelles circonstances.

Waiver of Solicitor-Client Privilege

La renonciation au secret professionnel de l'avocat

The record is clear that the RCMP put in issue Cpl. Reynolds' good faith belief in the legality of the reverse sting, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP factum in the Ontario Court of Appeal has already been quoted in para. 46. In my view, the RCMP waived the right to shelter behind solicitor-client privilege the contents of the advice thus exposed and relied upon. I characterize the RCMP rather than Cpl. Reynolds as the client in these circumstances because even though he was exercising the duties of his public office as a police officer, Cpl. Reynolds was seeking the legal advice in the course of his RCMP employment. The identification of "the client" is a question of fact. There is no conceptual conflict between the individual responsibilities of the police officer and characterizing the "client" as the RCMP. Despite the existence of the *Royal Canadian Mounted Police Act* and related legislation, I believe the relationship among individual policemen engaged in criminal investigations is accurately set out in *Halsbury's Laws of England* (4th ed. 1981), vol. 36, at p. 107:

67 Le dossier indique clairement que la GRC a fait valoir la croyance de bonne foi du capl. Reynolds dans la légalité de l'opération de vente surveillée et qu'elle a affirmé s'être fiée aux consultations qu'il avait eues avec le ministère de la Justice afin d'étayer cet argument. Le mémoire déposé par la GRC devant la Cour d'appel de l'Ontario a déjà été cité au par. 46. J'estime que la GRC a renoncé au droit d'abriter derrière le secret professionnel de l'avocat le contenu de l'avis ainsi dévoilé et invoqué. Je considère que c'est la GRC et non le capl. Reynolds qui est le client en l'espèce car, même s'il exerçait les fonctions liées à sa charge de policier, le capl. Reynolds a demandé l'avis juridique dans le cadre de l'exercice de son emploi à la GRC. L'identification du «client» est une question de fait. Il n'y a aucune contradiction conceptuelle entre les responsabilités individuelles du policier et le fait de considérer le «client» comme étant la GRC. Malgré l'existence de la *Loi sur la Gendarmerie royale du Canada* et des lois connexes, j'estime que la relation entre les policiers à titre individuel dans le cadre d'une enquête criminelle est décrite avec précision dans *Halsbury's Laws of England* (4e éd. 1981), vol. 36, à la p. 107:

The history of the police is the history of the office of constable and, notwithstanding that present day police forces are the creation of statute and that the police have numerous statutory powers and duties, in essence a police force is neither more nor less than a number of individual constables, whose status derives from the common law, organised together in the interests of efficiency.

[TRADUCTION] L'histoire de la police est l'histoire de la charge de policier, et malgré le fait que les forces policières actuelles sont des créations de la loi et que les policiers ont de nombreuses fonctions et obligations, il n'en demeure pas moins qu'une force policière n'est essentiellement ni plus ni moins qu'un groupe de policiers individuels, dont le statut découle de la common law, qui se sont structurés dans l'intérêt de l'efficacité.

If Cpl. Reynolds himself were characterized as the client, it could be said that sharing the contents of that advice with his fellow officers would have breached the confidentiality and waived the privilege, which would be absurd. At the same time, if the legal advice were intentionally disclosed outside the RCMP, even to a department or agency of the federal government, such disclosure might waive the confidentiality, depending on the usual rules governing disclosure to third parties by a client of communications from its solicitor.

Si le caporal Reynolds lui-même était considéré comme le client, on pourrait prétendre que le fait de discuter du contenu de cet avis avec ses collègues aurait violé la confidentialité et écarté le privilège, ce qui serait absurde. Par ailleurs, si le contenu de l'avis juridique a été volontairement divulgué à l'extérieur de la GRC, y compris à un ministère ou à un organisme du gouvernement fédéral, cette divulgation pourrait constituer une renonciation à la confidentialité, selon les règles habituelles régissant la divulgation à des tiers par un client de communications provenant de son avocat.

68 It is convenient to recall at this point that at the time of the original disclosure motions, the position of the appellants was clear, i.e., disclose the communications or forswear reliance upon them. Notwithstanding this caution, the RCMP and their legal counsel chose to rely upon the communications to support their argument of good faith reliance. In doing so, the privilege was waived.

Il est utile de rappeler à ce stade-ci qu'au moment de la présentation des requêtes en divulgation initiales, la position des appelants était claire, c.-à-d.: divulguez les communications ou renoncez à les invoquer. Malgré cet avertissement, la GRC et son avocat ont choisi de les invoquer au soutien de l'argument selon lequel l'avis avait été suivi de bonne foi. Ce faisant, ils ont renoncé au privilège.

69 In *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A.), the bank put a defaulting customer into receivership, and the customer sued both the bank and the receiver, who then launched third party proceedings at each other. The bank said it had relied on the receiver's advice in putting the customer into receivership. The receiver denied detrimental reliance on its advice, and wanted to know what other professional advice the bank had received at the relevant time. In particular, the receiver wanted to know what legal advice the bank had received from its own lawyers, MacKimmie Matthews. The bank claimed solicitor-client privilege over this correspondence. In

Dans *Rogers c. Bank of Montreal*, [1985] 4 W.W.R. 508 (C.A.C.-B.), la banque avait fait mettre sous séquestre les biens d'un client en défaut et ce dernier avait poursuivi tant la banque que le séquestre, qui avaient à leur tour intenté des actions en garantie l'un contre l'autre. La banque a prétendu s'être fiée à l'avis du séquestre avant de prendre une telle mesure contre son client. Le séquestre a contesté la prétention que l'avis qu'il avait donné avait causé un préjudice, et il a cherché à savoir quel autre conseil professionnel la banque avait reçu à l'époque pertinente. En particulier, le séquestre voulait connaître la nature de l'avis juridique que la banque avait reçu de ses propres avocats, MacKimmie Matthews. La banque a invoqué que le secret professionnel de

rejecting the bank's claim of privilege, the court, *per* Hutcheon J.A., stated as follows, at p. 513:

> The issue in this case is not the knowledge of the bank. The issue is whether the bank was induced to take certain steps in reliance upon the advice from the receiver on legal matters. To take one instance, the receiver, according to the bank, advised the bank that it was not necessary to allow Abacus [the plaintiff debtor] time for payment before the appointment of the receiver. A significant legal decision had been rendered some months earlier to the opposite of that advice. The extent to which the bank had been advised about that decision, not merely of its result, is important in the resolution of the issue whether the bank relied upon the advice of the receiver. [Emphasis added.]

The Court goes on to adopt the reasoning of the United States District Court for the District of Columbia in *United States v. Exxon Corp.*, 94 F.R.D. 246 (1981) as follows, at pp. 248-49:

> Most courts considering the matter have concluded that a party waives the protection of the attorney-client privilege when he voluntarily injects into the suit the question of his state of mind. For example, in *Anderson v. Nixon*, 444 F.Supp. 1195, 1200 (D.D.C. 1978), Judge Gesell stated that as a general principle "a client waives his attorney-client privilege when he brings suit or raises an affirmative defense that makes his intent and knowledge of the law relevant."
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> Thus, the only way to assess the validity of Exxon's affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon's interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives.

It appears the court in *Rogers* found that any privilege with respect to correspondence with the bank's solicitors had been waived as necessarily inconsistent with its pleading of reliance, even though the bank itself had not referred to, much less relied upon, the existence of advice from its own solicitors.

l'avocat sur la correspondance échangée à cet effet. En rejetant cette prétention, la cour, par l'entremise du juge Hutcheon, a dit, à la p. 513:

> [TRADUCTION] La question en litige n'est pas la connaissance de la banque. La question est de savoir si l'avis fourni par le séquestre en matière juridique a incité la banque à prendre certaines mesures. Pour prendre un exemple, la banque prétend que le séquestre l'a informée qu'il n'était pas nécessaire d'accorder à Abacus [le demandeur-débiteur] un délai de paiement avant la nomination du séquestre. Un jugement d'une importance majeure établissant l'inverse de cet avis avait été rendu quelques mois auparavant. Le fait que la banque ait été informée ou non du contenu de cette décision, et non seulement de son issue, est important pour déterminer si la banque s'est fiée à l'avis du séquestre. [Je souligne.]

La cour adopte ensuite le raisonnement suivi par la Cour de district des États-Unis du district de Columbia dans l'affaire *United States c. Exxon Corp.*, 94 F.R.D. 246 (1981), aux pp. 247 à 249:

> [TRADUCTION] La plupart des tribunaux qui ont examiné cette question ont conclu qu'une partie renonçait à la protection du secret professionnel lorsqu'elle invoquait volontairement la question de son état d'esprit. Par exemple, dans l'affaire *Anderson c. Nixon*, 444 F. Supp. 1195, 1200 (D.D.C. 1978), le juge Gesell dit que le principe général est qu'«un client renonce au secret professionnel lorsqu'il intente une poursuite ou qu'il présente une défense affirmative qui rend pertinentes son intention et sa connaissance de la loi».
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> . . .
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> Par conséquent, la seule façon d'évaluer la validité des défenses affirmatives volontairement soulevées par Exxon est d'enquêter sur les communications avocat-client à l'époque où l'interprétation de diverses politiques et directives du DOE a été établie et où Exxon a exprimé ses intentions relativement au respect de ces politiques et directives.

Il appert que, dans *Rogers*, la cour a conclu qu'il y avait eu renonciation au privilège protégeant la correspondance entre la banque et ses avocats parce que ce privilège était nécessairement incompatible avec sa prétention qu'elle s'était fiée à l'avis [du séquestre], même si la banque n'avait pas mentionné, et encore moins invoqué, l'existence d'un avis fourni par ses propres avocats.

70 The present case presents a stronger argument for waiver than *Rogers*. The Crown led evidence from Cpl. Reynolds about his knowledge of the law with respect to reverse sting operations – he testified that he had read the Superior Court decision in *Lore*, *supra*, and was of the view that the operation in question was legal. But Cpl. Reynolds also testified, in answer to the appellants' counsel, that he sought out the opinion of Mr. Leising of the Department of Justice to verify the correctness of his own understanding. The appellants' counsel recognized that this alone was not enough to waive the privilege. Cpl. Reynolds was simply responding to questions crafted by the appellants, as he was required to do. Appellants' counsel accepted that he had no right at that point to access the communications. His comment to the judge was simply that "I certainly don't want to hear the argument that 'Oh well, the police acted in good faith because they acted on legal advice'". The critical point is that the Court did hear that precise argument from the Crown at a later date. The RCMP and its legal advisers were explicit in their factum in the Court of Appeal, where it was argued that "regard must be had to the following considerations . . . (f) The R.C.M.P. . . . consulted with the Department of Justice with regard to any problems of illegality" (emphasis added). We understand that the same position was advanced to the trial judge. As *Rogers*, *supra*, shows, it is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communications of which it forms a part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. The clear implication sought to be conveyed to the court by the RCMP was that Mr. Leising's advice had assured the RCMP that the proposed reverse sting was legal.

La présente affaire justifie davantage l'existence de la renonciation au privilège que l'affaire *Rogers*. Le ministère public a fait entendre le capl. Reynolds au sujet de sa connaissance du droit en matière d'opérations de vente surveillée et il a témoigné qu'il avait lu la décision *Lore*, précitée, de la Cour supérieure, et pensait que l'opération en question était légale. Mais, en réponse aux questions de l'avocat d'un des appelants, le capl. Reynolds a aussi témoigné qu'il avait sollicité l'opinion de M. Leising du ministère de la Justice pour s'assurer qu'il ne faisait pas erreur. L'avocat d'un des appelants a reconnu que ce simple fait ne suffisait pas pour qu'il y ait renonciation au privilège. Le capl. Reynolds ne faisait que répondre aux questions formulées par les appelants, comme il était tenu de le faire. L'avocat d'un des appelants a admis qu'à cette étape, il n'avait pas droit à la divulgation des communications. Il s'est borné à dire au juge que: «Je ne veux certainement pas entendre l'argument que: «Et bien, les policiers ont agi de bonne foi parce qu'ils se sont fondés sur un avis juridique»». Le problème est que la cour a effectivement entendu cet argument de la part du ministère public par la suite. La GRC et ses conseillers juridiques ont été très clairs dans le mémoire déposé en Cour d'appel, où ils prétendent qu'«il faut tenir compte des points suivants [. . .] f) la G.R.C. [. . .] a consulté le ministère de la Justice concernant tout risque d'illégalité» (je souligne). Apparemment le même argument a été soulevé devant le juge du procès. Comme le montre l'affaire *Rogers*, précitée, il n'est pas toujours nécessaire que le client divulgue effectivement une part du contenu de l'avis juridique pour qu'il y ait renonciation au privilège protégeant les communications pertinentes dont l'avis fait partie. En l'espèce, il était suffisant que la GRC appuie son argument de la bonne foi sur l'avis non divulgué de l'avocat alors que l'existence ou la non-existence de la bonne foi invoquée dépendait du contenu de cet avis. L'impression que la GRC a tenté de transmettre à la cour était clairement que l'avis fourni par M. Leising lui avait assuré que l'opération proposée de vente surveillée était légale.

71 Cpl. Reynolds was not required to pledge his belief in the legality of the reverse sting operation

Il n'était pas nécessaire que le capl. Reynolds affirme qu'il croyait légale l'opération de vente

(comparable to the bank's putting in issue its belief in the correctness of the advice it was obtaining from the receiver in *Rogers*, *supra*). Nor was it necessary for the RCMP to plead the existence of Mr. Leising's legal opinion as a factor weighing against the imposition of a stay of proceedings (which went beyond what was done in *Rogers*). The RCMP and the Crown having done so, however, I do not think disclosure of the advice in question could fairly be withheld.

surveillée (comme la banque faisant valoir sa croyance dans l'exactitude de l'avis reçu du séquestre dans *Rogers*, précité). Il n'était pas non plus nécessaire que la GRC invoque l'existence de l'avis juridique de M. Leising comme argument contre l'imposition de l'arrêt des procédures (ce qui allait au-delà de ce qui a été fait dans *Rogers*). La GRC et le ministère public ayant toutefois agi de la sorte, je ne pense pas qu'il serait équitable d'empêcher la divulgation de l'avis en cause.

Result of Non-Disclosure

L'effet de l'absence de divulgation

Having found that the requested communications ought to have been disclosed at trial, the Court of Appeal nevertheless excused non-disclosure on the basis that it was willing to "assume the worst" against the Crown, observing at p. 197 that "[o]n any version there is no avoiding that this was very serious misconduct which should not be condoned by the courts in the sense of giving any encouragement to its repetition".

72 Ayant conclu que les communications visées auraient dû être divulguées au procès, la Cour d'appel a néanmoins justifié la non-divulgation en se disant prête à supposer «le pire» de la part du ministère public et faisant remarquer à la p. 197 que [TRADUCTION] «[p]eu importe la version adoptée, il n'en demeure pas moins qu'il s'agissait d'actes illicites très graves sur lesquels les tribunaux ne doivent pas fermer les yeux, ce qui serait de nature à encourager leur répétition».

I do not agree, with respect, that non-disclosure of information clearly relevant to the good faith reliance issue can properly be disposed of by adverse inferences. The appellants were entitled to disclosure. The Court of Appeal said that it was prepared to assume the worst against the RCMP and on that basis felt able to use s. 686(1)(*b*)(iii) of the *Code* to uphold the decision of the trial judge. The difference between my approach and that of the Court of Appeal is that in my view, with respect, a Department of Justice opinion pronouncing the reverse sting to be unlawful would weigh differently in the balancing of community values than a Department of Justice opinion to the opposite effect. Police illegality of any description is a serious matter. Police illegality that is planned and approved within the RCMP hierarchy and implemented in defiance of legal advice would, if established, suggest a potential systemic problem concerning police accountability and control. The RCMP position, on the other hand, that the Department of Justice lent its support to an illegal venture may, depending on the circumstances, raise a different but still serious dimension to the abuse of process proceeding. In either case, it is difficult to

73 Avec égards, je ne partage pas l'opinion que l'on peut régler par inférences défavorables la question de l'absence de divulgation de renseignements manifestement pertinents à l'égard du moyen de l'avis suivi de bonne foi. Les appelants avaient droit à la divulgation. La Cour d'appel a dit qu'elle était prête à supposer le pire contre la GRC, et, pour ce motif, elle a estimé qu'elle pouvait se fonder sur le sous-al. 686(1)*b*)(iii) du *Code* pour confirmer la décision du juge du procès. La différence entre ma démarche et celle de la Cour d'appel est que, en toute déférence, j'estime qu'une opinion du ministère de la Justice indiquant que la vente surveillée serait illégale aurait un poids différent, sous l'angle des valeurs collectives, qu'une opinion du ministère à l'effet contraire. Une illégalité de quelque sorte commise par la police est une affaire grave. Une illégalité policière planifiée et approuvée par la hiérarchie de la GRC et mise en œuvre en dépit d'un avis juridique contraire pourrait indiquer, si cela était établi, un problème systémique potentiel en matière de responsabilisation et de contrôle de la police. La position de la GRC, par ailleurs, selon laquelle le ministère de la Justice a apporté son appui à une entreprise illégale

assume "the worst" if neither alternative has been explored to determine what "the worst" is. Because the RCMP made a live issue of the legal advice it received from the Department of Justice, the appellants were and are entitled to get to the bottom of it.

pourrait, selon les circonstances, faire jouer une dimension différente, et cependant grave elle aussi, en matière d'abus de procédure. Dans les deux cas, il est difficile de présumer «le pire» si ni l'une ni l'autre de ces possibilités n'a été examinée pour déterminer ce que serait «le pire». La GRC ayant invoqué l'avis juridique reçu du ministère de la Justice dans le cadre du litige, les appelants avaient et ont le droit d'aller au fond de la question.

Disclosure Direction

Ordonnance de divulgation

74 The relevant legal advice received by Cpl. Reynolds should be disclosed to the appellants. This is not an "open file" order in respect of the RCMP's solicitor and client communications. The only legal advice that has to be disclosed is the specific advice relating to the following matters identified by Cpl. Reynolds:

> 1. The legality of the police posing as sellers of drugs to persons believed to be distributors of drugs.
>
> 2. The legality of the police offering drugs for sale to persons believed to be distributors of drugs.
>
> 3. The possible consequences to the members of the RCMP who engaged in one or both of the above, including the likelihood of prosecution.

Les avis juridiques pertinents reçus par le capl. Reynolds doivent être divulgués aux appelants. Il ne s'agit pas d'une ordonnance de divulgation totale des communications avocat-client de la GRC. Le seul avis juridique à divulguer est l'avis concernant spécifiquement les questions suivantes mentionnées par le capl. Reynolds:

> 1. La légalité du fait que des policiers prétendent être des vendeurs de drogue auprès de personnes soupçonnées d'être des distributeurs de drogue.
>
> 2. La légalité du fait que des policiers offrent de vendre de la drogue à des personnes soupçonnées d'être des distributeurs de drogue.
>
> 3. Les conséquences possibles pour les membres de la GRC qui se livrent à l'une des activités susmentionnées, ou aux deux, y compris la possibilité de poursuites.

While Cpl. Reynolds also sought advice from Mr. Leising about other matters, including the legality of any release of a sample of hashish to potential buyers, advice in these respects need not be disclosed as they do not relate to a live issue at this stage of the case. If the relevant advice is documented, those portions of the documents that deal with extraneous matters or that describe police methods of criminal investigation may be masked. All that is required is disclosure to the appellants of the bottom line advice to confirm or otherwise the truth of what the courts were advised about the legal opinions provided by the Department of Justice. If there is a dispute concerning the adequacy of disclosure, the disputed documents or information should be provided by the Crown to the trial judge for an initial determination whether this

Bien que le capl. Reynolds ait également sollicité l'avis de M. Leising sur d'autres questions, dont la légalité de la remise d'un échantillon de haschisch à des acheteurs potentiels, les opinions données à leur égard n'ont pas à être divulguées car elles ne sont pas liées à des questions demeurant en litige. Si l'avis pertinent est sous forme de documents, la partie des documents qui porte sur des questions non liées ou qui décrit des méthodes policières d'enquête criminelle peut être masquée. La seule chose requise est la divulgation aux appelants de la conclusion de l'avis pour confirmer ou non la véracité des observations faites devant les tribunaux relativement aux opinions juridiques fournies par le ministère de la Justice. En cas de conflit au sujet du caractère suffisant de la divulgation, les documents ou renseignements contestés doivent être

direction has been complied with. The trial judge should then determine what, if any, additional disclosure should be made to the appellants.

If it turns out that Mr. Leising simply erred in connection with this particular opinion, disclosure will support the RCMP officers' claim that they acted in good faith on legal advice, and the application for a stay of proceedings will have to be dealt with on that basis.

Nature of the New Trial

Even if it is established that the RCMP proceeded with the reverse sting contrary to the legal advice from the Department of Justice, the result would not automatically be a stay of proceedings. The test in *Mack* would still apply. The RCMP used its alleged good faith reliance on the Department of Justice legal advice to neutralize or at least blunt any finding of police illegality. If it were determined that the police did not rely on Department of Justice advice, the result would be a finding of police illegality without extenuating circumstances. As discussed in paras. 42 and 43, police illegality does not automatically give rise to a stay of proceedings.

If it should turn out that the reverse sting was launched despite legal advice to the contrary, I think this would be an aggravating factor. However, to repeat, it will be up to the trial judge to determine whether or not a stay is warranted in light of all the circumstances, including the countervailing consideration that police conduct did not lead to any serious infringement of the accused's rights, the RCMP was careful to keep control of the drugs and ensure that none went on the market, and the acknowledged difficulty of combatting drug rings using traditional police methods.

In *R. v. Pearson*, [1998] 3 S.C.R. 620, this Court accepted that in entrapment applications where the innocence of the accused is no longer a live issue,

remis par le ministère public au juge du procès qui décidera d'abord si la présente ordonnance a été respectée. Le juge du procès devra ensuite décider quelle information supplémentaire, s'il en est, devrait être divulguée aux appelants

75 S'il s'avère que M. Leising a simplement donné un avis erroné, la divulgation pourra étayer la position des agents de la GRC qu'ils ont agi de bonne foi en se fondant sur un avis juridique et la demande d'arrêt des procédures devra être tranchée en conséquence.

La nature du nouveau procès

76 Même s'il était établi que la GRC a effectué la vente surveillée malgré l'avis juridique contraire du ministère de la Justice, il n'en résulterait pas automatiquement un arrêt des procédures. Le critère de l'arrêt *Mack* s'appliquerait tout de même. En alléguant qu'elle s'était fondée de bonne foi sur l'avis juridique du ministère de la Justice, la GRC a cherché à neutraliser ou du moins atténuer toute conclusion selon laquelle il s'agissait d'une action policière illégale. Si la cour devait conclure que la police ne s'était pas fondée sur l'avis du ministère de la Justice, elle conclurait à l'illégalité de l'action policière sans circonstances atténuantes. Comme je l'ai expliqué aux par. 42 et 43, l'illégalité de l'action policière ne donne pas lieu automatiquement à un arrêt des procédures.

77 S'il s'avérait que la vente surveillée a été effectuée en dépit d'un avis juridique contraire, je pense que cela constituerait un facteur aggravant. Toutefois, je le répète, il appartiendra au juge du procès de décider s'il convient d'ordonner l'arrêt des procédures, compte tenu de l'ensemble des circonstances, y compris, en contrepoids, le fait que la conduite de la police n'a pas entraîné de grave violation des droits des accusés, le fait que la GRC a eu soin de conserver la garde des drogues et d'éviter qu'elles n'entrent sur le marché, et la difficulté reconnue de la lutte contre les réseaux de drogue avec les méthodes policières traditionnelles.

78 Dans l'arrêt *R. c. Pearson*, [1998] 3 R.C.S. 620, notre Cour a reconnu qu'en matière de demandes relatives à la provocation policière, où la question

a new trial may be limited to the stay of proceedings application. The authority to make such an order under ss. 686(2) and (8) is explained in *Pearson*, at para. 16:

> . . . the quashing of the formal order of conviction does not, without more, entail the quashing of the underlying verdict of guilt. In most successful appeals against conviction, the court of appeal which quashes the conviction will also overturn the finding of guilt; however, the latter is not a legally necessary consequence of the former. Under s. 686(8), the court of appeal retains the jurisdiction to make an "additional order" to the effect that, although the formal order of conviction is quashed, the verdict of guilt is affirmed, and the new trial is to be limited to the post-verdict entrapment motion.

As entrapment is simply one form of abuse of process, the same approach should be adopted in the present case.

Conclusion

79 The appeal is allowed in part, a new trial is ordered limited to the issue of whether a stay of proceedings should be granted for abuse of process. The respondent is ordered to disclose to the appellants the materials referred to in para. 74 of these reasons in advance of the retrial.

Appeal allowed in part.

Solicitors for the appellant Campbell: Gold & Fuerst, Toronto.

Solicitor for the appellant Shirose: Irwin Koziebrocki, Toronto.

Solicitor for the respondent: The Attorney General of Canada, Toronto.

de l'innocence de l'accusé ne se pose plus, le nouveau procès peut se limiter à la demande d'arrêt des procédures. Le pouvoir de rendre une telle ordonnance en vertu des par. 686(2) et (8) fait l'objet d'une explication dans *Pearson*, au par. 16:

> . . . l'annulation de l'ordonnance formelle de condamnation n'entraîne pas, sans plus, l'annulation du verdict de culpabilité sous-jacent. Dans la plupart des cas où l'appel d'une condamnation est accueilli, la cour d'appel qui annule la condamnation annule également la déclaration de culpabilité; toutefois, cette deuxième annulation n'est pas une conséquence légalement nécessaire de la première. Selon le par. 686(8), la cour d'appel conserve la compétence pour rendre une «ordonnance additionnelle» voulant que, même si l'ordonnance formelle de condamnation est annulée, le verdict de culpabilité soit confirmé, et le nouveau procès doit se limiter à la requête en matière de provocation policière déposée après le verdict.

Comme la provocation policière n'est qu'une forme d'abus de procédure, la même démarche doit être suivie en l'espèce.

Conclusion

Le pourvoi est accueilli en partie, et est ordonnée la tenue d'un nouveau procès limité à la question de savoir si la demande d'arrêt des procédures doit être accueillie pour cause d'abus de procédure. Il est ordonné à l'intimée de divulguer aux appelants les documents mentionnés au par. 74 des présents motifs avant la tenue du nouveau procès.

Pourvoi accueilli en partie.

Procureurs de l'appelant Campbell: Gold & Fuerst, Toronto.

Procureur de l'appelant Shirose: Irwin Koziebrocki, Toronto.

Procureur de l'intimée: Le Procureur général du Canada, Toronto.

Minister of Justice *Appellant*

v.

Sheldon Blank *Respondent*

and

Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada *Interveners*

Indexed as: Blank *v.* Canada (Minister of Justice)

Neutral citation: 2006 SCC 39.

File No.: 30553.

2005: December 13; 2006: September 8.

Present: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Access to information — Exemptions — Solicitor-client privilege — Distinction between solicitor-client privilege and litigation privilege — Claimant requesting documents relating to prosecutions of himself and a company for federal regulatory offences — Charges subsequently quashed or stayed — Request for access denied by government on various grounds including solicitor-client privilege exemption set out in s. 23 of Access to Information Act — Whether documents once subject to litigation privilege remain privileged when litigation ends — Access to Information Act, R.S.C. 1985, c. A-1, s. 23.

Law of professions — Barristers and solicitors — Solicitor-client privilege — Litigation privilege — Distinction between solicitor-client privilege and litigation privilege — Nature, scope and duration of litigation privilege.

In 1995, the Crown laid 13 charges against B and a company for regulatory offences; the charges were quashed, some of them in 1997 and the others in 2001.

Ministre de la Justice *Appelant*

c.

Sheldon Blank *Intimé*

et

Procureur général de l'Ontario, The Advocates' Society et Commissaire à l'information du Canada *Intervenants*

Répertorié : Blank *c.* Canada (Ministre de la Justice)

Référence neutre : 2006 CSC 39.

N^o^ du greffe : 30553.

2005 : 13 décembre; 2006 : 8 septembre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Accès à l'information — Exemptions — Secret professionnel de l'avocat — Distinction entre le secret professionnel de l'avocat et le privilège relatif au litige — Requérant demandant l'accès à des documents relatifs à des poursuites intentées contre lui et une société pour des infractions réglementaires fédérales — Annulation des accusations ou arrêt des procédures — Accès refusé par le gouvernement pour divers motifs dont l'exemption du secret professionnel de l'avocat prévue à l'art. 23 de la Loi sur l'accès à l'information — Les documents protégés par le privilège relatif au litige, continuent-ils à bénéficier de cette protection lorsque le litige prend fin? — Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 23.

Droit des professions — Avocats et procureurs — Secret professionnel de l'avocat — Privilège relatif au litige — Distinction entre le secret professionnel de l'avocat et le privilège relatif au litige — Nature, portée et durée du privilège relatif au litige.

En 1995, le ministère public a porté 13 accusations contre B et une société pour des infractions réglementaires; certaines accusations ont été annulées en 1997, et

In 2002, the Crown laid new charges by way of indictment, but stayed them prior to trial. B and the company sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers. In 1997 and again in 1999, B requested all records pertaining to the prosecutions of himself and the company, but only some of the requested documents were furnished. His requests for information in the penal proceedings and under the *Access to Information Act* were denied by the government on various grounds, including the "solicitor-client privilege" exemption set out in s. 23 of the Act. Additional materials were released after B lodged a complaint with the Information Commissioner. The vast majority of the remaining documents were found to be properly exempted from disclosure under the solicitor-client privilege. On application for review under s. 41 of the Act, the motions judge held that documents excluded from disclosure pursuant to the litigation privilege should be released if the litigation to which the record relates has ended. On appeal, the majority of the Federal Court of Appeal on this issue found that the litigation privilege, unlike the legal advice privilege, expires with the end of the litigation that gave rise to the privilege, subject to the possibility of defining "litigation" broadly.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Fish, and Abella JJ.: The Minister's claim of litigation privilege under s. 23 of the *Access to Information Act* fails. The privilege has expired because the files to which B seeks access relate to penal proceedings that have terminated. [9]

The litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences. Litigation privilege is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. The purpose of the litigation privilege is to create a zone of privacy in relation to pending or apprehended litigation. The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client

les autres en 2001. En 2002, le ministère public a porté de nouvelles accusations par voie de mise en accusation, mais a ordonné l'arrêt des procédures avant le procès. B et la société ont intenté une action en dommages-intérêts contre le gouvernement fédéral pour fraude, complot, parjure et exercice abusif des pouvoirs de la poursuite. En 1997, et de nouveau en 1999, B a demandé tous les dossiers se rapportant aux poursuites engagées contre lui et contre la société, mais seuls certains de ces documents lui ont été communiqués. Le gouvernement a soulevé divers motifs, y compris l'exemption relative au « secret professionnel de l'avocat » établie à l'art. 23 de la *Loi sur l'accès à l'information*, pour rejeter les demandes de renseignements qui lui ont été présentées en vertu de cette loi et dans le cadre des procédures pénales. D'autres documents ont été communiqués à B après qu'il eut porté plainte auprès du Commissaire à l'information. Il a été décidé que la très grande majorité des documents restants avaient été exclus à bon droit de la communication parce qu'ils étaient protégés par le secret professionnel de l'avocat. Saisi d'une demande de révision en application de l'art. 41 de la Loi, le juge des requêtes a conclu que les documents soustraits à la communication par application du privilège relatif au litige devaient être divulgués si le litige auquel ils se rapportaient avait pris fin. En appel, la Cour d'appel fédérale a conclu à la majorité, sur ce point, que le privilège relatif au litige, contrairement au privilège de la consultation juridique, s'éteint à l'issue du litige qui lui a donné lieu, sous réserve de la possibilité de définir le « litige » en termes larges.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Binnie, Deschamps, Fish et Abella : La revendication, par le ministre, du privilège relatif au litige, fondée sur l'art. 23 de la *Loi sur l'accès à l'information*, ne saurait être accueillie. Le privilège a pris fin parce que les dossiers auxquels B tente d'avoir accès concernent des procédures pénales qui sont terminées. [9]

Le privilège relatif au litige et le secret professionnel de l'avocat reposent sur des considérations de principe différentes et entraînent des conséquences juridiques différentes. Le privilège relatif au litige n'a pas pour cible, et encore moins pour cible unique, les communications entre un avocat et son client. Il touche aussi les communications entre un avocat et des tiers, ou dans le cas d'une partie non représentée, entre celle-ci et des tiers. L'objet du privilège relatif au litige est de créer une zone de confidentialité à l'occasion ou en prévision d'un litige. Le privilège relatif au litige reconnu en common law prend fin, en l'absence de procédures étroitement liées, lorsque le

privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well. [27] [33-39]

The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground. [44-45]

Litigation privilege should attach to documents created for the dominant purpose of litigation. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard is consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. [59-60]

Per Bastarache and Charron JJ.: Litigation privilege cannot be invoked at common law to refuse disclosure which is statutorily mandated. Either litigation privilege must be read into s. 23 of the *Access to Information Act* or it must be acknowledged that the Crown cannot invoke litigation privilege so as to resist disclosure under the Act. An exemption for litigation privilege should be read into s. 23 because litigation privilege has always been considered a branch of solicitor-client privilege. The two-branches approach to solicitor-client privilege should subsist, even accepting

litige qui lui a donné lieu est terminé. Contrairement au secret professionnel de l'avocat, il n'est ni absolu quant à sa portée, ni illimité quant à sa durée. Le privilège peut conserver son objet et son effet lorsque le litige qui lui a donné lieu a pris fin, mais qu'un litige connexe demeure en instance ou peut être raisonnablement appréhendé. Cette définition élargie du litige comprend les procédures distinctes qui opposent les mêmes parties, ou des parties liées, et qui découlent de la même cause d'action ou source juridique, ou d'une cause d'action connexe. Les procédures qui soulèvent des questions communes avec l'action initiale et qui partagent son objet fondamental seraient également visées. [27] [33-39]

Quoi qu'il en soit, le privilège relatif au litige ne saurait protéger contre la divulgation d'éléments de preuve démontrant un abus de procédure ou une conduite répréhensible similaire de la part de la partie qui le revendique. Même lorsque des documents seraient autrement protégés par le privilège relatif au litige, l'auteur d'une demande d'accès peut en obtenir la divulgation, s'il démontre *prima facie* que l'autre partie a eu une conduite donnant ouverture à action dans le cadre de la procédure à l'égard de laquelle elle revendique le privilège. Peu importe que le privilège soit revendiqué dans le cadre du litige initial ou d'un litige connexe, le tribunal peut examiner les documents afin de décider s'il y a lieu d'ordonner leur divulgation pour ce motif. [44-45]

Le privilège relatif au litige devrait s'attacher aux documents créés principalement en vue du litige. Le critère de l'objet principal est davantage compatible avec la tendance contemporaine qui favorise une divulgation accrue. Bien qu'il confère une protection plus limitée que ne le ferait le critère de l'objet important, le critère de l'objet principal est conforme à l'idée que le privilège relatif au litige devrait être considéré comme une exception limitée au principe de la communication complète et non comme un concept parallèle à égalité avec le secret professionnel de l'avocat interprété largement. [59-60]

Les juges Bastarache et Charron : On ne peut revendiquer le privilège relatif au litige en s'appuyant sur la common law pour refuser de communiquer un document que la loi nous oblige à divulguer. Soit l'art. 23 de la *Loi sur l'accès à l'information* doit être interprété comme visant implicitement le privilège relatif au litige, soit il faut reconnaître que le gouvernement ne peut invoquer ce privilège pour refuser de divulguer des documents sous le régime de cette loi. L'article 23 doit être tenu pour inclure implicitement une exemption concernant le privilège relatif au litige, parce que ce

that solicitor-client privilege and litigation privilege have distinct rationales. [67] [69-71] [73]

Once the privilege is determined to exist, s. 23 grants the institution a discretion as to whether or not to disclose. Although litigation privilege is understood as existing only *vis-à-vis* the adversary in the litigation, the effect of s. 23 is to permit the government institution to refuse disclosure to any requester so long as the privilege is found to exist. In this case, the Minister's claim of litigation privilege fails because the privilege has expired. [72] [74]

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By Fish J.

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privilège a toujours été considéré comme une composante du secret professionnel de l'avocat. Il faut continuer à considérer le secret professionnel de l'avocat comme comportant deux composantes, même si l'on admet que le secret professionnel de l'avocat et le privilège relatif au litige reposent sur des fondements différents. [67] [69-71] [73]

Une fois établie l'existence du privilège, l'art. 23 confère à l'institution le pouvoir discrétionnaire de divulguer ou non les renseignements. Alors que le privilège relatif au litige est considéré comme n'ayant d'effet que contre l'autre partie au litige, l'art. 23 permet à une institution fédérale de refuser la communication à quiconque la demande, à condition que l'existence du privilège soit établie. La revendication par le ministre du privilège relatif au litige ne saurait être accueillie en l'espèce, parce que ce privilège a pris fin. [72] [74]

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Citée par le juge Fish

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POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Décary, Létourneau et Pelletier), [2005] 1 R.C.F. 403, 244 D.L.R. (4th) 80, 325 N.R. 315, 21 Admin. L.R. (4th) 225, 34 C.P.R. (4th) 385, [2004] A.C.F. nº 1455 (QL), 2004 CAF 287, qui a confirmé en partie un jugement du juge Campbell, 2003 CarswellNat 5040, 2003 CFPI 462. Pourvoi rejeté.

Graham Garton, *Q.C.*, and *Christopher M. Rupar*, for the appellant.

Sheldon Blank, on his own behalf.

Luba Kowal, *Malliha Wilson* and *Christopher P. Thompson*, for the intervener the Attorney General of Ontario.

Wendy Matheson and *David Outerbridge*, for the intervener The Advocates' Society.

Raynold Langlois, *Q.C.*, and *Daniel Brunet*, for the intervener the Information Commissioner of Canada.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish and Abella JJ. was delivered by

FISH J. —

I

1 This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the *solicitor-client privilege* and the *litigation privilege*. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.

2 More particularly, we are concerned in this case with the litigation privilege, with how it is born and when it must be laid to rest. And we need to consider that issue in the narrow context of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), but with prudent regard for its broader implications on the conduct of legal proceedings generally.

3 This case has proceeded throughout on the basis that "solicitor-client privilege" was intended, in s. 23 of the *Access Act*, to include the litigation privilege which is not elsewhere mentioned in the Act.

Graham Garton, *c.r.*, et *Christopher M. Rupar*, pour l'appelant.

Sheldon Blank, en personne.

Luba Kowal, *Malliha Wilson* et *Christopher P. Thompson*, pour l'intervenant le procureur général de l'Ontario.

Wendy Matheson et *David Outerbridge*, pour l'intervenante The Advocates' Society.

Raynold Langlois, *c.r.*, et *Daniel Brunet*, pour l'intervenant le Commissaire à l'information du Canada.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, Deschamps, Fish et Abella rendu par

LE JUGE FISH —

I

Dans le présent pourvoi, la Cour est appelée à établir pour la première fois une distinction entre deux exceptions à la communication forcée qui sont connexes, mais distinctes sur le plan conceptuel : le *privilège du secret professionnel de l'avocat* (*solicitor-client privilege*) et le *privilège relatif au litige* (*litigation privilege*). Ces privilèges coexistent souvent et on utilise parfois à tort le nom de l'un pour désigner l'autre, mais leur portée, leur durée et leur signification ne coïncident pas.

En l'espèce, nous nous intéressons plus particulièrement au privilège relatif au litige, à la façon dont il prend naissance et au moment où il s'éteint. Il nous faut en outre examiner cette question dans le contexte restreint de la *Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1 (« *Loi sur l'accès* »), mais avec circonspection quant à ses répercussions plus larges sur le déroulement des instances judiciaires en général.

À tous les paliers, la présente affaire a été examinée à partir de la prémisse selon laquelle, pour l'application de l'art. 23 de la *Loi sur l'accès*, le « secret professionnel qui lie un avocat à son

Both parties and the judges below have all assumed that it does.

As a matter of statutory interpretation, I would proceed on the same basis. The Act was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the Act. And it explains as well why, despite the Act's silence in this regard, I agree with the parties and the courts below that the *Access Act* has not deprived the government of the protection previously afforded to it by the legal advice privilege *and* the litigation privilege: In interpreting and applying the Act, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

In short, we are not asked in this case to decide whether the government can invoke litigation privilege. Quite properly, the parties agree that it can. Our task, rather, is to examine the defining characteristics of that privilege and, more particularly, to determine its lifespan.

The Minister contends that the solicitor-client privilege has two "branches", one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the "legal advice privilege"; the second, as the "litigation privilege".

Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view,

client » est censé englober le privilège relatif au litige, qui n'est mentionné dans aucune autre disposition de la Loi. Les deux parties et les juges des juridictions inférieures ont tous tenu cette proposition pour avérée.

4 Pour ce qui est de l'interprétation de la Loi, je m'appuierais sur la même prémisse. La Loi a été édictée il y a près d'un quart de siècle. À l'époque, il n'était pas inhabituel de percevoir les termes « secret professionnel de l'avocat » comme une expression concise utilisée pour désigner à la fois le privilège de la consultation juridique et le privilège relatif au litige. C'est ce qui explique le mieux pourquoi le privilège relatif au litige n'est mentionné isolément dans aucune disposition de la Loi. Cela explique aussi très bien pourquoi, malgré le silence de la Loi à cet égard, je partage l'opinion des parties et des juridictions inférieures selon laquelle la *Loi sur l'accès* n'a pas privé le gouvernement de la protection que le privilège de la consultation juridique *et* le privilège relatif au litige lui offraient auparavant. Lorsqu'il s'agit d'interpréter et d'appliquer la Loi, il faut considérer l'expression « secret professionnel de l'avocat », utilisée à l'art. 23, comme renvoyant aux deux privilèges.

5 En somme, nous ne sommes pas appelés en l'espèce à décider si le gouvernement peut invoquer le privilège relatif au litige. Les parties conviennent à juste titre qu'il le peut. Notre tâche consiste plutôt à examiner les caractéristiques fondamentales de ce privilège et, plus particulièrement, à en déterminer la durée.

6 Le ministre soutient que le secret professionnel de l'avocat comporte deux « composantes » : l'une touchant les communications confidentielles échangées entre les avocats et leurs clients, l'autre, les renseignements et documents recueillis ou créés dans le contexte du litige. Comme je l'ai déjà indiqué, la première de ces composantes est généralement désignée comme le « privilège de la consultation juridique » et, la seconde, comme le « privilège relatif au litige ».

7 Compte tenu de leur portée, de leur objet et de leur fondement différents, j'estime qu'il serait

to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases — solicitor-client privilege and legal advice privilege — synonymously and interchangeably, except where otherwise indicated.

préférable de reconnaître qu'il s'agit en l'occurrence de concepts distincts, et non de deux composantes d'un même concept. Par conséquent, dans les présents motifs, j'utiliserai l'expression « secret professionnel de l'avocat » comme s'entendant exclusivement du privilège de la consultation juridique et, à moins d'indication contraire, j'emploierai les deux expressions — secret professionnel de l'avocat et privilège de la consultation juridique — comme des synonymes interchangeables.

8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

S'agissant d'une question de fond, et non de simple terminologie, la différence entre le privilège relatif au litige et le secret professionnel de l'avocat est déterminante en l'espèce. Le premier, contrairement au second, est temporaire. Il prend fin en même temps que le litige qui lui a donné lieu. Qualifier le privilège relatif au litige de « composante » du secret professionnel de l'avocat, comme le voudrait le ministre, n'a pas pour effet de lui conférer le même caractère permanent.

9 The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

La revendication, par le ministre, du privilège relatif au litige ne saurait être accueillie en l'espèce parce que, peu importe le nom choisi pour le désigner, ce privilège a pris fin : Les dossiers auxquels l'intimé tente d'avoir accès concernent des procédures pénales qui sont terminées depuis longtemps. En sollicitant une réparation civile pour la façon dont se sont déroulées ces procédures, l'intimé ne leur a insufflé ni une nouvelle vie ni une existence posthume et parallèle.

10 I would therefore dismiss the appeal.

Je suis donc d'avis de rejeter le pourvoi.

II

II

11 The respondent is a self-represented litigant who, though not trained in the law, is no stranger to the courts. He has accumulated more than ten years of legal experience first-hand, initially as a defendant and then as a petitioner and plaintiff. In his resourceful and persistent quest for information and redress, he has personally instituted and conducted a plethora of related proceedings, at first instance and on appeal, in federal and provincial courts alike.

L'intimé assure lui-même sa défense et, bien qu'il n'ait pas de formation en droit, il connaît bien les tribunaux. Il a accumulé plus de dix années d'expérience en droit au contact des tribunaux, d'abord en qualité de défendeur puis de requérant et de demandeur. Dans la quête de renseignements et de redressements qu'il a menée avec beaucoup de détermination et de débrouillardise, il a personnellement intenté et dirigé une pléthore de procédures connexes, en première instance et en appel, devant les tribunaux tant fédéraux que provinciaux.

This saga began in July 1995, when the Crown laid 13 charges against the respondent and Gateway Industries Ltd. ("Gateway") for regulatory offences under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Pulp and Paper Effluent Regulations*, SOR/92-269. The respondent was a director of Gateway. Five of the charges alleged pollution of the Red River and another eight alleged breaches of reporting requirements.

12 La présente saga a commencé en juillet 1995, lorsque le ministère public a porté 13 accusations contre l'intimé et Gateway Industries Ltd. (« Gateway ») pour des infractions réglementaires prévues par la *Loi sur les pêches*, L.R.C. 1985, ch. F-14, et le *Règlement sur les effluents des fabriques de pâtes et papiers*, DORS/92-269. L'intimé était l'un des administrateurs de Gateway. Dans le cas de cinq des accusations, l'infraction reprochée consistait à avoir pollué la rivière Rouge, et dans le cas des huit autres, à avoir contrevenu à des exigences en matière de rapport.

The counts relating to reporting requirements were quashed in 1997 and the pollution charges were quashed in 2001. In 2002, the Crown laid new charges by way of indictment — and stayed them prior to trial. The respondent and Gateway then sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers.

13 Les chefs d'accusation relatifs aux exigences en matière de rapport ont été annulés en 1997 et ceux concernant la pollution l'ont été en 2001. En 2002, le ministère public a porté de nouvelles accusations par voie de mise en accusation — et a ordonné l'arrêt des procédures avant le procès. L'intimé et Gateway ont alors intenté une action en dommages-intérêts contre le gouvernement fédéral pour fraude, complot, parjure et exercice abusif des pouvoirs de la poursuite.

This appeal concerns the respondent's repeated attempts to obtain documents from the government. He succeeded only in part. His requests for information in the penal proceedings and under the *Access Act* were denied by the government on various grounds, including "solicitor-client privilege". The issue before us now relates solely to the *Access Act* proceedings. We have not been asked to decide whether the Crown properly fulfilled, in the criminal proceedings, its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. And in the record before us, we would in any event be unable to do so.

14 Le présent pourvoi concerne les tentatives répétées faites par l'intimé pour obtenir certains documents du gouvernement, sans y réussir complètement. Le gouvernement a soulevé divers motifs, y compris le « secret professionnel de l'avocat », pour rejeter les demandes de renseignements qui lui ont été présentées dans le cadre des procédures pénales et en vertu de la *Loi sur l'accès*. La question dont nous sommes saisis touche uniquement les procédures engagées sous le régime de la *Loi sur l'accès*. La Cour n'est pas appelée à se prononcer sur la question de savoir si, dans le cadre des procédures pénales, le ministère public s'est correctement acquitté des obligations de divulgation qui lui incombaient selon l'arrêt *R. c. Stinchcombe*, [1991] 3 R.C.S. 326. De toute façon, nous serions incapables de la trancher au vu du dossier qui nous a été soumis.

In October 1997, and again in May 1999, the respondent requested from the Access to Information and Privacy Office of the Department of Justice all records pertaining to his prosecution and the prosecution of Gateway.

15 En octobre 1997, et de nouveau en mai 1999, l'intimé a demandé au Bureau de l'accès à l'information et de la protection des renseignements personnels du ministère de la Justice tous les dossiers se rapportant aux poursuites engagées contre lui

Only some of the requested documents were furnished.

16 Additional materials were released after the respondent lodged a complaint with the Information Commissioner. The Director of Investigation found that the vast majority of the remaining documents were properly exempted from disclosure under the solicitor-client privilege.

17 The respondent pursued the matter further by way of an application for review pursuant to s. 41 of the *Access Act*. Although the appellant relied on various exemptions from disclosure in the *Access Act*, proceedings before the motions judge focussed on the appellant's claims of solicitor-client privilege in reliance on s. 23 of the *Access Act*.

18 On the respondent's application, Campbell J. held that documents excluded from disclosure pursuant to litigation privilege should be released if the litigation to which the record relates has ended (2003 CarswellNat 5040, 2003 FCT 462).

19 On appeal, the Federal Court of Appeal divided on the duration of the privilege. Pelletier J.A., for the majority on this point, found that litigation privilege, unlike legal advice privilege, expires with the end of the litigation that gave rise to the privilege, "subject to the possibility of defining . . . litigation . . . broadly" ([2005] 1 F.C.R. 403, 2004 FCA 287, at para. 89). He therefore held that s. 23 of the *Access Act* did not apply to the documents for which a claim of litigation privilege is made in this case because the criminal prosecution had ended.

20 Létourneau J.A., dissenting on this point, found that the privilege did not necessarily end with the termination of the litigation that gave rise to it. He would have upheld the privilege in this case.

III

21 Section 23 of the *Access Act* provides:

et contre Gateway. Seuls certains de ces documents lui ont été communiqués.

D'autres documents lui ont été communiqués après qu'il eut porté plainte auprès du Commissaire à l'information. Le directeur des enquêtes a conclu que la très grande majorité des documents restants avaient été exclus à bon droit de la communication parce qu'ils étaient protégés par le secret professionnel de l'avocat.

L'intimé a persévéré en présentant une demande de révision en application de l'art. 41 de la *Loi sur l'accès*. Bien que l'appelant ait invoqué diverses exemptions de communication prévues à la *Loi sur l'accès*, l'instance présidée par le juge des requêtes a porté principalement sur la revendication par l'appelant du secret professionnel de l'avocat en vertu de l'art. 23 de la *Loi sur l'accès*.

Le juge Campbell, qui a examiné cette demande de l'intimé, a conclu que les documents soustraits à la communication par application du privilège relatif au litige devaient être divulgués si le litige auquel ils se rapportaient avait pris fin (2003 CarswellNat 5040, 2003 CFPI 462).

En appel, la Cour d'appel fédérale était divisée quant à la durée du privilège. Le juge Pelletier, s'exprimant au nom des juges majoritaires sur ce point, a conclu que le privilège relatif au litige, contrairement au privilège de la consultation juridique, s'éteint à l'issue du litige qui lui a donné lieu, « sous réserve de la possibilité de définir le litige en termes [. . .] larges » ([2005] 1 R.C.F. 403, 2004 CAF 287, par. 89). Il a donc conclu que l'art. 23 de la *Loi sur l'accès* ne s'appliquait pas, en l'espèce, aux documents visés par la revendication du privilège relatif au litige puisque les poursuites pénales avaient pris fin.

Le juge Létourneau, dissident sur ce point, a conclu que le privilège ne s'éteignait pas nécessairement avec la fin du litige qui lui avait donné lieu. Il aurait confirmé l'existence du privilège dans la présente affaire.

III

L'article 23 de la *Loi sur l'accès* prévoit :

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

The narrow issue before us is whether documents once subject to the litigation privilege remain privileged when the litigation ends.

According to the appellant, this Court has determined that litigation privilege is a branch of the solicitor-client privilege and benefits from the same near-absolute protection, including permanency. But none of the cases relied on by the Crown support this assertion. The Court has addressed the solicitor-client privilege on numerous occasions and repeatedly underlined its paramount significance, but never yet considered the nature, scope or duration of the litigation privilege.

Thus, the Court explained in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; and *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31. In an oft-quoted passage, Major J., speaking for the Court, stated in *McClure* that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).

It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.

Much has been said in these cases, and others, regarding the origin and rationale of the

23. Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

22 La question précise dont nous sommes saisis est celle de savoir si, une fois protégés par le privilège relatif au litige, les documents continuent à bénéficier de cette protection lorsque le litige prend fin.

23 Selon l'appelant, la Cour aurait statué que le privilège relatif au litige est une composante du secret professionnel de l'avocat et bénéficie de la même protection quasi absolue, notamment de son caractère permanent. Aucune des décisions qu'il invoque n'étaye toutefois cette affirmation. La Cour a maintes fois traité du secret professionnel de l'avocat et souligné son importance primordiale, mais elle n'a encore jamais examiné la nature, la portée ou la durée du privilège relatif au litige.

24 Ainsi, la Cour a expliqué dans *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, et a réitéré depuis, que le secret professionnel de l'avocat a d'abord été une règle de preuve qui s'est transformée au fil des ans en une règle de fond. En outre, la Cour n'a pas cessé d'insister sur l'étendue et la primauté du secret professionnel de l'avocat. Voir par exemple : *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Smith c. Jones*, [1999] 1 R.C.S. 455; *R. c. McClure*, [2001] 1 R.C.S. 445, 2001 CSC 14; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, [2002] 3 R.C.S. 209, 2002 CSC 61; et *Goodis c. Ontario (Ministère des Services correctionnels)*, [2006] 2 R.C.S. 32, 2006 CSC 31. Dans un extrait souvent cité de l'arrêt *McClure*, le juge Major, s'exprimant au nom de la Cour, a dit que « le secret professionnel de l'avocat doit être aussi absolu que possible pour assurer la confiance du public et demeurer pertinent » (par. 35).

25 Toutefois, il ressort clairement du texte et du contexte de ces décisions qu'elles ne portent que sur le privilège de la consultation juridique, ou sur le secret professionnel de l'avocat proprement dit, et non sur le privilège relatif au litige.

26 Ces décisions, parmi d'autres, traitent abondamment de l'origine et du fondement du secret

solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And 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.

28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is

professionnel de l'avocat, fermement établi depuis des siècles. Il reconnaît que la force du système de justice dépend d'une communication complète, libre et franche entre ceux qui ont besoin de conseils juridiques et ceux qui sont les plus aptes à les fournir. La société a confié aux avocats la tâche de défendre les intérêts de leurs clients avec la compétence et l'expertise propres à ceux qui ont une formation en droit. Ils sont les seuls à pouvoir s'acquitter efficacement de cette tâche, mais seulement dans la mesure où ceux qui comptent sur leurs conseils ont la possibilité de les consulter en toute confiance. Le rapport de confiance qui s'établit alors entre l'avocat et son client est une condition nécessaire et essentielle à l'administration efficace de la justice.

Par ailleurs, le privilège relatif au litige n'a pas pour cible, et encore moins pour cible unique, les communications entre un avocat et son client. Il touche aussi les communications entre un avocat et des tiers, ou dans le cas d'une partie non représentée, entre celle-ci et des tiers. Il a pour objet d'assurer l'efficacité du processus contradictoire et non de favoriser la relation entre l'avocat et son client. Or, pour atteindre cet objectif, les parties au litige, représentées ou non, doivent avoir la possibilité de préparer leurs arguments en privé, sans ingérence de la partie adverse et sans crainte d'une communication prématurée.

R. J. Sharpe (maintenant juge de la Cour d'appel) a particulièrement bien expliqué les différences entre le privilège relatif au litige et le secret professionnel de l'avocat :

> [TRADUCTION] Il est crucial de faire la distinction entre le privilège relatif au litige et le secret professionnel de l'avocat. Au moins trois différences importantes, à mon sens, existent entre les deux. Premièrement, le secret professionnel de l'avocat ne s'applique qu'aux communications confidentielles entre le client et son avocat. Le privilège relatif au litige, en revanche, s'applique aux communications à caractère non confidentiel entre l'avocat et des tiers et englobe même des documents qui ne sont pas de la nature d'une communication. Deuxièmement, le secret professionnel de l'avocat existe chaque fois qu'un client consulte son avocat, que ce soit à propos d'un litige ou non. Le privilège relatif au litige, en revanche, ne s'applique que dans le

very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

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

("Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65)

With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 ("*Big Canoe*"); *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; *General*

contexte du litige lui-même. Troisièmement, et c'est ce qui importe le plus, le fondement du secret professionnel de l'avocat est très différent de celui du privilège relatif au litige. Cette différence mérite qu'on s'y arrête. L'intérêt qui sous-tend la protection contre la divulgation accordée aux communications entre un client et son avocat est l'intérêt de tous les citoyens dans la possibilité de consulter sans réserve et facilement un avocat. Si une personne ne peut pas faire de confidences à un avocat en sachant que ce qu'elle lui confie ne sera pas révélé, il lui sera difficile, voire impossible, d'obtenir en toute franchise des conseils juridiques judicieux.

Le privilège relatif au litige, en revanche, est adapté directement au processus du litige. Son but ne s'explique pas valablement par la nécessité de protéger les communications entre un avocat et son client pour permettre au client d'obtenir des conseils juridiques, soit l'intérêt que protège le secret professionnel de l'avocat. Son objet se rattache plus particulièrement aux besoins du processus du procès contradictoire. Le privilège relatif au litige est basé sur le besoin d'une zone protégée destinée à faciliter, pour l'avocat, l'enquête et la préparation du dossier en vue de l'instruction contradictoire. Autrement dit, le privilège relatif au litige vise à faciliter un processus (le processus contradictoire), tandis que le secret professionnel de l'avocat vise à protéger une relation (la relation de confiance entre un avocat et son client).

(« Claiming Privilege in the Discovery Process », dans *Special Lectures of the Law Society of Upper Canada* (1984), 163, p. 164-165)

29 À l'exception de la Cour d'appel de la Colombie-Britannique dans l'arrêt *Hodgkinson c. Simms* (1988), 33 B.C.L.R. (2d) 129, les juridictions d'appel du pays ont conclu de façon constante que le privilège relatif au litige repose sur un fondement différent de celui sur lequel repose le secret professionnel de l'avocat : *Liquor Control Board of Ontario c. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) c. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (« *Big Canoe* »); *College of Physicians & Surgeons (British Columbia) c. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower c. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. c. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96;

Accident Assurance Co. v. Chrusz (1999), 45 O.R. (3d) 321.

30 American and English authorities are to the same effect: see *In re L. (A Minor)*, [1997] A.C. 16 (H.L.); *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218, and *Hickman v. Taylor*, 329 U.S. 495 (1947). In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics: Sharpe; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 745-46; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 197-98; J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 868-71; G. D. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 *Can. Bar Rev.* 315. For the opposing view, see J. D. Wilson, "Privilege in Experts' Working Papers" (1997), 76 *Can. Bar Rev.* 346, and "Privilege: Watson & Au (1998) 77 Can. Bar Rev. 346: REJOINDER: 'It's Elementary My Dear Watson'" (1998), 77 *Can. Bar Rev.* 549.

31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.

32 Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or

General Accident Assurance Co. c. Chrusz (1999), 45 O.R. (3d) 321.

Les jurisprudences américaine et anglaise vont dans le même sens : voir *In re L. (A Minor)*, [1997] A.C. 16 (H.L.); *Three Rivers District Council c. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218, et *Hickman c. Taylor*, 329 U.S. 495 (1947). Aux États-Unis, les communications avec les tiers et les autres documents préparés en vue d'une instance sont protégés par une doctrine semblable relative « aux préparatifs de l'avocat » (« *attorney work product* »). La majorité des auteurs adhèrent aussi à cette théorie du « fondement différent » : Sharpe; J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 745-746; D. M. Paciocco et L. Stuesser, *The Law of Evidence* (3e éd. 2002), p. 197-198; J.-C. Royer, *La preuve civile* (3e éd. 2003), p. 868-871; G. D. Watson et F. Au, « Solicitor-Client Privilege and Litigation Privilege in Civil Litigation » (1998), 77 *R. du B. can.* 315. Pour l'opinion contraire, voir J. D. Wilson, « Privilege in Experts' Working Papers » (1997), 76 *R. du B. can.* 346 et « Privilege : Watson & Au (1998) 77 Can. Bar Rev. 346 : REJOINDER : "It's Elementary My Dear Watson" » (1998), 77 *R. du B. can.* 549.

Bien que distincts d'un point de vue conceptuel, le privilège relatif au litige et le privilège de la consultation juridique servent une cause commune : l'administration sûre et efficace de la justice conformément au droit. En outre, ils sont complémentaires et n'entrent pas en concurrence l'un avec l'autre. Cependant, le fait de considérer le privilège relatif au litige et le privilège de la consultation juridique comme deux composantes d'un même concept tend à en occulter la vraie nature.

Contrairement au secret professionnel de l'avocat, le privilège relatif au litige prend naissance et produit ses effets *même en l'absence d'une relation avocat-client* et il s'applique sans distinction à toutes les parties, qu'elles soient ou non représentées par un avocat : voir *Alberta (Treasury Branches) c. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407. La partie qui se défend seule a autant besoin

"chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

d'une « zone » de confidentialité; elle devrait donc y avoir droit. Une autre distinction importante mène à la même conclusion. La confidentialité, condition *sine qua non* du secret professionnel de l'avocat, ne constitue pas un élément essentiel du privilège relatif au litige. Lorsqu'ils se préparent en vue de l'instruction, les avocats obtiennent ordinairement des renseignements auprès de tiers qui n'ont nul besoin ni attente quant à leur confidentialité, et pourtant ces renseignements sont protégés par le privilège relatif au litige.

In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

33 Bref, le privilège relatif au litige et le secret professionnel de l'avocat reposent sur des considérations de principe différentes et entraînent des conséquences juridiques différentes.

The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

34 L'objet du privilège relatif au litige est, je le répète, de créer une « zone de confidentialité » à l'occasion ou en prévision d'un litige. Aussitôt que le litige prend fin, le privilège auquel il a donné lieu perd son objet précis et concret — et, par conséquent, sa raison d'être. Mais, comme certains le diraient, le litige n'est pas terminé tant qu'il n'est pas terminé : On ne peut pas dire qu'il est « terminé », au vrai sens du terme, lorsque les parties au litige ou des parties liées demeurent engagées dans ce qui constitue essentiellement le même combat juridique.

Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

35 Sauf lorsqu'un tel litige connexe persiste, il n'est ni nécessaire ni justifié de protéger contre la communication quelque élément que ce soit qui aurait pu faire l'objet d'une divulgation forcée, n'eût été la procédure en cours ou prévue en raison de laquelle il est protégé. Lorsque le litige est effectivement terminé, il n'y a pas vraiment lieu de craindre que l'avocat de la partie adverse ou ses clients plaident leur cause en [TRADUCTION] « se servant des capacités intellectuelles de l'adversaire », pour reprendre les termes utilisés par la Cour suprême des États-Unis dans *Hickman*, p. 516.

I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the

36 Je suis donc d'accord avec les juges majoritaires de la Cour d'appel fédérale et ceux qui partagent leur avis pour dire que, en l'absence de procédures étroitement liées, le privilège relatif au litige reconnu en common law prend fin lorsque

privilege: *Lifford*; *Chrusz*; *Big Canoe*; *Boulianne v. Flynn*, [1970] 3 O.R. 84 (H.C.J.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (Q.B.). See also Sopinka, Lederman and Bryant; Paciocco and Stuesser.

37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining . . . litigation more broadly than the particular proceeding which gave rise to the claim" (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).

39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

40 As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, at p. 165). This purpose, in the context of s. 23 of the *Access Act* must take into account the nature of much government litigation. In the 1980s, for example, the federal government

le litige qui lui a donné lieu est terminé : *Lifford*; *Chrusz*; *Big Canoe*; *Boulianne c. Flynn*, [1970] 3 O.R. 84 (H.C.J.); *Wujda c. Smith* (1974), 49 D.L.R. (3d) 476 (B.R. Man.); *Meaney c. Busby* (1977), 15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. c. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (B.R.). Voir aussi : Sopinka, Lederman et Bryant; Paciocco et Stuesser.

Ainsi, le principe de la « pérennité des privilèges », si essentiel en ce qui concerne le secret professionnel de l'avocat, ne joue pas dans le cas du privilège relatif au litige. Ce dernier, contrairement au secret professionnel de l'avocat, n'est ni absolu quant à sa portée, ni illimité quant à sa durée.

Or, comme je l'ai déjà mentionné, le privilège peut conserver son objet — et, par conséquent, son effet — lorsque le litige qui lui a donné lieu a pris fin, mais qu'un litige connexe demeure en instance ou peut être raisonnablement appréhendé. À cet égard, je partage l'opinion du juge Pelletier au sujet de « la possibilité de définir le litige en termes plus larges que la seule procédure qui a donné lieu au privilège » (par. 89); voir *Ed Miller Sales & Rentals Ltd. c. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).

Il me semble que cette définition élargie du terme « litige » comprend, à tout le moins, les procédures distinctes qui opposent les mêmes parties ou des parties liées et qui découlent de la même cause d'action (ou « source juridique ») ou d'une cause d'action connexe. À mon avis, les procédures qui soulèvent des questions communes avec l'action initiale et qui partagent son objet fondamental seraient également visées.

En principe, les limites de cette acception élargie du terme « litige » sont circonscrites par l'objet de la reconnaissance du privilège relatif au litige, soit, comme je l'ai déjà mentionné, [TRADUCTION] « le besoin d'une zone protégée destinée à faciliter, pour l'avocat, l'enquête et la préparation du dossier en vue de l'instruction contradictoire » (Sharpe, p. 165). Dans le contexte de l'art. 23 de la *Loi sur l'accès*, cet objet doit tenir compte de la nature de beaucoup de litiges auxquels le gouvernement est partie.

confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.

In such a situation, the advocate's "protected area" would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the *Access Act*. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.

IV

In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the *Access Act*, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.

À titre d'exemple, dans les années 80, le gouvernement fédéral a fait face, partout au Canada, à des litiges découlant du programme d'isolation à la mousse d'urée-formaldéhyde. Les parties n'étaient pas les mêmes et les détails de chaque réclamation étaient différents, mais les questions sous-jacentes de responsabilité étaient les mêmes partout au pays.

41 Dans une telle situation, la « zone protégée » de l'avocat s'étendrait au travail lié à ces questions sous-jacentes de responsabilité, même après le règlement d'une partie des demandes individuelles, si toutes n'ont pas été tranchées. Les poursuites soulevaient des questions communes et les causes d'action, du point de vue des préparatifs du plaideur, étaient étroitement liées. En revanche, une fois tranchées la totalité des demandes appartenant à ce groupe particulier de causes d'action, le privilège relatif au litige aurait expiré, même si la divulgation subséquente des documents aurait révélé certains aspects des opérations du gouvernement ou les stratégies générales d'instance que le gouvernement aurait préféré ne pas dévoiler à ses anciens adversaires ou à d'autres auteurs de demandes formulées en vertu de la *Loi sur l'accès*. Des questions similaires pourraient se poser dans le secteur privé. Ce serait le cas, par exemple, d'une entreprise manufacturière qui ferait face à des demandes connexes, fondées sur la responsabilité du fabricant. Dans chaque cas, la durée et la portée du privilège relatif au litige sont circonscrites par son objet sous-jacent, soit la protection essentielle au bon fonctionnement du processus contradictoire.

IV

42 En l'espèce, l'intimé poursuit le gouvernement fédéral en dommages-intérêts pour fraude, complot, parjure et exercice abusif des pouvoirs de la poursuite. Il exige qu'on lui communique, en application de la *Loi sur l'accès*, tous les documents relatifs à la façon dont le ministère public a mené les poursuites intentées contre lui. La source de ces poursuites était la prétendue pollution et la violation alléguée des exigences en matière de rapport reprochées à l'intimé et à sa société.

43 The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.

44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

46 Finally, in the Court of Appeal, Létourneau J.A., dissenting on the cross-appeal, found that the government's status as a "recurring litigant" could justify a litigation privilege that outlives its common law equivalent. In his view, the "[a]utomatic and uncontrolled access to the government lawyer's brief, once the first litigation is over, may impede the possibility of effectively adopting and implementing [general policies and strategies]" (para. 42).

47 I hesitate to characterize as "[a]utomatic and uncontrolled" access to the government lawyer's brief once the subject proceedings have ended. In my respectful view, access will in fact be neither automatic nor uncontrolled.

Le privilège revendiqué par le ministre concerne donc des documents qui avaient pour objet principal des poursuites pénales relatives à la protection de l'environnement et à des exigences en matière de rapport. Quant à elle, l'action de l'intimé vise essentiellement l'obtention d'une réparation civile pour la manière dont le gouvernement a mené ces poursuites. Elle procède d'une source juridique différente et, dans ce sens, elle n'est pas liée au litige qui a donné lieu au privilège revendiqué.

Quoi qu'il en soit, le privilège relatif au litige ne saurait protéger contre la divulgation d'éléments de preuve démontrant un abus de procédure ou une conduite répréhensible similaire de la part de la partie qui le revendique. Il ne s'agit pas d'un puits sans fond duquel la preuve que l'on s'est mal conduit ne pourra jamais être extraite pour être exposée au grand jour.

Même lorsque des documents seraient autrement protégés par le privilège relatif au litige, l'auteur d'une demande d'accès peut en obtenir la divulgation, s'il démontre *prima facie* que l'autre partie a eu une conduite donnant ouverture à action dans le cadre de la procédure à l'égard de laquelle elle revendique le privilège. Peu importe que le privilège soit revendiqué dans le cadre du litige initial ou d'un litige connexe, le tribunal peut examiner les documents afin de décider s'il y a lieu d'ordonner leur divulgation pour ce motif.

Enfin, en Cour d'appel, le juge Létourneau, dissident quant à l'appel incident, a conclu que le fait que le gouvernement puisse faire l'objet de poursuites répétées pouvait justifier la reconnaissance d'un privilège relatif au litige qui survivrait à son équivalent en common law. À son avis, « [l]'accès libre et automatique au [dossier] de l'avocat du gouvernement, une fois le litige terminé, pourrait entraver l'adoption et la mise en œuvre efficace [de politiques et stratégies générales] » (par. 42).

J'hésite à qualifier de « libre et automatique » l'accès au dossier de l'avocat du gouvernement une fois la procédure en cause terminée. Avec égards, j'estime que cet accès ne sera, dans les faits, ni libre ni automatique.

First, as mentioned earlier, it will not be automatic because all subsequent litigation will remain subject to a claim of privilege if it involves the same or related parties and the same or related source. It will fall within the protective orbit of the *same litigation defined broadly.*

Second, access will not be uncontrolled because many of the documents in the lawyer's brief will, in any event, remain exempt from disclosure by virtue of the 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 of, or in relation to, the originating proceedings. The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context.

Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged.

I hasten to add that the *Access Act* is a statutory scheme aimed at promoting the disclosure of information in the government's possession. Nothing in the Act suggests that Parliament intended by its adoption to extend the lifespan of the litigation privilege when a member of the public seeks access to government documents.

The language of s. 23 is, moreover, permissive. It provides that the Minister *may* invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*.

Premièrement, comme je l'ai déjà mentionné, cet accès ne sera pas automatique parce que tous les litiges subséquents pourront donner lieu à une revendication du privilège s'ils mettent en cause les mêmes parties ou des parties liées et s'ils sont issus de la même source ou d'une source connexe. Ils feront partie de la sphère de protection du *même litige défini en termes larges.* 48

Deuxièmement, l'accès ne sera pas libre parce que de nombreux documents contenus dans le dossier de l'avocat continueront, quoi qu'il en soit, d'échapper à la communication par application du privilège de la consultation juridique. En pratique, le dossier d'un avocat comprend habituellement des documents visés par le secret professionnel de l'avocat, à cause de leur lien évident avec l'avis juridique sollicité ou donné dans le cadre de la procédure initiale ou relativement à celle-ci. La distinction établie entre le secret professionnel de l'avocat et le privilège relatif au litige n'exclut pas la possibilité qu'ils se chevauchent dans le contexte d'un litige. 49

Au fil des ans, la Cour a attribué au secret professionnel de l'avocat une interprétation libérale à la mesure de son importance. Dans ce contexte, tout ce qui, dans un dossier, bénéficie de la protection du secret professionnel de l'avocat demeurera manifestement protégé à jamais. 50

Je m'empresse d'ajouter que la *Loi sur l'accès* établit un régime législatif destiné à favoriser la communication des renseignements détenus par le gouvernement. Rien dans la Loi ne laisse croire que le législateur voulait, en l'édictant, étendre la durée de vie du privilège relatif au litige dans le cas où un membre du public cherche à avoir accès à des documents gouvernementaux. 51

Le libellé de l'art. 23 crée en outre une faculté. Il prévoit que le ministre *peut* invoquer le privilège. Ce libellé favorise la communication en encourageant le ministre à s'abstenir d'invoquer le privilège, sauf s'il estime nécessaire de le faire dans l'intérêt public. Il étaye aussi une interprétation qui favorise une communication *accrue*, et non une communication *plus restreinte*, des documents gouvernementaux. 52

53 The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the *Access Act*, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when the original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the *Access Act* to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended. A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice. Should that possibility materialize — should related proceedings in fact later be instituted — the government may well have been required in the interim, in virtue of the *Access Act*, to disclose information that would have otherwise been privileged under the extended definition of litigation. This is a matter of legislative choice and not judicial policy. It flows inexorably from Parliament's decision to adopt the *Access Act*. Other provisions of the *Access Act* suggest, moreover, that Parliament has in fact recognized this consequence of the Act on the government as litigator, potential litigant and guardian of personal safety and public security.

Comme je l'ai indiqué précédemment, la définition élargie du terme « litige » s'applique autant au gouvernement qu'aux parties privées à un litige. Cependant, il se pourrait qu'en vertu de la *Loi sur l'accès*, la protection dont le gouvernement bénéficie soit moins efficace en pratique. Voici pourquoi. Tout comme les parties privées, le gouvernement ne peut invoquer le privilège relatif au litige qu'au cours ou en prévision de la procédure initiale ou de procédures connexes. En revanche, contrairement aux parties privées, le gouvernement peut être tenu, en vertu de la *Loi sur l'accès*, de divulguer de l'information une fois la procédure initiale terminée, lorsque aucune procédure connexe n'est en cours ni prévue. La simple possibilité qu'une procédure connexe puisse être engagée ultérieurement ne suffit pas. Si cette possibilité se matérialise — si une procédure connexe est effectivement engagée ultérieurement — il est fort possible qu'en vertu de la *Loi sur l'accès*, le gouvernement ait été tenu dans l'intervalle de divulguer de l'information qui, autrement, aurait été privilégiée selon la définition élargie du terme « litige ». Ce résultat relève non pas de la politique judiciaire, mais d'un choix du législateur. Elle découle inexorablement de la décision du Parlement d'édicter la *Loi sur l'accès*. De plus, d'autres dispositions de cette loi portent à croire que le législateur a effectivement reconnu qu'elle aurait cette conséquence pour le gouvernement en sa qualité de partie réelle ou éventuelle à un litige ou de gardien de la sécurité individuelle ou publique.

54 For example, pursuant to s. 16(1)(*b*) and (*c*), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals. The special status of the government as a "recurring litigant" is more properly addressed by these provisions and other legislated solutions. In addition, as mentioned earlier, the nature of government litigation

À titre d'exemple, les al. 16(1)*b*) et *c*) permettent au gouvernement de refuser la communication de documents contenant des renseignements relatifs à des techniques d'enquêtes ou à des projets d'enquêtes licites déterminées ou contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois ou au déroulement d'enquêtes licites. En outre, en vertu de l'art. 17, le gouvernement peut refuser la communication des renseignements dont la divulgation risquerait vraisemblablement de nuire à la sécurité des individus. Ces dispositions et d'autres mesures législatives répondent mieux au statut particulier du gouvernement à titre de partie pouvant faire l'objet de poursuites répétées. De plus,

may be relevant when determining the boundaries of related litigation where multiple proceedings involving the government relate to common issues with closely related causes of action. But a wholesale expansion of the litigation privilege is neither necessary nor desirable.

comme je l'ai mentionné précédemment, la nature des litiges auxquels le gouvernement est partie peut être pertinente pour circonscrire les limites des litiges connexes lorsque de multiples procédures auxquelles participe le gouvernement portent sur des questions communes et ont des causes d'action très voisines. Néanmoins, il n'est ni nécessaire ni souhaitable d'étendre tous azimuts le privilège relatif au litige.

Finally, we should not disregard the origins of this dispute between the respondent and the Minister. It arose in the context of a criminal prosecution by the Crown against the respondent. In criminal proceedings, the accused's right to discovery is constitutionally guaranteed. The prosecution is obliged under *Stinchcombe* to make available to the accused all relevant information if there is a "reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence" (p. 340). This added burden of disclosure is placed on the Crown in light of its overwhelming advantage in resources and the corresponding risk that the accused might otherwise be unfairly disadvantaged.

55 Enfin, nous ne devons pas faire abstraction de la genèse du litige opposant l'intimé et le ministre. Ce litige est survenu dans le contexte de poursuites pénales intentées par le ministère public contre l'intimé. En matière pénale, le droit de l'accusé à la communication préalable est garanti par la Constitution. Conformément à l'arrêt *Stinchcombe*, la poursuite est tenue de permettre à l'accusé d'avoir accès à tous les renseignements pertinents s'il existe une « possibilité raisonnable que la non-divulgation porte atteinte au droit de l'accusé de présenter une défense pleine et entière » (p. 340). Cette obligation de divulgation additionnelle est imposée au ministère public en raison de l'énorme avantage dont il jouit sur le plan des ressources et du risque corrélatif que l'accusé soit injustement désavantagé.

I am not unmindful of the fact that *Stinchcombe* does not require the prosecution to disclose everything in its file, privileged or not. Materials that might in civil proceedings be covered by one privilege or another will nonetheless be subject, in the criminal context, to the "innocence at stake" exception — at the very least: see *McClure*. In criminal proceedings, as the Court noted in *Stinchcombe*:

56 Je me rends bien compte que l'arrêt *Stinchcombe* n'oblige pas la poursuite à divulguer tout le contenu de son dossier, qu'il soit protégé ou non. Des documents qui pourraient être protégés par un privilège ou un autre dans une procédure civile seront néanmoins assujettis, dans le contexte pénal, à l'exception relative à la « démonstration de l'innocence » — à tout le moins : voir l'arrêt *McClure*. Dans une procédure pénale, ainsi que la Cour l'a signalé dans *Stinchcombe* :

> The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. [p. 340]

> Le juge du procès pourrait également, dans certaines circonstances, conclure que la reconnaissance de l'existence d'un droit au secret ne constitue pas une restriction raisonnable du droit constitutionnel de présenter une défense pleine et entière, et ainsi exiger la divulgation malgré le droit au secret. [p. 340]

On any view of the matter, I would think it incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from

57 Quel que soit l'angle sous lequel on envisage l'affaire, je pense qu'il serait incongru de conclure que le privilège relatif au litige permet au ministère

the disclosure it was bound but failed to provide in criminal proceedings that have ended.

V

58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169. It has been adopted in this country as well: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44 Board of School Trustees* (1981), 29 B.C.L.R. 114 (C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); *Nova, an Alberta Corporation v. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755 (Alta. C.A.); *Ed Miller Sales & Rentals*; *Chrusz*; *Lifford*; *Mitsui*; *College of Physicians*; *Gower.*

60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. As Royer has noted, it is hardly surprising that modern legislation and case law

[TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend

public de refuser de communiquer des documents en matière civile, alors qu'il était tenu de les divulguer, mais ne l'a pas fait, dans le cadre des procédures pénales qui ont pris fin.

V

L'issue du présent pourvoi est dictée par la conclusion selon laquelle le privilège relatif au litige expire au moment où le litige prend fin. J'aimerais néanmoins ajouter quelques mots à propos des circonstances dans lesquelles il prend naissance.

La question s'est posée de savoir si le privilège relatif au litige devrait s'attacher aux documents dont un objet important, l'objet principal ou le seul objet est la préparation du litige. Parmi ces possibilités, la Chambre des lords a opté pour le critère de l'objet principal dans *Waugh c. British Railways Board*, [1979] 2 All E.R. 1169. Ce critère a également été retenu dans notre pays : *Davies c. Harrington* (1980), 115 D.L.R. (3d) 347 (C.A.N.-É.); *Voth Bros. Construction (1974) Ltd. c. North Vancouver School District No. 44 Board of School Trustees* (1981), 29 B.C.L.R. 114 (C.A.); *McCaig c. Trentowsky* (1983), 148 D.L.R. (3d) 724 (C.A.N.-B.); *Nova, an Alberta Corporation c. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755 (C.A. Alb.); *Ed Miller Sales & Rentals*; *Chrusz*; *Lifford*; *Mitsui*; *College of Physicians*; *Gower.*

Je ne vois aucune raison de déroger au critère de l'objet principal. Bien qu'il confère une protection plus limitée que ne le ferait le critère de l'objet important, il me semble conforme à l'idée que le privilège relatif au litige devrait être considéré comme une exception limitée au principe de la communication complète et non comme un concept parallèle à égalité avec le secret professionnel de l'avocat interprété largement. Le critère de l'objet principal est davantage compatible avec la tendance contemporaine qui favorise une divulgation accrue. Comme l'a souligné Royer, il n'est guère surprenant que la législation et la jurisprudence modernes

portent de plus en plus atteinte au caractère purement accusatoire et contradictoire du procès civil, tendent à

to limit the scope of this privilege [that is, the litigation privilege]. [p. 869]

Or, as Carthy J.A. stated in *Chrusz*:

The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]

While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

A related issue is whether the litigation privilege attaches to documents gathered or copied — but not *created* — for the purpose of litigation. This issue arose in *Hodgkinson*, where a majority of the British Columbia Court of Appeal, relying on *Lyell v. Kennedy* (1884), 27 Ch. D. 1 (C.A.), concluded that copies of public documents gathered by a solicitor were privileged. McEachern C.J.B.C. stated:

It is my conclusion that the law has always been, and, in my view, should continue to be, that in circumstances such as these, 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. [p. 142]

This approach was rejected by the majority of the Ontario Court of Appeal in *Chrusz*.

The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting

limiter la portée de ce privilège [soit le privilège relatif au litige]. [p. 869]

Ou, pour reprendre les termes utilisés par le juge Carthy dans *Chrusz* :

[TRADUCTION] La tendance moderne favorise une divulgation complète et il n'existe aucune raison apparente de freiner cette tendance dans la mesure où l'avocat continue à jouir d'une souplesse suffisante pour servir adéquatement son client qui est partie à un litige. [p. 331]

61 Tandis que le secret professionnel de l'avocat a été renforcé, réaffirmé et relevé au cours des dernières années, le privilège relatif au litige a dû être adapté à la tendance favorable à la divulgation mutuelle et réciproque qui caractérise le processus judiciaire. Dans ce contexte, il serait incongru de renverser cette tendance et de revenir au critère de l'objet important.

62 Se pose également la question connexe de savoir si le privilège relatif au litige s'attache aux documents recueillis ou copiés — mais non *créés* — en vue du litige. Cette question a été soulevée dans *Hodgkinson*, où les juges majoritaires de la Cour d'appel de la Colombie-Britannique, s'appuyant sur *Lyell c. Kennedy* (1884), 27 Ch. D. 1 (C.A.), ont conclu que les copies de documents publics recueillies par un avocat étaient protégées. Le juge en chef McEachern a dit ce qui suit :

[TRADUCTION] Je conclus que le droit veut depuis toujours — et cette règle devrait selon moi être maintenue — qu'en pareilles circonstances, l'avocat qui réussit à colliger, grâce à ses connaissances, ses habiletés, son jugement et ses efforts soutenus, une pile de copies de documents pertinents pour ses dossiers en vue de conseiller ou de représenter son client à l'occasion ou en prévision d'un litige, ait le droit, et soit en fait tenu, sauf avec le consentement de son client, de revendiquer le privilège à l'égard de tous ces documents et de refuser de les produire. [p. 142]

63 Cette approche a été rejetée par les juges majoritaires de la Cour d'appel de l'Ontario dans *Chrusz*.

64 La divergence d'opinions des juridictions d'appel à ce sujet devra être tranchée lorsque cette question sera expressément soulevée et pleinement débattue. Il semblerait davantage compatible avec

from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

le fondement et l'objet du privilège relatif au litige de l'étendre aux documents recueillis au moyen de recherches ou à l'aide de connaissances et d'habiletés. Cela dit, je tiens à mentionner que le fait d'attribuer une portée aussi étendue au privilège relatif au litige n'a pas pour objectif, et ne devrait pas avoir pour effet, de soustraire automatiquement à la communication tout document ou renseignement qui aurait dû être communiqué au préalable, s'il n'avait pas été transmis à l'avocat ou versé aux dossiers constitués par une partie relativement au litige.

VI

VI

65 For all of these reasons, I would dismiss the appeal. The respondent shall be awarded his disbursements in this Court.

Pour tous ces motifs, je suis d'avis de rejeter le pourvoi. L'intimé recevra le remboursement de ses débours devant la Cour.

The reasons of Bastarache and Charron JJ. were delivered by

Version française des motifs des juges Bastarache et Charron rendus par

66 Bastarache J. — I have read the reasons of Fish J. and concur in the result. I think it is necessary to provide a more definitive and comprehensive interpretation of s. 23 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), however, so as not to leave open the possibility of a parallel application of the common law rule regarding litigation privilege in cases where the *Access Act* is invoked. I therefore propose to determine the scope of s. 23 and rule out the application of the common law in this case.

Le juge Bastarache — J'ai lu les motifs du juge Fish et j'y souscris quant au résultat. Je crois toutefois qu'il est nécessaire de donner une interprétation plus définitive et plus complète de l'art. 23 de la *Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1 (« *Loi sur l'accès* »), afin d'écarter la possibilité d'une application parallèle de la règle de common law concernant le privilège relatif au litige dans les cas où la *Loi sur l'accès* est invoquée. Je propose donc de circonscrire la portée de l'art. 23 et d'exclure l'application de la common law en l'espèce.

67 Here, the government institution has attempted to refuse disclosure by claiming litigation privilege pursuant to s. 23 of the *Access Act*. The question of whether these documents are covered by litigation privilege only arises once it is decided that s. 23 includes litigation privilege within its scope. The question is whether Parliament intended that the expression "solicitor-client privilege" in s. 23 also be taken to include litigation privilege. Whether s. 23 is interpreted so as to include litigation privilege or not does not constitute a departure from litigation privilege *per se*. Either way, the privilege is left unaffected by the

En l'occurrence, l'institution fédérale a tenté de refuser de communiquer des documents en revendiquant le privilège relatif au litige en application de l'art. 23 de la *Loi sur l'accès*. La question de savoir si ces documents sont protégés par le privilège relatif au litige ne se pose que s'il est statué que la portée de l'art. 23 s'étend au privilège relatif au litige. Il faut donc déterminer si le législateur a voulu que l'expression « secret professionnel qui lie un avocat à son client » utilisée à l'art. 23 soit considérée comme englobant également le privilège relatif au litige. Que l'art. 23 soit interprété comme incluant ou comme excluant le privilège

legislation. In my view, litigation privilege cannot be invoked at common law to refuse disclosure which is statutorily mandated. Either Parliament intended to include litigation privilege within the phrase "solicitor-client privilege" or litigation privilege cannot be invoked.

It is unclear, from a legal standpoint, why the government would be able to refuse a statutory duty to disclose information by claiming litigation privilege as a matter of common law. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875, this Court held that legislation may infringe solicitor-client privilege (let alone litigation privilege), though such legislation would be interpreted restrictively. The *Access Act* is such legislation and it is not unique in mandating disclosure of certain information. Corporations' legislation, legislation governing certain professions, securities legislation, to name but a few examples, include statutory provisions that require certain persons to disclose information/documentation to directors, tribunals or governing bodies. It has not been open to those persons to resist disclosure on the basis of solicitor-client or litigation privilege. However, where related litigation arises, those persons will often argue that the compulsory disclosure to an auditor (for example) does not amount to a waiver of the privilege (see *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 F.C. 367 (T.D.)). In that case, the appellants had disclosed legal advice to their auditors pursuant to s. 170 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Before the Federal Court, they argued that this did not constitute a waiver of the privilege. The judge cited the following passage from this Court's decision in *Descôteaux*, at p. 875:

relatif au litige, il ne constitue pas une dérogation au privilège relatif au litige en soi. Peu importe l'interprétation retenue, la loi ne modifie en rien ce privilège. À mon avis, on ne peut revendiquer le privilège relatif au litige en s'appuyant sur la common law pour refuser de communiquer un document que la loi nous oblige à divulguer. Ou bien le législateur a voulu que le « secret professionnel de l'avocat » englobe le privilège relatif au litige, ou bien ce privilège ne peut être invoqué.

68

Il est difficile de comprendre pourquoi, d'un point de vue juridique, le gouvernement pourrait se soustraire à son obligation légale de communiquer des renseignements en s'appuyant sur la common law pour revendiquer le privilège relatif au litige. Dans *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, p. 875, la Cour a statué qu'un texte législatif peut porter atteinte au secret professionnel de l'avocat (et à plus forte raison au privilège relatif au litige), bien qu'un tel texte doive être interprété restrictivement. La *Loi sur l'accès* en est un exemple et n'est pas le seul texte législatif à commander la divulgation de certains renseignements. Ainsi, les textes législatifs régissant les sociétés par actions, certaines professions ou les valeurs mobilières, pour n'en nommer que quelques-uns, comportent des dispositions qui obligent certaines personnes à communiquer des renseignements ou des documents à des administrateurs, à des tribunaux administratifs ou à des organes directeurs. Ces personnes ne conservent pas la faculté de s'opposer à la communication en s'appuyant sur le secret professionnel de l'avocat ou sur le privilège relatif au litige. Toutefois, lorsqu'un litige connexe survient, elles plaident souvent que la divulgation forcée à un vérificateur (par exemple) n'emporte pas renonciation au privilège (voir *Interprovincial Pipe Line Inc. c. M.R.N.*, [1996] 1 C.F. 367 (1re inst.)). Dans cette affaire, les appelants avaient divulgué des avis juridiques à leurs vérificateurs en application de l'art. 170 de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44. Devant la Cour fédérale, ils ont fait valoir qu'ils n'avaient pas renoncé de ce fait au privilège. Le juge a cité l'extrait suivant de la p. 875 de l'arrêt *Descôteaux* rendu par notre Cour :

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

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

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

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [Emphasis added; p. 377.]

69 It is my view, however, that as a matter of statutory interpretation an exemption for litigation privilege should be read into s. 23. In 1983, litigation privilege was merely viewed as a branch of solicitor-client privilege. This means that Parliament most likely intended to include litigation privilege within the ambit of "solicitor-client privilege". *Amato v. The Queen*, [1982] 2 S.C.R. 418 (*per* Estey J., dissenting), and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 358-60, suggest that the incorporation of the common law concept of solicitor-client privilege into the *Access Act* does not freeze the development of the common law for the purposes of s. 23 at its 1983 state.

70 Nonetheless, my view is that the two-branches approach to solicitor-client privilege should subsist, even accepting that solicitor-client privilege and litigation privilege have distinct rationales. The Advocates' Society, intervener, suggests at para. 2 of its factum that:

1. La confidentialité des communications entre client et avocat peut être soulevée en toutes circonstances où ces communications seraient susceptibles d'être dévoilées sans le consentement du client.

2. À moins que la loi n'en dispose autrement, lorsque et dans la mesure où l'exercice légitime d'un droit porterait atteinte au droit d'un autre à la confidentialité de ses communications avec son avocat, le conflit qui en résulte doit être résolu en faveur de la protection de la confidentialité.

3. Lorsque la loi confère à quelqu'un le pouvoir de faire quelque chose qui, eu égard aux circonstances propres à l'espèce, pourrait avoir pour effet de porter atteinte à cette confidentialité, la décision de le faire et le choix des modalités d'exercice de ce pouvoir doivent être déterminés en regard d'un souci de n'y porter atteinte que dans la mesure absolument nécessaire à la réalisation des fins recherchées par la loi habilitante.

4. La loi qui en disposerait autrement dans les cas du deuxième paragraphe ainsi que la loi habilitante du paragraphe trois doivent être interprétées restrictivement. [Je souligne; p. 377.]

J'estime néanmoins que, selon les principes d'interprétation législative, l'art. 23 doit être tenu pour inclure implicitement une exemption concernant le privilège relatif au litige. En 1983, le privilège relatif au litige était considéré simplement comme une composante du secret professionnel de l'avocat. Cela signifie que le législateur avait fort probablement l'intention d'inclure le privilège relatif au litige dans la portée du « secret professionnel qui lie un avocat à son client ». *Amato c. La Reine*, [1982] 2 R.C.S. 418 (le juge Estey, dissident), et R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 358-360, indiquent que l'incorporation, à la *Loi sur l'accès*, du concept du secret professionnel de l'avocat en common law ne stoppe pas l'évolution de la common law pour la maintenir telle qu'elle était en 1983 pour l'application de l'art. 23.

Je suis cependant d'avis qu'il faut continuer à considérer le secret professionnel de l'avocat comme comportant deux composantes, même si l'on admet que le secret professionnel de l'avocat et le privilège relatif au litige reposent sur des fondements différents. L'intervenante The Advocates' Society avance, au par. 2 de son mémoire :

At an overarching level, litigation privilege and legal advice privilege share a common purpose: they both serve the goal of the effective administration of justice. Litigation privilege does so by ensuring privacy to litigants against their opponents in preparing their cases for trial, while legal advice privilege does so by ensuring that individuals have the professional assistance required to interact effectively with the legal system.

[TRADUCTION] Dans l'ensemble, le privilège relatif au litige et le privilège de la consultation juridique poursuivent un but commun : ils servent tous les deux l'objectif de l'administration efficace de la justice. Le privilège relatif au litige favorise cet objectif en offrant aux plaideurs qui préparent leur dossier pour l'instruction une garantie de confidentialité opposable à la partie opposée, tandis que le privilège de la consultation juridique le favorise en garantissant à chacun l'accès à l'aide professionnelle requise pour traiter efficacement avec le système de justice.

Reading litigation privilege into s. 23 of the *Access Act* is the better approach because, in fact, litigation privilege has always been considered a branch of solicitor-client privilege. As the reasons of my colleague acknowledge, at para. 31, "[t]hough conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation."

71 Interpréter l'art. 23 de la *Loi sur l'accès* comme incluant implicitement le privilège relatif au litige est la solution la plus appropriée parce que, de fait, ce privilège a toujours été considéré comme une composante du secret professionnel de l'avocat. Comme mon collègue le reconnaît dans ses motifs, au par. 31, « [b]ien que distincts d'un point de vue conceptuel, le privilège relatif au litige et le privilège de la consultation juridique servent une cause commune : l'administration sûre et efficace de la justice conformément au droit. En outre, ils sont complémentaires et n'entrent pas en concurrence l'un avec l'autre. »

Second, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), at p. 336, Carthy J.A. commented that "[w]hile solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation." Thus, even if litigation privilege is read into s. 23 of the *Access Act*, it is not clear that the Crown could properly invoke it as against a third party, such as the media. This is also a question to be dealt with as a matter of statutory interpretation. In my view, once the privilege is determined to exist, s. 23 grants the institution a discretion as to whether or not to disclose. Although litigation privilege is understood as existing only *vis-à-vis* the adversary in the litigation (*Chrusz*), the effect of s. 23 is to permit the government institution to refuse disclosure to any requester so long as the privilege is found to exist.

72 Deuxièmement, dans l'arrêt *General Accident Assurance Co. c. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), p. 336, le juge Carthy a fait la remarque suivante : [TRADUCTION] « [A]lors que le secret professionnel de l'avocat offre une protection universelle, le privilège relatif au litige ne protège que contre l'adversaire, et uniquement jusqu'à la fin du litige. » Ainsi, même si l'on interprète l'art. 23 de la *Loi sur l'accès* comme incluant implicitement le privilège relatif au litige, il n'est pas certain que le ministère public puisse l'opposer à juste titre aux tiers, par exemple aux médias. Cette question relève elle aussi de l'application des principes d'interprétation législative. Selon moi, une fois établie l'existence du privilège, l'art. 23 confère à l'institution le pouvoir discrétionnaire de divulguer ou non les renseignements. Alors que le privilège relatif au litige est considéré comme n'ayant d'effet que contre l'autre partie au litige (*Chrusz*), l'art. 23 permet à une institution fédérale de refuser la communication à quiconque la demande, à condition que l'existence du privilège soit établie.

73 I would also disagree with the reasons of Fish J., at para. 5, that "we are not asked in this case to decide whether the government can invoke litigation privilege." This appeal turns on the proper interpretation of s. 23 of the *Access Act*. Either litigation privilege must be read into s. 23 or it must be acknowledged that the Crown cannot invoke litigation privilege so as to resist disclosure under the *Access Act*. The consequences of this latter option would have to be considered in the context of the other exemptions provided for by the Act — including those contained in ss. 16 and 17 and outlined at para. 54 of the reasons of my colleague:

> For example, pursuant to s. 16(1)(*b*) and (*c*), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals.

74 For the reasons expressed by Fish J., I agree that the Minister's claim of litigation privilege fails in this case because the privilege has expired.

75 I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener The Advocates' Society: Torys, Toronto.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

Je ne souscris pas non plus aux motifs que le juge Fish exprime au par. 5, lorsqu'il dit que « nous ne sommes pas appelés en l'espèce à décider si le gouvernement peut invoquer le privilège relatif au litige. » Le présent pourvoi porte sur l'interprétation correcte de l'art. 23 de la *Loi sur l'accès*. Soit cette disposition doit être interprétée comme visant implicitement le privilège relatif au litige, soit il faut reconnaître que le gouvernement ne peut invoquer ce privilège pour refuser de divulguer des documents sous le régime de la *Loi sur l'accès*. Les conséquences de cette dernière option devraient être examinées dans le contexte des autres exemptions prévues par la Loi — dont celles énoncées aux art. 16 et 17 et décrites sommairement au par. 54 des motifs de mon collègue :

> À titre d'exemple, les al. 16(1)*b*) et *c*) permettent au gouvernement de refuser la communication de documents contenant des renseignements relatifs à des techniques d'enquêtes ou à des projets d'enquêtes licites déterminées ou contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois ou au déroulement d'enquêtes licites. En outre, en vertu de l'art. 17, le gouvernement peut refuser la communication des renseignements dont la divulgation risquerait vraisemblablement de nuire à la sécurité des individus.

Pour les motifs exprimés par le juge Fish, j'estime moi aussi que la revendication par le ministre du privilège relatif au litige ne saurait être accueillie en l'espèce, parce que ce privilège a pris fin.

Je suis d'avis de rejeter l'appel.

Pourvoi rejeté.

Procureur de l'appelant : Sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante The Advocates' Society : Torys, Toronto.

Procureur de l'intervenant le Commissaire à l'information du Canada : Commissaire à l'information du Canada, Ottawa.

In the Court of Appeal of Alberta

Citation: Alberta v Suncor Energy Inc, 2017 ABCA 221

Date: 20170704
Docket: 1603-0148-AC
Registry: Edmonton

Between:

Her Majesty the Queen In the Right of Alberta

Appellant
(Applicant)

- and -

Suncor Energy Inc.

Respondent
(Respondent)

- and -

Richard Howden, Jim Harris, Corey Black, Andrew Robinson, Patrick Fortune, Juan Bracho, Wayne MacDonald, Berislav Samardzic, Ryan Tarkowski, Catherine Canning and Richard Loiselle

Not Parties to the Appeal
(Respondents)

- and -

The Advocates' Society

Intervenor

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Sheila Greckol

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.J. Manderscheid
Dated the 10th day of May, 2016
Filed on the 12th day of July, 2016
(2016 ABQB 264, Docket: 1603 03547)

Memorandum of Judgment

The Court:

I. Introduction

[1] On April 20, 2014, a Suncor employee was fatally injured at a worksite near Fort McMurray. Occupational Health and Safety (OHS) officers issued a stop-work order that day. Immediately after the accident, anticipating litigation, Suncor began an internal investigation and threw a privilege blanket over all information pertinent to its investigation.

[2] From May 2014 onward, OHS issued demands for production of information under section 19 of the *Occupational Health and Safety Act*, RSA 2000, c O-2 [*OHSA*]. On November 14, 2014, in compliance with section 18 of *OHSA*, Suncor provided OHS with a report of its investigation. Suncor produced materials that pre-dated or coincided with the incident, since such materials could not have been prepared in contemplation of litigation, but asserted solicitor-client privilege and/or litigation privilege over materials created or collected in the course of its internal investigation after the accident.

[3] Her Majesty the Queen in Right of Alberta [Alberta] filed an originating application on February 26, 2016, seeking an order that Suncor provide the refused materials and allow OHS to interview Suncor's internal investigators, or at least provide further particulars about the claims of privilege. On May 10, 2016, the chambers judge held that the dominant purpose of Suncor's internal investigation was in contemplation of litigation: *Alberta v Suncor Energy Inc*, 2016 ABQB 264 [the Decision] at paras 67-68; 72, 266 ACWS (3d) 377. The chambers judge ordered Suncor to meet with a referee, who would assess the claims of privilege and provide recommendations to the Court.

[4] Alberta appeals that decision. For the reasons that follow, we conclude the chambers judge erred in finding the dominant purpose of Suncor's investigation was in contemplation of litigation so as to clothe all material "created and/or collected" during that investigation with legal privilege; that he erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims; that there was no error in invoking the referee process under Rule 6.45 of the *Alberta Rules of Court*, AR 124/10 [the *Alberta Rules of Court*], to determine privilege claims but that he also erred in failing to grant Alberta the right to make submissions to the referee.

II. Facts

[5] Within hours of the workplace incident on April 20, 2014, legal counsel for Suncor contacted its environmental health and safety employees and requested an internal investigation. Legal counsel directed the investigation team to segregate the investigation documents and to endorse all material as privileged and confidential.

[6] The Suncor investigation team interviewed witnesses, recorded statements and collected photographs. On May 5, 2014, OHS issued a demand under section 19 of the *OHSA* for Suncor to provide copies of the witness statements, as well as employees' names and contact information. OHS reiterated this demand on May 12, 2014. On May 20, 2014, Suncor replied and provided the names and contact information of employees, but asserted privilege over the witness statements collected by its investigation team.

[7] OHS did not issue a further demand until October 2, 2014, when it requested a report under section 18 of the *OHSA*, outlining the circumstances of the incident and any preventive measures adopted by Suncor. On November 14, 2014, Suncor provided a copy of the incident report, and on December 5, 2014, OHS confirmed that Suncor was in compliance with the section 18 demand.

[8] On October 23, 2015, nearly a year after Suncor provided its report, OHS issued another demand for the names and contact information of persons interviewed by Suncor, copies of witness statements, names and contact information of investigation team members, and copies of notes, records, photos, videos, and other documents taken or collected by Suncor.

[9] On November 20, 2015, Suncor provided the names and contact information of witnesses who were interviewed. Suncor also provided the names and contact information of its investigation team members, but expressly stated that it was not waiving privilege by doing so.

[10] On December 4, 2015, OHS rejected Suncor's claims of privilege and reiterated its request for the investigation materials. On December 7, 2015, OHS demanded that certain employees of Suncor, including investigation team members, attend at OHS offices for interviews. Suncor continued to assert privilege and OHS ultimately issued an administrative penalty of $5000. That penalty is the subject of separate proceedings pending the outcome of this matter.

[11] Between January 12 and January 28, 2016, OHS issued three requests for particulars about the refused documents and the nature of the privilege. On March 3, 2016, Suncor produced a list of 1655 records bundled into eight categories, asserting solicitor-client privilege and litigation privilege over all of them. OHS took the position that the descriptions of the documents were insufficient to allow it to assess the claims of privilege.

[12] The charging deadline under *OHSA* expired on April 20, 2016 and no charges have been laid.

III. Decision Below

[13] The chambers judge identified three issues between the parties: (1) Is Suncor *entitled* to claim litigation privilege over the information collected during its internal investigation? (2) Are the documents and other records created or collected during Suncor's internal investigation privileged? (3) Has Suncor provided *sufficient* justification for its claims to litigation privilege and solicitor-client privilege? (Decision at para 20; emphasis in original).

[14] The chambers judge first considered whether it was possible for the dominant purpose of Suncor's internal investigation to be in contemplation of litigation, despite the statutory requirement to carry out an investigation under section 18 of the *OHSA*. Relying on *Thomson v Berkshire Investment Group Inc.*, 2007 BCSC 50, [2007] BCJ No 45, the chambers judge held that an overlapping statutory obligation does not foreclose Suncor's ability to prove that its dominant purpose was in contemplation of litigation and to assert privilege.

[15] Second, the chambers judge considered whether Suncor had in fact proved that the dominant purpose of the investigation was in contemplation of litigation. Legal counsel for Suncor deposed that he immediately concluded litigation was a possibility after the incident and requested the internal investigation, taking steps on the same day to protect the investigation as privileged and confidential. He stated that he did not turn his mind to the statutory obligation under section 18 of the *OHSA* as being a reason to conduct the investigation. The chambers judge accepted this evidence and found that the dominant purpose of undertaking the investigation was in contemplation of litigation: Decision at paras 67-68; 72.

[16] Finally, the chambers judge assessed whether Suncor had sufficiently justified its claims of privilege. Given the volume of documents, he found that he could not make a determination about whether each particular document was protected by either solicitor-client privilege or litigation privilege. The chambers judge referred this assessment to Case Management Counsel to act as referee and provide recommendations to the Court under Rule 6.45 of the *Alberta Rules of Court*. The chambers judge ordered that the referee set the process for conducting the initial assessment and identification of records, allowing Suncor to make submissions to explain the evidentiary basis for its claims (Decision at paras 92 – 98).

IV. Legislation

[17] Sections 18 and 19 of the *OHSA* provide as follows:

> **18(1)** If an injury or accident described in subsection (2) occurs at a work site, the prime contractor or, if there is no prime contractor, the contractor or employer responsible for that work site shall notify a Director of Inspection of the time, place and nature of the injury or accident as soon as possible.
>
> **(2)** The injuries and accidents to be reported under subsection (1) are
>
> (a) an injury or accident that results in death,
>
> (b) an injury or accident that results in a worker's being admitted to a hospital for more than 2 days,
>
> (c) an unplanned or uncontrolled explosion, fire or flood that causes a serious injury or that has the potential of causing a serious injury,

(d) the collapse or upset of a crane, derrick or hoist, or

(e) the collapse or failure of any component of a building or structure necessary for the structural integrity of the building or structure.

(3) If an injury or accident referred to in subsection (2) occurs at a work site or if any other serious injury or any other accident that has the potential of causing serious injury to a person occurs at a work site, the prime contractor or, if there is no prime contractor, the contractor or employer responsible for that work site shall

(a) carry out an investigation into the circumstances surrounding the serious injury or accident,

(b) prepare a report outlining the circumstances of the serious injury or accident and the corrective action, if any, undertaken to prevent a recurrence of the serious injury or accident, and

(c) ensure that a copy of the report is readily available for inspection by an officer.

(4) The prime contractor, contractor or employer who prepared the report referred to in subsection (3) shall retain the report for 2 years after the serious injury or accident.

(5) A report prepared under this section is not admissible as evidence for any purpose in a trial arising out of the serious injury or accident, an investigation or public inquiry under the *Fatality Inquiries Act* or any other action as defined in the *Alberta Evidence Act* except in a prosecution for perjury or for the giving of contradictory evidence.

(6) Except as otherwise directed by a Director of Inspection, an occupational health and safety officer or a peace officer, a person shall not disturb the scene of an accident reported under subsection (1) except insofar as is necessary in

(a) attending to persons injured or killed,

(b) preventing further injuries, and

(c) protecting property that is endangered as a result of the accident.

19(1) If an accident occurs at a work site, an officer may attend at the scene of the accident and may make any inquiries that the officer considers necessary to determine the cause of the accident and the circumstances relating to the accident.

(2) Every person present at an accident when it occurred or who has information relating to the accident shall, on the request of an officer, provide to the officer any information respecting the accident that the officer requests.

(3) An officer may, for the purposes of determining the cause of the accident, seize or take samples of any substance, material, product, tool, appliance or equipment that was present at, involved in or related to the accident.

(4) If an officer seizes or takes samples of any substance, material, product, tool, appliance or equipment under subsection (3), the officer shall

(a) give to the person from whom those items were seized or taken a receipt for those items, and

(b) on that person's request, return those items to that person when those items have served the purposes for which they were seized or taken.

(5) Any statement given under this section is not admissible in evidence for any purpose in a trial, public inquiry under the *Fatality Inquiries Act* or other proceeding except to prove

(a) non-compliance with this section, or

(b) a contravention of section 41(3)

in an action or proceeding under this Act.

(6) A peace officer may assist an officer in carrying out the officer's duties under this section if the officer so requests.

[18] Rule 6.45 of the *Alberta Rules of Court* provides as follows:

6.45(1) The Court may refer a question or matter to a referee or order an inquiry to be conducted or an account to be taken by a referee.

(2) Subject to an order of the Court, the referee may do all or any of the following:

(a) hold an inquiry at, or adjourn the inquiry to, any convenient time and place;

(b) inspect and verify records;

(c) inspect, examine or take a view of property;

(d) conduct an accounting or verify accounts;

(e) make any determination required;

(f) do anything else required to answer a question or respond to a matter in accordance with the reference or order.

(3) The Court may

(a) give any directions for the conduct of the matter it considers necessary, and

(b) prescribe the fees and expenses to be paid to the referee, if any, and who is to pay them.

(4) Proceedings before a referee, as nearly as circumstances allow, are to be conducted in the same way proceedings are conducted before a Court.

V. Issues

[19] The following issues are raised by the appeal:

1. Did the chambers judge err in finding that the dominant purpose of the investigation was in contemplation of litigation?

2. Did the chambers judge err in finding that the documents were sufficiently described to allow an assessment of the privilege claims?

3. Did the chambers judge err in referring the assessment to a referee after making a finding about the dominant purpose of the investigation?

4. Did the chambers judge err by failing to grant Alberta the right to make submissions before the referee?

VI. Standard of Review

[20] The question of the test to be applied in determining whether a claim of legal privilege succeeds is an extricable question of law and reviewable on the standard of correctness: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8; 33, [2002] 2 SCR 235.

[21] Though the chambers judge's exercise of discretion to invoke Rule 6.45 is not in dispute, we note that, absent material error of law or principle, such exercises of procedural discretion under the *Alberta Rules of Court* are entitled to deference: see *eg Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd***,** 2014 ABCA 74 at para 17, 569 AR 308; *Balogun v Pandher*, 2010 ABCA 40 at para 7, 474 AR 258.

VII. Analysis

1. Did the chambers judge err in finding that the dominant purpose of the investigation was in contemplation of litigation?

[22] In oral argument, counsel for Alberta properly conceded that sections 18 and 19 of the *OHSA* do not preclude claims of privilege. After the Decision was issued on May 10, 2016, the Supreme Court of Canada clarified the law pertaining to solicitor-client privilege and litigation privilege: *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521 [*Lizotte*]; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555 [*University of Calgary*]. Those decisions confirm the central role of legal privilege in the justice system as well as the legal and policy reasons why privilege must be sedulously protected.

[23] The Supreme Court held that both litigation privilege and solicitor-client privilege "cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it": *Lizotte* at para 64.

[24] Section 19(1) of the *OHSA* provides that an OHS officer "may make any inquiries" with respect to the accident, while section 19(2) provides that persons who have information about the accident must "provide ... any information" upon request. This language is not sufficiently clear or unequivocal to abrogate privilege. It is akin to the legislation at issue in *Lizotte* that authorized requests for production of "any ... document": *Lizotte* at paras 66-67. Without further legislative precision, solicitor-client privilege and litigation privilege remain intact: *Lizotte* at para 67.

[25] Notwithstanding its concession, Alberta argues that the chambers judge erred by making a general finding that the dominant purpose of Suncor's internal investigation as a whole was in contemplation of litigation. In oral argument, Alberta pointed to several instances where the chambers judge used conclusory language to that effect, including at para 68 of the Decision.

[26] Alberta argues that this conclusion is contrary to the settled principle that the dominant purpose for creating any particular record must be established on a document-by-document basis, relying on *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289 at para 87, 376 DLR (4th) 581 [*ShawCor*].

[27] The approach taken by the chambers judge is shown in the Decision, para 68:

> Based on the uncontroverted affidavit evidence of Mr. Chell, I find that, in the circumstances of the Accident and the course of actions undertaken by Suncor's legal counsel – beginning on the *same day* the Accident occurred – the dominant purpose for Suncor's conduct of the subject investigation into the Accident was in contemplation of litigation. This finding invariably and logically leads to the collateral finding that, within the context of Suncor's internal investigation that was

> carried out in anticipation of litigation, the information and documents created and/or collected during the internal investigation with the dominant purpose that they would assist in the contemplated litigation, are integrally covered by litigation privilege. (emphasis in original)

[28] In our view, this formulation of legal privilege by the chambers judge is overbroad and in error. Even if the dominant purpose of the internal investigation as a whole was in contemplation of litigation, this does not mean that every document "created and/or collected" during the investigation assumes the mantle of that overarching dominant purpose so as to be clothed with legal privilege.

[29] This formulation runs afoul of the approach commended by this court in *ShawCor*, albeit in the context of the *Alberta Rules of Court*, whereby each document or group of like documents must be examined. The inquiry requires examination "document by document" or group of like documents to determine the purpose behind its creation: *ShawCor* at para 87.

[30] The overreach of the chambers judge's formulation is illustrated by viewing a portion of the OHS demand of October 23, 2015, and the Suncor response of November 20, 2015, in light of the Chamber judge's formulation of privilege:

OHS Request:

> Copy of all notes, records, photos/video, documents, TapRoot (or other such safety root cause determination process) *taken/collected* by the Suncor Investigation team, relating to the April 20th 2014, incident. . . (emphasis added)

Suncor Response:

> Suncor's investigation into the incident of April 20/14 was conducted on a legally privileged and confidential basis. As such, Suncor is claiming legal privilege over *all notes, records, photos/videos, documents, TapRoot (or other such root cause determination process), and any materials derived therefrom as part of the investigation into the incident of April 20/14*. (emphasis added)

[31] The chambers judge took the view that the internal investigation was in contemplation of litigation, leading to his finding that "information and documents *created and/or collected* during the internal investigation with the dominant purpose that they would assist in the contemplated litigation, are integrally covered by litigation privilege." In this example, OHS sought "notes, records, photos/video, documents ... *taken/collected* by ... Suncor ... relating to the April 20th 2014 incident." Suncor claimed legal privilege "over all notes, records, photos/videos, documents, TapRoot (or other such root cause determination process), and any materials *derived* therefrom as part of the investigation ...". The chambers judge's conception of privilege would extend to the

entirety of the internal investigation file, regardless of the genesis of the individual documents or bundles of like documents.

[32] Further, the chambers judge's broad formulation of privilege would capture materials in the investigation file that pre-date the incident, since they were "created and/or *collected* during the investigation with the dominant purpose that they would assist in the contemplated litigation." (Here, these documents were admittedly not created for the dominant purpose of litigation). This formulation would capture information *created* in the ordinary course of business pertaining to the day-to-day function of equipment, schedules, protocols, and the like, *collected* in the course of the investigation; or any video footage *created* by existing worksite surveillance cameras during and after the accident and *collected* for the investigation file; or photo or video images recorded by bystanders or employees for their own purposes, and later *collected* for the investigation. It would include employee statements *created* pursuant to standing worksite safety protocols after unusual incidents or unsafe events and *collected* for the internal investigation; or documents *created* where the actuating purpose is statutory obligation under the *OHSA* or other statutes. Arguably, none of this material is created for the dominant purpose of litigation, but all would be covered by the formulation of privilege set out in the Decision at paras 48, 68, and 72.

[33] The chambers judge observed that "the Ministry has failed to demonstrate in a satisfactory manner that Suncor did not carry out its internal investigation in contemplation of litigation": Decision at para 67. Rather, Suncor bears the evidentiary onus to establish that each document or bundle of documents was created for the dominant purpose of litigation. Simply showing that the document was "derived," as Suncor has described it, as part of the internal investigation does not demonstrate that the "notes, records, photos/videos, documents" were created for the dominant purpose of litigation.

[34] Suncor cannot, merely by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" or "derived from" the internal investigation, and thereby extend solicitor-client privilege or litigation privilege over them. This Court stated in *ShawCor*, at para 84, that "[b]ecause the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling." And further, at para 87, the Court stated that "the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her."

[35] First, *ShawCor* requires that, under the dominant purpose test, the inquiry must focus on the purpose for preparing or creating the material, not the purpose for obtaining it. Second, it is necessary for the referee to examine *each* of the contested documents or bundle of like documents to determine whether or not they meet the test of legal privilege. In doing so, it is necessary to apply a legal definition of the claimed solicitor-client privilege or litigation privilege.

[36] Solicitor-client privilege attaches to confidential communications between a client and a legal advisor that are connected to seeking or giving legal advice: *Blood Tribe Department of Health v Canada (Privacy Commissioner)*, 2008 SCC 44 at para 10, [2008] 2 SCR 574; see also *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras 26-38, [2006] 2 SCR 319 [*Blank*]. The communication does not have to be in contemplation of litigation, and the privilege is of permanent duration: *Blank* at paras 28, 50.

[37] Litigation privilege attaches to documents created for the dominant purpose of litigation: *Blank* at paras 59-60. This includes any document created for the dominant purpose of preparing for related litigation that "remains pending or may reasonably be apprehended": *Blank* at para 38. The object of this inquiry is the purpose for which the document was *created*, or came into existence, as distinct from the purpose for which it may have been collected or put to use: *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2014 ABCA 244 at para 38, 577 AR 335.

[38] The focus of the chambers judge was on whether sections 18 and 19, on their face and in effect, expressly *ousted* the ability of Suncor to claim legal privilege. He correctly concluded the terms of the *OHSA* did not operate to defeat legal privilege, though he did not have the advantage of *Lizotte* at that time.

[39] However, given the breadth of the litigation privilege he conceived and the referee process he directed, the chambers judge has not yet turned his mind to the interplay between the claims of legal privilege and the statutory obligations upon Suncor under sections 18 and 19 of the *OHSA*. These include the obligation to carry out an investigation, prepare a report, and provide access to the workplace and employees for information respecting the accident for the *OHS* investigation. He may be required to consider Suncor's obligation to prepare a report "outlining" the circumstances and corrective action taken after an accident, under section 18 (3) (b) of the *OHSA;* or employees' obligation to provide information to an OHS officer after an accident under s 19 (2) of the *OHSA*, when their statements are also prepared for the internal investigation and claimed to be privileged.

[40] Plainly, if legal privilege does not cover particular records or information, and the requirements of sections 18 and 19 of the *OHSA* apply to those same records or information, the question of whether sections 18 and 19 operate to override any aspect of privilege disappears. Once the procedure for assessing the contested materials is complete, records or information sifted out of the scope of privilege will be subject to the consideration under the correct legal interpretation of sections 18 and 19 of the *OHSA*.

[41] In conclusion, the chambers judge erred in finding that the dominant purpose of the investigation was in contemplation of litigation and proceeding to conclude that, within the context of Suncor's internal investigation carried out in anticipation of litigation, the material "created and/or collected during the internal investigation with the dominant purpose that they would assist in the contemplated litigation, are integrally covered by litigation privilege".

[42] Since the decisions in *Lizotte* and *University of Calgary*, it is clear the statutory obligations upon Suncor following a workplace accident, and found in sections 18 and 19 of the *OHSA*, do not preclude claims of litigation privilege. In accordance with *ShawCor*, each document or bundle of like documents must be described with sufficient particularity to identify the claimed privilege and the evidentiary basis for the claim.

[43] The referee's inquiry, and ultimately that of the chambers judge, must focus on the dominant purpose for creating each document or bundle of like documents, whether it be for routine, day to day operation of the plant or some other purpose; for compliance with statutory obligations, including sections 18 and 19 of the *OHSA;* or for seeking or giving legal advice or for contemplated litigation. Remaining to be decided is what material falls within the sphere of legal privilege, and the interplay between sections 18 and 19 of the *OHSA* and those privilege claims.

2. Did the chambers judge err in finding that the documents were sufficiently described to allow an assessment of the privilege claims?

[44] Alberta argues the chambers judge erred by concluding that Suncor had sufficiently described the documents, and the grounds for asserting privilege, in its list of bundled records. With respect to solicitor-client privilege, the chambers judge accepted that Suncor engaged in privileged communications with its lawyers. However, the chambers judge referred to a referee the question of which particular communications were covered by solicitor-client privilege. The chambers judge contemplated that the referee's role would include an "initial assessment and identification of the records": Decision at para 92. He also referred to the referee the assessment of whether litigation privilege applies to each bundle of documents: Decision at para 95.

[45] Suncor asserted both solicitor-client *and* litigation privilege over nearly all of the documents it refused to produce. Although documents may frequently be subject to both forms of privilege, Suncor must independently distinguish whether solicitor-client or litigation privilege applies, in order to permit a meaningful assessment and review of each bundle of documents. Making a blanket assertion that both forms of privilege apply, in instances where one or the other is clearly unavailable, is a litigation tactic that ought to be discouraged.

[46] Parties must describe the documents in a way that indicates the basis for their claim: *ShawCor* at para 9. The grounds for claiming solicitor-client privilege and litigation privilege are distinct. A description that supports one class of privilege does not necessarily support the other.

[47] To support a claim of solicitor-client privilege, Suncor must at least describe the documents in a manner that indicates communications between a client and a legal advisor related to seeking or receiving legal advice.

[48] To support a claim of litigation privilege, Suncor must describe documents with enough particularity to indicate whether the dominant purpose for their *creation* was in contemplation of litigation.

[49] In conclusion, we find that the chambers judge erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims. The comments in *ShawCor* at para 63 apply equally to the OHS context: the claim of privilege is based on the honour system, and reasonable people can disagree as to whether particular material is privileged. The eight categories of material claimed as privileged by Suncor are not particularized to identify whether and how it claims the material was *created* in contemplation of litigation. As noted above, material created in the ordinary course of business and later collected for the investigation file, may arguably not be covered by litigation privilege. Of course, this does not require Suncor to describe the document in a way that undermines the privilege claimed.

3. Did the chambers judge err in referring the assessment to a referee under Rule 6.45 of the *Alberta Rules of Court*?

[50] Alberta argues that an assessment by the referee is illusory because the chambers judge already found as a fact that the dominant purpose of the investigation as a whole was in contemplation of litigation. Even if that general finding does not bind the referee with respect to any individual document, or bundle of like documents, Alberta asserts that it is prejudicial to the assessment.

[51] We agree. The inquiry undertaken by the referee under Rule 6.45 of the *Alberta Rules of Court* for consideration of whether legal privilege applies to particular documents or bundles of documents should be undertaken as contemplated in these reasons.

4. Did the chambers judge err by failing to grant Alberta the right to make submissions before the referee?

[52] Alberta argues that the chambers judge erred by ordering an *ex parte* assessment before the referee while Alberta should be entitled to make submissions. In oral argument, Alberta clarified that it did not seek to inspect the documents put before the referee. Instead, Alberta wishes to assist in setting out the basis upon which the referee may determine which documents are arguably relevant and need to be put before the referee; and to make submissions about how the documents are described and identified. We agree. As is customary where parties dispute the claim of privilege, both parties should have the opportunity to make submissions.

VIII. Conclusion

[53] The chambers judge erred in finding that the dominant purpose of the internal investigation was in contemplation of litigation and therefore every document "created and/or collected" during the investigation is clothed with legal privilege. Suncor cannot, simply by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" so as to clothe them with solicitor-client or litigation privilege. Where a workplace accident has occurred, and the employer has statutory duties under sections 18 and 19 of the *OHSA* and simultaneously undertakes an internal investigation, claiming

legal privilege over all materials derived as part of that investigation, an inquiry is properly directed to a referee under Rule 6.45 to determine the dominant purpose for the creation of each document or bundle of like documents in order to assess the claims of legal privilege.

[54] However, the chambers judge erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims. Suncor must independently distinguish the nature of the legal privilege claimed, and the evidentiary basis for the claim, in order to allow for a meaningful assessment. The eight categories of material Suncor claims as privileged are not sufficiently particularized to identify whether the material was *created* in contemplation of litigation, as opposed to merely gathered or collected for that purpose.

[55] The chambers judge erred by failing to grant Alberta the right to make submissions before the referee. Whether or not legal privilege attaches to any particular material or bundle of like materials is a matter about which reasonable people can disagree; fairness requires that both parties have the opportunity to make submissions, whilst protecting legal privilege.

[56] In the result, we allow the appeal in part and vary the Formal Order under Rule 6.45 by removing clause 1 and clarifying clauses 2 to 7. The ultimate issue concerning the scope and effect of sections 18 and 19 of the *OHSA* on legal privilege remains to be argued, as may be necessary. This approach is necessary to ensure that the Legislature's purposes expressed in the *OHSA* are duly respected and effectuated, while affording Suncor an opportunity to make its case for legal privilege claims. The positions of both parties involve important values, and none are appropriate to resolve in a summary fashion on an academic platform.

[57] The order should be varied, including in these respects:

(a) Paragraph 1 should be deleted.

(b) A Court of Queen's Bench Case Management Counsel will act as Referee under Rule 6.45; and is vested with authority to determine and set the process for conducting an assessment of claimed legal privilege respecting Refused Information.

(c) By ..., 2017, Suncor shall provide the Refused Information to the referee, identifying the records, information and communications it claims are covered by litigation privilege or solicitor-client privilege.

(d) Suncor shall then, in accordance with the set process, provide written and/or oral submissions to the Referee explaining the evidentiary basis for such claims.

(e) Alberta shall then, in accordance with the set process, provide written and/or oral responses.

(f) The inquiry by the referee must focus on the dominant purpose for creation of each document or bundle of like documents, and whether the contested documents meet the test of solicitor-client privilege or litigation privilege.

(g) The referee shall then make recommendations to the Court with respect to Suncor's privilege claims over the Refused Information for the Court's consideration and ruling. Disputes will be finally resolved by the chambers judge.

[58] The appeal is allowed to the extent set out in this judgment.

Appeal heard on March 3, 2017

Memorandum filed at Edmonton, Alberta
this 4th day of July, 2017

Berger J.A.

Watson J.A.

Greckol J.A.

Appearances:

D.A. Cranna and S.A. Roberts
for the Appellant

D. Myrol
for the Respondent

C.G. Jensen, QC and E.J. Baker
for the Intervenor

In the Court of Appeal of Alberta

Citation: Canadian Natural Resources Limited v ShawCor Ltd., 2014 ABCA 289

Date: 20140915
Docket: 1301-0128-AC
Registry: Calgary

Between:

Canadian Natural Resources Limited

Respondent (Plaintiff)

- and -

ShawCor Ltd., Shaw Pipe Protection Ltd., Bredero Shaw Company Limited

Appellants (Defendants)

IMV Projects Inc., Flint Field Services Ltd., Flint Pipeline Services Ltd., formerly Transline Energy Services Ltd., ABC Ltd., and XYZ Inc.

Not Parties to the Appeal
(Defendants)

**Ram River Pipeline Outfitters Ltd. and
Dunn Hiebert & Associates Ltd.**

Not Parties to the Appeal
(Third Party Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Jack Watson

Reasons for Judgment Reserved

Appeal from the Order by

The Honourable Chief Justice N.C. Wittmann
Dated the 17th day of April, 2013
Filed on the 15th day of May, 2013
(2013 ABQB 230, Docket: 1001-01541)

Reasons for Judgment Reserved

The Court:

I. Introduction

[1] This appeal requires us to examine aspects of Part 5 of the new Alberta *Rules of Court*, Alta Reg 124/2010 (*Rules*) relating to the content of an affidavit of records where a party claims privilege. We must also assess a claim by the respondent, Canadian Natural Resources Limited (CNRL), that certain of its records are privileged and therefore not subject to disclosure.

[2] CNRL sued the appellants, ShawCor Ltd., Shaw Pipe Protection Ltd. and Bredero Shaw Company Limited (collectively ShawCor) along with others not parties to this appeal for damages relating to the alleged improper design and construction of its 32 kilometre pipeline running between its Primrose East Plant and its Wolf Lake Plant (the Pipeline). This Pipeline, completed in 2008, had been designed, constructed and installed by ShawCor and others. CNRL asserts that its damages flowed from the need to replace the Pipeline following a well blowout.

[3] ShawCor applied to the court for an order that CNRL provide a further and better affidavit of records, asserting that CNRL had not disclosed all of the records in its possession in four critical areas. The main issue turned on disclosure of evidence relating to CNRL's testing and investigation of the Pipeline after February 4, 2009, the date on which CNRL called in its legal counsel. CNRL had voluntarily disclosed investigation and testing records before that date but, with a few exceptions, had refused to provide any records created thereafter. It claimed that they were subject to either or both solicitor-client and litigation privilege. ShawCor contended that CNRL had made an improper "blanket" claim of privilege and thereby failed to describe each record or the privilege claimed to attach thereto. ShawCor also submitted that, in any event, CNRL had waived any privilege over the records by referring to them in its Statement of Claim.

[4] The case management judge dismissed ShawCor's application: ***Canadian Natural Resources Limited v ShawCor Ltd***, 2013 ABQB 230, 559 AR 66. ShawCor appeals that decision. We have concluded that the appeal should be allowed, the order of the case management judge set aside, and an order issued requiring CNRL to prepare a new or supplementary affidavit of records in compliance with the *Rules* and this judgment.

[5] The *Rules* reflect the cultural shift identified in ***Hryniak v Mauldin***, 2014 SCC 7 [***Hryniak***] at para 2: "... a culture shift is required in order to create an environment promoting timely and affordable

access to the civil justice system. This shift entails simplifying pre-trial procedures..." Accordingly, this shift should inform not merely this Court's interpretation of the specific rules under consideration but the overall approach to civil justice issues before the courts.

[6] Tension has always existed between discovery and privilege in the civil justice system. Discovery facilitates a practical and effective search for the truth by ascertaining and limiting the real issues and facts in dispute. Privilege protects the integrity of the adversarial system and shields parties from damage to legitimate interests and relationships. Despite the culture shift, both competing values remain of importance in civil litigation. Any error in the parameters of discovery or privilege may impair the fairness of the process and deter or defeat *bona fide* litigants. Discovery should not be used to undermine legitimate spheres of privilege. At the same time, privilege should not be used to turn litigation into a game of hide and seek – with the seeker blindfolded.

[7] Reforms to the civil justice system have enhanced the role of case management judges as gatekeepers in the litigation process. But this more active judicial role was not designed to lighten the burden on the parties or the responsibilities of their counsel. Thus, the *Rules* should be interpreted in a manner that maximizes the ability of opposing counsel or parties to resolve disputes over privilege and minimizes the time and expense involved in further litigation steps or judicial intervention. Simply put, resort to the courts on privilege issues should not be the first stop on the litigation highway.

[8] We have concluded that a party preparing an affidavit of records must, short of revealing information that is privileged, provide a sufficient description of each record for which privilege is claimed to assist other parties in assessing the validity of the claimed privilege. While the objective is to reduce the need for parties to seek recourse to other time-consuming and costly litigation steps, we are equally satisfied that this can be accomplished in a manner that does not injure valid privileges. In addition, where a judge is nevertheless called on to determine privilege issues, a sufficient description of records will assist the judge in determining whether a more probing assessment is required and, if so, the confines of that assessment.

[9] This result is premised on a number of specific conclusions. Rule 5.7 was intended to apply to all relevant and material records, even those a party objects to produce. Thus, in an affidavit of records, a party must number all records in a convenient manner and briefly describe them (Rule 5.7(1)). The right to bundle and treat that bundle as a single record under Rule 5.7(2) applies equally to records over which privilege is claimed. Rule 5.8 imposes additional responsibilities on a party who objects to produce a *prima facie* producible record. The particular ground(s) of the objection must be identified with respect to each record in order to assist other parties in assessing the validity of the claimed privilege. That means the party must state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege. These requirements apply equally to a bundled record over which a party claims privilege.

[10] Our detailed reasons for these conclusions follow. We begin by outlining certain relevant background information (Part II). We then review the decision of the case management judge (Part III). We next outline the issues (Part IV) and briefly refer to the standard of review (Part V) before turning to our

analysis of the various issues (Part VI). Finally, we confirm our disposition of this appeal and summarize the requirements for an affidavit of records involving privilege claims (Part VII).

II. Background Information

[11] On January 3, 2009, a blowout of a heavy oil well in CNRL's Primrose East Field caused oil to flow to the surface. It is undisputed that, as a result of the blowout, CNRL decided, for periods of time, to allow hotter than usual bitumen to flow through its Pipeline, in particular bitumen that was hotter than 160 degrees Celsius.

[12] In mid-January 2009, CNRL personnel observed that snow appeared to have melted at a number of "hot spots" along the Pipeline right-of-way. This caused CNRL to suspect that something was wrong with the Pipeline's insulation system, resulting in further tests being required. During the latter half of January 2009 and early February 2009, CNRL conducted an airborne thermal scan and began or completed excavation at several of these "hot spots". It subsequently characterized this period as the "Initial Investigation".

[13] On February 4, 2009, Jerry Harvey, CNRL's Executive Advisor of Commercial Operations, asked CNRL's Director of Legal Services for its Horizon Oil Sands Project, Paul Mendes, to provide legal advice regarding further investigation and testing of the Pipeline. On February 5, 2009, Mendes sent out an e-mail to the CNRL employees conducting the Pipeline investigation advising that the investigation would henceforth be conducted under the guidance of legal counsel. A protocol was established to funnel all reports and communications regarding the investigation produced after February 4, 2009 to the legal department. CNRL characterized this as the beginning of the "Litigation Investigation" and took the position that the dominant purpose of the Pipeline investigation post-February 4, 2009 was to prepare for litigation.

[14] On January 29, 2010, CNRL filed a Statement of Claim seeking damages against ShawCor and other defendants not parties to this appeal for faulty design, construction and installation of the Pipeline. The pleadings, and a later request for particulars, referred to information garnered from investigative steps taken both before and after February 4, 2009. In its pleadings, CNRL asserted that its investigation revealed a total or substantial failure of the Pipeline's coating and insulation system which, CNRL alleged, should have been able to withstand the temperatures to which it was subjected. ShawCor's defence was that any problems CNRL experienced with the Pipeline were due to CNRL's own negligence, in particular the fact that it had sent bitumen through the Pipeline that was hotter than allowable.

[15] As the action proceeded, Harvey swore an Affidavit of Records on June 14, 2012 identifying what were, in CNRL's view, its producible records. That category included only those records relating to testing and investigation of the Pipeline failure up to February 4, 2009. Schedule 1 of that Affidavit of Records was replaced on August 17, 2012 by a new, unsworn, supplemental schedule. However, Schedule 2 dealing with privileged records remained the same. It simply made a blanket claim of privilege over an unspecified number of documents and listed the types of privilege claimed. That list was taken from the examples provided in Schedule 2 of Form 26 of the *Rules*. Following that format, Schedule 2 merely said this:

Relevant and material records under the Plaintiff's control for which there is an objection to produce:

(a) without prejudice communications;

(b) communications and copies of communications between solicitor and client;

(c) solicitor's work product, including all interoffice memoranda, correspondence, notes, memoranda and other records prepared by the solicitor or their assistants;

(d) records made or created for the dominant purpose of litigation, existing or anticipated;

(e) other: NIL

(f) records that fall into 2 or more of the categories described above.

[16] It will be obvious that the only item of substance that CNRL included in this Schedule to its Affidavit of Records was the assertion that there were NIL records in the "other" category over which CNRL was claiming privilege. Nothing was said, whether in terms of numbers or description, about records claimed to fall within any of the other listed categories.

[17] ShawCor then brought an application under Rule 5.11 of the *Rules* seeking an order that CNRL produce a new and better affidavit of records. The general purpose of the application was to compelCNRL to produce four broad categories of records that ShawCor considered had not been adequately produced: (a) records relating to the event(s) that caused CNRL's operation of the Pipeline at temperatures higherthan designed for (what it termed "Out-of-Scope Operation"), the cause for that Out-of-Scope Operation and CNRL's response to such extended operation; (b) investigation and testing records relating to the Out-of-Scope Operation and its impact on the Pipeline; (c) records relating to other aspects of the Pipeline's operation relevant and material to the cause of the Out-of-Scope Operation, including the Pipeline's design capacities; and (d) regulatory filings relating to the failure of the Pipeline.

[18] With regard to the investigation and testing records produced after February 4, 2009, ShawCor submitted that it was entitled to disclosure of all such records. It asserted that the mere fact that the records were directed to be sent to, and through, in-house counsel did not bring the records within the scope of solicitor-client privilege. It further contended that it was unreasonable to conclude, in the circumstances, that litigation had been the dominant purpose behind the creation of all these documents. Alternatively, ShawCor submitted that any litigation privilege arising had been waived because CNRL had relied on the facts arising

from the investigation and testing in its Statement of Claim. Finally, ShawCor took issue with the content of Schedule 2, noting that CNRL had neither individually listed the records for which privilege was claimed, nor provided any information about those records to allow ShawCor to assess whether privilege had been properly claimed.

[19] In response, CNRL filed an affidavit sworn by Harvey on December 28, 2012, on which he was subsequently examined, replying to the issues raised in ShawCor's application. Attached to that affidavit were letters documenting CNRL's position. Essentially, CNRL refused to provide any records related to the blowout and the flow of oil to the surface, asserting that such records were irrelevant to the Pipeline's failure. It also refused to disclose testing and investigation records relating to the Pipeline failure generated after February 4, 2009 on the basis that they were, as part of the Litigation Investigation, subject to either or both solicitor-client and litigation privilege. With respect to the alleged deficiencies in Schedule 2, Harvey deposed that CNRL claimed privilege over documents falling into five discrete categories:

> Category #1: Litigation Investigation related documents created by CNRL's Consultant and its associates;
>
> Category #2: Communications between CNRL and [Burnet, Duckworth & Palmer LLP] relating to the formal litigation process;
>
> Category #3: Meeting minutes, meeting agendas, and correspondence between CNRL and CNRL's Consultant and its associates relating to the Litigation Investigation;
>
> Category #4: Internal CNRL documents relating to the Litigation Investigation; and
>
> Category #5: Documents created by other third party contractors in order to assist CNRL with the Litigation Investigation.

[20] This second affidavit, which was not characterized as an amended Affidavit of Records, did at least disclose the number of documents – 1,058 – over which CNRL was claiming privilege. With respect to the investigation and testing records created after February 4, 2009, Harvey deposed that, by that date, it was clear from CNRL's Initial Investigation of the Pipeline that litigation was "obvious". Therefore, CNRL's position was that records from CNRL's continuing investigation and testing of the Pipeline from that point on had been created for the dominant purpose of litigation.

III. Decision of the Case Management Judge

[21] In dismissing ShawCor's application, the case management judge made a number of determinations. First, he refused to order production of the records related to the cause of the blowout and the resulting

flow of oil to the surface. He reasoned that CNRL was not claiming damages against any of the defendants in the Statement of Claim in connection with the blowout itself and that CNRL had acknowledged it was solely responsible for deciding to send oil through the Pipeline at the high temperatures that it did. However, he did leave this issue open in the event that further evidence uncovered during discovery made this information relevant and material. ShawCor does not take issue with this particular conclusion and has not therefore appealed this aspect of the judgment.

[22] Second, the case management judge found that all relevant and material records that were not privileged had been produced. He held that the question at issue in the lawsuit was whether the Pipeline should have been able to handle bitumen at such high temperatures and whether there were other shortcomings in the Pipeline. Despite ShawCor's concerns to the contrary, he accepted Harvey's evidence that CNRL had disclosed everything that was relevant, material, and non-privileged with respect to the Pipeline's operation records and regulatory filings. He also found that all records relating to CNRL's investigation of the Pipeline failure generated before February 4, 2009 had been produced. Finally, the case management judge agreed with CNRL's argument that by February 4, 2009 its investigation had moved from a preliminary stage to the point where its dominant purpose in creating records thereafter was to prepare for litigation. Thus, the case management judge held that CNRL's investigation and testing records generated after February 4, 2009 were protected by solicitor-client or litigation privilege.

[23] Third, the case management judge found that the privileged documents had been properly described in Schedule 2. In particular, he found that there was no need under the *Rules* to list the documents or describe them in a manner that would allow the opposing side to assess the claim of privilege. In coming to this conclusion, he relied on ***Dorchak v Krupka*** (1997), 196 AR 81 (CA) [***Dorchak***] and ***Attila Dogan Construction v AMEC Americas Limited***, 2011 ABQB 794, 530 AR 264, stating at para 41:

> The Shaw Defendants also argue that CNRL has made an improper "blanket" claim of litigation privilege and has not listed in its Affidavit of Records which records it claims privilege over as required by Rule 5.6. The leading case in Alberta with respect to the requirements for listing privileged documents remains *Dorchak v. Krupka*.... In *Attila Dogan Construction v. AMEC Americas Ltd.*, 2011 ABQB 794, this Court held at para. 57:
>
> > There is nothing in Rule 5.8 that would suggest that privileged documents should be identified in a manner that would allow the opposing party to assess the claim of privilege. I further agree that *Dorchak* is not distinguishable on the basis of the number of privileged records in question, nor the complexity of the lawsuit. It is clear that in *Dorchak* the Court of Appeal intended to establish a set of principles that would guide the

> identification of privileged documents in all litigation in Alberta, not merely litigation involving a small number of documents and a low level of complexity...

[24] Finally, the case management judge decided that while it was possible to waive litigation privilege by referring to evidence in pleadings, a party did not have to "choose between loss by default and privilege", citing ***Can-Air Services Ltd v British Aviation Insurance Co*** (1988), 91 AR 258 at para 12, 63 Alta LR (2d) 61 (CA). He found that privilege was not waived since CNRL's pleadings were not based on privileged communications.

IV. Issues on Appeal

[25] ShawCor submits that the case management judge erred in concluding that:

(a) CNRL was not required to describe each record and specify the type of privilege asserted for each record in its Affidavit of Records;

(b) CNRL properly claimed solicitor-client privilege and/or litigation privilege over the investigation records generated after February 4, 2009; and

(c) CNRL did not waive privilege over its investigation records by describing the investigation in its pleadings.

V. Standard of Review

[26] Errors of law are reviewable on the correctness standard: ***Housen v Nikolaisen***, 2002 SCC 33 at para 8, [2002] 2 SCR 235 [***Housen***]. Interpretation of the *Rules* raises a question of law and is therefore reviewed for correctness: ***Dow Chemical Canada ULC v Nova Chemicals Corporation***, 2014 ABCA 244 [***Dow Chemical***] at para 11; ***Edmonton Flying Club v Edmonton Regional Airports Authority***, 2013 ABCA 91 at para 14, 544 AR 6.

[27] Errors of fact, and mixed fact and law are reviewed on the standard of palpable and overriding error: ***Housen***, *supra* at paras 10, 36. An exercise of discretion also involves deference. Discretion as to whether records should be produced will only be interfered with on appeal where based on an error in principle, a misapprehension of the facts, or the decision itself is unreasonable: ***Dow Chemical***, *supra* at para 11.

VI. Analysis

A. The *Rules* and Records Subject to Claims of Privilege

1. Position of the Parties

[28] ShawCor asserts that the *Rules* have changed the law relating to the content of affidavits of records where a party claims privilege and that CNRL's affidavits fell short of satisfying the *Rules*. In its view, the *Rules* require that: (a) records over which privilege is claimed must now be numbered in a convenient order, (b) the particular privilege or other legal right relied on to resist production must be stated with respect to each record, and (c) each individual record must be described to the extent necessary to permit the other side to challenge the claim of privilege or at least make it clear that it is within the privilege claimed. ShawCor accepts that a description need not give away the privileged information.

[29] CNRL takes the position that ***Dorchak*** remains the law with respect to an affidavit of records involving privileged records and that under ***Dorchak***, no description of the records claimed to be privileged is required.

2. Interpretive Approach to the *Rules*

[30] The *Rules* have a status comparable to a statute: *Judicature Act*, RSA 2000, c J-2, s. 28.1, s. 63. Therefore, the relevant Rules relating to disclosure and the content of affidavits of records must, like a provision in a statute, be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the overall scheme of the legislation, its objects and the intention of the legislature: ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 SCR 27 at para 21. That relevant context includes the culture shift endorsed in ***Hryniak***, one objective of which is to simplify pre-trial procedures in the delivery of justice. As the Supreme Court of Canada noted in ***Hryniak***, *supra* at para 1: "Ensuring access to justice is the greatest challenge to the rule of law in Canada today."

[31] The courts, bar and government in Alberta, as in other jurisdictions, identified this long-standing and persistent challenge years ago. All understood that delays, coupled with the high costs of litigation, created barriers to justice. Through the joint efforts of the Alberta Law Reform Institute, the Rules of Court Committee (established under s. 28.2 of the *Judicature Act*), and the Alberta government, the *Rules* were implemented. They were designed in part to streamline the civil litigation process and encourage early disclosure and settlement of issues. Once the Rules of Court Committee agreed to the *Rules* and recommended their adoption, Alberta promulgated the *Rules* by Order in Council under s. 28.1 of the *Judicature Act*. This section authorizes the Lieutenant Governor in Council, by regulation, to make rules governing practice and procedure in the Court of Queen's Bench and Court of Appeal.

[32] Interpreting the *Rules* in a manner which promotes access to justice is also supported by the stated purposes of the *Rules* themselves. Although the purpose section of a statute carries less weight than a

substantive provision, it is still useful for interpretive purposes as a statement of legislative intent: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 391. Of course, purpose language in legislation cannot be used to distort the legislation's specific operational words: *Gallant v Farries*, 2012 ABCA 98, 522 AR 13. Rule 1.2 of the *Rules* confirms the foundational purpose of the *Rules* and provides that parties have a joint and individual obligation to take steps to achieve that purpose. It reads in part:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way.
>
> (2) In particular, these rules are intended to be used
>
> > (a) to identify the real issues in dispute,
> >
> > (b) to facilitate the quickest means of resolving a claim at the least expense...
>
> (3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,
>
> > (a) identify... the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense...
> >
> > ...
> >
> > (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
> >
> > (d) when using publicly funded Court resources, use them effectively.

[33] Not only does this foundational purpose reflect the culture shift occurring throughout Canada, the *Rules* also include, for the first time, a statutory provision describing the intended purpose of Part 5 dealing with disclosure and records. That purpose is expressly stated in Rule 5.1:

> **Purpose of this Part**
>
> 5.1(1) Within the context of rule 1.2 *[Purpose and intention of these rules]*, the purpose of this Part is

> (a) to obtain evidence that will be relied on in the action,
>
> (b) to narrow and define the issues between parties,
>
> (c) to encourage early disclosure of facts and records,
>
> (d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and
>
> (e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.
>
> (2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

[34] Thus, our interpretation of the *Rules* is informed by the foundational purpose in Rule 1.2, the stated purpose relating to disclosure contained in Rule 5.1, and the culture shift required to create a litigation environment that enhances, and does not obstruct, access to justice. All three encourage early disclosure and narrowing of the issues in dispute between parties. One objective is to facilitate a timely evaluation of the parties' respective positions with a view to achieving, if possible, a settlement without the need to resort to a trial.

3. The *Rules* Relating to Affidavits of Records

[35] We now turn to the specific rules dealing with disclosure of information under the *Rules*. The main rules relevant to the contents of an affidavit of records are Rules 5.6, 5.7 and 5.8, which provide in part as follows:

> **Form and contents of affidavit of records**
>
> 5.6(1) An affidavit of records must
>
> (a) be in Form 26, and
>
> (b) disclose all records that
>
> (i) are relevant and material to the issues in the action, and

> (ii) are or have been under the party's control.
>
> (2) The affidavit of records must also specify
>
> (a) which of the records are under the control of the party on whose behalf the affidavit is made,
>
> (b) which of those records, if any, the party objects to produce and the grounds for the objection, ...
>
> **Producible records**
>
> 5.7(1) Each producible record in an affidavit of records must
>
> (a) be numbered in a convenient order, and
>
> (b) be briefly described.
>
> (2) A group of records may be bundled and treated as a single record if
>
> (a) the records are all of the same nature, and
>
> (b) the bundle is described in sufficient detail to enable another party to understand what it contains.
>
> **Records for which there is an objection to produce**
>
> 5.8 Each record in an affidavit of records that a party objects to produce must be numbered in a convenient order and the affidavit must identify the grounds for the objection in respect of each record.

4. What Do the *Rules* on Affidavits of Records Require Regarding Privilege Claims?

[36] Rules 5.6, 5.7 and 5.8 lie at the heart of this dispute. As noted above, we have concluded that a grammatical, purposive and contextual reading of these Rules imposes on a party the obligation to number and briefly describe each record that is relevant and material, including those it claims are privileged. In accordance with Schedule 2 of Form 26, those latter records should be set out in separate categories as contemplated therein. A party is entitled to bundle privileged records providing that the bundled record otherwise meets the requirements of Rule 5.7. For records that a party claims are privileged, the party must, in accordance with Rule 5.8, identify the particular grounds of the objection to production for each record in

order to assist other parties in assessing the validity of the claimed privilege. That means the party must state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege. These requirements apply equally to a bundled record over which a party claims privilege. We offer four reasons for these conclusions.

(a) The Text of the *Rules* Supports a Modern Approach to Privileged Records

[37] The textual wording of the provisions in the *Rules* dealing with disclosure of records supports a broad interpretation of a party's obligations with respect to records it claims are privileged. This is reinforced by s. 10 of the *Interpretation Act*, RSA 2000, c I-8, which provides that an enactment, which would include the *Rules*, "shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects".

(i) Reading the Rules Together

[38] The first issue is the scope of Rule 5.7. It requires that each producible record be numbered and briefly described. What was intended by the reference to "producible records" in the heading and body of Rule 5.7? The key question is this. Does producible records in Rule 5.7 include those a party objects to disclose?

[39] The starting point for this analysis must be Rule 5.6(1)(b). It requires that an affidavit "disclose all records... relevant and material to the issues in the action" that "are or have been under the party's control". Thus, all relevant and material records are *prima facie* producible. Subsection (2)(b) of this Rule goes on to require that the affidavit must also specify which of "those records", if any, the party objects to produce and the grounds for the objection. The words "those records" obviously refer back to records that "are relevant and material to the issues in the action". Therefore, relevant and material records include those a party objects to producing.

[40] The next question is what is meant by "producible records" in Rule 5.7. Rule 5.7(1) requires that each producible record be numbered in a convenient order and briefly described and Rule 5.7(2) allows bundling of a group of records. Does "producible records" in Rule 5.7(1) and "records" in Rule 5.7(2) include those records a party objects to producing? Again, in our view, the answer is yes (providing, of course, that the record is otherwise material and relevant). It was argued that a record that is objected to under Rule 5.8 ceases, as a result of that objection, to be a "producible" record for purposes of description and bundling of those records under Rule 5.7. However, nothing in the language of either Rule 5.7 or 5.8 suggests this. Indeed, the only reason a party would *need* to object to production of a record under Rule 5.8 is because the record is otherwise producible under Rule 5.7. The language of these Rules does not suggest that the drafters intended that a record that is *prima facie* producible would somehow automatically lose that quality – or the requirement that it be briefly described – merely because an objection, yet to be considered, is taken. Accordingly, the word "producible" as it appears in Rule 5.7 refers to records which

are relevant and material, even where objection is taken to production. In other words, it includes records which are *prima facie* producible.

[41] It follows that we do not view Rules 5.7 and 5.8 as creating discrete obligations and rights depending on whether a party objects to produce records. Rather, despite any ambiguity suggested by their headings, we are satisfied that Rule 5.7 was intended to apply to all relevant and material records that are *prima facie* producible and that Rule 5.8 was intended to impose *additional*, not separate, obligations on a party who objects to producing a *prima facie* producible record. What further information does Rule 5.8 require a party to disclose for records over which privilege is claimed? The answer is that it requires, in particular, that a party identify the "grounds for the objection in respect of each record".

[42] This being so, even if we are wrong in concluding that relevant and material records a party objects to produce must, short of disclosing privileged information, be briefly described by that party in accordance with Rule 5.7, the same result would follow given the requirements under Rule 5.8. Why? Identifying "the grounds" for claiming privilege in relation to each record obliges a party to do two things. First, it must state the actual privilege being relied upon with respect to a particular record (e.g. litigation privilege). Second, it must provide a sufficient description about that record to assist other parties in assessing the validity of the claimed privilege. An objection does not exist in a factual vacuum. It is tied to a specific record. Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.

[43] Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.

[44] The content of Form 26 set out in Schedule A of the *Rules* – specifying the format for an affidavit of records – also supports the conclusion that a party claiming that a record is privileged must satisfy these obligations. The use of the Form is mandatory since the word "must" is stated in Rule 5.6(1)(a) in reference to its completion. Nevertheless, its format is not strictly binding providing the substance of the form satisfies the requirements found in the *Rules*: see Rule 13.16.

[45] Schedule 2 of Form 26 deals with documents a party objects to produce. It lists a number of specific kinds of records which would ordinarily attract privilege, such as "without prejudice communications" or "litigation privilege". Significantly, however, each of these listed examples is followed by a colon, which indicates that a party is expected to provide more detailed information. In other words, the matters listed before the colon are various recognized categories of privilege, the first required element of

the "grounds" for the claim. What a party must include after the colon, however, is the second aspect of the grounds, namely the description of each record, along with the numbering in convenient order, that indicates how the record fits within the claimed privilege. Once properly completed, the end result will be a list of individual or bundled records corresponding to the different categories of privilege, numbered and adequately described.

[46] In summary, the *Rules* read together indicate that a party must provide more information in describing a record subject to a privilege claim than merely parroting the nature of the various privileges listed in Schedule 2 of Form 26 in an abstract, incomplete manner, untethered to any specific record. It would be ironic, indeed, if the *Rules* were interpreted so as to allow a party not to provide at least a brief description of records where that description is most required. After all, these are the records that another party is not entitled to examine unless it successfully challenges the privilege claim.

[47] We stress, however, that the requirements we have identified are subject to the option to bundle records.

(ii) Interpreting Rule 5.7 to Include Privileged Records Allows Them to be Bundled

[48] The *Rules* define for the first time what records may be bundled. Rule 5.7 permits records of the "same nature" to be bundled so long as the bundle can be "described in sufficient detail to enable another party to understand what it contains". Bundling can be helpful since it avoids the necessity of having to describe each record individually. There is no legitimate reason to deny this bundling tool to records a party objects to disclose based on privilege claims. Hence, this is another reason why we have concluded that producible records under Rule 5.7 was intended to include all *prima facie* producible records.

[49] Moreover, the requirement in Rule 5.7(2)(b) that the bundle be described in sufficient detail to allow a party to understand its contents adds support for this interpretation. That description is of particular importance where an objection to disclosure is made. In all other cases, the bundle can be examined. But where a party claims a bundle is privileged, without a sufficient description to allow another party to understand the contents of the bundle, that other party would have no idea what is not being disclosed and why. Accordingly, we reject the notion that the *Rules* are encumbered by a false dichotomy under which records that are not subject to objections to disclosure may be "bundled" by a party but objected to records cannot be bundled at all. The *Rules* do not say that.

[50] As noted, we have concluded that each record over which privilege is claimed must be (i) numbered in a convenient order and (ii) described in a way that, without revealing privileged information, indicates how that record fits within the claimed privilege. However, this requirement to describe each record individually is subject to the proviso that relevant and material records of the same nature can be bundled and treated as a single record so long as the requirements of Rule 5.7(2) are met. That is, the description offered for the bundle must be sufficiently clear so as to allow another party to understand what it contains. In addition,

given the requirements of Rule 5.8, this description must also provide sufficient facts to assist other parties in assessing the validity of the claimed privilege over the bundle in question.

[51] Bundling can be effective even with multiple claims of privilege. To illustrate, consider a party who claims privilege over 50 records. After describing the bundle in sufficient detail to enable another party to understand what it contains and providing sufficient information to assist other parties in assessing the validity of the claimed privilege over the bundle in question, the party objecting to disclosure identifies records 1 to 30 as subject to solicitor-client privilege, records 40 to 50 as litigation privilege and records 31 to 39 as both. This permits a party to identify which form(s) of privilege attaches to each record while recognizing that some records might have multiple reasons for objection, any one of which may be sufficient: see ***Opron Construction Co. v Alberta*** (1989), 100 AR 58 (CA) at para 5. Another party would be assisted by this degree of specificity and might well choose to accept the objections, or only resist them selectively. A judge reviewing the records under Rule 5.11 would also be in a better position to organize the evaluation of the objections.

[52] We recognize that the predecessor rules of court to the *Rules* did not expressly permit bundling, much less stipulate what restrictions would apply to such bundling. While this Court's interpretation of prior iterations of the rules of court permitted bundling in certain circumstances, it did not require that the bundled records be described in sufficient detail to enable another party to understand what the bundle contains. However, the *Rules* now impose this obligation. Requiring this description balances the competing values of privilege and discovery by protecting the privileged information while providing some information to assess the claimed privilege and thereby hopefully narrowing the disputed areas to the margins of the privilege claims.

(iii) *Dorchak* is not a Barrier to Describing Records Subject to a Privilege Claim

[53] The next question is whether this Court's decision in ***Dorchak*** commands a different reading of the text of the *Rules*. The answer is no. The parties spent some time on the implications of ***Dorchak***. It was asserted that ***Dorchak*** did not require that any description be provided with respect to records subject to a privilege claim. However, ***Dorchak*** was decided under different rules of court relating to disclosure. Those rules were amended shortly after that decision and have now been replaced with Part V of the *Rules*.

[54] Since ***Dorchak*** was decided in 1997, vast and varied technological changes have allowed parties to litigation to massively enlarge the scope of their record keeping. The *Rules* accept that it is not too onerous for a party to briefly describe every record (or bundle of records) they object to produce. In this technological age, there can be no practical barrier to a party's preparing the necessary brief description of relevant and material records it claims are privileged. Indeed, in major litigation cases, this would typically be done as a matter of routine for the party's internal purposes alone. It is noteworthy that in this case, the parties had no difficulty providing brief descriptions for the more than 10,000 records they did not object to produce.

[55] That said, much of what was said in ***Dorchak*** still has resonance. While concerned that privilege not be "frittered away" through description of a record, this Court was aware of the need to balance this concern against the need to describe enough facts about the record to bring it within the privilege. As noted in ***Dorchak***, *supra* at para 62:

> Ordinarily one should be able to describe a file or bundle in some manner which will not reveal secrets. For example, if it is E. Marshall Hall's file, one may call it a lawyer's file without naming the lawyer.

[56] Indeed, ***Dorchak*** held that it was necessary for an affidavit of records to articulate the particular privilege being asserted with respect to a given document or bundle of documents. While this Court held that it was not necessary to describe each document or bundle of documents so as to "corroborate the privilege", a primary concern was that a party not be obliged to cite facts that effectively gave away the privilege. This concern remains valid today. Hence, we emphasize that the obligation to provide sufficient information to indicate how a record fits within the claimed privilege does not require a degree of particularity that would itself defeat the privilege. No doubt best practices by counsel for parties will develop over time to accommodate to the new realities.

(b) Context Supports a Modern Approach to Privileged Records

[57] The legislative history sheds considerable light on the rationale for changes to the rules relating to claims of privilege. That history underscores why the *Rules* ought to be given a generous and liberal interpretation and why it is reasonable to conclude that they were intended to usher in a modern approach to privileged records.

[58] Preparation of the *Rules* involved considerable consultation with the profession. That consultation revealed substantial professional complaints regarding how affidavits of records dealt with claims of privilege. The Alberta Law Reform Institute (ALRI) discussed many of these complaints in Consultation Memorandum No. 12.2 of the Alberta Rules of Court Project, *Document Discovery and Examination for Discovery*. That memorandum expressly recognized at 28-29 the serious concerns in the legal profession associated with the description of privileged documents, or more to the point, the lack thereof:

> The general feeling is that privileged documents must be described in a manner which adequately describes the ground upon which privilege is claimed as there is no way of knowing that a document exists if it is not disclosed. Some counsel indicated that a recent case suggests that counsel may be negligent if they proceed without cross-examining on the affidavit of records to determine why privilege is claimed over specific records.

[59] In our view, Part V of the *Rules* was aimed at remedying this problem. In addition, there is no good policy reason for adopting an interpretation of the *Rules* that exposes members of the legal profession to

negligence claims if they fail to run down every blind alley that the rules themselves would otherwise be responsible for creating.

(c) Policy Reasons Support the Modern Approach to Privileged Records

[60] Further, interpreting Rules 5.7 and 5.8 to require parties to describe records over which privilege is claimed to the extent we have identified is consistent with the purpose of Part V of the *Rules* and the shift toward early disclosure. Early disclosure facilitates the ability of another party to evaluate the legitimacy of privilege claims without resorting to the courts for resolution of all disputes. A contrary approach means that a party would provide no useful information whatever about records claimed to be privileged. It is difficult to fathom how such a system could operate effectively when an opposing party has no knowledge of what documents are subsumed under the blanket claim of privilege. To continue with this blanket approach to privilege claims makes little sense. Today, all involved in the justice system recognize the benefits of early resolution of contentious issues and early settlement before parties have wasted months, if not years, in protracted and costly litigation.

[61] It has been suggested that it is unnecessary to require a description of records claimed to be privileged at the front end of any litigation because the *Rules*, as with the predecessor rules, provide several options for counsel to deal with disputes regarding privileged records. Rule 5.11 sets out the role of the court when a party alleges a relevant and material record has been omitted or a claim of privilege has been made incorrectly or improperly:

> 5.11(1) On application, the Court may order a record to be produced if the Court is satisfied that
>
> > (a) a relevant and material record under the control of a party has been omitted from an affidavit of records, or
> >
> > (b) a claim of privilege has been incorrectly or improperly made in respect of a record.
>
> (2) For the purpose of making a decision on the application, the Court may
>
> > (a) inspect a record, and
> >
> > (b) permit cross-examination on the original and on any subsequent affidavit of records.

[62] In addition, we recognize that there are several other Rules under which a privilege (or immateriality) position might perhaps be tested or affected, such as: (a) during questioning (Rule 5.17(1)); (b) by

undertakings requested (Rule 5.30); (c) having a Master inspect the records (Rule 5.14(2)); (d) moving for directions (Rule 5.1(2)); (e) moving for modification of rights (Rule 5.3); (f) moving to have a corporate representative answer further questions by informing himself or herself from others (Rule 5.4); and (g) moving to bar records not disclosed (Rule 5.16).

[63] However, the purpose of providing a brief description of each record claimed to be privileged is to mitigate the need for a party to seek a remedy under these other Rules. We accept that discovery is based on the honour system. But we are not oblivious to reality. The fact is that reasonable people may reasonably disagree on what is, or is not, privileged – and do. Indeed, the very existence of these numerous options demonstrates that a claimed privilege position may well be incorrect. Errors may still be made. Parties and their counsel must have some reasonable way of assuring themselves that the claims advanced are in fact appropriate. If there is no means by which an opposing party can satisfy itself that the privilege claimed is properly invoked from the way the affidavit of records is drafted, that party may well feel compelled to take other steps to assess the validity of the claims. That may include cross-examining on the affidavit, and then asking a judge to scrutinize the disputed records. Rule 5.11 makes plain that parties are entitled to seek to satisfy themselves on this point.

[64] It is true that the right to have a judge review records claimed to be privileged remains the ultimate safeguard in the event of legitimate differences of opinion or allegations of abuse of the system. But it is preferable that the *Rules* be interpreted in a way that minimizes the need to pursue these other various options, all of which come at additional cost and time to the litigants. Full and fair discovery of records also militates in favour of earlier dispute resolution and enhances the likelihood that opposing parties will make only appropriate challenges.

[65] Further, in this day of increasingly scarce judicial resources, judges should not be bogged down regularly by the need to examine volumes of records to assess privilege. And lawyers should not be put in the position of having to ask them to do so. This potential Hobson's choice can be avoided by a system of document discovery that requires a brief description of each record claimed to be privileged in the affidavit of records. Providing that description at an early stage will help counsel focus and, in many cases, resolve litigation privilege issues without their being required to shoot all the arrows in the litigation quiver. Many privilege claims will no doubt be readily accepted. It also means that where court review is still required, a judge will not likely be called on to examine every record subject to a privilege claim. And even if that should prove necessary, a brief description of the challenged records may well also save judicial time.

[66] The trend towards increased disclosure is, in part, a reaction to the increased complexity of the modern commercial lawsuit, where parties are forced to deal with thousands of potentially relevant documents at a time. The circumstances in this case are a good example of the problems inherent in an approach that would allow counsel to simply slap a non-disclosure label on records by using a generic description of the privileges claimed. Here, CNRL said it was claiming the various forms of privilege listed in Schedule 2 of Form 26 over an undisclosed number of records. There was, therefore, no means by which

ShawCor could possibly assess the validity of the privilege(s) claimed, or even affirm the number of records in question short of cross-examining or making the court application that it did.

[67] CNRL responded to the court application by filing a second affidavit that quantified the number of documents which it claims to be privileged – 1,058 records – and set out five possible categories of privilege. It did not identify how many records fell into which category. Nor did it describe the documents in such a way that ShawCor or, for that matter, the case management judge, could assess the validity of the various privilege claims. Little wonder that during the application, the case management judge mused about whether he should examine the 1,000 plus documents to see if they fit within the privileges claimed. The parties were understandably reluctant to ask him to do so, as they recognized the burden this would place on him.

[68] Thus, this case speaks for itself as to the difficulties inherent in the approach taken to date. The fact is that, like the case management judge, we have no idea to what extent CNRL's privilege claims over 1,058 documents are valid. Parties who face disclosure objections should not have to rely solely on the courts, whether through use of Rule 5.11 or otherwise, to assess privilege claims. Further, without an affidavit of records that complies with the requirements we have identified under the *Rules*, the courts themselves would often lack the institutional capacity – particularly where, as here, the records are voluminous – to adequately probe the issue of privilege. Finally, what this case demonstrates is the comparative ease of minimizing or avoiding these difficulties with the modern approach.

[69] Ultimately the rule of law is effective as an honour system because the institutions and processes of the justice system are understandable and reliable to those caught up in it. In our increasingly complex society, that system must provide workable and efficient methods for getting to the heart of matters in dispute and providing a credible answer in a prompt and proportional manner. On the other hand, justice systems do not exist to strip personal privacy and legal autonomy away from litigants. The modern approach to disclosure reflected in the *Rules* continues the expression of confidence in *bona fide* justice system participation by parties and their counsel, but backstops that confidence with judicial intervention where necessary.

(d) The Modern Approach is Consistent with the Evolving Law on Privilege

[70] Other jurisdictions which have faced similar problems to those documented by the ALRI have adopted solutions favouring greater disclosure of information to support claims of privilege. This includes requiring that privileged records be described to a sufficient extent that privilege claims can be challenged without immediate resort to the courts. For example, Rule 7-1(7) of the British Columbia *Supreme Court Civil Rules*, BC Reg 168/2009 states: "The 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 other parties to assess the validity of the claim of privilege." Similar disclosure rules exist in Saskatchewan and Ontario, as well as in the federal courts of Canada and the United States: see Rules 5-6 and 5-8 of the *Queen's Bench Rules, 2013* (Saskatchewan); Rule 30.03 of the *Rules of Civil Procedure* (Ontario), RRO

1990, Reg 194; Rule 223(2) of the *Federal Courts Rules*, SOR/98-106; Rule 26(5) of the United States *Federal Rules of Civil Procedure*, Fed R Civ P.

[71] While the rules of other jurisdictions are not, by themselves, a reason to interpret Alberta law in a particular way, they are indicative of the evolving trend in Canada towards more open disclosure in keeping with the philosophy the Supreme Court of Canada expressed in ***Hryniak***. It is also fair to say that the approach that jurisdictions like British Columbia have taken is consistent with what courts generally have been doing in recent years to encourage greater disclosure. We hasten to add that there are differences in the language of the rules elsewhere and nothing we say should be understood as diminishing the "made in Alberta" solutions that were achieved after extensive consultation here.

5. Summary and Conclusion

[72] In summary, records where privilege is asserted must now be dealt with individually. Each record must be numbered in a convenient order and briefly described, short of disclosing privileged information. Records may be bundled where privilege is being asserted providing that the bundled record otherwise meets the requirements of Rule 5.7. In accordance with Rule 5.8, a party must also identify the grounds for claiming privilege with respect to each record in order to assist other parties in assessing the validity of the claim. This latter requirement means that, for each record, a party must state the particular privilege being asserted and describe the record in a way, again without revealing information that is privileged, that indicates how the record fits within the claimed privilege. The description of all relevant and material records over which privilege is claimed should be set out in Schedule 2 of Form 26 in the separate categories contemplated therein.

[73] CNRL's affidavits do not comply with these requirements. Harvey's first affidavit made a blanket claim of privilege over an undisclosed number of documents and merely listed the privilege categories set out in Schedule 2 of Form 26, with nothing added except the word "NIL" in reference to the "Other" category. While Harvey's later affidavit disclosed the number of records over which privilege was claimed, namely 1,058, and stated that these records fell into five discrete categories, this too falls well short of what is required under the *Rules*. It follows that the appeal must be allowed. CNRL is directed to prepare a new or supplementary affidavit in compliance with the *Rules* and this judgment.

B. The Status of the Investigation Records Generated After February 4, 2009

[74] As noted, in the application before the case management judge, ShawCor sought production of four broad categories of records. These included what it described in its application as the "Testing and Investigation Records" and in particular those produced after February 4, 2009. Those records are defined in the application as "Records regarding or relating to the testing and investigations of the Out-of-Scope Operation and its impact on the Pipeline." The "Out-of-Scope Operation" is described as the "extended operation of the insulated and buried pipeline at temperatures higher than those provided for in its design." The net result of the investigation and testing conducted by CNRL with respect to the Pipeline is set out in paragraphs 23 and 24 of its Statement of Claim and forms the basis of CNRL's action against ShawCor and others.

[75] The case management judge found at para 37 of his reasons that CNRL's testing and investigation would have continued past February 4, 2009 to satisfy a variety of on-going purposes, even if CNRL had not contemplated litigation after that date:

> The Shaw Defendants contend that the investigation efforts conducted by CNRL after February 4th, 2009 had several purposes other than litigation, including understanding the extent of the Pipeline failure, correcting the problems that had occurred and avoiding them in future; repairing the Pipeline; providing the necessary information to CNRL management to respond to the failure; satisfying any internal CNRL policies regarding management of pipeline failures; demonstrating the implementation of its own policies; satisfying regulatory requirements and advancing a claim under any applicable insurance policy. I agree with the Shaw Defendants that, even if this litigation had not occurred, CNRL would have conducted an investigation for some or all of these purposes. [emphasis added]

[76] Despite this finding, the case management judge concluded that by February 4, 2009, CNRL had gathered enough information from its Initial Investigation that any further records generated thereafter relating to the investigation and testing of the Pipeline were created either to obtain legal advice with respect to a claim (and within solicitor-client privilege) or were for the dominant purpose of litigation (and within litigation privilege). He stated at paras 38-39:

> The Shaw Defendants further contend that CNRL has not provided any explanation as to why litigation and/or solicitor-client privilege attached to the investigation records over which CNRL has claimed privilege on and after February 5th, 2009. Here, I disagree. It is apparent that in the wake of an incident such as the Pipeline failure, the operator will immediately undertake to investigate the cause and to attempt to determine what, if anything, must be done in terms of repair, replacement, advancing an insurance claim and satisfying regulatory requirements. Documents generated in connection with this initial investigation may not be privileged.

> At some point, however, the operator will turn its mind to the potential for litigation. The proximity of this date to the date of the failure may depend upon the results of the operator's initial investigation.
>
> The explanation for the February 5th, 2009 date is in Harvey's evidence. He states that given the extremely short lifetime of the Pipeline and the conclusions of the Initial Investigation, it was clear very early that litigation would occur and that he made contact with Mendes, a lawyer employed by CNRL, on February 4th 2009, to discuss the failure and the further investigation and testing that was going to be necessary to determine fault and damages and to pursue litigation.

[77] ShawCor submits that the case management judge erred in allowing blanket protection for these records simply because litigation was contemplated. ShawCor further contends he erred in concluding that the testing and investigation records obtained or created after February 4, 2009 fell under the rubric of solicitor-client privilege. It submits that this privilege only applies to communications between solicitor and client or a third party with the authority to obtain legal services or to act upon legal advice. In its view, the testing and investigation records did not fit into this category.

[78] ShawCor also submits that the case management judge erred by finding that these same records were also covered by litigation privilege because there was no evidence before him that the records had been prepared for the dominant purpose of litigation. In fact, ShawCor submits that the judge's own findings suggest there were a variety of reasons for conducting the investigation. Therefore, in its view, the investigation would have been undertaken regardless of any contemplated litigation. Accordingly, given these findings, ShawCor questions how it could be said that the investigation was for the dominant purpose of litigation. In its view, the evidence supports the conclusion that on February 4, 2009, CNRL was still seeking out the root causes of the Pipeline failure before deciding, on the basis of that investigation, how to proceed, including whether to repair or replace the Pipeline.

[79] To begin with, it is unclear on what basis the case management judge concluded that solicitor-client privilege attached to all the testing and investigation records obtained or created after February 4, 2009 that CNRL declined to disclose. CNRL did voluntarily release some information/records from the period after February 4, 2009: see case management judge's reasons at para 40. The case management judge seems to have assumed that because CNRL's management had decided that litigation would be necessary by that date, and because CNRL's in-house counsel had directed that all future documentation regarding the Pipeline failure come to him, this was by itself sufficient to place all records created thereafter and not disclosed by CNRL within the scope of the privilege. But this is not necessarily so.

[80] The mere fact that a lawyer directs that all records obtained or created after a certain date must first come to him or her is not sufficient to automatically place all such records within the category of solicitor-client privilege. Not every form of communication with a solicitor by a client is necessarily covered by

solicitor-client privilege: ***Foster Wheeler Power Co v SIGED Inc***, 2004 SCC 18 at paras 37-40, [2004] 1 SCR 456. The privilege attaches to communications between lawyer and client designed to seek out or give legal advice. While a number of the testing and investigation records in question, or perhaps even all, might well fall within this category, we have no way of knowing which ones do so because they have not been adequately described and the case management judge declined to examine them. Thus, the case management judge erred to the extent that he relied on this privilege as a blanket justification for refusing to order the disclosure of the testing and investigation records post-February 4, 2009. Nothing in CNRL's affidavits assists in making a determination whether any records for which privilege have been claimed fall under the near-absolute category of solicitor-client privilege.

[81] Equally problematic is CNRL's blanket claim of litigation privilege which has characteristics and limitations that distinguish it from solicitor-client privilege: see ***Blank v Canada (Minister of Justice)***, 2006 SCC 39 at paras 23-37, [2006] 2 SCR 319 [***Blank***]. This Court discussed the purpose of litigation privilege in ***Moseley v Spray Lakes Sawmills (1980) Ltd.***, 1996 ABCA 141 (CanLII), 184 AR 101 [***Moseley***] at para 21:

> It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation. As a rule, this preparation will be orchestrated by a lawyer, though in some cases parties themselves will initiate certain investigations with a view to providing information for the "lawyer's brief".

[82] The test for litigation privilege in Alberta is that of "dominant purpose" as described by this Court in ***Nova, An Alberta Corporation v Guelph Engineering Co*** (1984), 50 AR 199 [***Nova***]. The dominant purpose test was explained in ***Moseley***, *supra* at para 24 as follows:

> The key is, and has been since this Court adopted the dominant purpose test in ***Nova***, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. [emphasis in original]

[83] Accordingly, a record will not be protected by litigation privilege simply because litigation was one of several purposes for which the record was created: ***Dow Chemical***, *supra* at para 38. In ***Blank***, *supra* at paras 59-60, the Supreme Court of Canada affirmed the dominant purpose test and emphasized its narrow nature at paras 60-61:

> The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure...

> While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.

[84] In addition, it must be remembered that under the dominant purpose test, the focus is on the purpose for which the records were prepared or created, not the purpose for which they were obtained: ***Ventouris v Mountain***, [1991] 1 WLR 607 at 620-622 (Eng CA); ***General Accident Assurance Company v Chrusz et al*** (1999), 45 OR (3d) 321 at 334 (CA). Pre-existing records gathered or copied at the instruction of legal counsel do not automatically fall under litigation privilege: ***Bennett v State Farm Fire and Casualty Company***, 2013 NBCA 4 at paras 47-51, 358 DLR (4th) 229. Because the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling.

[85] This very point was made thirty years ago by this Court in ***Nova***, *supra* at para 20:

> The only case for exclusion which can be made [on the facts before the court] is for documents which were brought into existence by reason of an intention to provide information to solicitors. That this is *an* object is insufficient – such a test provides a cloak where other purposes predominate. Such a test would clothe material that probably would otherwise have been prepared, and otherwise not privileged, with a privilege intended to serve a narrow interest. Such a test conflicts with the object of discovery today which is to disclose material provided for other purposes.

[86] CNRL began its investigation into the Pipeline failure to discover its cause and to determine how to mitigate its effects in the context of a well blowout. That investigation was ongoing on February 4, 2009. Indeed, the case management judge identified seven reasons why CNRL, regardless of any decision to litigate, would have pursued testing and investigation beyond February 4, 2009. Among them were the following: "understanding the extent of the Pipeline failure, correcting the problems that had occurred and avoiding them in future, repairing the Pipeline," and "providing the necessary information to CNRL management to respond to the failure...". It appears, therefore, that the general character of the investigation remained the same even after Harvey's trip to see Mendes. The only thing that appears to have changed at that point was the direction of the mail. Thus, it is difficult to see how, without more information, the case management judge could have found that all the investigation records created post-February 4, 2009 not disclosed by CNRL were created for the *dominant* purpose of litigation. February 5 is simply the date that CNRL chose to direct all records through its in-house counsel.

[87] We accept that when an investigation is ongoing, records may be created for the dominant purpose of litigation at any point after litigation is contemplated. And we recognize the case management judge

effectively found that litigation would be pursued as of February 4, 2009. But the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her. Or even because a decision has been made to pursue litigation. One must always look to the particular record at issue and *determine* the dominant purpose behind its creation. After all, litigation privilege "must be established document by document": ***Gichuru v British Columbia (Information and Privacy Commissioner)***, 2014 BCCA 259 at para 32, citing ***Keefer Laundry Ltd. v Pellerin Milner Corp. et al.***, 2006 BCSC 1180 at para 96. An assertion that something was for the dominant purpose of litigation must always be examined in the context of all the facts, the nature of the records in question and all the real reasons that the records were created.

[88] Here, the case management judge found that even if the subject litigation had not occurred, CNRL would have conducted an investigation for some or all of the purposes he identified. Thus, without further information from CNRL as to precisely what records were created, and for what purpose, we are unable to understand how all these testing and investigation records, created for a variety of purposes, could be found, without further inquiry, to fall within solicitor-client privilege or litigation privilege. This is so even accepting that CNRL had decided to pursue litigation as of the critical date. The reasons of the case management judge also indicate that he concluded that any third-party expert retained might "generate a privileged analysis for litigation purposes": para 40. However, while the analysis would likely be privileged, it is not necessarily the case that the factual platform on which that analysis is built automatically shares that same status.

[89] All this said, it does not follow that ShawCor is entitled to all the testing and investigation records created after February 4, 2009 not disclosed by CNRL. Some, many, or perhaps even all of those records might yet be found to be within the scope of either one or both of the privileges claimed. However, we are not able to determine on the materials before us whether these privileges have been properly invoked. Whether this continues to be a contentious issue after CNRL has provided the new or supplementary affidavit of records as directed herein remains to be seen. At that point, if the parties cannot agree on whether a particular record fits within the declared privilege, then the matter can be reviewed by a judge under Rule 5.11.

C. Waiver of Privilege and Content of Pleadings

[90] Because CNRL is being directed to file a new or supplementary affidavit of records, it would be premature to discuss the issue of waiver and we decline to do so.

VII. Disposition and Summary

[91] The appeal is allowed and CNRL is directed to provide a new or supplementary affidavit of records in compliance with the *Rules* and this judgment.

[92] Without limiting what we have said, we summarize for convenience the requirements of the *Rules* discussed above relating to affidavits of records and privilege claims. We stress that this is not intended to be an exhaustive list of those requirements:

> 1. Every relevant and material record is *prima facie* producible and the minimum requirements and rights under Rule 5.7(1) and (2) apply to all such records, even where a party objects to production based on claimed privilege or some other legal ground.
>
> 2. Every relevant and material record must be numbered in a convenient order and briefly described. These should be set out in the separate Schedules applicable to each as contemplated in Form 26. Accordingly, a party claiming privilege over a number of records must number and briefly describe each record short of revealing information that is privileged. The description of those records should be set out in Schedule 2 of Form 26 in the separate categories contemplated therein.
>
> 3. A party is permitted to bundle and treat as a single record a group of records that are all of the same nature so long as the bundle is, in accordance with Rule 5.7(2)(b), described in sufficient detail to enable another party to understand what it contains. This bundling option also applies to records over which a party claims privilege.
>
> 4. If a party objects to the disclosure of otherwise relevant and material records, it shall, in addition to numbering the records in a convenient order and briefly describing them, set forth the grounds for objection in respect of each record to assist other parties in assessing the validity of the claimed privilege. In doing so, the party is required to (i) state the actual privilege being relied upon with respect to that record; and (ii) describe the record in a way that, without revealing privileged information, indicates how the record fits within the claimed privilege. These requirements also apply to a bundled record over which a party claims privilege.

[93] We were advised in the course of this appeal that ShawCor filed an affidavit of records that took the same approach to disclosure of privileged documents as did CNRL. Disclosure is a two-way street. If CNRL is dissatisfied with the affidavit of records filed by ShawCor to date, it is also at liberty to pursue such steps as it considers necessary.

Appeal heard on October 7, 2013

Judgment filed at Calgary, Alberta

this 15th day of September, 2014

Fraser C.J.A.

Conrad J.A.

Watson J.A.

Appearances:

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