SOLICITOR CLIENT PRIVILEGE: THE CONTINUED DEVELOPMENT OF THE PRINCIPLES AND EXCEPTIONS

The Alberta Criminal
Trial Lawyers Association
- 25th Anniversary -
November 23, 2002

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I. THE REINFORCEMENT OF GENERAL PRINCIPLES

The first principles of solicitor-client privilege as this doctrine has evolved in the Canadian legal system were recently revisited by Mr. Justice Major in the Supreme Court of Canada decision, *R. v. McClure* (2001), 151 C.C.C. (3d) 321.[1] While noting there that some jurists and scholars disagree as to the origin of this distinctive privilege, Mr. Justice Major observed that it has become a substantive rule of law in Canada: *McClure*, *supra*, at 328. His Lordship described the history of the principle noting that, although solicitor-client privilege began in Canada as a rule of evidence, it has since been judicially elevated to a "fundamental civil and legal right": *McClure*, *supra*, at 329; see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p.836, and *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at p.383. Indeed, Mr. Justice Cory observed in *Smith v. Jones*, [1999] 1 S.C.R. 455, that solicitor-client privilege attracts *Charter* protection, and Mr. Justice Major referred to solicitor-client privilege in *McClure* as a principle of "fundamental justice": *McClure*, *supra*, at 334.

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[1] In *McClure* the accused was a school librarian who was facing various sexual offences charges brought by former students at the school, when another the complainant person read about these in the newspaper and, as a result, told the police that he also had been sexually touched by the accused. This complainant subsequently contacted a lawyer and brought a civil suit against the accused and the North York Board of Education. For the purpose of his defence at his criminal trial, McClure sought production of the complainant's civil litigation file, in order to identify the nature of the allegations the complainant had made to his lawyer, and to assess the extent of the complainant's motive to fabricate or exaggerate the alleged incidents of abuse.

Mr. Justice Major explained further in *McClure* that, owing to its "unique position in our legal fabric", solicitor-client privilege is the "most notable example of a class privilege": *McClure*, *supra*, at 330. Indeed, from a broad policy perspective solicitor-client privilege as a class privilege is considered to be *critical* to the effective operation of litigation, and by implication, the proper administration of justice. Without the protection of absolute confidentiality that this fundamental privilege affords to individuals with legal problems, such persons will be unwilling to provide complete and candid information to lawyers, who require such information to make professional judgments in their clients' interests, and upon whose very skills the modern legal system depends: see *McClure*, *supra*, at 332. Of course, this privilege extends only to those solicitor-client communications wherein the client is seeking lawful professional legal advice or assistance, and only the client, not the lawyer, may waive this privilege: *McClure*, *supra*, at 332-33.[2]

To the extent that solicitor-client privilege has acquired the status of a *right* held by clients of lawyers, like any right recognized in Canada's legal system, it is not absolute, but rather must yield to other legal interests where sound policy so requires. As Mr. Justice Cory (as he then was) explained in *Smith* v. *Jones* at 477,

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[2] This paper will not address the subject of waiver of solicitor-client privilege in any detail. Suffice it to say here that if a party or person has privilege in certain documents, that privilege can only be lost by waiver: see *M.(A.) v. Ryan*, [1997] 143 D.L.R. (4th) 1 at 6. "Waiver" of solicitor-client and other such privileges must be voluntary. It does not occur, for example, simply because a witness is forced to reveal the substance of privileged communications in response to cross-examination: see *Creswell, infra*, at para. 42. Similarly, in a civil context, waiver does not arise merely because a witness is forced to reveal confidential communications in the course of being cross-examined on his or her affidavit: *Gower v. Tolko Manitoba Inc.*, [2001] M.J. No. 39 (Man. C.A.) at para. 42.
Waiver can occur by words or by action: *R. v. Claus* (1999), 139 C.C.C. (3d) 47 (Ont. Sup. Ct. J.) at 53; *Campbell and Shirose, infra*. Solicitor-client privilege may be waived inferentially, notwithstanding the continued assertion of the claim: *Rossner v. Kelowna General Hospital*, [1997] B.C.J. No. 1273 (B.C.S.C.) at para.16; *Souter v. 375561 B.C. Ltd.*, [1994] B.C.J. No. 2623. In *Souter, supra*, the court held that the defendant had effectively waived solicitor-client privilege by raising the issue of the instructions he gave to his solicitor, even though these instructions were given during the conduct of litigation.

> Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.[3]

For Mr. Justice Major in *McClure*, given the centrality of solicitor-client privilege to the proper functioning of litigation in general, solicitor-client privilege must be "as close to absolute as possible": *McClure, supra*, at 332. In his view, "Solicitor-client privilege should be set aside only in the most unusual cases. Unless individuals can be certain that their communications with their solicitors will remain entirely confidential, their ability to speak freely will be undermined": *McClure*, *supra*, at 335. In *R. v. Brown* (2002) 162 C.C.C. (3d) 267, at para. 27, elaborating upon *McClure*, Mr. Justice Major repeated that "this Court views the invasion of the solicitor-client privilege to be serious, with the potential to restrict solicitor-client communications and thereby to undermine the public perception of the protection of the client in the legal system. Piercing solicitor-client privilege should be treated as an extraordinary measure, performed only in accordance with *McClure*".

II. THE INNOCENCE AT STAKE EXCEPTION AND SECTION 11(D) OF THE *CHARTER*

i. The Principles in Play

Bearing in mind Mr. Justice Cory's observation in *Smith* v. *Jones* that, in some situations, the robust character of the solicitor-client privilege may well have to yield to other "societal values", clearly one such value in our society is that people should not be

[3] The exception addressed in *Solosky* and *Smith v. Jones* was the "public safety" exception.

convicted and punished for crimes they did not commit. Accordingly, it is well accepted that a person accused of a crime should not be denied access to information which is capable of exonerating him or her. Since the advent of the Canadian *Charter of Rights and Freedoms*, this belief has become associated with the fundamental right of an accused person to a fair trial, as explained by Madam Justice McLachlin in *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 at 607:

> The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s.11(d) of the *Charter*. It has long been recognized that an essential facet of a fair hearing is the "opportunity adequately to state [one's] case"...This applies with particular force to the accused, who may not have the resources of the state at his or her disposal. Thus...our courts have held that even informer privilege and solicitor-client privilege may yield to the accused's right to defend himself on a criminal charge. (Citations omitted).

Mr. Justice Major stated this idea very concisely in *Brown*, wherein he remarked that "Canada's abhorrence at the possibility of a faulty convictions tips the balance slightly in favour of innocence at stake over solicitor-client privilege": *Brown*, *supra*, at para. 2. In *McClure*, he made the same point by saying that "Rules and privileges will yield to the *Charter* guarantee of a fair trial where they stand in the way of an innocent person establishing his or her innocence": *McClure*, *supra*, at 333.

The right to a fair trial as embodied in s.11(d) of the *Charter* has evolved jurisprudentially to involve considerations of one's right to life, liberty, and security of the person, as provided by s.7 of the *Charter*. Accordingly, both of these *Charter* rights are engaged where an accused person argues that his innocence is at stake by the

withholding of relevant solicitor-client communications. As Mr. Justice Major explained in *McClure,* at p. 344,

> The right of an accused to full answer and defence is personal to him or her and engages the right to life, liberty, security of the person and the right of the innocent not to be convicted. Solicitor-client privilege while also personal is broader and is important to the administration of justice as a whole. It exists whether or not there is the immediacy of a trial or a client seeking advice.

For Mr. Justice Major in *McClure* and *Brown*, the central importance of solicitor-client privilege in the administration of justice dictates that any attempt to intrude upon it in the form of an innocence at stake argument must have real merit. In *McClure*, His Lordship remarked that "the innocence at stake test should be stringent", such that the privilege should be set aside "only where core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction": *McClure, supra*, at 335. He further explained that "Before the test is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is unable to raise a reasonable doubt as to his guilt in any other way": *McClure*, *supra*, at 335. In *Brown*, he made the same point forcibly and simply by stating that the innocence at stake test "is intended to be a rare exception and used as a last resort": *Brown*, *supra*, at para. 3.

As with most statements of broad principle in criminal law and elsewhere, the articulation of the principle itself is much easier than the application of it to particular sets of circumstances. Mr. Justice Major effectively recognized this problem in *McClure* insofar as he considered the possibility that, when applying his stringent innocence at stake test, in some case, an accused person could be denied access to privileged solicitor-client

communications that "might raise a reasonable doubt" as to his guilt: *McClure*, *supra*, at 336. Such a situation could arise where, for example, the accused person could raise a reasonable doubt by virtue of alibi or identification evidence: *McClure*, *supra*, at 336. Of course, even this analysis is problematic to the extent that the ability of a certain line of defence or piece of evidence to raise a reasonable doubt cannot be predicted with any certainty, especially in a case involving complex evidence. The original motions judge in *Brown* expressly noted the difficulty of determining prior to trial whether the accused person in that case could raise a reasonable doubt about his guilt without access to an alleged confession by a previous suspect to legal advisors, as there was little basis on which to assess the accused's level of jeopardy: see *Brown*, *supra*, at para. 21. Indeed, as the evidence in a criminal case becomes more complex, the exculpatory or inculpatory value of any single piece of evidence will likely become more difficult to assess, in which case it becomes illogical to reason that relevant solicitor-client communications are categorically incapable of raising an existing level of doubt in the fact finder's mind to the required standard of a reasonable doubt. In this regard it is worth noting that, in deciding to order production of certain solicitor-client documents, the motions judge in *Brown* considered the "potential cumulative effect of evidence coming from multiple sources": see *Brown*, *supra*, at para. 24. Mr. Justice Major criticized this approach, however, and explained that, at para. 68,

> Cumulative effect might be a basis for allowing access to solicitor-client communications where the other evidence would not, in the absence of those solicitor-client communications, be able to raise a reasonable doubt. That is, cumulative effect should only be considered where, given their context, the solicitor-client communications help to make sense of the other evidence and thereby raise a reasonable doubt. A court may not allow these privileged

> communications to be admitted to breathe credibility into other evidence; it may do so only in order to breathe meaning into otherwise sterile facts.

In other words, Mr. Justice Major recognizes that the cumulative effect of admitting into evidence certain solicitor-client communications needs to be considered if such communications appear capable of shedding light on existing evidence, to the point where such evidence becomes capable of raising a *reasonable* doubt. The problem remains, however, that sometimes and perhaps often, simply making sense of banal facts will affect perceptions of witness credibility.

ii. The *McClure / Brown* Procedure

As already mentioned, if an accused person claims that his innocence is at stake, he must first establish that the information he is seeking from the solicitor-client communication is not available from any other source, and that he cannot raise a reasonable doubt as to his guilt without obtaining this information: *McClure, supra*, at 335; *Brown*, *supra*, at para. 4. In *Brown* the issue arose as to the meaning of "information" in this context. Must "information" here have a restrictive meaning, such as information having *evidentiary value*, or should it be given its ordinary dictionary meaning, such as knowledge of a fact? Mr. Justice Major reasoned that, for practical purposes, "information" in this context must extend to information that ostensibly provides a basis for the accused person's belief that the solicitor-client communications in question contain information capable of proving his innocence: *Brown*, *supra*, at para. 31. An accused person should not be expected to "magically divine" that exculpatory

information is contained in certain solicitor-client communications: *Brown*, *supra*, at para. 31.

On the other hand, Mr. Justice Major reasoned that an accused person should not be categorically denied access to probative solicitor-client communications just because the relevant information is available from another source: *Brown, supra*, at para. 32. Such information might not be admissible at trial for reasons unrelated to solicitor-client privilege. Accordingly, Mr. Justice Major concluded that "A *McClure* application should only succeed on the threshold question if the accused does not have access to other information that will be admissible at trial", and this information must be "more than simple knowledge of a fact": *Brown*, *supra*, at para. 35.[4]

If the accused person can meet the threshold test, then the court shall follow a two-step process in determining whether otherwise privileged information should be produced: *McClure, supra*, at 336; *Brown*, *supra*, at para. 4. The accused person must first provide some evidentiary basis upon which to conclude that a communication exists that *could* raise a reasonable doubt as to his guilt: *McClure, supra*, at 336.[5] If the accused person can do this to the court's satisfaction, then the judge will examine the materials in question and ask herself if they are *likely* to raise a reasonable doubt as to the accused

[4] In *Brown* Mr. Justice Major ruled that the motions judge "prematurely" decided that the desired information would be inadmissible through a particular witness, such that the accused person should be entitled to obtain the same information through solicitor-client communications: *Brown, supra*, at para. 40. Although the witness's testimony appears to have had real reliability problems, it could have been considered sufficiently reliable to be admitted under an exception to the hearsay rule. Moreover, if the *McClure* application were to fail, then the witness's testimony would become the *only* evidence capable of exonerating the accused person, and could be admissible as a matter of necessity: *Brown*, *supra*, at para. 40.

person's guilt: *McClure, supra*, at 336. At this stage the examining judge must confine herself solely to the written and oral contents of the lawyer's file, and for amplification purposes, may request an affidavit from the lawyer "stating either that the information contained in the files is a complete record of the communications in question or containing all other information necessary to complete the record": *Brown, supra*, at paras. 61, 62, 64, and 65. If the judge decides, in light of this information, that the communications are *likely* to raise a reasonable doubt as to the accused person's guilt, then she must order that the documents be produced.

III. THE SCOPE OF THE INNOCENCE AT STAKE EXCEPTION

Although it is now abundantly clear from *McClure* and *Brown* that the innocence at stake exception to solicitor-client privilege is to be applied stringently, and only in the most meritorious cases, innocence at stake has been applied in the courts of British Columbia fairly broadly. In *R. v. Creswell*, 2000 BCCA 583, the British Columbia Court of Appeal extended the applicability of the innocence at stake doctrine to situations where solicitor-client communications are considered relevant to establishing a valid abuse of process argument. The accused in *Creswell* had admitted that he had unlawfully laundered money, but argued that the illegal "reverse-sting" procedure by which he had been apprehended amounted to an abuse of process, requiring a remedy in the form of a stay of proceedings. Madam Justice Ryan reviewed a number of cases that addressed innocence at stake and concluded that "these cases support the notion that innocence at stake includes defending a charge on the basis that the unfair treatment of the accused

[5] In *Brown*, Mr. Justice Major ruled that evidence of a confession to a solicitor to the murder in question by a third party was, if sufficiently credible, capable of raising a reasonable doubt as to the guilt of the accused person: *Brown, supra*, at para. 59.

disentitles the Crown to carry on with the prosecution of the charge or charges": *Creswell*, *supra*, at para. 51. Indeed, Madam Justice Ryan made clear that innocence at stake bears a broader meaning than factual innocence (or innocence with respect to "the offences themselves"), and extends to innocence arising from police illegality amounting to an abuse of process, and possibly to police conduct amounting to entrapment: *Creswell*, *supra*, at paras. 47 – 51. Although Madam Justice Ryan recognized that the established law supported an expanded view of the *meaning* of innocence at stake she also very carefully maintained the then already established position that solicitor-client communications should be protected as fully as possible, and ruled that the trial judge erred in ordering disclosure of legal opinions provided by Department of Justice lawyers to police without first ensuring that the opinions were sufficiently edited to reveal only as much information as was necessary to enable proof of innocence: *Creswell*, *supra*, at para. 60.

Subsequently the British Columbia Court of Appeal was asked to consider the impact of *McClure* on *Creswell* in *R. v. Castro*, 2001 BCCA 507 leave to appeal denied, March 14, 2002, [2001] SCCA No.533. In *Castro* the accused person had become the focus of a police investigation as a result of an illegal undercover operation directed against others, and sought access to certain legal opinions to support an abuse of process argument. Disclosure of this information to the accused was denied to the accused at trial, but the British Columbia Court of Appeal ruled that "that there is a sufficiently close link between the illegal operation and these prosecutions to found an argument for a stay and

that the appellants are entitled to have the legal opinions considered in the disposition of their claim": *Castro*, *supra*, at para. 28.

As for the question of the impact of *McClure* on *Creswell* (and by implication, *Castro*), Mr. Justice Donald observed that *McClure* did not address the issue of *when* communications that would otherwise be privileged as solicitor-client should be disclosed in the context of a stay of proceedings application. *McClure* simply ruled that "the proper test for determining whether to set aside solicitor-client privilege is "innocence at stake", not *O'Connor*: [6] *Castro*, *supra*, at para.38. Accordingly, *McClure* and *Creswell* (and for that matter *Castro*) do not conflict in principle, and in British Columbia, "*Creswell* remains good law": *Castro*, *supra*, at para. 38.

Of course the underlying facts and specific issues in question in any proceeding remain paramount. In a recent police undercover case from Alberta, *McClure* was applied as authority in part for denying defence counsel requests for disclosure of a variety of communications and memos from the Crown prosecutor to file and to other persons, including investigating officers: *R. v. Mah*, [2001] A. J. No. 516 (Alta. Q. B.), at paras. 52 and 53. Having reviewed the memoranda and communications in question, and having listened to argument on point, Justice Sulyma did not find on the evidence that the communications supported defence counsels' claim that Crown counsel was purposefully

[6] Some confusion about solicitor-client privilege appears to have been generated by Mr. Justice Major's observation in *McClure* that an accused person's right to make full answer and defence can be curtailed by the privacy interest which a complainant or third party has in medical and therapeutic records: see *McClure*, *supra*, at paras. 43 and 44. In *McClure*, Mr. Justice Major made the simple point that the so-called *O'Connor* test was devised to ensure some degree of privacy or confidentiality for persons with records of medical or therapeutic treatment, when accused persons seek access to these records in the name of their constitutional right to make full answer and defence.

obfuscating disclosure and attempting to prejudice the accused persons' ability to prepare for their defence. It is perhaps noteworthy that Justice Sulyma did not consider *Creswell* or its progenitor, *R. v. Campbell and Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.).

IV. Crown Disclosure Duties: The Scope of Work-Product Privilege

i. The Content of Work-Product Privilege

Work product privilege is sometimes also called "solicitor's brief privilege", "litigation privilege" or "litigation purpose privilege". The rationale for this privilege, as well as its general description, is provided in the leading American authority of *Hickman v. Taylor*, where Murphy J. stated:

> 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 as 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.
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> *Hickman v. Taylor*, 329 U.S. 495 (1947), at 510-511

The same sort of justification for work product privilege has been accepted in Canada, a typical pronouncement coming from O'Leary J. in *Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co.*:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel.

Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 O.R. (2d) 637 (Div. Ct.), at 643
J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada*, 2nd ed., Toronto: Butterworths, 1999, at §5.63, at pp. 166-167
D. Paciocco and L. Stuesser, *The Law of Evidence*, 3rd ed., Toronto: Irwin Law, 2002, at pp. 197-198

A growing number of Canadian courts have recognized the existence of Crown work product privilege in the criminal context. Much of the case law in this regard is canvassed in two recent decisions of the Alberta Queen's Bench, *R. v. Trang* and *R. v. Chan*. In the criminal setting, work product privilege claimed by the Crown generally includes Crown counsel's preparatory notes, memoranda and correspondence on a file, as well as his or her trial strategy and opinion as to various aspects of the case. With respect to a Crown claim, it has been said that work product privilege is "rooted in analysis, not investigation" and comprises "fruits of the mind, not the feet".

R. v. Stewart, [1997] O.J. No. 924 (G.D.), at para. 33
R. v. Chan (2002), 164 C.C.C. (3d) 24 (Alta. Q.B.)
R. v. Trang (2002), 50 C.R. (5th) 242 (Alta. Q.B.)
United States v. Nobles, 422 U.S. 225 (1975)
Report of the Attorney-General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, 1993, ("the Martin Report") Recommendation 15

Federal Prosecution Service Deskbook, Department of Justice, 2000, §18.5.8
I. Carter, "Chipping Away at *Stinchcombe*: the Expanding Privilege Exception to Disclosure" (2002), 50 C.R. (5th) 332, at pp. 334-335

ii. Work-Product Privilege as Sub-set or Independent of Solicitor-Client Privilege?

With respect, in the author's view, the strong preponderance of contemporary legal authority and academic commentary in Canada recognizes that work product privilege is *not* identical to solicitor-client privilege. Solicitor-client privilege aims to encourage candid communications between client and counsel, and so to foster the provision of legal advice within a confidential relationship. Work product privilege has a different goal, namely, to permit parties to prepare for litigation in an adversarial system without the risk of disclosing opinions, analyses and strategies to the other side. The object of work product privilege is thus to create a zone of privacy for the lawyer in preparing a case in an adversarial system. Work product privilege does not concern communications between a client and counsel. Moreover, and in especially sharp contrast to solicitor-client privilege, work product privilege only arises once litigation is reasonably foreseen, and will not apply unless the work in question was performed for the dominant purpose of litigation. Furthermore, as will be discussed further below, work product privilege ends once the litigation has concluded, which is hardly surprising given that the reason for its existence will have ended. These distinctions serve to emphasize that work product privilege exists to foster an adversarial process designed to arrive at the truth in litigation, while solicitor-client privilege promotes confidential communications between client and counsel.

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241 (Ont. C.A.), at 253-260, 285-293, 295
Edgar v. Auld (2000), 184 D.L.R. (4th) 747 (N.B.C.A.)
Gower v. Tolko Manitoba Inc. (2001), 196 D.L.R. (4th) 716 (Man. C.A.)
R. v. Chan, supra, at 45-48
R. v. Card, [2002] A.J. No. 737 (Q.B.), at paras. 7, 12-21
College of Physicians and Surgeons of B.C. v. Information and Privacy Commissioner of B.C. (2001), 90 B.C.L.R. (3d) 299 (S.C.), at para. 87
R. v. Peruta (1992), 78 C.C.C. (3d) 350 (Que. C.A.), at 367
R. Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, L.S.U.C. Special Lectures, Toronto: De Boo, 1984, at 163

G. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 Can. Bar Rev. 315
Sopinka, et al, *The Law of Evidence in Canada, supra*, at §14.75, pp. 745-746
D. Paciocco and L. Stuesser, *The Law of Evidence*, 3rd ed., Toronto: Irwin Law, 2002, at pp. 197-198
contra J. Wilson, "Privilege in Experts' Working Papers" (1997), 76 Can. Bar Rev. 346

There is judicial commentary in British Columbia that views work product privilege as a subset of solicitor client privilege, a view which at first blush holds the potential to blur the distinctions between the two privileges. In *Hodgkinson v. Simms*, the Court of Appeal was asked to decide whether copies of documents made by a lawyer were privileged despite the fact that the originals were not so privileged. In holding that privilege applied to the copies, Chief Justice MacEachern observed that:

> Similarly, I do not find it helpful to attempt a distinction between solicitor privilege and the "lawyer's work product" that was recognized by the United States Supreme Court in the leading case of *Hickman v. Taylor* (1946), 329 U.S. 495, and which distinction some commentators attempt to extract from some of the cases: "Civil Litigation Trial Preparation in Canada," Neil J. Williams, 1980, 58 C.B.R. 1 at p.50. "Lawyer's work product" is a convenient term to describe the kinds of material that, subject to controlling authorities such as *Voth*, *infra*, are protected by privilege, but I see no need to recognize a separate category of immunity against production.
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> ...
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> Thus it appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely: (a) confidential communications with a client; and (b) the contents of the solicitor's brief, it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquires and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.
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> *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C.C.A.), at 580 and 583
> *R. v. Trang, supra,* at para. 83
> *cf. R. v. Lavallee* (2000), 143 C.C.C. (3d) 187 (Alta C.A.), at 209-210
> *Hoy v. Medtronic Inc.*, [2001] B.C.J. No. 1332 (B.C.S.C.), at paras. 52-53

It is instructive to isolate several important features of the decision in *Hodgkinson v. Simms*. First, on the facts of the case the copies in question appear to have been available

to the party seeking discovery. Chief Justice MacEachern was particularly unimpressed with the argument against privilege, and by extension against "trial by ambush", given that the documents had been collected from public sources by virtue of the enterprise and hard work of the privilege-claiming party's lawyer. The moving party had made no serious effort to undertake the same investigation. Second, the classification of work product privilege as a subset of solicitor-client privilege was not necessary to the decision in *Hodgkinson v. Simms*. The holding that privilege applied to the copies was by no means dependent upon a finding that work product and solicitor-client privileges are subsets of a single privilege. Third, and vitally, the case occurred in the context of civil litigation. The Court of Appeal was not faced with a situation where one of the parties had a special duty to provide disclosure to the opposing litigant, as is the case for the Crown in every criminal matter.

It is necessary to elaborate upon this last point, which strongly suggests a need to modify the application of *Hodgkinson v. Simms* in the criminal law context. *Stinchcombe* and its progeny, decided subsequent to *Hodgkinson v. Simms*, clearly establish that the Crown has a duty to disclose all relevant information to the defence in criminal cases. Lawyers acting in a civil litigation matter have no such duty. This special obligation of the Crown means that the reasoning in *Hodgkinson v. Simms* must be tailored or customized for use in criminal matters. To take an example, case law decided after *Stinchcombe* holds that Crown Counsel must disclose new information obtained from a witness during a trial preparation interview. Importing *Hodgkinson v. Simms* into the criminal arena absent modification would arguably situate this sort of new information within a global solicitor-client privilege so as to bar disclosure. Such a restrictive interpretation of the Crown disclosure application is obviously contrary to the law as applied by Canadian courts, and consequently must be incorrect.

R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.), at 45
R. v. Brown, [1997] O.J. No. 6163 (G.D.), at para. 9
R. v. Trang, *supra*, at paras. 69-71
R. v. Regan (1997), 174 N.S.R. (2d) 72 (N.S.S.C.), at paras. 37-43
R. v. Lalo (2002), 206 N.S.R. (2d) 108 (S.C.), at paras. 9, 25, 30-35
R. v. Johal, [1995] B.C.J. No. 1271 (S.C.)
R. v. Dempsey, [2000] B.C.J. No. 2787 (S.C.), at para. 7

College of Physicians and Surgeons of B.C. v. Information and Privacy Commissioner of B.C., *supra*, at paras. 86-95
The Martin Report, *supra,* Recommendation 15
Carter, "Chipping Away at *Stinchcombe*: the Expanding Privilege Exception to Disclosure", *supra*, at pp. 336-337, 342

The same point can be made by considering how disclosure principles would apply if the facts in *Hodgkinson v. Simms* were to arise in a criminal case circa 2002. Suppose that the Crown undertook an extensive investigation aimed at obtaining information from various public archives, either using its own resources or employing those of the police (who in turn have a unique ability to obtain information, for instance, through use of statutory processes, information-sharing arrangements with other law enforcement agencies and moral suasion). Also suppose that all documents so discovered were copied for use by the Crown, the originals being left in the location in which they were discovered. On these facts, there is absolutely no doubt that *Stinchcombe* would apply to require disclosure to the accused of both the copies and information revealing the location of the originals. In short, replication of the *Hodgkinson v. Simms* facts in the criminal context post-*Stinchcombe*, with the Crown claiming work product privilege, would lead to an order for disclosure.

The Crown disclosure obligation in criminal matters is intimately linked to the special role played by the Crown as prosecutor. In civil litigation, private litigants, with equal access to the means to obtain data, have significant freedom to utilize the adversarial features of the justice system. The situation changes dramatically, however, with respect to the Crown in criminal proceedings. The Crown has a unique function in the criminal justice process, derived from the fact that the Crown lawyer's notional client is a public that seeks the attainment of justice as opposed to victory in court. Justice must be done in a fair and impartial manner, within a system that both searches for truth and values the protection of individual rights. The prosecutor thus shuns the brand of zealous advocacy typically demanded of defence lawyers or civil litigators. In this sense, the prosecutorial function has been termed "quasi-judicial" or "administrative", the Crown lawyer acting in a "magisterial fashion" as a "minister of justice". This is not to say that the Crown

completely ignores strategy and tactics within the adversarial setting. Yet adversarial zeal is undeniably muted with respect to the Crown prosecutorial function.

> *R. v. Boucher* (1955), 110 C.C.C. 263 (S.C.C.), at 270
> *R. v. Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.), at 125-126 (per the majority) and 152, 156-158 (per the minority)
> *College of Physicians and Surgeons of B.C. v. Information and Privacy Commissioner of B.C., supra,* at paras. 86-95
> *British Columbia Handbook of Professional Conduct*, c. 8 rule 18 CBA *Code of Professional Conduct*, c. IX comm. 9
> Carter, "Chipping Away at *Stinchcombe*: the Expanding Privilege Exception to Disclosure", *supra*, at pp. 337-338

Moreover, some Crown duties are exercised in a non-adversarial setting, under circumstances where no opponent is present to make counter-arguments and no judge is available for the purpose of reining in overly aggressive conduct. Such duties call for unwavering neutrality and do not permit the kind of strategy and tactics employed during the course of a trial proceeding. A paradigmatic example of this sort a duty is the charging decision, which is almost always made by the prosecutor in private, without the benefit of a response by defence counsel or scrutiny by a neutral judge. Prosecutorial charging decisions must therefore demonstrate a high degree of neutrality, fairness and consistency, the Crown lawyer acting primarily in a quasi-judicial and non-adversarial role.

> D. Butt, "Malicious Prosecution: *Nelles v. Ontario*: Rejoinder – John Sopinka – [1994] 74 Can. Bar. Rev. 366" (1995), 75 Can. Bar Rev. 335 at 337-343
> G. Mitchell, "'No Joy in this for Anyone': Reflections on the Exercise of Prosecutorial Discretion in *R. v. Latimer*" (2001), 64 Sask. L. Rev. 491 at 497

The Crown disclosure obligation and the legal and ethical limitations placed upon the Crown as prosecutor together justify a sophisticated analysis of work product privilege that accommodates the very real distinctions between the civil and criminal litigation contexts. *Hodgkinson v. Simms* is perfectly amenable to such an approach. At bottom, Chief Justice MacEachern merely suggests that communications between client and lawyer for the purpose of obtaining legal advice (solicitor-client privilege) and work done by a lawyer for the dominant purpose of preparing for litigation (work product privilege)

constitute two subsets of a capacious legal-professional privilege. It does not follow from this approach, however, that the two subsets need be treated exactly the same insofar as deciding whether the privilege applies, nor that work product privilege should be applied in the same manner in civil and criminal litigation. That is to say, even if work product privilege is classified as a subset of a broader legal-professional privilege, this particular arm of the privilege should yield more easily than will solicitor-client communications made for the purpose of obtaining legal advice, most especially where the privilege claimant is the Crown prosecutor in a criminal proceeding.

> *College of Physicians and Surgeons of B.C. v. Information and Privacy Commissioner of B.C., supra,* at para. 87
> *R. v. Chan*, *supra*, at 39-42, 57-58
> *R. v. Card*, *supra*, at paras. 7, 12-21
> *cf. R. v. Trang*, *supra*, at paras. 64-83
> *cf. R. v. DeRose* (2000), 264 A.R. 359 (Q.B.)

Applying a different standard with respect to work product privilege claimed by the Crown, as opposed to private litigants, is by no means unprincipled or foreign to our criminal justice system. To the contrary, the Crown and accused are frequently treated differently with respect to criminal procedure and even rules of evidence. Speaking very generally, the principle against self-incrimination and its corollary rights create many rules that apply differently to accused and Crown (e.g., the Crown bears the standard of proof beyond a reasonable doubt, whereas the accused ordinarily bears no persuasive legal burden at all). The *Stinchcombe* disclosure obligation is itself a prime example of an obligation being owed by the Crown but not the accused. An example of differential treatment concerning admissibility issues occurs with respect to the hearsay rule, which tends to be less strictly applied where the defence seeks to rely upon hearsay evidence.

> ss. 7, 10, 11 and 13 *Charter*
> *R. v. Folland* (1999), 132 C.C.C. (3d) 14 (Ont. C.A.), at 31-32

iii. Determining When a Crown Claim for Work Product Privilege Must Yield

In the author's view, the Crown disclosure obligation, conjoined with the Crown's special role as "minister of justice" serving the public interest when conducting a prosecution,

operates to define or delimit Crown claims for work product privilege in criminal matters. In practical terms, the result is that work product privilege will be defeated whenever the accused can meet the relevance threshold described in *Stinchcombe*. Applying the ordinary *Stinchcombe* test to work product privilege makes perfect sense in light of the fact that Crown work product is irrelevant to full answer and defence, and thus not subject to disclosure, in the vast majority of cases. For instance, a Crown lawyer's opinion as to a particular aspect of the case (e.g., the credibility of a witness or the strength of the prosecution evidence as a whole) is usually of absolutely no moment to any live issue raised before the jury or on a *Charter* application. In this sense, disclosure of work product privileged material will almost always be denied because the accused is unable to meet the initial *Stinchcombe* relevance threshold.

> *R. v. Johal*, [1995] B.C.J. No. 1271 (S.C.), at para. 4-5
> *contra R. v. Chan, supra,* at 58
> The Martin Report, *supra,* at p. 252

In the alternative, to the extent that an accused is required to meet a standard more onerous than the initial test in *Stinchcombe* in order to obtain disclosure of work product privileged material, a simple balancing test should be employed. Such an approach was recently taken by the Alberta Queen's Bench in *R. v. Chan*, where Madame Justice Sulyma set out the following procedure for the determination of disclosure applications where work product privilege is claimed by the Crown:

> The following procedures will apply in the *voir dire* in terms of Crown's claims of work product privilege:
>
> 1. The Crown has the onus of establishing that the privilege applies. The Crown and defence may call evidence and make submissions as to whether the information is subject to work product privilege.
>
> 2. Where the Crown fails to establish the material is privileged, disclosure will be ordered.
>
> 3. If the Crown establishes the privilege, the onus shifts to the defence to establish waiver or that the information sought might possibly affect the outcome of the trial. This is a very broad relevance test. Both the defence and the Crown will be given the opportunity to adduce evidence and make submissions in this regard, with the defence going first.

4. If the Court finds the privilege was waived, disclosure will be ordered.

5. If the Court finds the privilege was not waived but the information sought might possibly affect the outcome of the trial, it will review the privileged communication;

6. After the Court reviews the information, the Crown and defence will be given the opportunity to make submissions on the factors to be taken into account in balancing the right of the applicants to make full answer and defence and the right to assert work product privilege.

7. Where the Court finds the right of the applicants to make full answer and defence is paramount in the circumstances, disclosure will be ordered.

8. Before disclosure is ordered in any of these circumstances, the Crown will be given an opportunity to determine whether it wishes to disclose the material and continue with the prosecution or stay the proceedings.

Notably, points 6 and 7 provide that privileged materials will be ordered disclosed where the accused's right to full answer and defence outweighs any countervailing interest in keeping work product privileged materials secret.

R. v. Chan, supra, at 59
R. v. Giroux, [2001] O.J. No. 5495 (S.C.J.), at paras. 38-42

It is emphasized that when balancing the right to full answer and defence against similar privilege claims the British Columbia Court of Appeal has consistently ordered disclosure as a means of ensuring both the protection of individual rights and the proper functioning of government.

R. v. Gray (1993), 79 C.C.C. (3d) 332 (B.C.C.A.), leave refused (1994), 83 C.C.C. (3d) vi
Canada (Attorney General) v. Sander (1994), 90 C.C.C. (3d) 41 (B.C.C.A.)

V. STATUTORY INTRUSIONS

i. The *Criminal Code* s. 488.1

The great judicial debate as to the validity of *Code* s. 488.1 has now been concluded with the Supreme Court of Canada's September 12, 2002 decision in *Lavallee v. Canada* (2002) 167 C.C.C. (3d) 1.

ii. The *Criminal Code* s. 487

Whether or not *Code* s. 487 remains valid in respect to law office searches, in light of the *Lavallee* guidelines, remains open in light of the Supreme Court of Canada's post-*Lavallee* (Oct.11,2002) remand of the Crown's leave application from the British Columbia Court of Appeal suspension of Code s. 487 for law offices in *Festing v. Canada* [2001] B.C.J. No. 2278 . The referral of the *Festing* decision back to the B.C.C.A. for reconsideration in light of *Lavallee* will no doubt lead to that Court considering (commencing Dec.17,2002) whether *Code* s.487 provides sufficient protection for privileged materials in both law office searches and in searches of other premises in which there are reasonable grounds to believe that privileged materials may be found.

iii. Proceeds of Crime Investigations Within the Law Office

The outcome of the Supreme Court of Canada's decision in *R. v. Charron* (2002) 161 C.C.C. (3d) 64, leave granted May 16, 2002, will be of particular interest to the criminal defence bar. In that case the Quebec Court of Appeal found that it depends upon context

as to whether the amount of fees paid to a lawyer (but not the description of services) is privileged in the context of a proceeds of crime investigation of the target/client.

iv. The *Proceeds of Crime (Money Laundering) Act*

Finally, the judgment of Madam Justice Allen in *Law Society of British Columbia v. Canada (Attorney General)*, 2001 BCSC 1593, affirmed 2002 B.C.J. 130 (BCCA); leave to appeal granted April 25, 2002, [2002] S.C.C.A. No. 52, and its progeny in other provinces, suspending the effect of the reporting requirements of s. 5 of the Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations SOR 2001 – 317 mean that there is very much yet to come in this most important and interesting area of our law. The trial of the validity of these provisions is now set to commence June 2, 2003.