"INGATHERED" RECORDS AND THE SCOPE OF LITIGAITON PRIVILEGE IN CANADA: DOES LITIGATION PRIVILEGE APPLY TO COPIES OR COLLECTIONS OF OTHERWISE UNPRIVILEGED DOCUMENTS?

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Plaintiff's counsel has on her litigation file copies of on-line newspaper articles collected by her client regarding the accident which gave rise to the plaintiff's claim.

A self-represented defendant has on his computer copies of various versions of the plaintiff's curriculum vitae which the defendant downloaded from the internet.

Defence counsel has in his possession copies of screen-shots of the plaintiff's Facebook page.

Plaintiff's counsel has on her computer downloads of the defendant's "tweets" about the plaintiff, obtained from the internet by an IT technician hired by plaintiff's counsel.

Introduction: The Issue

Each of the scenarios described above gives rise to the same, long-standing question regarding document production in civil litigation, ***namely: are copies of otherwise unprivileged original documents or records, gathered for the dominant purpose of litigation (i.e. "ingathered documents"), exempt from pre-trial production on the basis of litigation privilege?*** This issue is not new, but, as the scenarios above suggest, the question is of increasing importance in the modern information age where lawyers, litigants and third parties can readily obtain a wide range of information from social networking sites, public web-cam feeds and other internet sources.[1] Further, although lawyers and litigants must regularly

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confront this problem, to date Canadian law has not clearly resolved the question. Legislated civil procedure rules do not specifically address the production of ingathered documents. In *Blank v. Canada (Minister of Justice)*,[2] the Supreme Court of Canada definitively stated that litigation privilege attaches to records which are "created for the dominant purpose" of litigation, but the Supreme Court has not yet determined whether "creation" includes the copying or collecting of otherwise unprivileged records.[3] Instead, while recognizing the issue, the Supreme Court has elected to wait for "a case where it is explicitly raised and fully argued" in order to rule on the matter.[4] Lower courts have directly confronted the issue but the leading decisions on point are conflicting.[5]

My objective in this paper, then, is to provide some food for thought as to how litigants, lawyers and courts should resolve this question going forward. To this end, I have divided the paper into three parts. As background and context for the discussion that follows, Part I consists of a brief refresher on the fundamentals of privilege in general and litigation privilege in particular.[6] This includes a key comparison of the purpose and scope of litigation privilege as compared to other recognized classes of privilege. Part II summarizes the leading Canadian cases to date which have

1. Indeed, it has been suggested that "[i]t is becoming trite that legal due diligence now includes a Facebook search for an opposing party's profile" and that modern litigators are "well advised" to conduct internet searches for relevant information pertaining to the litigation and to the parties involved in the litigation. See C.J. Edwards and M.D. Swindley, "Throwing the (Face)Book at 'em. The Use and Abuse of Social Media in Civil Litigation: Facebook, Twitter, the Rules of Civil Procedure and the Rules of Professional Conduct" (2011), 38:1 Adv. Q. 19 at p. 21.
2. 2006 SCC 39, [2006] 2 S.C.R. 319, [2006] S.C.J. No. 39 (S.C.C.) at paras. 59-61.
3. This is so even though some cases have described the privilege as attaching to information "gathered" or "collected" for the purposes of litigation. See for example: *Whitehead v. Braidnor Construction Ltd.*, 2001 ABQB 994, 304 A.R. 72, 19 M.V.R. (4th) 44 (Alta. Q.B.) at para. 5; and *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, 1996 ABCA 141, 135 D.L.R. (4th) 69, [1996] A.J. No. 380 (Alta. C.A.) at para. 21. These courts have not employed this broader description as a means of determining whether ingathered documents are subject to litigation privilege.
4. *Blank*, *supra* note 2, at para. 64.
5. See Part II.A of this paper.
6. For an overview of the historical development in Canada of privilege in general, and litigation privilege in particular, see, respectively: Neil J. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58:1 Can. Bar Rev. 1-57; and Peter Y. Atkinson, "Production Obligations: The Narrowed Scope of the Work Product Privilege" (1994), 13:2 Advocates Soc. J. 6-9.

specifically addressed the question of whether litigation privilege attaches to ingathered documents. Finally, building on the principles and themes identified in Parts I and II, Part III proposes options for approaching this question in future. My conclusion is that litigation privilege should presumptively apply to ingathered documents but that clearly defined exemptions to the privilege should be established to account for situations where considerations of fairness, including the efficient resolution of litigation, weigh in favour of disclosure.

Part I – A Refresher on Privilege

A. Privilege Defined

According to *Black's Law Dictionary*, "privilege" is "[a] special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty".[7] In the context of civil litigation, then, privilege is a legally recognized exemption to a litigant's ordinary pre-trial duty to disclose to opposing parties information which is relevant and material to the lawsuit. It is the exception and not the rule when it comes to document production.

As a doctrine that exempts information from production, privilege runs contrary to the usual rules of evidence and civil procedure which favour the full disclosure of relevant information as a means of facilitating a just and expedient resolution of the lawsuit, either by trial, settlement or summary proceedings. The traditional trial process is built on the belief that full disclosure assists in the pursuit of truth and justice at trial.[8] So, where privilege applies to limit disclosure, it necessarily demonstrates the willingness of courts or legislators to "restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy".[9] Further, by enabling parties to shield information from pre-trial disclosure, privilege may operate as a barrier to early resolution of a claim via settlement or summary court applications. In particular, parties may be reluctant to enter into an out of court resolution without full knowledge of the opposing party's case.[10] This is a significant concern, particularly in light of

7. *Black's Law Dictionary*, 9th ed. (St. Paul: West Group, 2009).
8. As noted by L'Heureux-Dubé J. in *R. v. Gruenke*, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289, [1991] S.C.J. No. 80 (S.C.C.) at para. 52: "If the aim of the trial process is the search for truth, the public and the judicial system must have the right to any and all relevant information in order that justice be rendered."
9. *Ibid.*
10. As noted in *Rodriguez v. Woloszyn;* 2013 ABQB 269, 44 C.P.C. (7th) 260,

recent judicial statements highlighting settlement as both a typical and a preferred outcome of the litigation process.[11] Finally, the lack of full disclosure prior to trial may hinder a court's ability to determine the lawsuit on a summary basis. Again, this is an important consideration given recent court statements favouring the use of summary proceedings as a means of enhancing the efficiency of civil justice.[12]

B. Types of Privilege

Canadian case authorities distinguish between "case-by-case" privilege and "class privilege".[13] Case-by-case privilege is used for situations which do not fall within an existing class of privilege. In

[2013] A.J. No. 561 (Alta. Q.B.) at para. 53: "Settlements are most likely to occur when the litigants are in possession of the information which allows them to come to an informed decision as to what a court is likely to do if the matter goes to trial." Of course, as discussed in Part I.B, privilege can also facilitate settlement by protecting the confidentiality of settlement discussions between the parties.

11. For example, the Supreme Court of Canada in *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, 373 D.L.R. (4th) 626 noted that "[e]ncouraging settlements has been recognized as a priority in our overcrowded justice system" (para. 32) and explained that its decision on the settlement privilege question at bar was made "bearing in mind the overriding benefit to the public of promoting the out-of-court settlement of disputes" (para. 3). See also *Rodriguez v. Woloszyn*, *supra* note 10, at para. 52 where Wakeling J. of the Alberta Court of Queen's Bench explained that "settlements of legal disputes at the earliest possible time is in the public interest" because (1) "settlements reduce the demand for publicly funded court services and reduce the time those litigants who are unable to settle have to wait for a trial"; (2) "settlement reduces legal fees" which "is good for clients"; and (3) in the context of personal injury actions, settlement relieves doctors "of the burden of conducting more medical examinations, preparing reports and testifying", which "reduces the cost of litigation and makes health care professionals available for other tasks which arguably have more social utility".

12. See for example, *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7 at para. 2, where the Supreme Court of Canada called for a "culture shift . . . in order to create an environment promoting timely and affordable access to the civil justice system", which would include "moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case". Reflecting this reasoning, in *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, 371 D.L.R. (4th) 339, [2014] A.J. No. 256 (Alta. C.A.) at para. 15, the Alberta Court of Appeal stated that "the myth of trial should no longer govern civil procedure".

13. See for example: *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 331 D.L.R. (4th) 307, [2011] N.S.J. No. 164 (N.S. C.A.) at para. 50; and *R. v. Gruenke*, *supra* note 8 at para. 26. As pointed out by Lamer C.J. in *R. v.*

order to displace a presumption of disclosure, "the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case".[14] This balancing exercise is usually done by applying the four-point criteria of the "Wigmore Test".[15] These criteria are that:

(i) The communications must originate in a confidence that they will not be disclosed.
(ii) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation.
(iii) The relation must be one which, in the opinion of the community, ought to be sedulously fostered.
(iv) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[16]

In contrast, class privilege does not require the application of the Wigmore test. Class privilege refers to categories of privilege which have been established by the common law. Documents which are proven to fall within these categories are *prima facie* privileged unless an exemption to the privilege can be established.[17] At present, there are three established categories of class privilege in Canada:

- Solicitor-Client Privilege, also known as legal advice privilege,[18] which applies to all communications between a lawyer and a client for the purposes of obtaining legal advice;
- Litigation Privilege, which applies to documents created for the dominant purpose of litigation;[19] and

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Gruenke, at para. 26, class privilege is also referred to as "blanket", "*prima facie*" or "common law" privilege.

14. *R. v. Gruenke*, *supra* note 8 at para. 26.
15. *Ibid.*, at paras. 26, 35 and 98.
16. J.H. Wigmore, *Evidence in Trials at Common Law*, McNaughton Revision, Vol. 8 (Boston: Little, Brown & Co., 1961) at para. 2285.
17. *R. v. Gruenke*, *supra* note 8, at para. 26.
18. *Blank, supra* note 2, at para. 7.
19. The purpose and scope of this privilege is more fully explained in Parts I.C and I.D. As described by Bielby J., then of the Alberta Court of Queen's Bench in *R. v. Le* (1997), 41 C.R.R. (2d) 364, 197 A.R. 341, [1997] A.J. No. 112 (Alta. Q.B.) at para. 40, this privilege "was born in the United States but emigrated to Canada via the decision of the British Columbia Court of Appeal in *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577, 47 C.C.L.T. 94, 33 B.C.L.R. (2d) 129 (B.C. C.A.)". The seminal U.S. decision on litigation privilege is *Hickman v. Taylor* (1947), 91 L.Ed. 451, 67 S.Ct. 385, 329 U.S. 495 (U.S. Pa. S.C.).

- Settlement Privilege, sometimes known as the "Without Prejudice" rule,[20] which applies to communications between the parties to litigation or their counsel for the purpose of arranging or attempting to arrange a settlement of the litigation.[21]

C. Litigation Privilege as Compared to Other Types of Privilege

Litigation privilege is often conceptualized as a branch of solicitor-client privilege because it "extends the privilege which originally existed over the express oral and written communications between a solicitor and his client to the contents of the lawyer's brief".[22] However, in 2006 a majority of the Supreme Court of Canada stated in *Blank*[23] that litigation privilege should no longer be viewed as an adjunct of solicitor-client privilege.[24] Writing for a majority of the court, Fish J. stated that "it would be preferable . . . to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree".[25] Fish J. acknowledged that the two forms of privilege "serve a common cause: [t]he secure and effective administration of justice according to law" and that they are therefore "complementary and not competing in their operation".[26] Nonetheless, he concluded that "treating litigation privilege and legal advice privilege [solicitor-client privilege] as two branches of the same tree tends to obscure the true nature of both".[27]

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20. *Union Carbide Canada Inc. v. Bombardier Inc.*, *supra* note 11, at para. 31. Note, however, that at para. 34 of this case the court stated that, notwithstanding this title, "parties do not have to use the words 'without prejudice' to invoke the privilege".
21. Notably, non-settlement communications between opposing litigants or their counsel are not privileged. See: *Strass v. Goldsack* (1975), 58 D.L.R. (3d) 397, [1975] 6 W.W.R. 155, [1975] A.J. No. 497 (Alta. C.A.).
22. *R. v. Le*, *supra* note 19, at para. 40.
23. *Supra* note 2.
24. Note, however, that in *TransAlta Corp. v. Alberta (Market Surveillance Administrator)*, 2014 ABCA 196, 100 Alta. L.R. (5th) 52, [2014] A.J. No. 607 (Alta. C.A.), the Alberta Court of Appeal recently held that the Supreme Court's distinction between solicitor-client privilege and litigation privilege is not applicable in all circumstances. In particular, the Court of Appeal held that in some circumstances legislative references to "solicitor-client" privilege may still be interpreted as encompassing litigation privilege.
25. *Blank*, *supra* note 2, at para. 7.
26. *Ibid.*, at para. 31.
27. *Blank*, *ibid.* In a separate judgment written on behalf of himself and Charron J., and concurring in the result, Bastarache J. was content for the law to

In support of this conclusion, Fish J. referenced three differences between solicitor-client privilege and litigation privilege, as set out by R.J. Sharpe J.[28] The differences are that:

1. Solicitor-client privilege applies only to confidential communications between a lawyer and his client, whereas litigation privilege applies more broadly to non-confidential communications between a lawyer and third parties and includes non-communicative material;
2. Solicitor-client privilege arises anytime a client communicates with a lawyer for legal advice, whereas litigation privilege arises only in the context of litigation; and
3. The rationale for solicitor-client privilege is to ensure that a client's ability to access proper legal advice is not inhibited by the client's fear that communications with his or her lawyer will be revealed while the purpose of litigation privilege is to support the operation of the adversarial process of litigation:

> Litigation privilege is based on 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).[29]

Similar distinctions can be drawn between settlement privilege and litigation privilege:

1. Settlement privilege applies only to communications between litigants or their counsel, whereas litigation privilege can encompass communications between a lawyer or litigant and third parties and includes non-communicative material;
2. Settlement privilege applies only to communications which, in their content, are directed to the goal of achieving settlement, whereas litigation privilege applies to all records created for

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continue to view solicitor-client privilege and litigation privilege as different branches of solicitor-client privilege even though these two branches have different rationales. For Bastarache J., the more important consideration was that both types of privilege serve the common goal of the effective administration of justice (see para. 70).

28. Robert J. Sharpe, "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, LSUC Special Lectures (Toronto: De Boo, 1984), p. 163.
29. *Blank*, *supra* note 2, at para. 28.

the dominant purpose of litigation, regardless of their content; and

3. Settlement privilege is aimed at promoting "honest and frank discussions between the parties which can make it easier to reach a settlement" by enabling parties "to participate in settlement negotiations without fear that information they disclose will be used against them in litigation".[30] In contrast, as stated above, the goal of litigation privilege is to facilitate the adversarial process, which anticipates a trial, not a settlement.

In both of the above comparisons (solicitor-client privilege versus litigation privilege, and settlement privilege versus litigation privilege), the first two elements speak to the practical scope or operative rules associated with the privilege: that is, the circumstances in which the privilege applies and the material to which the privilege applies.[31] These elements, however, are founded in the third distinction which speaks to the purpose, and therefore to the substance, of each form of privilege. While the objectives of solicitor-client privilege and settlement privilege serve to protect communications which meet the requirements of the Wigmore Test, this is not true of litigation privilege. In contrast to solicitor-client privilege and settlement privilege, litigation privilege is not designed to protect particular communications made in the context of an identified confidential relationship. The purpose of litigation privilege is to preserve the privacy of a party's strategies in the context of the adversarial litigation process.

Litigation privilege protects the adversarial process by creating a "'zone of privacy' in relation to pending or apprehended litigation".[32] Its purpose is to "protect from disclosure the statements and documents which are obtained or created particularly to prepare one's case for litigation or anticipated litigation" so as 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".[33] As further described by Fish J. in *Blank*:[34]

30. *Union Carbide Canada Inc. v. Bombardier Inc.*, *supra* note 11, at para. 31.
31. Notably, in this regard, litigation privilege is distinct from both solicitor client privilege and settlement privilege because litigation privilege lasts only while the litigation, or a similar litigation, is in process. In contrast, solicitor client privilege and settlement privilege last forever unless exceptions which enhance the purpose of the privilege apply (*e.g.* waiver). See *Blank*, *supra* note 2, at para. 37 and *Union Carbide Canada Inc. v. Bombardier Inc.*, *supra* note 11, at para. 34.
32. *Blank v. Canada*, *supra* note 2, at para. 34.

> [The object of litigation privilege] is to ensure the efficacy of the adversarial process . . . And to achieve this purpose, parties to litigation . . . must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

In other words, instead of protecting against the erosion of a confidential relationship which is valued by the community, litigation privilege uniquely seeks to prevent the mischief of an opposing party arguing their case "on wits borrowed from the adversary".[35]

This underlying rationale of litigation privilege is widely recognized by both academic literature and judicial rulings.[36] These authorities suggest that a "zone of privacy" protecting each counsel's work product ultimately serves the truth-finding process because each side will be more diligent in readying its case if it can do so without fear of premature disclosure of its investigations or preparations and because each side has more incentive to diligently prepare, knowing that it cannot rely on investigations conducted by its counterpart.[37]

The difference in the objectives served by solicitor-client privilege and settlement privilege on the one hand and litigation privilege on the other hand is significant to a court's application of privilege in a given case. The rationale for the privilege "provides an essential guide for determining the scope of its application".[38] So, for

33. *Moseley v. Spray Lakes Sawmills* (1980) Ltd., *supra* note 3, at para. 21.
34. *Blank v. Canada, supra* note 2, at para. 27.
35. *Ibid.*, at para. 35, citing *Hickman v. Taylor* (1947), 91 L.Ed. 451, 67 S.Ct. 385, 329 U.S. 495 (U.S. Pa. S.C.) at p. 516.
36. See for example: J. Walker and L. Sossin, *Civil Litigation* (Toronto, Ontario: Irwin Law, 2010) at p. 199; Margaret L. Waddell, "Litigation Privilege and the Expert: In the Aftermath of Chrusz" (2001), 20 Advocates' Soc. J. 10; *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755, 80 C.P.R. (2d) 93, [1984] A.J. No. 977 (Alta. C.A.); and *Hodgkinson v. Simms*, 1988 CarswellBC 437, 33 B.C.L.R. (2d) 129, 47 C.C.L.T. 94 (B.C. C.A.).
37. In fact, in *Nova, an Alberta Corporation v. Guelph Engineering Company, supra* note 36, noting, at para. 20, that "the sole viable rationale" for litigation privilege "is to be found in the demands of the adversary system" and not in the confidentiality of communications, the Alberta Court of Appeal suggested, at para. 10, that the very title of "litigation privilege" might be misleading:
    > Indeed, it may be misleading to talk about the rule which protects documents from production as a privilege . . . what we are talking about is an exemption from discovery apart entirely from the solicitor and client privilege.
38. *Man-Shield Construction Inc. v. Renaissance Station Inc.*, 2014 MBQB 101, 305 Man. R. (2d) 100, [2014] M.J. No. 144 (Man. Q.B.) at para. 13 in regards to litigation privilege in particular.

example, because of the accepted critical importance of preserving the solicitor-client relationship, Canadian courts have broadly applied solicitor-client privilege, stating that this privilege "must be as close to absolute as possible to ensure public confidence and retain relevance"[39] and that "[s]olicitor-client privileged records are to be ordered disclosed only where absolutely necessary".[40] Likewise, recognizing the importance of promoting settlements, the Supreme Court of Canada recently interpreted both the settlement privilege rule and exemptions to this rule expressly to protect and facilitate settlement negotiation and enforceability.[41] In contrast, the courts have held that "there is nothing sacrosanct" about litigation privilege[42] because, rather than promoting a confidential relationship which satisfies the Wigmore Test, it merely "preserves the degree of nondisclosure which the courts consider necessary for the efficient operation of the adversarial system".[43] Accordingly, the courts have increasingly given litigation privilege a narrow application, as exemplified by the fact that the modern standard for litigation privilege requires a document to have been created for the "dominant" (as opposed to the substantial) purpose of litigation. As stated by the Supreme Court of Canada:[44]

> Though [the dominant purpose test] 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.

Moreover, with increasing judicial recognition that fair and efficient resolution is best achieved by full disclosure, the modern trend is to "favour disclosure values even if doing so diminishes the adversarial nature of litigation".[45] In short, as recently noted by the Alberta Court of Appeal, "litigation privilege enjoys a lesser status than legal advice privilege, and is therefore subject both to legislative and judicial limitation".[46]

39. *Ibid.*, at para. 14, citing the Supreme Court of Canada's decision in *Blank, supra* note 2, at para. 24.
40. *Ibid.*, citing the Supreme Court of Canada's decision in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32, 271 D.L.R. (4th) 40 (S.C.C.) at para. 15.
41. See *Union Carbide Canada Inc. v. Bombardier Inc.*, *supra* note 11.
42. *General Accident Assurance Co. v. Chrusz*, 1999 CarswellOnt 2898, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203 (Ont. C.A.) at para. 331.
43. *Rodriguez v. Woloszyn*, *supra* note 10, at para. 37.
44. *Blank*, *supra* note 2, at para. 60.
45. *Rodriguez v. Woloszyn*, *supra* note 10, at para. 37.
46. *Supra* note 24 at para. 36.

D. The Requirements of Litigation Privilege

Litigation privilege is known by a variety of labels, including, for example: professional privilege, solicitor's brief privilege, solicitor's work product privilege, work product privilege and legal professional privilege. The privilege is typically claimed in respect of documents that form part of a lawyer's litigation file which, in the modern age, must be understood to include both physically tangible and electronic information created, collected, or otherwise generated by counsel for the purposes of advancing or defending a lawsuit. Additionally, despite the reference to "solicitor" or "lawyer" in some of the titles given to this privilege, it is important to remember that the privilege is linked most fundamentally to the *purpose* for which a document is created and not to from where or by whom the document is obtained. Accordingly, litigation privilege may apply to records held by a self-represented litigant and to documents which are provided to a litigant or to litigation counsel by a third party who has no expectation of confidentiality or privacy. As noted by the Supreme Court of Canada:[47]

> 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 . . . A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" or 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 litigant privilege attaches nonetheless.

With this proviso in mind, the established and salient elements of litigation privilege include the following:

- It applies to records created for the *dominant* purpose of litigation. The "dominant purpose" requirement may be satisfied even where a document was created for multiple purposes, provided that one of the dominant purposes for its creation was litigation. However, the document does not need to have been created for the sole purpose of litigation.[48]
- "Dominant purpose" is determined at the time of creation.[49]

47. *Blank v. Canada*, *supra* note 2, at para. 32.
48. *Ibid.*, at paras. 59-60.
49. *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, *supra* note 3, at para. 24.

- It applies not only to records created for the dominant purpose of existing litigation, but also to documents created for the dominant purpose of apprehended or anticipated litigation.[50]
- It terminates with the litigation,[51] though in this context "litigation" is broadly defined to include related litigation which is "pending or may reasonably be apprehended".[52]
- It may also be terminated or lost by the actions of the litigant, for example where a litigant waives the privilege, either expressly or implicitly.[53]
- It does not apply to communications between opposing litigants or their lawyers.[54]
- As with privilege in general, the burden of proof lies with the party claiming the privilege.[55]

Part II – Case Authorities on the Application of Litigation Privilege to Ingathered Documents

Before discussing existing case authorities on the application of litigation privilege to ingathered documents, it is necessary to be clear about what is meant by an "ingathered" record. This is a record which is relevant and material to the litigation and which does not fall within any of the other types of privilege. It is often, but not always, a copy of a record, the original of which may be publicly or otherwise accessible to all or some of the parties to the litigation. Chiefly, though the original document was not generated for the dominant purpose of litigation, the document (in its original or duplicated form) is gathered onto a litigant's file for the dominant purpose of litigation and it is this gathering which forms the substance of the litigation privilege claim.

50. *Ibid.*
51. *Blank v. Canada*, *supra* note 2, at para. 37.
52. *Ibid.*, at para. 38. According to Fish J., at para. 39, "related litigation" for this purpose includes "proceedings that involve the same or related parties and arise from the same or a related cause of action" and "[p]roceedings that raise issues common to the initial action and share its essential purpose".
53. *Rodriguez v. Woloszyn*, *supra* note 10, at paras. 41-45.
54. *Nova, an Alberta Corporation v. Guelph Engineering Company*, *supra* note 36.
55. *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, *supra* note 3, at para. 26; *Man-Shield Construction Inc. v. Renaissance Station Inc.*, *supra* note 38, at para. 8.

A. *Hodgkinson* and *Chrusz*

As previously noted, current Canadian case law on the issue of whether litigation privilege attaches to documents is contradictory. The chief decisions feeding the controversy are *Hodgkinson v. Simms*[56] and *General Accident Assurance Co. v. Chrusz*.[57]

In *Hodgkinson* the plaintiff sued the defendant accountants for various breaches of duty and for negligence in relation to investments involving the plaintiff. Since the events giving rise to the litigation, the defendants had moved their offices several times and had lost records in relation to some of the relevant transactions. Through independent investigations, the plaintiff's counsel obtained copies of these records from outside sources but claimed litigation privilege over these ingathered documents. The defendant supported its application for production on the grounds that (1) copies of otherwise unprivileged documents do not become privileged only because they are collected on a lawyer's file and that (2) a narrow interpretation of litigation privilege is supported by the trend toward full disclosure. A majority of the British Columbia Court of Appeal held that the documents were privileged.

In arriving at this conclusion, the court held that "it is highly desirable to maintain the sanctity of the solicitor's brief which has historically been inviolate".[58] Further, after examining various cases addressing the question of whether litigation privilege attaches to ingathered documents, McEachern J., writing for the majority of the court, stated the following:[59]

> . . . a document or a copy of a document in the possession of a party before litigation, or "ingathered" by a party before that time in the ordinary course of events and not for the dominant purpose of litigation, does not become privileged just because it or a copy of it is later given to a solicitor . . .
>
> 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 purposes 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* . . .
>
> It follows that the copies are privileged *if the dominant purpose of their creation as copies satisfies the same test . . . as would be applied to the original*

56. *Supra* note 36.
57. *Supra* note 42.
58. *Hodgkinson*, *supra* note 36, at 135.
59. *Ibid.*, at 142-43 [emphasis added].

> *documents of which they are copies. In some cases the copies may be privileged even though the originals are not.*

In dissent, Craig J. held that, as an exception to the general obligation of production, litigation privilege should be narrowly construed. Taking this approach, Craig J. held that the documents were producible on the following grounds:[60]

> I fail to comprehend how original documents which are not privileged (because they are not prepared with the dominant purpose of actual or anticipated litigation) can become privileged simply because counsel makes photostatic copies of the documents and puts them in his "brief". This is contrary to the intent of the rules and to the modern approach to this problem. If a document relates to a matter in question, it should be produced for inspection.

In *Chrusz*, the Ontario Court of Appeal was asked to determine whether litigation privilege applied to various records, including a videotape of a witness statement. The litigation centered around the alleged fraud of an insured in claiming insurance coverage for a fire loss. The question before the court was whether various records held by the respective counsel for the insurance company and a former employee of the insured were privileged. The case was decided by a majority of the court on the basis of the dominant purpose test. However, in resolving the matter, each of the Court of Appeal justices wrote separate reasons discussing the scope of litigation privilege and providing *obiter* commentary as to whether copies of an otherwise unprivileged record can be protected by litigation privilege where they are gathered or copied for the purpose of litigation.

Carthy J. recognized that litigation privilege is designed to preserve "tactical room for the advocate to maneuver".[61] However, while acknowledging cases such as *Hodgkinson* which extended litigation privilege to copies of unprivileged records, Carthy J. suggested that this traditional approach is out of date with the modern trend favouring expansive pre-trial disclosure:[62]

> It is an instinctive reflex of any litigation counsel to collect evidence and to pounce at the most propitious moment. That's the fun in litigation! But the ground rules are changing in favour of early discovery. Litigation counsel must adjust to this new environment and I can see no reason to think that clients may suffer except by losing the surprise effect of the hidden missile.
>
> *. . . if original documents enjoy no privilege, then copying is only in a technical sense a creation. Moreover, if the copies were in the possession of the client prior*

60. *Ibid.*, at 148.
61. *Chrusz*, *supra* note 42, at 332.
62. *Ibid.*, at 335.

> *to the prospect of litigation they would not be protected from production. Why should copies of relevant documents obtained after contemplation of litigation be treated differently?* Suppose counsel for one litigant finds an incriminating filing by the opposite party in the Security Commission's files. Could there be any justification for its retention until cross-examination at trial? . . .
>
> The production of such documents in the discovery process does little to impinge upon the lawyer's freedom to prepare in privacy and weighs heavily in the scales supporting fairness in the pursuit of truth. . .
>
> . . . deference must be given to modern perceptions of discoverability in preference to historic landmarks that no longer fit the dynamics of the conduct of litigation. *The zone of privacy is thus restricted in aid of the pursuit of early exchange of relevant facts and the fair resolution of disputes.*

In a separate judgment, Doherty J. took issue with Carthy's J. analysis of litigation privilege as it pertains to copies of unprivileged records. He stated:[63]

> I do not disagree with the observation of Craig J.A. A non-privileged document should not become privileged merely because it is copied and placed in the lawyer's brief. I would not, however, go so far as to say that copies of non-privileged documents can never properly be the subject of litigation privilege.

Justice Doherty took the view that records obtained or copied by a party or its solicitor for the purpose of advice or use in litigation *should* fall under the protection of litigation privilege. In this regard, Doherty J. endorsed the finding of Wood J. in *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* that:[64]

> . . . a copy of an unprivileged document becomes privileged so long as it is obtained by a party, or its solicitor, for the sole purpose of advice or use in litigation. I think that the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of a solicitor, then I consider privilege should apply.

Justice Doherty also held, however, that the privilege is a "qualified one which can be overridden where the harm to other societal interests in recognizing the privilege clearly outweighs any benefit to the interest fostered by applying the privilege in the particular circumstances".[65]

Accordingly, Doherty J. proposed a two-step test for assigning litigation privilege. First, the party claiming privilege must

63. *Ibid.*, at 361.
64. (1985), 3 N.S.W.L.R. 44 (New South Wales S.C.) at 61-62, cited by Doherty J. in *Chrusz*, *supra* note 42, at 361.
65. *Chrusz*, *supra* note 42, at 362.

demonstrate that the material satisfies the dominant purpose test. Second, the party wanting to lift the privilege must demonstrate that "the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production".[66] In regards to this second stage, Doherty J. explained the issues to be considered as follows:[67]

> In deciding whether to require material which meets the dominant purpose test to be produced, the policies underlying the competing interests should be considered. The privacy interest reflects our commitment to the adversarial process in which competing parties control the preparation and presentation of their respective cases. Each side is entitled to and, indeed, obligated to prepare its own case. There is no obligation to assist the other side. Counsel must have a "zone of privacy" where they are free to investigate and develop their case without opposing counsel looking over their shoulder.
>
> . . . . .
>
> The policies underlying the disclosure interest are adjudicative fairness and adjudicative reliability. While we remain committed to the adversarial process, we seek to make that process as fair and as effective a means of getting at the truth as possible. Both goals are in jeopardy when one party can hide or delay disclosure of relevant information. The extent to which these policies are undermined by non-disclosure will depend on many factors. The nature of the material and its availability through other means to the party seeking disclosure are two important factors. If the material is potentially probative evidence going to a central issue in the case, non-disclosure can do significant harm to the search for the truth. If the material is unavailable to the party seeking disclosure through any other source, then applying the privilege can cause considerable unfairness to the party seeking disclosure.

This two-step approach was expressly rejected by Rosenberg J., the third member of the appeal panel. Rosenberg J. feared that "a balancing test would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation".[68] However, Rosenberg J. also disagreed with Carthy's J. suggestion that litigation privilege should not be applied to ingathered documents. In this regard, Rosenberg J., like Doherty J., preferred the approach set out in *Nickmar*.

B. Cases Decided Since *Hodgkinson* and *Chrusz*

Since the rulings in *Hodgkinson* and *Chrusz*, several court decisions have addressed the claim of litigation privilege as it applies to ingathered documents. Generally, British Columbia

66. *Ibid.*, at 365.
67. *Ibid.*
68. *Ibid.*, at 369.

courts have applied the *Hodgkinson* approach to support litigation privilege and Ontario courts have relied on *Chrusz* to support disclosure. Otherwise, the case authorities do not reveal a consistent approach for resolving this question, although, consistent with the approach advocated in *Nickmar*, many of the courts have based their findings on whether the solicitor exercised skill or judgment in obtaining the ingathered documents. Some of the most significant and recent cases are summarized below.

- In *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*,[69] the plaintiff, who was suing several corporate defendants and their former employees, relied on litigation privilege to resist an application for production brought by two corporate defendants. The production request included emails and other documents obtained and provided to the plaintiff by Mr. Kirk and Mr. Ellis, two of the individual defendants. After they were no longer employed by or affiliated with the corporate defendant, these individuals obtained the documents by using computer passwords belonging to other employees. Noting that these facts directly raised the issue "of whether the documents are protected or not by litigation privilege as enunciated in *Hodgkinson* and later clarified but narrowed in *Blank*",[70] the court ultimately rejected the privilege claim for three reasons.

  First, recognizing that litigation privilege is a "limited exception" to the principle of full disclosure, the court noted that the privilege should not apply to shield from one defendant documents provided to a plaintiff by another named defendant who is actually assisting the plaintiff in the action (despite being named as an adverse party). Second, relying on *Hodgkinson*, the court emphasized that a record does not become privileged just because a copy of the document is made and provided to a solicitor: "not everything a solicitor does or collects is privileged".[71] However, the court concluded that, unlike the situation in *Hodgkinson*, counsel claiming litigation privilege did not employ any investigative efforts, research skills or legal analysis in obtaining the documents at issue. Instead, in this instance, the individual defendants acted on their own initiative in providing copies of the documents to plaintiff's counsel, believing that co-operating with the

69. 2014 BCSC 999, 2014 CarswellBC 1584, [2014] B.C.J. No. 1118 (B.C. S.C.).
70. *Ibid.*, at para. 56.
71. *Ibid.*, at para. 69.

plaintiff would protect their interests in the lawsuit. The plaintiff's counsel's involvement in determining the relevance of these documents did not exhibit sufficient knowledge, skill or industry to support litigation privilege. The court also held that a relevant consideration was whether the party seeking document disclosure could obtain the documents by another means. In *Hodgkinson*, the documents could be obtained but in this case the corporate defendant seeking production had no way of knowing, in the absence of production by the plaintiff, which of its documents was in the plaintiff's possession. Finally, the court held that litigation privilege should not be used in a situation where its application would condone the conduct of Mr. Ellis and Mr. Kirk in obtaining the documents in a dishonest manner (*i.e.* by wrongfully using the computer passwords of other employees of the corporate defendant).

- In *Seller v. Grizzle*,[72] the British Columbia Supreme Court held that copies of clinical records obtained by the plaintiff in relation to treatment received by the plaintiff were not protected by litigation privilege because there was no evidence of skill or special selection involved in the lawyer's decision to obtain the documents. The court also expressly rejected counsel's suggestion that the court should presume that there is always a level of legal skill involved in determining what documents to collect, and therefore a risk that, if produced, the documents would give opposing counsel insight into the legal strategy of the party holding the documents.
- In *Edgar v. Auld*,[73] the New Brunswick Court of Appeal was asked to determine whether hospital records obtained by the plaintiff's counsel fell within the protection of litigation privilege. The court considered the conflicting viewpoints from *Hodgkinson* and *Chrusz* and favoured the latter as it reflected the modern trend toward full disclosure. The court rejected the privilege argument on the basis that the original hospital records were not created for the dominant purpose of litigation and that counsel did not exercise any legal skill in ordering copies of the records for his file. However, the court did suggest that there may be some cases in which counsel

72. (1994), 27 C.P.C. (3d) 210, 95 B.C.L.R. (2d) 297, [1994] B.C.J. No. 1565 (B.C. S.C.).
73. (2000), 184 D.L.R. (4th) 747, 43 C.P.C. (4th) 12, [2000] N.B.J. No. 69 (N.B. C.A.).

may be able to establish that legal skill and expertise was involved in collecting otherwise unprivileged documents.

- In *Bargen v. Canadian Broadcasting Corp.*,[74] officers of the defendant were asked in examinations for discovery about information provided to the defendants by the RCMP. The defendant argued, in part, that while the RCMP records were not created for the purpose of litigation, the defendant had obtained information from the RCMP for the dominant purpose of litigation. The Northwest Territories Superior Court ruled in favour of production of the documents, expressly adopting the reasoning in *Chrusz* over that in *Hodgkinson*. The court stated that the *Chrusz* approach is "in line with the modern trend towards a discovery process that is as complete as possible".[75] Further, while recognizing the objective of litigation privilege in providing a "zone of privacy" for the preparation of litigation strategy, the court concluded that:[76]

  > . . . there is merit to the argument that a distinction should be drawn between information generated by investigations conducted on behalf of one's client, or documents created by counsel in the context of imminent or existing litigation, as opposed to pre-existing information or documents that are simply copied or gathered by counsel.

- *Ontario (Ministry of Correctional Services) v. Goodis*[77] concerned the judicial review by the Ontario Divisional Court of a ruling by Ontario's Information and Privacy Commissioner requiring the Minister to disclose information requested by a journalist. The information requested related to allegations of sexual and physical misconduct by individuals employed in a particular Ministry office and in regards to which there was past, ongoing, and anticipated litigation involving the Ministry. The review required the court to consider a statutory provision which exempted the Ministry from its production obligations in regards to privileged information. The court was also required to determine

74. 2007 NWTSC 104, [2008] 4 W.W.R. 730, [2007] N.W.T.J. No. 101 (N.W.T. S.C.).
75. *Supra* at para. 50.
76. *Ibid.*
77. (2008), 290 D.L.R. (4th) 102, 77 Admin. L.R. (4th) 133, [2008] O.J. No. 289 (Ont. Div. Ct.), additional reasons (2008), 166 A.C.W.S. (3d) 1051, 2008 CarswellOnt 3853 (Ont. Div. Ct.).

whether copies of newspaper articles and copies of documents which were held in the litigation files of the Ministry's counsel were protected by litigation privilege. The court noted that the *obiter* comments by the Supreme Court of Canada in *Blank v. Canada* appear to prefer the *Hodgkinson* approach to the approach taken by Carthy J. in *Chrusz* but ultimately determined that it was unnecessary to determine whether all document copies held on a litigation file are privileged. Instead, the court took the *Nickmar* approach, and held that the records were protected by litigation privilege because the evidence established that "the records related to the fact-finding and investigation process of counsel to assist in defending the Ministry in the civil actions".[78] At the same time, however, the court ordered the Ministry to produce other documents where there was "nothing to indicate any research or exercise of skill by the Crown counsel in obtaining them for the litigation brief".[79]

- In *Cahoon v. Brideaux*,[80] the British Columbia Court of Appeal rejected the appellant's argument that her trial had been unfair because she was "ambushed" when defence counsel cross-examined her using a copy of a mortgage deed which had not been disclosed as a producible document prior to trial. Relying on *Hodgkinson*, the court held that defence counsel was entitled to claim litigation privilege over the mortgage document since the lawyer obtained a copy of the document as part of the investigations conducted to prepare for trial.

- In *Benning v. IWA - Forest Industry Ltd. Plan (Trustee of)*,[81] the British Columbia Supreme Court concluded that litigation privilege attached to documents which pre-dated the litigation but which had been collected on defence counsel's file as a result of counsel's investigative efforts during the course of litigation.

- In *Palma v. Reeb*,[82] the plaintiff claimed litigation privilege over a copy of an accident reconstruction report which the plaintiff's counsel held on file. The original report had been

78. *Ibid.*, at para. 65.
79. *Ibid.*, at para. 66.
80. 2010 BCCA 228, 485 W.A.C. 85, [2010] B.C.J. No. 853 (B.C. C.A.).
81. 2010 BCSC 1422, 193 A.C.W.S. (3d) 1109, [2010] B.C.J. No. 1985 (B.C. S.C.).
82. 2013 ONSC 7951, 236 A.C.W.S. (3d) 72, [2013] O.J. No. 5957 (Ont. S.C.J.).

prepared at the request of the plaintiff's insurer. The Ontario Superior Court of Justice ordered the report produced on the grounds that it was an expert report which must be produced prior to trial under Ontario's Rules of Court even if it was privileged. Following the Ontario Court of Appeal's ruling in *Chrusz*, the court concluded that the copy of the report was not privileged. Notably, in coming to this result, the court expressed its exasperation with what it characterized as "the very technical and narrow argument that the copy in [the lawyer's] file is privileged because it is a document gathered by him for the purpose of litigation".[83] The court described the debate as "rather silly"[84] because, even if the document was held to be privileged, the opposing counsel could still obtain the document by bringing an application to obtain it from the party who created the original report.

- In *Bennett v. State Farm Fire and Casualty Co.*,[85] the plaintiff sued his insurer for insurance coverage for loss resulting from a house fire. The plaintiff claimed litigation privilege over RCMP reports regarding investigations of the fire. The reports had been requested and obtained from the RCMP by the plaintiff's litigation counsel. The New Brunswick Court of Appeal rejected the privilege claim on the basis that the originally unprivileged reports did not become privileged simply because they were requested or gathered by the plaintiff's counsel for the purposes of the lawsuit. The court indicated its preference for full disclosure to support the truth-finding mission of the court at trial.

Part III – Future Directions

The above overview of the doctrine of litigation privilege and cases considering its application to ingathered documents demonstrates that this is not an easy question to resolve. It is clear, however, that this issue turns on the definition of the word "created" as used in the dominant purpose test. Further, it is evident that this issue sits at the juncture of two conflicting values: (1) the maintenance of the integrity of the adversarial system as a litigation and court process; and (2) the promotion of full disclosure as a mechanism for efficiently resolving litigation at and before trial.

83. *Ibid.*, at para. 14.
84. *Ibid.*, at para. 16.
85. 2013 NBCA 4, 358 D.L.R. (4th) 229, [2013] N.B.J. No. 4 (N.B. C.A.).

It is apparent from the judicial commentary in the various cases discussed above, including the Supreme Court of Canada's decision in *Blank*, that while the modern litigation trend generally favours disclosure, Canadian courts are not prepared to fully jettison the protection against disclosure offered by the doctrine of litigation privilege. After all, the trend toward disclosure itself takes place in the context of the adversarial litigation system. Thus, while acknowledging the legal trend toward full disclosure prior to trial, the courts are also cognizant of the need to permit a litigant to prepare its own case in private. Accordingly, the question of whether litigation privilege attaches to ingathered documents is one which calls for a pragmatic solution. The best solution, then, must be one which gives due regard to both of the above stated values.

Canadian authorities are consistent in identifying the primary purpose of litigation privilege as providing assistance to a litigant's case preparation by creating a private zone in which a litigation counsel or litigants can develop their case. Since litigation preparation often involves research and information collection from publicly accessible documents, there must be scope within the doctrine of litigation privilege for protecting the collection or copying of this information. As stated by Professors Janet Walker and Lorne Sossin:[86]

> If the purpose of litigation privilege is to provide the lawyer with a "zone of privacy" in which to develop the theory of the case and a plan for presenting it to the court, then it stands to reason that documents that are not privileged can become privileged where disclosing them would reveal counsel's emerging litigation strategy. For example, copies of journal articles collected in a file could reflect research being done into a particular theory of the case.

The challenge, of course, is to draw appropriate parameters around the litigation privilege doctrine to ensure that records which were not privileged at the time of creation are not automatically protected from disclosure by virtue of being copied, collected or otherwise gathered into a litigation file. As noted by Fish J. in *Blank*:[87]

> Extending the privilege to the gathering of documents resulting 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.*

86. J. Walker and L. Sossin, *supra* note 36, at p. 210.
87. *Blank*, *supra* note 2, at para. 64 [emphasis added].

If litigation privilege did attach to all materials simply by virtue of being copied, then a party could avoid producing relevant documents by copying and then destroying the originals.

To date, several solutions have been offered by courts in Canada and elsewhere for drawing appropriate parameters around the doctrine of litigation privilege as it applies to ingathered records so as to be sure that the privilege does not indiscriminately capture all documents collected by a litigant.

First, following the approach set out in *Nickmar*, some cases have held that ingathered documents fall within the scope of litigation privilege if the ingathering results from legal expertise, skill or judgment. While this approach may have been appropriate at one time, the problem with this approach today is that it does not account for modern realities. Many of today's litigants are self-represented and their ingathering of documents is often not based on any legal skill or professional judgment. On a pure application of the *Nickmar* criteria, these litigants may not be entitled to litigation privilege. If the purpose of litigation privilege is to create a zone of privacy for preparing litigation strategies, then litigation privilege should apply no less to a self-represented litigant than to a litigant represented by trained legal counsel. Moreover, even where legal counsel is involved, technology now allows for massive amounts of information to be accessed from essentially random internet searches. Again, skilled judgment in relation to the ingathering of records may have been required in a time when finding information was difficult and copying that information was expensive and therefore selective. If a lawyer today downloads and copies every internet document that mentions the opposing litigant, has the lawyer exercised a sufficient degree of skill to claim litigation privilege over any relevant downloaded information? In short, obtaining information which may be relevant to the lawsuit requires far less analysis and legal judgment than may have once been the case. Finally, this approach does not provide a clear standard by which counsel or a litigant can assess its obligation to disclose information: what level of expertise, what sort of judgment, brings an otherwise unprivileged document within the protection of litigation privilege?

A second solution, which is referenced by some of the Canadian cases discussed above, was offered by Lord Bingham in *Ventouris v. Mountain*.[88] Lord Bingham noted that the goal of litigation privilege, as derived from solicitor-client privilege, is to ensure that a litigant or a potential litigant can proceed with and prepare their

88. [1991] 3 All E.R. 472, [1991] 1 W.L.R. 607 (Eng. C.A.).

case without having to reveal the advice given to them by counsel in regard to their legal strategies. He then went on to say that, in most cases, this purpose is not threatened by the requirement that litigants and their counsel produce ingathered documents which are not otherwise privileged because the originals were not created for the purpose of litigation. However, in the rare instances where the selection of collected documents reveals the trend of counsel's advice, then the documents should be protected by litigation privilege.

This approach would essentially obligate a party to produce ingathered documents unless the production discloses the litigant's legal strategies. On its face, this seems to be an attractive solution as it promotes the trend toward disclosure while giving some recognition to the purpose served by litigation privilege. However, on a practical level, this solution is akin to restricting litigation privilege to documents collected by use of counsel's professional skill or judgment. Presumably, records which give away litigation strategies are usually those collected through the use of legal skill or judgment. So, the problems discussed above in regards to defining this standard arise again. Moreover, it is difficult to say which records give away litigation strategy – the utility of particular records may change over the course of the lawsuit.

Third, as discussed above, Doherty J. in *Chrusz* suggested a two-step analysis whereby records ingathered for the dominant purpose of litigation are presumed to be privileged unless the party seeking disclosure can demonstrate that, in the circumstances of the case, fairness requires disclosure. As noted by Rosenberg J. in the same case, the problem with this two-step approach is that it is frought with uncertainty. When does "fairness" mandate disclosure? Further, this approach arguably transforms litigation privilege from a class-based privilege to a case-by-case privilege because only a court application can determine whether the interests of justice require an exception to the presumed privilege.

Of the three solutions, however, Doherty J.'s approach comes closest to achieving a balanced resolution. From a procedural perspective, the two-step process suggested provides for due consideration of both values identified above. Further, in order to substantively balance the two competing values, it is necessary and appropriate that a presumption of litigation privilege applies to records gathered for the purpose of litigation, subject to overriding factors which favour disclosure.[89] Justice Doherty's approach also

89. If the rule is stated the other way around (*i.e.* so that production is presumed subject to an overriding need for litigation privacy), then, given the objective of litigation privilege, the overriding need logically must be the need to

sends the message that not all ingathered records are protected by litigation privilege, so parties must consider carefully whether it is worth claiming privilege over a particular record.

What is needed to make Doherty J.'s two-step approach workable, however, is a further definition of the circumstances when the second step of the test will be satisfied. That is, in order to make the test more predictable, more detail needs to be provided about when claiming privilege over ingathered documents will be deemed to be unfair. This definition can be provided as cases are decided and the law on "unfairness" builds, or a court may choose, in a single case, to set out a list of presumptive circumstances where the unfairness standard is met. Either way, while the second component of Doherty J.'s test might, in a sense, transform litigation privilege from a class privilege into a case-by-case privilege in the short term, in the long term this approach will allow the parameters of litigation privilege to be more clearly delineated. In any event, examples of circumstances where the litigation privilege over ingathered documents might be deemed unfair should include:

(1) where the original record cannot be obtained by the opposing litigant through its own due diligence efforts (for example, where the original record has been destroyed and litigation privilege is being claimed over the only known copy);
(2) where locating the original record or obtaining a copy of the record would impose an undue hardship (financial or otherwise) on the opposing party;[90]
(3) where a party obtains the documents from another party who is technically adverse in interest in the litigation but who is in fact co-operating with the party claiming litigation privilege;[91] and
(4) where the party claiming litigation privilege obtained the records in question through an act of dishonesty or illegality.[92]

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protect the privacy of litigation strategy. It is difficult to imagine why this privacy would be more important in some cases than others so as to satisfy the standard of an "overriding need", at least not without once again asking whether the documents were obtained through the exercise of legal expertise or judgment.

90. This restriction on litigation privilege is identified in the definition of "work product privilege" in *Black's Law Dictionary*, 9th ed. (St. Paul: West Group, 2009), citing Charles Alan Wright et al., *Federal Practice & Procedure*, 2nd ed. (West, 1994), at 371, 373-74, as stating that an exemption to work product privilege applies where the "party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means".
91. For example, as in *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, *supra* note 69.

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92. *Ibid.*

Conclusion

At present, Canadian law does not provide a decisive answer to the question of when, or whether, litigation privilege attaches to ingathered documents. At most, existing case authorities are consistent in: (1) identifying the purpose of litigation privilege as a means of protecting a litigant's ability to strategize and to develop its case; and (2) illustrating the need to balance this goal against the objective of efficient litigation resolution which is served by broad disclosure obligations. When a Canadian solution to this problem is finally achieved, it must be one which accommodates these competing interests.

Considering the factors raised in the case law to date, I suggest that the best answer would be for the courts to presume that ingathered documents are privileged, subject to factors which make it impractical or unreasonable for the opposing litigant to obtain the documents by its own investigations. Nonetheless, until the question is definitively resolved by the courts, counsel should be discerning in claiming litigation privilege for ingathered documents, always bearing in mind the fact that litigation privilege relates to the reason for creating (and possibly ingathering) a record and is never determined by whether the contents of the record help or hinder one's case.

92. *Ibid.*