

# Litigation Privilege: Scope, Rationale and Critique

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The focus of this short paper is the litigation privilege. The paper will first consider briefly the emergence of litigation privilege and its development up to the present state of the law in Canada, contrasting it with its equivalents in English and United States law. The paper will then consider how the existence of the litigation privilege is justified in each of these three jurisdictions. Finally, the paper will examine some critiques of the privilege, particularly its use by corporations and government, and finish by setting out a defence of the privilege. The paper does not purport to be exhaustive of the topics discussed, but rather is intended to provide a general overview and some ideas for further discussion and analysis.

## I. The Development and Scope of Litigation Privilege

Litigation privilege finds its origins in solicitor-client privilege. As originally conceived, what we now call solicitor-client privilege was an evidentiary rule limited to protecting from disclosure any material passing between client, solicitor, and barrister during the conduct of litigation.<sup>3</sup> Over time, the rule was broadened to include all communications between solicitor and client, in whatever context.<sup>4</sup> By the mid-19th century, there began to emerge a sub-rule of solicitor-client privilege designed to protect from disclosure documents obtained by the litigator in the course of preparing to argue his client's case.<sup>5</sup> In the United States, a similar doctrine emerged in 1947 when it was recognized by the U.S. Supreme Court in *Hickman v. Taylor* as the "work product doctrine".<sup>6</sup> As it has developed, the privilege has been called variously litigation privilege, lawyer's brief privilege, lawyer's work product privilege, and even legal professional privilege.

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<sup>3</sup> See Geoffrey C. Hazard, Jr., "An Historical Perspective on the Attorney-Client Privilege", (1978) 66 Cal. L.Rev. 1061, especially pp. 1070ff.; Wigmore, *Evidence at Trials at Common Law* (Boston and Toronto: Little, Brown and Co., 1961), vol. 8, p. 544 (§2290).

<sup>4</sup> Wigmore, *Evidence*, *supra* note 3 at p. 545 (§2290).

<sup>5</sup> *Ibid.*

<sup>6</sup> 329 U.S. 516 (1946).

In some jurisdictions, litigation privilege came to be seen as a branch of the larger solicitor-client privilege, with legal advice privilege as the other branch. Indeed, in English law this remains the case (though the term “solicitor-client privilege” has there been replaced by the term “legal professional privilege”).<sup>7</sup> On the other hand, in the United States the work product doctrine was seen to be separate and distinct from solicitor-client privilege, and indeed was denied the status of a true privilege.<sup>8</sup>

In Canada, most courts accepted the English position that litigation privilege was a branch of solicitor-client privilege.<sup>9</sup> However, in some Canadian courts this idea was challenged, with the suggestion that litigation privilege had become a separate and distinct privilege having an entirely different basis and rationale. This view received its pre-eminent statement in the Ontario Court of Appeal decision in *General Accident Assurance Company v. Chrusz* in 1999.<sup>10</sup>

Whether one viewed it as a branch of solicitor-client privilege or unique privilege, litigation privilege was seen as attaching to all documents created for the purpose of litigation, whether reasonably anticipated or ongoing. However, beginning in the 1980s, litigation privilege began to be given a narrower scope. The first narrowing of the scope came with the rise of the dominant purpose test as the measure of whether a record was caught by litigation privilege. Previously, a record could enjoy the protection of litigation privilege if a substantial purpose of its creation was anticipated or ongoing litigation. However, the *Waugh* decision adopted the more stringent dominant purpose test, which said the privilege would only apply if reasonably anticipated or ongoing litigation was the primary purpose for which the record was created.<sup>11</sup> Canadian courts debated whether to adopt the dominant purpose test or to stick with the substantial purpose (or adopt the sole purpose test), and eventually did adopt the new test.<sup>12</sup>

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<sup>7</sup> *Phipson on Evidence* (London: Sweet & Maxwell, 2005), p. 602 (§23-19); I.H. Dennis, *The Law of Evidence* (London: Sweet & Maxwell, 2007), pp. 393-394.

<sup>8</sup> Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence—Evidentiary Privileges* (New York and Gaithersburg: Aspen Law & Business, 2002), pp. 73ff. (§1.3.11).

<sup>9</sup> See, e.g. *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at p. 33; *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 at p. 142, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132, 1988 CanLII 181 (B.C.C.A.); *Blank v. Canada (Minister of Justice)*, 2004 FCA 287, [2005] 1 F.C.R. 403 at para. 17.

<sup>10</sup> See *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241, 124 O.A.C. 356, 1999 CanLII 7320 at paras. 22-28.

<sup>11</sup> *Waugh v. British Railways Board*, [1980] A.C. 521, [1979] 2 All. E.R. 1169 (H.L.).

<sup>12</sup> See *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 Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323; *Chrusz*,

The second major change that led to a narrowing of litigation privilege was the movement to reform rules of procedure in order to encourage more disclosure of information at the earliest possible moment so as to eliminate the practice of trial by ambush and, thus, to encourage early settlement of disputes. These rule changes meant that some types of records, previously inadmissible as evidence because of litigation privilege, were now required to be entered into evidence.<sup>13</sup>

Two other debates developed about the scope of the privilege. First, the question was debated as to whether litigation privilege extended to documents obtained or compiled by the litigator for the purpose of litigation, and whether this obtaining or compiling required some demonstration that it was an exercise of the lawyer's skill.<sup>14</sup>

The second question that was debated was the duration of litigation privilege. The general opinion seemed to be that it lasted so long as the litigation that gave rise to it was alive, but some proposed that it should be of indefinite duration, on the argument that as a branch of solicitor-client privilege it shared that privilege's underlying purpose. The issue was canvassed in *Alberta Treasury Branches v. Ghermezian*,<sup>15</sup> heard by Chief Justice Moore of the Alberta Court of Queen's Bench. The case concerned a tax appraisal report prepared by the defendants for use in a municipal tax assessment appeal. That appeal was eventually dropped, but the Alberta Treasury commenced proceedings against the defendants for unpaid debts. The defendants claimed litigation privilege and resisted disclosure of the appraisal.

The issue thus arose as to whether the litigation privilege ended with the municipal tax appeals.<sup>16</sup> The Court canvassed two separate lines of cases. The majority of Canadian cases followed *Boulianne v. Flynn*,<sup>17</sup> which held that the privilege ended with the litigation. The Court did note, though, that the matter had not yet received any Canadian appellate attention. The

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*supra* note 8; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401.

<sup>13</sup> See, e.g., the discussion in *Hinke v. Thermal Energy International Inc. et al.*, 2011 ONSC 1018; *Potash Corporation of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2010 SKQB 460 at paras. 31-33 *Norberg v. Wynrib* (1987), 19 B.C.L.R. (2d) 23, 1987 CanLII 2467 (B.C. C.A.).

<sup>14</sup> See, e.g., *Hodgkinson v. Simms*, *supra* note 9.

<sup>15</sup> *Alberta Treasury Branches v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407.

<sup>16</sup> The discussion, however, was technically *obiter*; Justice Moore had already determined that a municipal tax assessment process was not "litigation", and so the appraisal was never protected in the first place.

<sup>17</sup> [1970] 3 O.R. 84 (Co. Ct.).

defendants argued that those cases were wrongly decided and urged the Court to follow a line of English and earlier Canadian cases<sup>18</sup> that held that litigation privilege, like solicitor-client privilege, extended indefinitely and included even completely unrelated litigation. The Court rejected this view and approved of the *Boulianne* line of cases.

Must litigation be limited to a single proceeding, however? The issue was briefly, and somewhat indirectly, touched on in *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.*<sup>19</sup> In that case, a party resisted disclosure of a document that had been created when it was the subject of an investigation under the *Combines Investigation Act*. The Alberta Court of Appeal found that, although the initial investigation had ended, the complex nature of procedures under that *Act* meant that “[t]he parties could look ahead to many possible procedures”. Thus, while the investigation had been completed, the litigation had not; realistically, the investigation was only one small part of the same process, and so the privilege survived. This issue, however, was discussed in the context of whether or not the ultimate civil proceedings had been contemplated when the investigation was first launched, as “the civil litigation on the issues of the inquiry must have been in contemplation from the commencement of the inquiry.”<sup>20</sup>

Thus, by the mid-2000s, the time-limited nature of litigation privilege was relatively settled in Canadian law, but *Ed Miller* had at least opened the door to the idea that “litigation” could involve more than one discrete proceeding. The implication of the reasoning in that case, though, was that the subsequent proceedings must have been reasonably anticipated at the time the document was created in order for the privilege to attach.

Through all of this judicial debate, one court remained silent for many years: the Supreme Court of Canada. Although Canada’s highest court had pronounced itself several times in the 1980s and 1990s, and more frequently in the early 2000s, on the issue of solicitor-client privilege, it had not been presented with a case involving litigation privilege. This silence ended in 2006 when the Court rendered its decision in *Blank v. Canada (Minster of Justice)*.<sup>21</sup>

*Blank* concerned an ongoing battle between the plaintiff and the government. Mr. Blank was the director of a company that had been charged with various environmental offences. The

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<sup>18</sup> *The “Ageis Blaze”*, [1986] 1 Lloyd’s Rep. 203 (C.A.); *Northwestern Utilities Limited v. Century Indemnity Company*, [1934] 3 W.W.R. 139 (Alta. S.C.); *Mann v. American Automobile Ins. Co.*, [1938] 2 W.W.R. 261 (B.C.C.A.). *Basi* should be in this section somewhere.

<sup>19</sup> *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.*, 1988 ABCA 282 [*Ed Miller*].

<sup>20</sup> *Ibid.* at para. 22.

<sup>21</sup> [2006] 2 S.C.R. 319, 2006 SCC 39.

charges were quashed; the government laid new charges, but these were eventually stayed. Mr. Blank then launched his own civil action against the government for fraud and related allegations. In an attempt to obtain documents related to the original prosecution, he filed requests under the *Access to Information Act* and *Privacy Act*. The *Access to Information Act* provides a right of access to government documents, subject to a number of exceptions, including one for “solicitor-client privilege”.<sup>22</sup> The government refused access on the basis of the solicitor-client privilege exemption, arguing that litigation privilege was a branch of solicitor-client privilege and, therefore, was entitled to the same permanent protection afforded the legal advice privilege branch of solicitor-client privilege.

The majority of the Federal Court of Appeal, citing the *Boulianne*<sup>23</sup> line of cases and *Ed Miller*, found that the litigation privilege did terminate with the litigation, but with the catch that it was “subject to the possibility that the litigation may be defined more broadly than the particular proceeding in the course of which the document was created.”<sup>24</sup> However, Justice Pelletier, writing for the majority of the Court, did not spend much time deciding whether or not the original criminal prosecution was sufficiently closely related to Mr. Blank's civil action; he merely noted that the documents “lost their privileged status when the criminal prosecution ended.”<sup>25</sup>

In the Supreme Court of Canada, Justice Fish, writing for the majority of the Court, affirmed the prevailing view that litigation privilege was designed to prevent the disclosure of documents created by or for a lawyer for the purpose of reasonably anticipated or ongoing litigation. However, he then proceeded to settle some of those areas where the scope of litigation privilege had remained unclear.

First, Justice Fish held that litigation privilege was not a branch of solicitor-client privilege but was a distinct and separate privilege.<sup>26</sup> Litigation privilege, in his view, differed

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<sup>22</sup> *Access to Information Act*, R.S.C. 1985, c. A-1, s. 23. It should be noted that some provincial access to information statutes use different wording than the federal one, with the result that in those jurisdictions the disclosure exemptions cover both common law litigation privilege and a closely related, but non-time-limited, statutory privilege. See e.g. the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 19.

<sup>23</sup> *Boulianne v. Flynn*, [1970] 3 O.R. 84 (H.C.J.).

<sup>24</sup> *Blank v. Canada (Minister of Justice)*, [2005] 1 F.C.R. 403, 2004 FCA 287 at para. 84.

<sup>25</sup> *Ibid.* at para. 90.

<sup>26</sup> However, he did conclude that, for the purposes of the exemption in s. 23 of the *Access to Information Act*, the term “solicitor-client privilege” should be read to include both legal advice privilege and litigation privilege since that was how the term had been understood at the time the legislation was drafted: see *ibid.* at paras. 3 and 4.

fundamentally from its closely related cousin, the solicitor-client or legal advice privilege,<sup>27</sup> in several respects. First – and crucially – whereas the solicitor-client privilege has transformed into a substantive rule of law grounded in the *Charter*,<sup>28</sup> litigation privilege remained a mere rule of evidence of much more limited scope. Thus, while solicitor-client privilege could only be breached in carefully circumscribed circumstances that must pass *Charter* scrutiny,<sup>29</sup> litigation privilege, on the other hand, was to be measured only against the discovery procedures specific to a given jurisdiction.<sup>30</sup>

Second, while the focus of solicitor-client privilege is to protect *communications* (specifically, the provision of legal advice), litigation privilege protects *documents* (defined broadly). There need be no communication at all for litigation privilege to attach to a document.<sup>31</sup> The prototypical example – a lawyer's brief – may never be seen by the client or anyone else but the lawyer who prepared it. It is nonetheless covered. The privilege also extends to documents prepared or communicated between the lawyer and third-parties.<sup>32</sup> One consequence of this is that confidentiality is not a requirement for litigation privilege. As Justice Fish wrote in *Blank*,

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.<sup>33</sup>

Third, litigation privilege is temporally limited. The Supreme Court agreed with the Federal Court of Appeal that litigation privilege encompassed related proceedings. As Justice Fish put it, “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

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<sup>27</sup> *Ibid.* at paras. 7 and 8.

<sup>28</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209, 2002 SCC 61 at para. 21 [*Lavallee*] (“...present-day constitutional norms, which include the status of solicitor-client privilege as a principle of fundamental justice within the meaning of s. 7 of the *Charter*...”).

<sup>29</sup> See, for example, *Lavallee*, *supra* note 28; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, 2008 SCC 44.

<sup>30</sup> *Blank*, *supra* note 21 at paras. 60-61; see also *Davies v. American Home Assurance Co.*, 2002 CanLII 15469 (Ont. Div. Ct.); *Breau v. Naddy*, 1995 CanLII 3040 (P.E.I. Sup. Ct. T.D.).

<sup>31</sup> *Blank*, *supra* note 21 at para. 28.

<sup>32</sup> *Ibid.* at para. 27.

<sup>33</sup> *Ibid.* at para. 32.

essentially the same legal combat.”<sup>34</sup> As a result, “litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege”.<sup>35</sup>

For the Supreme Court, the scope of these related proceedings is tied to the purpose for which litigation privilege exists – to provide a “zone of privacy” seen as necessary to the adversarial process. Both “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.”<sup>36</sup>

The Court further stated that proceedings are sufficiently related to share litigation privilege where they share a common “juridical source”:

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.<sup>37</sup>

Thus, where the lawyer’s “work product” relates to issues and causes of action common to separate proceedings, the litigation privilege would encompass all of the proceedings. Justice Fish gave as an example of this the urea formaldehyde foam insulation program cases in the 1980s which had involved multiple plaintiffs but the same defendant government.<sup>38</sup>

On the facts in *Blank*, the Court found that the proceedings were not related, and so the litigation privilege had ended with the government’s criminal prosecution:

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.<sup>39</sup>

The suggestion here seems to be that even though the government’s criminal prosecution and Mr. Blank’s civil action might be seen as related (in the sense that one beget the other), the

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<sup>34</sup> *Ibid.* at para. 34.

<sup>35</sup> *Ibid.* at para. 36.

<sup>36</sup> *Ibid.* at para. 41.

<sup>37</sup> *Ibid.* at para. 39.

<sup>38</sup> *Ibid.* at paras. 40-41.

<sup>39</sup> *Ibid.* at para. 43.

distinction between criminal and civil proceedings was sufficient to terminate the privilege. The focus of the “related proceedings” analysis appears to be on the nature of the proceedings themselves, with the primary focus being the relationship between the causes of action that gave rise to the respective claims. The focus on the related proceedings sharing the same “juridical source” seems to suggest that even if the secondary litigation was unforeseeable at the time of the primary litigation, litigation privilege would cover both proceedings if the causes of actions were to spring from the same legal authority. However, Justice Fish also observed that litigation privilege retained its purpose where “related litigation remains pending or may reasonably be apprehended”.<sup>40</sup> As the actual analysis in *Blank* focuses on the nature of the claims, however, the relationship between the foreseeability of the related litigation and its relationship to the primary litigation's “juridical source” remains unclear.

Finally, Justice Fish confirmed that the dominant purpose test was the correct test of whether litigation privilege applied to a document, emphasizing that it best accorded with the limited nature of the litigation privilege. In his view,

[t]he 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 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]

61 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.

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<sup>40</sup> *Ibid.* at para. 38.



Since *Blank* there have been a handful of decisions addressing the scope of “related proceedings”.<sup>41</sup> One example is *R. v. Bidzinski*,<sup>42</sup> a decision of the Court of Queen's Bench of Manitoba, seems to support the conclusion that civil and criminal proceedings are so fundamentally unrelated that litigation privilege cannot survive a jump between the two. That case dealt with a situation in which an individual died after an altercation with security staff at a hotel. The owners of the hotel prepared, as a matter of routine, statements from the security staff. As a result of the incident, a civil claim was launched against the corporate owner and three of the security staff were charged with manslaughter. The Crown sought access to the statements for use in the criminal proceedings, but the owner claimed litigation privilege (stemming from the civil action).

Justice Oliphant expressly disagreed with a pre-*Blank* case<sup>43</sup> that had concluded that “litigation privilege that arises in the context of civil litigation also applies in the context of criminal litigation where the defendant in the civil litigation is an accused in the criminal litigation.”<sup>44</sup> Instead:

[T]he criminal proceeding in which the Crown seeks disclosure of the witness statements is different from the civil proceeding involving Canad and its three employees who are now accused of manslaughter. The parties involved in the criminal proceeding are different from those in the civil proceeding. For example, the plaintiff in the civil proceeding is not involved in the criminal proceeding. Similarly, the Crown is not involved in the civil proceeding although it is involved in the criminal proceeding. Not only are the issues different as between the criminal and civil proceedings, but also, the essential purpose of each of the two proceedings is markedly different in my view.<sup>45</sup>

Time prevents further discussion of how the post-*Blank* case law has elaborated on the general principles set out in *Blank* with respect to what constitutes “closely related proceedings”

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<sup>41</sup> See *Smith v. London Life Insurance Company* (2007), 219 O.A.C. 309, 44 C.P.C. (6th) 21 (Ont. Div. Ct.); *Potash Corporation of Saskatchewan Inc. v. DuPont Canada Inc.*, 2007 NBQB 389; *Saskpower International Inc. v. UMA/B&V Ltd.* (2008), 319 Sask. R. 144, 2008 SKQB 294, 61 C.P.C. (6th) 58, 170 A.C.W.S. (3d) 80; *Basi v Basi*, 2009 BCSC 772; *Potash Corporation of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2010 SKQB 460; *R. v. Bates*, 2009 ABPC 267 at paras. 40-41; *Ameron International Corporation v. Sable*, 2010 NSCA 107; *I.C. Group, Inc. v. Yorkville Printing Inc.*, 2010 ONSC 5215; *Benning v. The Trustees of the IWA*, 2010 BCSC 1422; *Bank of Montreal v. Tortora*, 2010 BCSC 1430; *Reis v. CIBC Mortgages Inc.*, 2011 ONSC 2309; *Gibson v. Labourers' International Union of North America, Local 247*, 2011 CanLII 19649 (Ont. L.R.B.); *Schwartz Estate v. Kwinter*, 2011 ABQB 169; *Rozak (Estate)*, 2011 ABQB 239.

<sup>42</sup> *R. v. Bidzinski et al.*, 2007 MBQB 138.

<sup>43</sup> *R. v. Kea* (2005), 27 M.V.R. (5th) 182 (Ont. S.C.J.).

<sup>44</sup> *Bidzinski*, *supra* note 42 at para. 32.

<sup>45</sup> *Ibid.* at para. 35.

as well as other questions addressed in that case. However the case law may develop, one will always need to return to *Blank* to determine the foundational principles on which specific applications of litigation privilege are to be built.

## II. Litigation Privilege: Rationale

Among the foundational principles of litigation privilege, none is more critical to its development than its underlying rationale, the policy advanced to justify its existence as an exception to the general litigation rule in favour of full discovery of all relevant facts and documents. In this section, we will discuss the rationales that have been advanced to justify the existence of litigation privilege in England, the United States, and Canada.

In England, as noted above, the litigation privilege is viewed as a branch of legal professional privilege. Consequently, the rationale for litigation privilege rests on an expanded version of the general rationale for legal professional privilege. An oft-quoted version of the rationale is the one articulated by Jessel M.R. in the Chancery Division in *Anderson v. Bank of British Columbia*:<sup>46</sup>

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.<sup>47</sup>

In discussing the extent of the rule, Jessel M.R. noted that “solicitor’s acts must be protected for the use of the client”, including the obtaining of information from a third party for the purpose of the litigation, “and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor.”<sup>48</sup> On appeal, James L.J. said that the

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<sup>46</sup> (1876) 2 Ch. D. 644.

<sup>47</sup> *Anderson*, *supra* note 46 at p. 649.

<sup>48</sup> *Ibid.*

rationale for the litigation privilege was “that as you have no right to see your adversary’s brief, you have no right to see that which comes into existence merely as the materials for the brief.”<sup>49</sup>

A recent writer summarized the rationale for litigation privilege in England thus:

The rationale of this form of privilege is generally agreed to be the adversary system of procedure in criminal and most civil proceedings. This system is founded on the principle of party autonomy whereby the parties to legal proceedings decide on the presentation of their case and the evidence they will use to support it. Just as they can decide not to rely on evidence adverse to their case so they cannot build their case by calling upon their opponents to reveal their own preparations and evidence. Litigation privilege thus derives from the logic of the adversary process, and it is reinforced by the argument that legal representation is essential to ensure equality of arms in adversarial litigation. Since the object of legal representation is to enable the client’s case to be put as effectively as possible, this would be undermined if all preparations for the litigation had to be disclosed.<sup>50</sup>

In these statements of the English rationale there seems to be two different policies at work. On the one hand is the policy that the individual client will only receive the best legal advice and representation in court if he or she divulges all of the relevant facts, and this can only happen if he or she trusts that his lawyer will keep his confidences. The second policy is that the adversary process functions best where each party has the freedom to prepare in private so as to be able to make the strongest presentation of the case possible.

However, in one case, a judge of the English Chancery Division seemed to argue that the first policy justification was the more important one, if not the *sine qua non* for its existence. In *Re Barings*,<sup>51</sup> Scott V.-C. expressed concern about what he saw as the over-broad reach of the contemporary rule governing when litigation privilege applies that is founded on giving the protection to all records created or obtained for the dominant purpose of litigation. In his view, discovery rules that encouraged disclosure all of all relevant documents by both parties to a controversy were “intended to assist and make more likely the achieving of a just result in litigation.” This important interest could be overridden only by a greater public interest such as the interest “that individuals should be able to consult their lawyers and the advice they receive from their lawyers, whether orally or in writing, will be immune from compulsory disclosure.”

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<sup>49</sup> *Anderson*, *supra* note 46 at p. 656. See also *Lee v. South West Thames Health Authority*, [1985] 1 W.L.R. 845 at p. 850 per Donaldson M.R.

<sup>50</sup> I.H. Dennis, *The Law of Evidence*, Third Ed. (London: Sweet & Maxwell, 2007) at p. 425.

<sup>51</sup> *Re Barings Plc*, [1998] 1 All E.R. 673.

However, Scott V.-C. was not convinced that such a greater public interest existed where the records were prepared for the dominant purpose of reasonably anticipated or ongoing litigation. After reviewing the case law on the rationale for litigation privilege, he concluded:

These citations make clear, in my opinion, that documents brought into being by solicitors for the purposes of litigation were afforded privilege because of the light they might cast on the client's instructions to the solicitor or the solicitor's advice to the client regarding the conduct of the case or on the client's prospects. There was no general privilege that attached to documents brought into existence for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery and no privilege. So, for example, an unsolicited communication from a third party, a potential witness, about the facts of the case would not, on this view, have been privileged. And why should it be? What public interest is served by according privilege to such a communication?...<sup>52</sup>

Scott V.-C.'s reasoning has not generally been followed by other courts, but it does demonstrate the tension that exists between the rationales in English law.

In the United States, unlike England, the work product doctrine is not a privilege at all, nor a branch of attorney-client privilege (as solicitor-client privilege is known). Consequently, work product doctrine is justified by a rationale strictly separate from that advanced for the attorney-client privilege. The rationale for the work product doctrine was set out in *Hickman v. Taylor*,<sup>53</sup> the Supreme Court decision which first established the existence of this protection. In his majority decision, Justice Murphy described the rationale as follows:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as

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<sup>52</sup> *Re Barings*, *supra* note 51 at pp. 681-82.

<sup>53</sup> *Hickman v. Taylor*, 329 U. S. 495 (1947).

the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.<sup>54</sup>

One writer has written that the rationale underlying the work product doctrine is “to encourage [attorneys] to prepare their cases thoroughly and to investigate not only the favorable but the unfavourable aspects of the cases” and to “ensure that attorneys have the maximum incentive to prepare for trial by creating useful litigation-related information.”<sup>55</sup>

Thus, the rationale underlying the work product doctrine in U.S. law is focused strictly on the needs of the adversarial process. The doctrine encourages lawyers to do the best job they can in preparing their client's case so that the battle of the trial is fought thoroughly and with the greatest skill on both sides, leading to the best possible resolution of the dispute. Absent is the concern in English law for the needs of the client to have a confidential relationship with the lawyer in order to obtain the best legal advice possible.

In Canadian law, the rationale used to underpin litigation privilege has tended to mirror the U.S. law rationale. For example, in *Susan Hosiery Ltd. v. Minister of National Revenue*,<sup>56</sup> J. J. Jackett P. described the rationale underlying the litigation privilege (what he called the “lawyer's brief rule”) as follows:

Turning to the 'lawyer's brief' rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the Court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

Similarly, in *Blank*, Justice Fish described the purpose of litigation privilege as follows:

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<sup>54</sup> *Hickman*, *supra* note 53 at pp. 510-511.

<sup>55</sup> *New Wigmore*, *supra* note 8 at p. 76.

<sup>56</sup> [1969] 2 Ex. C.R. 27, 69 D.T.C. 5278.

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.<sup>57</sup>

Justice Fish continued his discussion of the rationale underlying litigation privilege by quoting R.J. Sharpe:<sup>58</sup>

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).<sup>59</sup>

The Canadian rationale thus focuses, like the U.S. rationale, on facilitating the adversary process by encouraging thorough trial preparation, although with the twist that it recognizes that clients are sometimes unrepresented and thus the ones who must do the trial preparation.

However, it is important to note that the U.S. and Canadian rationales both emphasize the importance of each party enjoying the privacy and autonomy to decide how and what to present in defence of its case in the adversarial battle. As we will see in the next section, this type of justification may be vulnerable where it is applied to corporations and governments, just as a similar rights-based justification has been attacked with respect to the availability of solicitor-client privilege to such bodies.

### **III. Limits on and Criticisms of the Litigation Privilege**

As we have seen, litigation privilege has not in modern Canadian law enjoyed the unalloyed near-absolute protection given to solicitor-client privilege. This has been because litigation privilege has lacked the focus on protecting the important interest of ensuring that

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<sup>57</sup> *Blank, supra* note 21 at para. 27.

<sup>58</sup> Now a judge of the Ontario Court of Appeal.

<sup>59</sup> *Blank, supra* note 21 at para. 28, quoting R.J. Sharpe, "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) 163 at pp. 164-165.

individuals can obtain legal advice rather than the more narrow focus of promoting the adversarial process. Consequently, litigation privilege has since the advent of the movement to greater discovery been under constant pressure to be construed in the narrowest way possible while still ensuring that the zone of privacy is sufficiently protected to promote the adversary process.

However, even in the sphere of solicitor-client privilege there has been pressure to reassess the near-absolute protection it has been given by the Supreme Court of Canada. In particular, it has been argued that the rationale for such a near-absolute privilege is not sustainable when claimed by corporations and particularly governments. For example, Professor Allan Hutchinson criticized the availability of the privilege to governments in a 2008 law journal article.<sup>60</sup>

Although this privilege has considerable, if not irresistible, appeal in the context of private individuals and their lawyers, especially in the criminal context, it loses much of its credibility and *gravitas* when transferred to the situation of government lawyers. Insofar as the rule of confidentiality is meant to protect the relatively powerless citizen against the state by ensuring effective legal representation through open communication, it does not seem necessary or useful when the government is the putative client being protected. While government business is important, it has no need of such privileges and protections. The dignity and vulnerability of individuals is no at stake in the same way. Indeed, the basic democratic commitment to openness and transparency as a vital prerequisite for accountability suggests that there is very little for confidentiality in the affairs of government: confidentiality and open government do not sit at all well together.

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After all, the absolute duty of confidentiality is already under steady criticism in the corporate context, where the broad interpretation of privileged communications has begun to persuade some commentators and regulators that it might be desirable to place certain limitations and restrictions on the duty. The need to facilitate the flow of information between the corporate organization, its employees, and its lawyers seems much less compelling than in the case of the isolated citizen who must deal with the state and its government departments. Out of concern that the duty is being utilized too easily to hide corporate mischief and even criminality from appropriate public scrutiny, there are efforts to restore a greater sense of balance between the need for confidentiality and the need for publicity so that greater weight is given to the public interest in determining whether appropriate occasions of required disclosure or perhaps noisy withdrawal. Consequently, the reasons for maintaining strict confidentiality in such

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<sup>60</sup> Allan C. Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers”, (2008) 46 *Osgoode Hall L.J.* 105.

circumstances are less persuasive.

Similarly, even if there is to be a general duty on government lawyers to keep confidential communications between themselves and their political superiors and colleagues, it should be severely curtailed. If there are strong arguments against protecting the internal workings of corporations from public scrutiny, there are fewer reasons to do so in the case of governments....<sup>61</sup>

Professor Adam Dodek has also written on the problems with the application of solicitor-client privilege to government:

The more that courts, commentators and lawyers attempt to elevate the Privilege to the constitutional plane, the less it makes sense for the Privilege to apply to Government as a client. When lawyers and judges speak of the Privilege as a “fundamental right” or try to attach it to certain sections of the *Charter*, it strengthens the Privilege for individual clients but risks diluting it for organizational ones. If the Privilege is protected by sections 7 (life, liberty and security of the person), 8 (unreasonable search and seizure) or 10(b) (right to counsel) then it is difficult to talk about the Government having an equivalent *Charter*-based right. This is as conceptually problematic as a Government claim to equality....<sup>62</sup>

Further, Professor Dodek has also written:

The privilege faces additional problems in the civil context when it is applied to organizations, be they government entities, corporations, charities or not-for-profits. It bears repeating that a rights-based approach to the privilege focuses on the inherent dignity of the individual, the privacy of their thoughts and the protection of their right to autonomy. These are individual rights. They inhere in individuals qua individual human beings sharing a common humanity. It is easy to malign corporations, but the legal fiction of personality applies equally to government and any other group entity. “[A]n organization does not have human dignity, because it is not human.”

Most justifications for the privilege break down in an organizational context, whether the purported basis is full and frank disclosure or a rights-based justification. This is demonstrated by the separation between the communicator of the information and the controller of the privilege in the organizational context. It is usually ordinary employees that communicate information to a lawyer.

However, the holder of the keys to the privilege is usually someone else: a President, the Board of Directors, a Deputy Minister, a Minister, etc. The communicator of the privileged information has no autonomy, no capacity to

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<sup>61</sup> Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers”, *supra* note 60 at pp. 125-129.

<sup>62</sup> Adam Dodek, *Solicitor-Client Privilege in Canada: Challenges for the 21<sup>st</sup> Century* (Ottawa: Canadian Bar Association, 2011) at p. 36.



control the privacy of her communications, and the decision regarding disclosure or waiver of the privilege lies elsewhere. The privilege is very much based on an individual client paradigm.

In larger organizations, solicitor-client privilege is less "special," as legal communications are not distinct from other types of information that organizations must disclose but they might want to keep confidential. As Hutchinson rightly states, "[c]orporations have little choice other than to involve their lawyers in important corporate decision making." Therefore, it is difficult to justify keeping legal communications confidential, while other corporate information can be disclosed.<sup>63</sup>

Thus, in summary, a justification of solicitor-client privilege founded on a rights-based rationale focused on individual dignity, privacy and autonomy is argued not to apply to non-individuals who, it is in turn argued, cannot enjoy such rights.

On the face of it, this attack ought not to be of concern when considering litigation privilege since the Supreme Court of Canada has declared it to be founded on an entirely different rationale. This seems implicit, for instance, in Professor Dodek's argument that the non-application of solicitor-client privilege to organizations such as government "would not leave all such communications completely open to disclosure" because "numerous other doctrines...may also apply to such communications", including litigation privilege.

However, as we have seen above, while it is true that the rationale for litigation privilege is said to be the better functioning of the adversary process, the means identified to accomplish this are the creation of a zone of privacy and ensuring the autonomy of the lawyer preparing the case and ultimately of the litigant, particularly where the latter is self-represented. In other words, the means are couched in rights-based terms that sound not so different from those that are used to justify solicitor-client privilege.

On the other hand, it is important to note that justification for solicitor-client privilege in its usual formulation is focused on the fostering of an effective legal system and of a rule-of-law based society which requires that all participants in it have the best legal advice possible. This is just as utilitarian and process-focused as the justification given for litigation privilege, but because it has been articulated in a way that focuses on the relationship between lawyer and individual client it has been easier to defend the need for near-absolute protection to protect the individual client's rights.

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<sup>63</sup> Adam Dodek, "Reconceiving Solicitor-Client Privilege", (2009-2010) 35 Queen's L.J. 493 at pp. 527-528.

Consequently, it is arguable that litigation privilege has at least some, if not an equal, claim to being grounded on a rights-based justification as solicitor-client privilege. And certainly when one considers the English rationale for litigation privilege, it becomes evident that in English law that has already been explicitly recognized. But if litigation privilege is in part justified on a rights basis, it means that it becomes susceptible to some of the same criticisms made by Professors Hutchinson and Dodek where it is applied to corporations and governments.

Interestingly, this is exactly the sort of argument that was advanced to attack the availability of the work product doctrine's protection in *Hickman v. Taylor*.<sup>64</sup> In that case, the petitioner argued that allowing a corporate defendant to apply the work product doctrine to prevent discovery of otherwise relevant documents

...would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff. Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with immunity from disclosure all that a lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.<sup>65</sup>

However, Justice Murphy rejected this argument on essentially utilitarian grounds:

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.<sup>66</sup>

While Justice Murphy's defence may be true enough, it does not really respond to the underlying criticism inherent in the plaintiff's argument: that corporate entities enjoy a significant power and resources advantage over individuals that is strengthened by the

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<sup>64</sup> *Hickman*, *supra* note 53.

<sup>65</sup> *Ibid.* at pp. 506-507.

<sup>66</sup> *Ibid.* at p. 507.

availability of a doctrine (as in the U.S. law) or a privilege (as in English and Canadian law) that can hide the fruits of the use of that power and those resources to their advantage. It also does not address the Hutchinson/Dodek-type criticism that corporations cannot enjoy rights like the privacy and autonomy that litigation privilege is supposed to be protecting in the name of fostering the adversary process.

Thus, there is an argument that can be made that the rationale for litigation privilege, given that it is, like solicitor-client privilege, based at least in part on a rights basis, should not be extended to corporations and governments. Further, the sorts of arguments advanced by Professor Hutchinson with respect to the need to remove the availability of solicitor-client privilege from governments in order to promote government transparency so as to encourage more accountability and thus foster a more democratic society would seem equally applicable with respect to litigation privilege. One could indeed ask why the government should enjoy the ability to shield documents from disclosure to adverse parties in litigation that it obtains or creates using the immense resources and powers of the state while being denied the comparable ability to shield confidential communications between lawyers and government officers and employees made to give and obtain legal advice with respect to the day-to-day workings of government.

Notwithstanding this potential line of attack, there are two responses that can be made to these attacks on the availability of litigation privilege to corporations and governments. Time does not permit extensive development of these responses, but they can at least be sketched in outline form.

First, the attacks are premised on the idea that only individuals, by which term is meant human beings, are able to enjoy rights such as dignity, privacy and autonomy, so only individual human beings should be able to enjoy a privilege founded on such rights. This premise is contestable. In the sense of a “right” as an enforceable obligation, which is perhaps its most fundamental meaning, there can be no question but that collectivity enjoy rights. In this sense, a government enjoys rights in that it possesses the ability to enforce obligations owed to it by others, including both individuals and corporate entities. However, in the sense used Professor Dodek the term “right” seems to mean “human right” of the type found in the *Charter* or human rights legislation. Nevertheless, even “human rights” have been found by the Supreme Court of Canada to be enjoyed by corporate entities, for example, protection of corporate freedom of

speech<sup>67</sup> and protection against unreasonable search and seizure.<sup>68</sup> So if the idea of a corporate entity enjoying such rights as dignity, privacy and autonomy is not just not impossible but in fact everyday reality, it seems at least open to argument that some type of similar rights might be enjoyed by government.

Second, the premise that rights are only enjoyed by individuals and not by corporate entities or governments ignores the reality that every corporation and every government acts through human agents. Government officers and employees, and corporate officials and employees, do not become mere unintelligent cogs when they enter their places of work, leaving behind their humanity like some overcoat hung in the coatroom to be put back on when they leave. Rather, these individuals who work in corporations and governments have the same fears about the choices they have to make each day in fulfilling their responsibilities within their workplaces: they fear that they may make a mistake, or that their decision will be challenged in court, or that they may not have sufficient authority to make the decision they need, from an operational point of view, to make. In fact, it could be argued that their fears are greater than those of the individual citizen, because often their decisions impact hundreds, thousands and perhaps millions of people, and they will be held accountable for those decisions. In that kind of environment of great responsibility for the decisions and actions one takes as a corporate or government employee or officer, these individuals need to be able to get the best legal advice they can get and the best legal representation in court that they can get. But when so much responsibility is on their shoulders, it can be argued that they will not have confidence to seek that legal advice or the benefits of a litigator to defend their actions and decisions in court if they are afraid that every thought they think and every idea they consider is going to be available for the world to scrutinize. They, too, just like the individual, need to be able to “make a clean breast of it” with a legal advisor who can advise them as to the legal framework that must frame their decisions and actions. And they, too, need to know that their litigator will be free to engage in every avenue of inquiry needed to prepare the best defence in order to have confidence to cooperate in that trial preparation.

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<sup>67</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

<sup>68</sup> *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145.

Thus, in our view, the criticisms raised by Professors Hutchinson and Dodek, whether applied to solicitor-client privilege or litigation privilege, are not as strong or unchallengeable as they may seem at first glance. That said, the defences proposed here remain to be fully worked out so as to be ready to protect against these attacks.