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ACCIDENTAL WAIVER OF PRIVILEGE

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INTRODUCTION

In the 17th century John Selden metaphorically referred to the length of the Chancellor's foot when describing how the exercise of discretion by the courts can lead to variable and unpredictable results:

> What one person's conscience dictated, in Selden's view, was no more consistent with another person's conscience that the length of their feet might be the same. The result you got in court might as well depend on the length of the Chancellor's foot. Selden called such equity a "roguish thing".
> (*R. v. Lewandowski*, 2010 NSPC 37 at para. 16).

As discussed below, questions of waiver of privilege often involve assessment of fairness: is it fair that one party should have access to otherwise privileged records of another party given the conduct of that other party?

Although a number of guiding principles apply to questions of waiver, predicting the outcomes of particular cases can be difficult, partly because the outcome is influenced by the court's somewhat personal assessment of fairness. Indeed, Wigmore has commented that it is difficult to predict exactly when fairness will require waiver:

> What constitutes a waiver by implication?...Judicial decision gives no clear answer to this question.
> (Wigmore, J., *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, revised by McNaughton et al. (Boston: Little, Brown & Co., looseleaf) at 635-636, para. 2327).

With the above caution in place, this paper tackles the question of waiver in two parts: the first part summarizes general principles of waiver of privilege and the second part discusses cases which have applied those principles in various situations.

As will be seen the question of waiver can arise in a myriad of contexts, not all of which are identified in this brief (considering the breadth of the topic) paper which is provided as an adjunct to a one hour CLE TV presentation. For the situations of waiver discussed, this paper typically presents just one or two cases; readers can consult chapters 11 (solicitor-client privilege) and 12 (litigation privilege) of Hubbard, Magotiaux & Duncan, *The Law of Privilege in Canada* (Aurora: Canada Law Book, looseleaf) for detailed discussion of many cases dealing with waiver of privilege in various contexts.

PART I: GENERAL PRINCIPLES OF WAIVER

Definition of waiver

The Supreme Court of Canada has approved of the definition of wavier stated in Black's Law Dictionary and described waiver as the relinquishment of a right:

> The essential problem for the appellants, it seems to me, lies in the nature of waiver. "Waiver" is described in *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, at p. 1876, as follows:
>
> A person is said to waive a benefit when he renounces or disclaims it . . . .
>
> In *Black's Law Dictionary* (5th ed. 1979), the following appears at p. 1417:
>
> > **Waiver.** The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact . . . . The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege . . . .
> >
> > Waiver is essentially unilateral, resulting as legal consequence from some act or conduct of party against whom it operates, and no act of party in whose favor it is made is necessary to complete it.
>
> Simply put, waiver does not confer rights, it repudiates them. If you waive your right to A, it does not mean that you are entitled to B. It means only that you are no longer entitled to A.
>
> (*R. v. Turpin*, [1989] 1 SCR 1296).

Test for waiver: knowledge of privilege combined with intention to waive, or fairness

Waiver of privilege occurs when the privilege holder, or his or her agent, voluntarily performs acts which, considered objectively, demonstrate an intention to waive privilege:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.
> (*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CanLII 407 at para. 6 (BCSC), per McLachlin J. as she then was).

A succinct summary of how waiver may occur, and a candid acknowledgement of the wide variety of circumstances that may result in waiver, was provided by the Alberta Court of Queen's Bench as follows:

> Waiver of a privilege may occur either expressly, inadvertently, by implication or where fairness requires it. It is not possible to enumerate all the instances when waiver may be found to have occurred, nor is it necessary here.
> (*Western Canadian Place Ltd. v. Con-Force Products Ltd.*, 1997 CanLII 14770 at para. 20 (ABQB)).

That same court commented (in a case not dealing with inadvertent disclosure) that fairness has indeed become the key consideration when assessing waiver of privilege:

> There are cases where disclosure of privileged material was inadvertent, but in those cases, waiver was required because fairness demanded it. Indeed, it is likely that fairness has become the dominant test for waiver rather than intention.
> (*Western Canadian Place Ltd. v. Con-Force Products Ltd.*, 1997 CanLII 14770 at para. 35 (ABQB)).

Intention to waive may be inferred from conduct

The test for whether a party has voluntarily evinced an intention to waive privilege is not subjective:

> I note that the insurance adjuster in charge of the file indicates that he never intended to waive the privilege. I have no doubt that that is correct. But that is not the test. His intention is basically irrelevant. It is a more objective test of whether or not the privilege has been waived.
> (*Maier v. Fischer*, 2004 BCSC 196 at para. 23).

Rather, the standard is objective and an intention to waive may be inferred from the conduct of a party:

> A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.
> (*Hub International Limited v. Tolsma*, 2008 BCCA 500 at para. 23 citing Wigmore on Evidence, McNaughton Revision (1961), Vol. 8, pp. 635-36).

However, there must always be some voluntary act from which an intention to waive privilege can be inferred:

> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived.
> (*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CanLII 407 at para. 10 (BCSC) per McLachlin J. (as she then was)).

Fairness is a key consideration

Unfair to allow use of privilege as a sword and shield

It is unfair to allow a party to take a position and then, using privilege as a shield, prevent the opposition from exploring the validity of that position:

> It would be unfair to permit a party who has set up a claim or defence based on privileged communications to preclude his opponent from discovering against that

> claim by relying on the privilege. If privilege were successfully raised, the opponent would be left with no reasonable method of exploring the validity of the claim or defence.
> (*Petro Canada Oil & Gas Corp. Ltd. v. Resource Service Group Ltd.* (1988), 59 Alta. L.R. (2d) 34 (Q.B.)).

Relevance is a pre-requisite for, but does not necessarily lead to, waiver
Fairness will not require disclosure of information that is not relevant:

> What is sought to be disclosed involves a tangential issue that is not directly related to the issue to be determined on the contempt application. Fairness dictates that requests for access to non-material information do not satisfy the waiver test.
> (*Hub International Limited v. Tolsma*, 2008 BCCA 500 at para. 27-28).

However, the fact that the disclosed information is relevant will not necessarily lead to a conclusion that waiver has occurred:

> [P]rivilege is not lost simply because the inadvertently disclosed documents are relevant to the action…Just because privileged documents prove to be particularly useful to the receiving counsel does not mean that solicitor-client privilege has been lost.
> (*Chan v. Dynasty Executive Suites Ltd*., 2006 CanLII 23950 at para. 23 (Ont. SC)).

The fairness analysis involves consideration of all factors, including relevance, and relevance will only be determinative if the information the party claiming waiver seeks access to is not relevant.

In the case of legal advice privilege, the issue must be important
The right to keep solicitor-client communications confidential is a fundamental principal of law and so legal advice privilege will not be lightly set aside. Accordingly, it has been said that the disclosure must be important to the proper determination of the issues to justify waiver of legal advice privilege:

> Thus, on the basis of [*Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC)], where a third party (to the solicitor and the client) wishes to introduce a confidential communication between the solicitor and his client into evidence, and privilege has not been waived (i.e., it has been inadvertently released), the party wishing to introduce the evidence will have the onus of satisfying the judge that the evidence is important to the issues in the case and that no other form of evidence is available which would serve the same purpose.
> (*Metcalfe et al. v. Metcalfe*, 2001 MBCA 35 at para. 26).

Mere reference to a state of affairs on which the asserting party may have received legal advice will not result in waiver of legal advice privilege:

> [A] mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege.
> (*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2004 BCCA 512 at para. 19).

Further, passing reference to legal advice having been received will not result in waiver of solicitor-client privilege:

> To deny the client's privilege in the circumstances of this case would result in a loss of the privilege in most cases and would generally inhibit a client from giving evidence in his cause or producing relevant documents which contain passing references to the need to consult one's solicitor. Production of the documents on this ground must be refused.
> (*Pax Management Ltd. v. A.R. Ristau Trucking Ltd.*, 1987 CanLII 153 at page 10 (BCCA)).

Rather, for legal advice privilege to be waived there must be an issue which in all fairness (in light of the information disclosed, or position taken by the waiving party) the opposition is entitled to explore even though that requires disclosure of otherwise privileged information.

Waiver more easily found in the case of litigation privilege
Courts have acknowledged that since legal advice privilege is more sacred than litigation privilege, waiver may be more readily found in the case of litigation privilege:

> [T]he nature of the privilege determines the level of protection the document receives. Litigation privilege typically receives less protection because it relates to the litigation process rather than the solicitor-client relationship itself… It must therefore follow that the standard for finding that an accused has waived privilege over a document protected by litigation privilege should be proportionately less stringent than one for finding a waiver of solicitor-client privilege.
> (*R. v. Fast*, 2009 BCSC 1671 at para. 34).

Extent of waiver
Because waiver is controlled by fairness, waiver only occurs to the extent fairness requires, which is usually only over the communication, or issue, in question:

> Limiting the waiver of privilege to the matters put in issue is also consistent with the proposition in [*Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC),] that the degree of interference with issues of privilege should be limited to what is necessary to ensure fairness.
> (*Biehl v. Strang*, 2011 BCSC 213 at para. 47).

Similarly:

> When privilege is waived, the question then becomes to what extent. In *Souter v. 375561 B.C. Ltd.*, 1995 CanLII 843 (BCCA) at paras. 24-25, the court rejected the proposition that a loss of privilege over one aspect of a client's file would result in a complete loss of privilege as between the client and its lawyers. Rather, as already stated, privilege is waived only with respect to materials pertaining to the specific subject matter in question: *W. Johnston Equities Ltd. v. Allen*, 2012 BCSC 414 at para. 29. Thus, the existence and extent of any waiver is a question of fact to be determined according to its relevance to the matters at issue…
> (*McDermott v. McDermott*, 2013 BCSC 534 at para. 117).

Courts have even drawn a dividing line between instructions to the solicitor, and advice back in response to those instructions. In *Lefebvre v. Robert Stierle,* 1996 CanLII 3509 (BCSC) a party being examined for discovery described the instructions he had given to his lawyer and privilege over that information was found to have been waived (para. 9), but the court found that privilege had not been waived over the advice the lawyer provided in response to those instructions:

> Clearly, nowhere in the pleadings do the plaintiffs allege that they adopt a certain position because of legal advice, nor do the answers of Mr. Hansen in the examination for discovery go so far as to open that door.
>
> Solicitor/client privilege has been waived by Mr. Hansen with respect to the communication of instructions from himself to Ms. Chee. There has been no waiver of privilege over the advice Ms. Chee gave to Mr. Hansen.
>
> (*Lefebvre v. Robert Stierle,* 1996 CanLII 3509 at para. 17-18 (BCSC)).

Waiver cannot be retracted

In light of the fact that fairness is a consideration in finding a waiver of privilege, it is not surprising that courts have held that waiver cannot be retracted:

> [O]nce a waiver of privilege has been made it cannot be retracted. This is a logical consequence of the waiver, as being able to retract it would result in untenable litigation advantages and general unfairness.
> (*Mayer v. Mayer*, 2012 BCCA 77 at para. 185).

In *Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 (BCSC) plaintiff's counsel representing clients in a real estate dispute over a number of properties in Vancouver swore an affidavit in defence to a court application. After the defendant took the position that privilege had been waived plaintiff's counsel said that he would not rely on the affidavit but would provide a second set of material not sworn by the solicitor. The court held that the waiver could not be undone:

> The damage was done when the material was filed. The Plaintiffs cannot avoid the damage by simply filing more material after the fact or indeed in hindsight, saying that this was an error, we want to try and change our position. It matters not whether the second set of material filed to shore up the position is done in a response to a challenge from the Defendant. The damage is done, the privilege is waived once the first material is filed.
> (*Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 at para. 13 citing the reasons of the master whose conclusions were upheld (BCSC)).

Authority to waive privilege

Solicitor client privilege belongs to the client:

> [Solicitor client privilege] belongs to the client and can only be asserted or waived by the client or through his or her informed consent…
> (*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61 at para. 39).

In the case of joint retainers, the privilege belongs jointly to the clients and cannot be waived by one of them:

> An additional complicating factor is the fact that the file to which the plaintiff seeks access contains joint or common reports to the two sets of clients, and information and documents which are subject to solicitor-client privilege of all of them. Any waiver of privilege would have to come from both sets of clients.
> (*Turner v. Rhodes*, 1998 CanLII 5723 (BCSC)).

It has also been held that settlement privilege cannot be unilaterally waived by one of the parties to the settlement communications:

> The law encourages settlement, and accordingly permits the parties to exchange correspondence with a view to resolving their disputes…This correspondence may not be used in evidence if the settlement efforts fail. On the other hand, if an agreement of settlement is reached, the correspondence can be used to prove the settlement contract. The privilege that attaches to correspondence in furtherance of settlement belongs to both parties, and it cannot be unilaterally waived by either one of them.
> (*Pinder v. Sproule*, 2003 ABQB 33 at para. 11).

A client's agent can also waive privilege:

> [I]t is only the client or the client's agent or successor who can waive the solicitor-client privilege…
> (*Metcalfe et al. v. Metcalfe*, 2001 MBCA 35 at para. 13).

Acts of counsel, such as drawing a pleading that put the client's state of mind in issue may result in wavier of privilege. In such circumstances the act of counsel is considered to be an act of the client under the principle of agency.

Regretful counsel have argued that the they did not have instructions to perform the act said to constitute waiver and therefore their clients could not have intended waiver, but that argument has been rejected. In *Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 (BCSC) plaintiff's counsel representing clients in a real estate dispute over a number of properties in Vancouver swore an affidavit when his clients were not available to do so. The plaintiffs argued that privilege should not be taken to be waived because they did not know that their counsel had sworn the affidavit and that he did not have actual authority to swear the affidavits:

> The appellants [plaintiffs] submit that the Master was clearly wrong in holding that solicitor-client privilege had been waived in circumstances where the plaintiffs themselves were unaware of the affidavits. The Master held that since, at all times, the solicitor is and was the agent of the plaintiffs, he was implicitly authorized to proceed as he did whether with or without their instructions. The appellants say that while Mr. Cheung was indeed their agent with respect to this proceeding, since they were unaware that the two affidavits were being made, and since the affidavits were made only as a result of a difficulty on Mr. Cheung's part in getting in touch with them, it cannot be said that Mr. Cheung acted under their actual authority.
> …

> In order to be bound by their solicitor's ostensible authority, the appellants say it must be shown that:
> (i) the plaintiffs made a representation with respect to authority;
> (ii) there was reliance by the defendant on the plaintiffs' representation; and
> (iii) there was an alteration in the defendant's position resulting from such a reliance.
> Here, the appellants say that the defendant has not actually relied on either the two affidavits and has not altered its position as a result of the receipt of either affidavit.
>
> (*Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 at para. 15 and 17 (BCSC)).

The British Columbia Supreme Court chambers judge rejected the agency argument and upheld the ruling of the master in finding that privilege had been waived. In doing so it was held that reliance by the receiving party is not a requirement for waiver of privilege:

> Reliance on disclosed evidence which would otherwise be subject to privilege is irrelevant to the question of whether its disclosure results in waiver of the privilege.
> (*Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 at para. 21(d) (BCSC)).

PART II: EXAMPLES OF WAIVER IN PRACTICE

WAIVER BY DISCLOSURE

Waiver may occur by disclosure

There is no doubt that waiver of privilege can occur by disclosure:

> There is no question that generally speaking when privileged information is disclosed to an outsider, the privilege to that information is considered to be waived.
> (*Wade v. Ray*, 1997 CanLII 1030 at paras. 15 (BCSC)).

Waiver based on disclosure is founded on the principle that once confidentiality is lost there is no need for the information to be protected:

> There is a well-established rule that a disclosure of a privileged solicitor-client communication to a third party results in a waiver of the privilege…. This form of waiver is usually justified on the basis that the disclosure has undermined the first of Wigmore's principles, namely that the communication must originate in confidence. The argument is that once the communication is passed on to the third party, it is no longer confidential, and there is no reason for the law to afford it any privilege.
> (*Pinder v. Sproule*, 2003 ABQB 33 at para. 46).

Principles applicable to inadvertent disclosure

Accidental disclosure is bound to occur

Courts have acknowledged that accidental disclosure is bound to occur:

> In modern commercial litigation, mountains of paper are sometimes exchanged. Mistakes will be made.
> (*Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 at para. 56).

Old rule was that accidental disclosure resulted in waiver, but now do fairness assessment

Although the historical common law position was that accidental disclosure permanently destroyed privilege, courts now consider whether fairness requires waiver in the circumstances of the individual case:

> [A]lthough courts have long followed *Calcraft v. Guest*, [1898] 1 Q.B. 759 C.A. - which suggests that privilege is lost whether the disclosure is by accident or by design, and thus privileged material may be admitted at trial if not restrained by an injunction beforehand - the more recent trend in the authorities is to enquire into the circumstances by which the privileged information has come to the attention of the third party…
> (*McDermott v. McDermott*, 2013 BCSC 534 at para. 183).

In *Fording Coal Ltd. v. United Steelworkers of America, Local Union*, 1998 CanLII 6613 (BCSC) an administrative error resulted in an invoice of the plaintiff's lawyer coming into the hands of the defendants. The defendants returned the original invoice, but refused to return the copies that had been made of the invoice and took the position that the accidental disclosure had resulted in loss of privilege. In holding that the inadvertent disclosure did not constitute waiver of privilege the

court cited the following passage from an earlier Alberta Court of Appeal case confirming that mere disclosure does not result in privilege:

> [O]lder cases saying that privilege is lost when a document is dropped on the street, or when a non-party steals it, seems very doubtful in Canada today. The recent English cases cited by both parties draw very fine distinctions as to when the equitable protection for confidences will prevail over a loss of privilege in that way. Those English cases conflict. But as Canada has abolished the old rules on loss of privilege, we need not draw those distinctions. There is no such conflict in Canada, because mere physical loss of custody does not end privilege automatically.
> (*Fording Coal Ltd. v. United Steelworkers of America, Local Union*, 1998 CanLII 6613 (BCSC) at para. 15 citing *Royal Bank v. Lee* (1992), 9 C.P.C. (3d) 199 (Alta. C.A.)).

If inadvertent disclosure has occurred the court will consider whether the disclosing party made immediate efforts to retrieve the documents and whether, in all of the circumstances, fairness requires a finding of waiver:

> Whether or not privilege has been waived through inadvertent disclosure depends on the circumstances and requires the court to consider three factors – whether the error was in fact inadvertent and thus excusable; whether an immediate attempt has been made to retrieve the documents; and whether preservation of the privilege in the circumstances would cause unfairness to the receiving party
> (*Chan v. Dynasty Executive Suites Ltd*., 2006 CanLII 23950 at para. 30 (Ont. SC)).

Lawyers' duties on receiving inadvertently released privileged material

Counsel who receive privileged documents inadvertently and who know, or ought to know, that the information is privileged, are required by the *Code of Professional Conduct for British Columbia* to return (or delete if received in electronic form) all copies and indicate the extent to which the materials have been reviewed:

> 7.2-10 A lawyer who has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, must:
> (a) in the case of a paper document, return it unread and uncopied to the party to whom it belongs,
> (b) in the case of an electronic document, delete it unread and uncopied and advise the party to whom it belongs that that was done, or
> (c) if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it or delete it, uncopied, to the party to whom it belongs, advising that party:
> (i) of the extent to which the lawyer is aware of the contents, and
> (ii) what use the lawyer intends to make of the contents of the document.
> (*Code of Professional Conduct for British Columbia*, Law Society of British Columbia, January 1, 2013).

If the rules regarding prompt return of accidentally disclosed documents are not followed counsel runs the risk of being removed from the record on the basis that prejudice will arise from access to the opponent's confidential information.

In *Chan v. Dynasty Executive Suites Ltd.,* 2006 CanLII 23950 (Ont. SC) documents were inadvertently disclosed and, when it realized its mistake, the disclosing party demanded return of the documents. The receiving counsel refused to return the documents, and instead reviewed them in detail (para. 2). The court disqualified receiving counsel from acting further on the case and explained the obligations of the receiving counsel as follows:

> The case law on this point is clear. Once a lawyer has been advised that privileged
> documents were produced inadvertently, the lawyer must promptly return the material uncopied and, if possible, unread. If there is any issue as to whether privilege is properly asserted, the obligation of the receiving counsel is to seal the documents, and any notes made in respect of the documents, and seek further direction from the court…
> (*Chan v. Dynasty Executive Suites Ltd.,* 2006 CanLII 23950 at para. 74 (Ont. SC)).

The court held that there was no remedy short of removal of counsel that would eliminate the prejudice the disclosing party would suffer if counsel for the receiving party continued to act

> [I]t is completely unacceptable to allow the current litigation team to simply return the documents and continue on as if nothing has happened. Given that the McCague litigation team is now fully aware of the contents of the documents, and have had them in their possession for more than three years, no reasonable person would have confidence in any *ex post facto* measures that might, at this late date, be fashioned to isolate or contain the McCague litigation team's repeated violation of HSBC's privilege.
> …
> There is a real risk that the plaintiffs' counsel will use information from the privileged documents to the prejudice of the defendant HSBC, and this prejudice cannot realistically be overcome by a remedy short of disqualification.
>
> (*Chan v. Dynasty Executive Suites Ltd.,* 2006 CanLII 23950 at para. 97 and 102 (Ont. SC)).

Cases considering accidental disclosure of documents

In *Fording Coal Ltd. v. United Steelworkers of America, Local Union*, 1998 CanLII 6613 (BCSC) an administrative error resulted in an invoice of the plaintiff's lawyer coming into the hands of the defendants. The defendants returned the original invoice, but refused to return the copies that had been made of the invoice and took the position that the accidental disclosure had resulted in loss of privilege. The court rejected that argument, and held that the inadvertent disclosure did not result in loss of privilege (para. 16).

In *Universal Sales Ltd. v. Edinburgh Assurance Co.*, 2009 FC 151 plaintiffs' counsel delivered a CD of documents to the defendants' counsel and through inadvertence the CD contained a transcript of a privileged telephone conversation between the plaintiffs and their prior counsel. The court found that privilege had not been waived:

> The uncontradicted evidence of Mr. MacDonald makes it clear that the Plaintiffs never intended to waive privilege over the communication contained in Exhibit "A1." The Plaintiffs and their counsel were simply not aware of the existence of the transcript on the CD when the large production was disclosed. Immediately upon learning of the existence of the transcript in the production, Plaintiffs' counsel repeatedly asserted privilege over the document.
>
> As the Plaintiffs point out, the mere physical loss of custody of a privileged document does not automatically end privilege, especially in the context of modern litigation where large quantities of documents, such as the electronic production of a CD in this case, are exchanged between counsel and accidental disclosure is bound to occur from time to time.
>
> In this case, there was neither knowledge on the part of the Plaintiffs when the CD was produced to the Defendants, nor any silence when the Plaintiffs learned of the inadvertent disclosure at the discovery.
>
> (*Universal Sales Ltd. v. Edinburgh Assurance Co.*, 2009 FC 151 at para. 27-29).

Disclosure of documents within an organization

Where the client is an organization, distribution of privileged information within that organization is not considered to be disclosure to a third party, and so generally waiver does not occur.

Certainly, a corporation can distribute privileged documents to its employees (or its shareholders' employees where is shareholders are corporations) without waiving privilege:

> Because WCPL is a body corporate it must act through its directors and employees. Thus, any privilege which it has over documents is not lost when those documents are provided to directors or the shareholders' employees for the purposes of assisting WCPL in its litigation. It appears from the evidence before me that WCPL had no employees of its own to whom it could turn for such assistance.
> (*Western Canadian Place Ltd. v. Con-Force Products Ltd.*, 1997 CanLII 14770 at para. 23 (ABQB)).

In *R. v. Campbell, R. v. Shirose*, [1999] 1 S.C.R. 565 the Supreme Court of Canada held that for the purposes of determining whether disclosure of legal advice constitutes waiver of privilege, "client" must be defined broadly. In that case the "client" was considered to be the entire RCMP:

> I characterize the RCMP rather than Cpl. Reynolds as the client in these circumstances because even though he was exercising the duties of his public office as a police officer, Cpl. Reynolds was seeking the legal advice in the course of his RCMP employment. The identification of "the client" is a question of fact. There is no conceptual conflict between the individual responsibilities of the police officer and characterizing the "client" as the RCMP.
> (*R. v. Campbell, R. v. Shirose*, [1999] 1 S.C.R. 565 at para. 67).

Binnie J. emphasized that so long as the information was not shared outside the RCMP, privilege was not waived:

> If Cpl. Reynolds himself were characterized as the client, it could be said that sharing the contents of that advice with his fellow officers would have breached the confidentiality and waived the privilege, which would be absurd. At the same time, if the legal advice were intentionally disclosed outside the RCMP, even to a department or agency of the federal government, such disclosure might waive the confidentiality, depending on the usual rules governing disclosure to third parties by a client of communications from its solicitor.
> (*R. v. Campbell, R. v. Shirose*, [1999] 1 S.C.R. 565 at para. 67).

Disclosure to auditors

Disclosure of information to third party may constitute waiver of privilege, but may be considered to be a "limited waiver" for the purposes of the audit only, and privilege will remain for all other purposes. However, there must be a mutual understanding that the receiving party will keep the information confidential:

> There is no waiver where the privilege holder discloses the document to a third party pursuant to an understanding that the document will be held in confidence and not disclosed to others.
> (*Sauvé v. ICBC*, 2010 BCSC 763 at para. 21).

In *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 FC 367 (TD) a legal opinion was provided to an auditor in the context of a corporate audit. In subsequent tax litigation, Canada Revenue Agency argued that privilege over the opinion had been waived when it was disclosed to the auditor, and that they were therefore entitled to disclosure of it in the course of the tax litigation. Gibson J. refused to order production of the opinion and held that the disclosure of privileged information to the auditor was waiver for the limited purpose of the audit only. That result was base in part on s. 170(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 which requires a corporation to furnish whatever documents auditors demand. (Most provinces have similar legislation that applies to provincially incorporated corporations: e.g. s. 153(5) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16). A key finding of fact in *Interprovincial Pipe* was that the corporation had not intended to waive privilege over the information provided to the auditors. Gibson J. said:

> [T]he evidence before me discloses that the applicants' intention was to do all in their power to protect their solicitor-client privilege while complying with the demands of their auditors under the potential sanction of a qualified auditor's certificate and, ultimately, subsection 170(1) of *Canada Business Corporations* Act.
> (*Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 FC 367 (TD)).

Gibson J. held that because the legal opinion was disclosed involuntarily the law would imply a "limited waiver" for the purpose of the audit. However, Gibson J. cautioned that it may be prudent to specifically document the limited waiver:

> If the doctrine of limited waiver is to be relied on in future in similar circumstances, it would appear to me to be the prudent course of action to set forth in writing the client's intent regarding limited waiver in any disclosure to its auditors of solicitor-client privileged information and in the formal arrangement between the client and its auditors. Further, it would appear to me to be the

> height of unreasonable expectation to expect auditors, in the course of a highly complex audit and examination, to refrain from making notes of complex legal advice on complex transactions provided, as was here apparently the case, in response to a demand of the auditors, a stipulation with which the auditors here obviously did not comply. Some more formal arrangement regarding the disposition of such notes as between the client and the auditors, once those notes have served their purpose for the auditor, would appear to be desirable. (*Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 FC 367 (TD)).

The court in *Philip Services Corp. v. Ontario Securities Commission* 2005 CanLII 30328 (ONSCDC) approved of the doctrine of limited waiver set out in *Interprovincial Pipe* and said at para. 47 that given "the great importance of the legal advice privilege to the proper functioning of the legal system" the limited waiver doctrine will apply even if the client fails to document its intention to limit the waiver.

Waiver when disclose expert evidence

Waiver when serve expert report under the rules of court

Waiver of privilege over the experts file takes place in two stages after service of an expert report

1. The facts (including test data) upon which the report is based are to be disclosed promptly after a request for such information, which request can be made immediately after service of the report: Rule 11-6(8)(a)
2. The entire expert's file is to be produced, if requested, 14 days before trial: Rule 11-6(8)(b).

The rationale for disclosure of the expert's file is that once the expert takes the stand his or her role is to assist the court and not be an advocate for either party. A study of the scope of what must be disclosed, and when, under the Rules of Court when expert evidence is served, or admitted at trial, is beyond the scope of this paper, but the discussion below considers how waiver may occur by disclosing expert reports other than to the opposing party in ongoing litigation.

Disclosure of expert report to regulatory authority

In *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* 1988 ABCA 282 the plaintiff sued for conspiracy in relation to a 5% service surcharge on the price of caterpillar equipment related to after sales maintenance and repairs. Prior to the litigation the defendant had been investigated under the *Combines Investigation Act* and in the course of that process delivered a report to the Director of Investigations. The investigation concluded and then, on examination for discovery of one of the defendants in the conspiracy action, the report was produced by a defendant other than the one who had commissioned the report. The plaintiff requested production of the working papers underlying the report, but the defendant who had commissioned the report refused on the basis of privilege. The Alberta Court of Appeal held that both the report and working papers were privileged documents and that there had been no waiver of privilege when the report was given to the Director of Investigations or disclosed to the plaintiff by the other defendant in the conspiracy action:

> It must first be noted that the Director's inquiry is not a public proceeding. The Director hears witnesses in private and even in the absence of other subjects of the inquiry and their solicitors. Secondly, to hand a privileged document to one party to the litigation for the purpose of settlement or any other purpose, does not,

> in my opinion, show any intention that the privilege is thereby to terminate as to other parties or in related litigation.
>
> The respondent also argued that the Caterpillar companies waived any privilege which existed by failing to object when the officer of R. Angus Alberta Limited produced the Price Waterhouse report on his examination for discovery. The simple answer is that, even if one litigant has the status to interject on the examination for discovery of another, the objection is pointless if his co-defendant is resolved to produce the document. Waiver depends on intention. Failure to make a pointless objection does not, in my opinion, demonstrate that intention.
>
> (*Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* 1988 ABCA 282).

Disclosure of expert report to joint venture parties

In *Western Canadian Place Ltd. v. Con-Force Products Ltd.*, 1997 CanLII 14770 (ABQB) a post tensioning cable on the fourth floor of a two tower office complex broke and engineering expert reports were prepared at the request of Western Canadian Place Ltd. ("WCPL"), which was a joint venture between Husky Oil Operations Ltd. ("Husky") and Trizec Properties Limited ("Trizec"). WCPL disclosed the reports to Husky and Trizec and it was argued that privilege over the reports was waived as a result, but the court ruled against that argument:

> Here, WCPL's directors faced a somewhat similar dilemma. They owed a duty as directors to WCPL and they owed similar duties as officers and directors of Husky and Trizec respectively. The latter duty required them to rely on such documents as they and their advisors considered necessary in the course of the litigation between them. It would serve no useful nor policy purpose to require that the performance of that duty put them into conflict with their duty to act in the best interests of WCPL by not waiving privilege over those documents for the purposes of any matters involving WCPL. In my view this is the only rational conclusion in these common circumstances of interrelated bodies corporate and directorships. Complex litigation requires that counsel retain the ability to show his or her hand to some but not all — to compromise or to settle; and to define and reduce issues. Parties must now be free of the old strict rules of waiver.
> …
> Here the facts compel the conclusion that no waiver was intended beyond the limited purposes of the litigation between the two shareholders to whom WCPL had properly given the privileged material. No unfairness arises for the applicants since they would not have received these reports and opinions in the normal course — except for those experts' reports which might eventually be produced under Rule 218.1. Counsel for WCPL rightly calls it a "windfall" if the applicants now get its experts' reports and legal opinions.
>
> (*Western Canadian Place Ltd. v. Con-Force Products Ltd.* 1997 CanLII 14770 at para. 33 (ABQB)).

Disclosure of expert report between select parties during settlement discussions

In *Canada Safeway Ltd. v. Toromont Industries Ltd.*, 2004 ABQB 433, the Court considered whether exchange of expert reports between the plaintiff and defendant A in settlement discussions resulted in waiver such that defendant B, who was apply for production of the report, was entitled to review it. The court did not find a common interest privilege, but held that there

was a zone of privacy around the discussions and that that disclosure between certain parties did not result in waiver entitling other parties to review the reports exchanged:

> In my view the determination of whether or not the acknowledged privilege has been waived should start from the rationale for the privilege. As noted, litigation privilege exists to ensure to parties who submit their dispute to resolution through the adversarial process a zone of privacy in the preparation of their case. The privilege gives priority to a litigant's interest in a zone of privacy over the general policy of disclosure of relevant information. When it is suggested that the privilege has been waived, the question becomes whether the event said to be a waiver has made the rationale for the privilege inapplicable, or whether the event otherwise justifies a reversal of the priority.
> …
> In this case, in the context of litigation privilege, the first question is whether the communication of the privileged information to one of many adversaries signaled that a zone of privacy was no longer required for the communicated information. The second question is whether the communication of the information in the circumstances makes it unfair to continue to maintain the privilege.
>
> In my view the exchange of the expert reports between Safeway and Toromont in furtherance of settlement discussions and with express limitations as to the use to which the reports can be put, does not indicate that either party no longer sought to maintain the reports they had obtained within their respective zones of privacy. Neither, in my view, does maintenance of the privilege compromise fairness.
>
> (*Canada Safeway Ltd. v. Toromont Industries Ltd*., 2004 ABQB 433 at para. 15, 18 and 19).

Disclosure of medical reports to treating practitioners

In *Pinder v. Sproule*, 2003 ABQB 33 a plaintiff in a personal injury claim disclosed a medical report to one of her treating physicians and the court found that did not result in a waiver of litigation privilege:

> Under the rules of the adversarial system, Mrs. Pinder was entitled to keep these documents away from the Defendants, and could even suppress the information in them at trial. Whatever inherent unfairness to the Defendants there may be in that rule, the unfairness has not in any way been enhanced by the disclosure to Dr. Block. The Defendants are essentially in the same position after the disclosure to Dr. Block, as they were before. I see no prejudice or unfairness that would weigh decisively in favour of the Defendants. Nor does the mere fact that the documents have now been disclosed to Dr. Block have an impact on the integrity of the system of administration of justice. In all of the circumstances, I do not regard the disclosure of these two reports to Dr. Block as being sufficient to undermine the privilege over the reports. The Plaintiff is accordingly not obliged to produce the two reports to the Defendants.
> (*Pinder v. Sproule*, 2003 ABQB 33 at para. 30).

The court in *Pinder v. Sproule*, 2003 ABQB 33 set out a detailed framework for determining whether litigation privilege is lost due to intentional disclosure: para. 30.

Waiver over expert reports when referenced in correspondence between counsel

In *British Columbia v. Canadian National Railway*, 2004 BCSC 283 the defendant wrote a letter referring as follows to the conclusions of a fire investigation report (para. 25):

> Because of the nature and circumstances of this fire, a Fire Science Expert was engaged immediately to investigate this fire. Their report was prepared for our General Counsel, and as such it is privileged, however, it categorically states that this fire was not in any way caused by railway activities.

The defendant claimed privilege over the report and the plaintiff argued that by referring to the conclusions of the report the defendant had waived privilege. The court held that the letter did not indicate an intention to waive privilege and that there was no waiver on the facts of that case:

> It is clear that the letter refers to the reports of the investigator and asserts it privilege. The letter refers to the conclusion of the report, but only in general terms.
> …
> In the present case, the defendant has merely referred to the existence of the document and its conclusion without more. I find that that does not amount to a waiver.
> (*British Columbia v. Canadian National Railway*, 2004 BCSC 283 at para 26 and 28).

In *McCarty v. Chen*, 1994 CanLII 3134 (BCCA) plaintiff's counsel in a motor vehicle accident claim offered to provide a medical report prepared by a doctor who examined the plaintiff (para. 2):

> We are pleased to inform you that we are now in receipt of a medical-legal report from Dr. John A. Fuller.
>
> We are prepared to provide you with a copy of this report in exchange for the reimbursement of the same, a copy of the invoice is enclosed. Payment is to be made by cheque, payable to Maryn Jensen.
>
> Our client is under great financial strain at the present time and we request that an advance be made against his claim in the amount of $5,000.00.
>
> We look forward to hearing from you in the near future.

ICBC declined to accept the offer as set out in the letter, and so the report was not handed over. The plaintiff later claimed privilege over the report and ICBC argued that privilege had been waived by the previous offer to disclose the report. The British Columbia Court of Appeal upheld the following reasoning of the chambers judge that there had been no waiver:

> With respect, I do not agree that the privilege was waived. Privilege creates in its possessor a right to withhold disclosure of a relevant document. The possessor may elect to not assert (i.e. to waive) that right. He may, if he thinks it is in his interest to do so, elect without terms but I know of no principle precluding him from stipulating for a benefit in return. That may be disclosure by the other side

> of its privileged documents, or it may be reimbursement of the cost of the report or some other form of benefit. If an offer in that form is not accepted, it counts for no more than any other unaccepted offer, i.e., it does not change the legal position of either party.
>
> The basic point is that the possessor does not, merely by making the offer, evince an intention to waive privilege.
>
> (*McCarty v. Chen*, 1994 CanLII 3134 (BCCA)).

Waiver by listing on list of documents

In *Trask v. Can. Life Assur. Co.*, 2002 BCSC 1741 the plaintiff dentist claimed that the defendant, her long-term disability insurer, breached the insurance contract by failing to make certain payments to her. The defendant listed certain documents subject to privilege on its list of documents. Such listing was not accidental, but intentional, and the defendant wished to rely on those documents in defending the plaintiff's claims. The three documents in question contained calculations and conclusions about the quantum of benefits that the plaintiff might be entitled to. The court found that the defendant was not entitled to release just select information and that the working papers behind the initially listed documents were subject to production:

> As far as the working papers are concerned, "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be a waiver as to the entire communication."
> (*Trask v. Can. Life Assur. Co.*, 2002 BCSC 1741 at para. 72).

In *G.W.L. Properties Ltd.v. W.R. Grace & Co. of Canada Ltd.*, 1993 CanLII 417 (BCSC) the plaintiff went ahead and completed on a transaction to purchase a building containing asbestos because its lawyer had advised that the "courts would not look favourably upon Great-West Life for terminating the transaction solely because of the asbestos issue." That advice was referred to in a memo that was listed on the plaintiff's List of Documents in subsequent litigation related to the cost to remove the asbestos. The court found that by listing the memo the plaintiff had waived privilege and was required to answer questions related to the solicitor client communications on that issue:

> I consider that, when G.W.L. disclosed the advice Ms. Fairweather gave to Mr. Sullivan, it waived privilege over the information he gave her upon which the advice was based. Otherwise, G.W.L. could disclose, and perhaps rely upon, what it was told by its solicitors without revealing what it said to them to obtain the advice. That, in my view, can not be right. It certainly would not be fair.
>
> There will accordingly be an order that Mr. Sullivan answer questions about the advice he received from Ms. Fairweather, that he relayed in October 1988, concerning G.W.L. terminating the transaction because of the asbestos issue and that, when asked, he disclose all of the communications between G.W.L. and Bull, Houser and Tupper on that limited subject.

(*G.W.L. Properties Ltd.v. W.R. Grace & Co. of Canada Ltd.*, 1993 CanLII 417 (BCSC)).

Waiver through affidavit evidence

In *Pacific Concessions, Inc. v. Weir*, 2004 BCSC 1682 the plaintiff sought to enforce a guarantee against the defendant, but the defendant pleaded that he did not believe the guarantee would be enforceable (para. 19). The defendant then attached to an affidavit an email he had sent to his lawyer at the time the transaction was entered into. The defendant relied on the email in support of an argument that the transaction documents presented to him by the plaintiff did not represent his understanding of the transaction they agreed to (para. 9). The court held that the pleading and disclosure of the email resulted in a waiver of privilege over communications between the defendant and his lawyer on the issue of the enforceability of the guarantee:

> When Mr. Weir tendered the email as an exhibit to his affidavit in the summary trial, he did so in support of his position that he did not understand it to have the legal effect which the plaintiff claimed it did. In this respect, his state of legal knowledge at the time the guarantee was executed is very much at issue…
> …
> I conclude that solicitor-client privilege has been waived with respect to the email of February 1, 1999 and any communications passing between the defendants and their solicitor in response to the issues raised in the email. In the circumstances of this case, fairness and consistency require further disclosure to the plaintiff. It would be unfair to permit Mr. Weir to pick and choose which aspects of his communications with his solicitor to place in evidence before the court to support his case, while claiming privilege in respect of other related communications that may be relevant to these proceedings.
>
> (*Pacific Concessions, Inc. v. Weir*, 2004 BCSC 1682 at para. 20 and 22).

In *Hub International Limited v. Tolsma*, 2008 BCCA 500 the plaintiff sued two insurance brokers who previously worked for it for breach of fiduciary for disclosing confidential information. One of the defendant's was 14 days late in providing an affidavit of documents required by court order and subsequently swore an affidavit saying that he had not received an e-mail from his counsel about the deadline for the affidavit of documents and that contributed to the late delivery of the affidavit of documents. The plaintiff argued that the defendant had thereby waived privilege, but the chambers judge held that since the key issue in the contempt of court application being brought by the plaintiff was the alleged ongoing failure to properly comply with the court order fairness did not require disclosure of solicitor-client privilege. In refusing leave to appeal to the Court of Appeal Madam Justice Smith affirmed that reasoning:

> As I understand his reasoning, the chambers judge concluded that, whether or not Peter Tolsma had evinced an intention to waive his solicitor/client privilege, the central issue in the contempt application was the alleged ongoing failure on the part of the defendants to comply with the disclosure order, not the reasons for a 14-day delay in swearing an affidavit of documents. Therefore, fairness does not require that Peter Tolsma disclose the reasons for his delay in filing the affidavit of documents; any misconduct in relation to the delay is irrelevant to the central issue in the contempt application. This reasoning, in my view, amounts to

> no more than an exercise of the chambers judge's discretion in determining if the second prong of the waiver by implication test was met.
>
> In the absence of an error of law, Hub cannot meet the four-point test for granting leave to appeal from an interlocutory order. I find there is no *prima facie* meritorious appeal that requires the attention of a division of this Court. What is sought to be disclosed involves a tangential issue that is not directly related to the issue to be determined on the contempt application. Fairness dictates that requests for access to non-material information do not satisfy the waiver test.
>
> (*Hub International Limited v. Tolsma*, 2008 BCCA 500 at para. 27-28).

In *Langret Investments S.A. v. McDonnell*, 1995 CanLII 774 (BCCA) the plaintiff took default judgment against the defendant for failure to attend examination for discovery. In support of the application to set aside the default judgment the defendant referred to parts of a letter he had received from his solicitor in an attempt to explain why he had not appeared at his court ordered examination for discovery. The court concluded that the defendant having put his state of mind in issue in the affidavit the entire letter should be produced and that the plaintiff should be entitled to a full cross-examination regarding the solicitor's letter:

> Having put his state of mind in issue, and given the history of this litigation, it would not now be fair to allow Mr. McDonnell to make the limited disclosure of the 12 May 1994 letter which he proposes. The rest of the letter may support, or at least be consistent with, his contention as to his true state of mind. Equally, however, the rest of the letter may contain information which might serve to impugn his bona fides, or to disclose a state of mind other than that which he asserts. Counsel conducting the cross-examination of him on his affidavit should be in a position to test those possibilities.
> (*Langret Investments S.A. v. McDonnell*, 1995 CanLII 774 at para. 14 (BCCA)).

Affidavit evidence on a party's state of mind will not lead to waiver of privilege if that party's state of mind is not relevant:

> I have already said that evidence of the plaintiff's state of mind or its subjective understanding of its legal position is not relevant to the claim in contract. A subject that is not relevant on the pleadings is not made relevant merely because it is addressed in an affidavit. Therefore, even if Mr. Morrow's affidavit can be said to allude to the plaintiff's state of mind, that can not be considered a "matter of substance" in this action.
> (*International Container Terminal Services Inc. v. British Columbia Railway Company*, 2009 BCSC 150 at para. 18).

In *W. Johnston Equities Ltd. v. Allen*, 2012 BCSC 414 the plaintiff sought an order that a settlement agreement contained an implied term that a property would be transferred free of any encumbrances. The plaintiff swore an affidavit providing evidence of her subjective belief that the settlement would involve transfer of clear title to the property. Although court found that the plaintiff's state of mind had likely been influenced by the legal advice she received (para. 34) fairness did not require waiver because the plaintiff's subjective understanding as the terms of the settlement agreement would not be relevant to interpretation of the contract:

> Legal advice relating to Ms. Johnston's subjective belief in the strength of the claims being settled is not relevant to a matter in issue. Fairness and consistency do not require that privilege be displaced with regard to matters that are not relevant and will not assist in the interpretation of the Settlement Agreement.
> …
> … In my view, a party's knowledge of the facts on which the implied term is based does not include that party's subjective belief.
>
> (*W. Johnston Equities Ltd. v. Allen*, 2012 BCSC 414 at para. 39 and 40, emphasis in original).

However, the court held that the plaintiff, having disclosed some of the notes from a meeting around the time of entering into the settlement agreement was required to disclose the remainder of the notes:

> The plaintiffs have not produced Mr. Sutherland's notes made at that meeting. In my view, the information discussed during this meeting can be seen to fall into the category of Ms. Johnston's knowledge of facts on which the implied term is based. I conclude that fairness and consistency requires that the plaintiffs, having disclosed some of the documents relating to the meeting, must disclose all documents relating to the meeting. Accordingly, the defendants are entitled to an un-redacted copy of Mr. Sutherland's notes.
> (*W. Johnston Equities Ltd. v. Allen*, 2012 BCSC 414 at para. 42).

Waiver through interrogatories

In *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 1 the plaintiff sued for wrongful dismissal after he had been fired based on certain sexual harassment allegations. When answering interrogatories the defendant said it had acted in good faith and had relied on legal advice when dismissing the plaintiff. The plaintiff sought disclosure of such advice, arguing that privilege had been waived, but the Manitoba Court of Appeal held that Tolko had not voluntarily put its state of mind in issue:

> The question becomes whether the defendant in this case has indeed placed its state of mind in issue voluntarily. The Supreme Court of Canada followed by the British Columbia Court of Appeal have held that responding to questions on cross-examination cannot constitute voluntary waiver. The same is true of questions asked on a cross-examination on an affidavit.
>
> In this case, the reference to good faith and reliance upon legal advice was made by the defendant in response to interrogatories sent to it by the plaintiff. This is similar to a response on cross-examination and does not represent the kind of affirmative choice contemplated by the Supreme Court of Canada in [*R. v. Campbell, R.v. Shirose*, [1999] 1 S.C.R. 565].
>
> That is not to say that the situation may not change sometime down the road in this litigation. The defendant may indeed choose to affirmatively rely on the legal advice received as evidence of its good faith in the manner in which it dismissed the plaintiff.…
>
> (*Gower v. Tolko Manitoba Inc.*, 2001 MBCA 1 at para. 52-54)

Waiver on examination for discovery

Reference to legal advice on discovery

However, if the party against whom waiver is claimed did not voluntarily put forward the information on which the allegation of waiver is based, there may be no waiver at all:

> First, the fact that Doman received legal advice was elicited by GMAC on examination for discovery of Doman's representative; it was not voluntarily injected into the lawsuit by Doman for its benefit.
> (*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2004 BCCA 512 at para. 26).

In *Bolivar v. Craft*, 1991 CanLII 2567 (NSCA) the defendant had caused a motor vehicle accident and it was disputed whether he had insurance at the time of the accident. Mr. Craft had pleaded guilty to a charge of driving without insurance at the time of the accident. Then, on discovery in the civil action, he testified that he pleaded guilty after consulting with counsel. The Court held that Mr. Craft had not waived privilege by merely referring to his consultation with counsel:

> The respondent referred only to his action of pleading guilty as a result of what his lawyer told him following privileged communications, not to the content of those privileged communications.
> (*Bolivar v. Craft*, 1991 CanLII 2567 (NSCA)).

However, if the party discloses the contents of the privileged information (as opposed to objecting to the question on the grounds of privilege) waiver may occur:

> When Mr. Oliver questioned Mr. Hansen, he asked him numerous questions about what he had communicated to his then solicitor regarding that understanding. In a number of responses, Mr. Hansen described what he had told Ms. Chee in instructing her with respect to the transaction. He could have declined to answer such questions on the ground that his communication with Ms. Chee was privileged, but he did not. Objection was taken at certain points by Mr. Cote to the extent of Mr. Oliver's questioning. However, I am satisfied that Mr. Hansen, by his replies, waived the solicitor/client privilege between himself and Ms. Chee with respect to the instructions that he gave her regarding the transaction.
> (*Lefebvre v. Robert Stierle,* 1996 CanLII 3509 at para. 9 (BCSC)).

In *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1998), 161 F.T.R. 226 (F.C.T.D.) the plaintiffs sought an injunction against the defendant who had been using the words "engineer" and "engineering" to describe its computer science degree. The representative of the defendant (who was an in-house lawyer for the university) was questioned about a reference in some meeting minutes about a legal opinion that had been obtained about the merits of the university's case. The lawyer being examined took a request to produce that opinion under advisement, but then went on to disclose information about the opinion and the court found that waiver had occurred:

> In these circumstances, I think Mr. Thistle's voluntary elaboration on the opinion constituted a voluntary waiver of privilege. In *The Law of Evidence in Canada*,

> Sopinka, Lederman and Bryant, (Toronto: Butterworths 1992), the learned authors state at page 665:
>
> > Similarly, if a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject-matter.
> > ...
> > If the communication is elicited in cross-examination of the client, it seems that unless it can be shown that the witness was misled or did not comprehend what was being asked of him or her, the assertion of the communication would amount to a waiver.
>
> (*Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1998), 161 F.T.R. 226 (F.C.T.D.)).

In *Gill v. Canada (Attorney General)*, 2012 BCSC 1807 a government department revoked certain licences of an aviation company after an aeroplane crash occurred. The company sued for wrongful revocation of the licence and alleged that the government owed them a duty of care. On examination for discovery the defendants answered questions about having attended a course put on by Crown lawyers dealing with duty of care generally. Taking a broad view of the scope of legal advice privilege the court found the course materials were protected by legal advice privilege. The plaintiff argued (para. 30) that despite privilege fairness required disclosure of the course materials that were handed out at that seminar because they had been refereed to on examination for discovery, but the court ruled against that argument:

> Here, the defendants do not plead reliance on legal advice in relation to their interactions with the plaintiff. Nor do Mr. Heryet's answers at his examination for discovery, as they relate to the Course, suggest that he relied on the legal advice he obtained during the Course in forming his understanding of the legal question of whether the defendants owed the plaintiff a private law duty of care. This is a legal question which will be resolved by this court at trial. What Mr. Heryet personally understood about that legal question or what legal advice he may have received in forming his understanding are not relevant to the court's determination of that issue. No unfairness and inconsistency exists in this case.
> (*Gill v. Canada (Attorney General)*, 2012 BCSC 1807 at para. 36).

Review of documents prior to discovery

It has been noted that courts have come to mixed conclusions on whether a witness reviewing notes before discovery results in waiver of privilege:

> Civil law cases divide over the question whether a refresh beyond a mere glance before or during examination for discovery constitutes a waiver.
> (*R. v. Fast*, 2009 BCSC 1671 at para. 15).

A number of cases have held that waiver of privilege over documents does not occur as a result of review of them when preparing for discovery.

In *Schellert v. Nesteegaard*, 1985 CanLII 403 (BCCA) the defendant in a motor vehicle accident case gave a statement to ICBC, and then reviewed that statement about a month before being

examined for discovery, and then referred to that review during the course of the examination for discovery. The plaintiff argued that by reviewing the statement before discovery the defendant waived privilege over it:

> [The plaintiff argued that] when in the course of the examination for discovery it became apparent that the defendant had referred to the statement to refresh his memory in preparation for the examination for discovery, it ceased to attract the cloak of privilege. Counsel for the [plaintiff] likens this to the circumstances obtaining when in the course of cross-examination a witness is permitted to refer to notes made following the occurrence of the events in which the witness was involved. If in the course of cross-examination in those circumstances the witness is permitted to examine notes to refresh his memory the usual order is, if requested, that the witness produce those notes for the inspection of opposing counsel.
> (*Schellert v. Nesteegaard*, 1985 CanLII 403 at para. 27 (BCCA)).

The British Columbia Court of Appeal rejected that argument:

> I think the circumstances here, however, are different [from when a witness during cross examination at trial reviews a statement]. To remove the privilege attaching to communications like those in the case at bar would unduly narrow the effect on privilege.
>
> Counsel for the [defendant] compares these circumstances to those obtaining when an officer of a corporation being examined for discovery is asked to inform himself more adequately in order that the discovery may be effectively pursued. He suggests that the officer in those circumstances may inform himself by looking at a variety of documents, some one or more of which may well be privileged communications. Counsel for the [defendant] submits that simply because an officer refers to privileged documents in order to inform himself for purposes of discovery could not possibly be said to remove the privilege attaching to the document.
>
> I think that is an apt analogy and I think should be applied in the circumstances of this case. I think the fact that the defendant referred to the statements made by him to the adjuster during the course of his examination for discovery does not in the circumstances of this case affect the claim for privilege.
>
> (*Schellert v. Nesteegaard*, 1985 CanLII 403 at para. 28-30 (BCCA)).

In *Wronick v. Allstate*, [1997] O.J. No. 544 (Gen. Div.) the adopted the reasoning in *Schellert v. Nesteegaard*, 1985 CanLII 403 (BCCA) and held that review of a statement during examination for discovery does not result in waiver of privilege:

> I concur with the reasoning of the court in *Schellert v. Nesteegaard* that reference to privileged documentation to refresh one's memory in preparation for examination for discovery does not amount to a waiver of the privilege and that to remove the privilege in those circumstances unduly narrows the effect of privilege. As the court in *Schellert* noted, those circumstances are quite different from the situation where a witness refers to notes to refresh his memory during

> the course of his testimony at trial and the witness is required to produce the notes for the inspection of opposing counsel during cross-examination. I am of the view that there is no difference in substance to a review of notes one month prior to the examination for discovery as was the case in *Schellert* and a review of the notes during the course of the examination for discovery as is the case here.
>
> Further, in both of the instances in which reference was made by Mr. Hisson to the notes, Mr. Wunder who was conducting the examination for discovery specifically asked if there was an annotated copy in the file and whether there was an indication in the report as to remuneration of jobs. In other words, the manner in which Mr. Wunder framed the question directed the witness to his notes. In these circumstances, therefore, the privilege was not deliberately and knowingly waived.
>
> (*Wronick v. Allstate* [1997] O.J. No. 544 at para. 14-15 (Gen. Div.)).

In *Thyssen Mining Construction of Canada Ltd. v. Kamad Silver Co. (N.P.L.) et al.* (1977), 3 C.P.C. 279, [1977] 1 A.C.W.S. 760 (B.C.S.C.) during an examination for discovery the witness glanced at a document to verify the number of dates in question. The trial judge found that the witness had not sufficiently refreshed himself to constitute a waiver of his claim of privilege over the document.

Contrary to the above, there have been some cases in which waiver privilege has been found based on review of documents in preparation for discovery.

In *Copeland v. Fry*, [2002] O.J. No. 1356 (S.C.J.) the defendant motorist provided her insurance adjuster with a statement with respect to the accident which was then read over by her before she was examined for discovery. The court found that when she read over her statement privilege was waived. This was explained as follows:

> However, the defendant Sundermann had used her statement to refresh her memory before attending at her Examination for Discovery and in so doing waived her privilege.
>
> The defendant, in using her statement to refresh her memory may have given evidence which is not a true recollection and it would be unfair to refuse this document to the opposite party for the purpose it could be put to test whether the alleged recollection is accurate or not.
>
> Accordingly, I order that the Sundermann statement *supra* be provided to the plaintiff.
>
> (*Copeland v. Fry*, [2002] O.J. No. 1356 (S.C.J.)).

Waiver through evidence given at trial

Review of document to refresh memory

If a witness uses a document to refresh their memory when giving evidence at trial, that document is, subject to a claim of privilege, producible for the purposes of cross examination:

> [W]here the judge finds that the witness has refreshed their memory with the use of a document that is not privileged, the document is producible to the opposing party, in this case the Crown, so they can cross-examine in order to test the credibility and reliability of the witness's memory.
>
> Once the trial judge finds that the refresh document is privileged, he or she must next decide whether the witness waived that privilege by refreshing.
>
> (*R. v. Fast*, 2009 BCSC 1671 at para. 36-37).

It has been held that the law generally favours waiver when a witness refreshes his or her memory before giving evidence at a civil trial:

> In the case of a witness who refreshes (beyond a mere glance) during or before giving testimony at trial, the civil law weighs strongly in favour of a finding that the witness has waived privileged over the refresh document….
> (*R. v. Fast*, 2009 BCSC 1671 at para. 45, citations omitted).

Waiver through evidence elicited on cross examination

Although different considerations apply to evidentiary rules in the criminal and civil contexts (*Maranda v. Richer*, 2003 SCC 67 at para. 29) waiver principles from each context have been considered in the other and there is some value in considering the rules in the criminal context.

In *R. v. Campbell, R. v. Shirose*, [1999] 1 S.C.R. 565 the accused applied for a stay of proceedings arguing that a reverse sting operation operated by the police was illegal and, consequently, an abuse of process. In defence, the police submitted that even if a reverse sting operation was illegal, they had acted in good faith relying upon the advice of their legal counsel. During direct examination, the Crown asked the police officer about his knowledge of the law with respect to reverse sting operations and the officer simply stated that he was of the opinion that the operation in question was legal. On cross-examination, the officer testified that he had sought out the opinion of legal counsel to verify the correctness of his own understanding. Although privilege was waived in that case by the Crown positively asserting good faith in conducting the reverse sting operation, the Supreme Court of Canada held (as counsel for the accused conceded) privilege was not waived by the answers given on cross-examination because waiver must be voluntary; it cannot be forced on a party through questions raised by the opposing side on cross-examination:

> But Cpl. Reynolds also testified, in answer to the appellants' counsel, that he sought out the opinion of Mr. Leising of the Department of Justice to verify the correctness of his own understanding. The appellants' counsel recognized that this alone was not enough to waive the privilege. Cpl. Reynolds was simply responding to questions crafted by the appellants, as he was required to do. Appellants' counsel accepted that he had no right at that point to access the communications.
> (*R. v. Campbell, R. v. Shirose*, [1999] 1 S.C.R. 565 at para. 70).

In *R. v. Desabrais*, 2000 BCCA 585 and *R. v. Creswell*, 2000 BCCA 583 the accuseds made applications for stays of proceedings based on an abuse of process arising from reverse sting operations. In those cases the Crown did not plead good faith reliance on legal advice, and were

not found to have voluntarily waived legal advice privilege merely by answering questions posed by defence counsel in cross-examination.

> [W]aiver must be voluntarily undertaken by the party who enjoys the privilege. Waiver cannot be forced on a party through questions raised by the opposing side on cross-examination.
> …
> The Crown did not set out to establish good faith. It was only on cross-examination that the existence of the legal opinions and the extent of the reliance upon them by the RCMP was elicited by defence counsel.
>
> I am of the view that the Crown should succeed on its first ground of appeal. The evidence did not establish that the RCMP had waived the privilege which attached to the legal opinions in question.
>
> (*R. v. Creswell*, 2000 BCCA 583 at para. 37 and 42 – 43).

In the civil context in *Biehl v. Strang*, 2011 BCSC 213 the court found that waiver had occurred when, on discovery, the defendant said that he did not agree with certain content of the statement of defence filed on his behalf (para. 7). It was argued that information elicited on cross examination cannot support a finding of waiver but the court distinguished *R. v. Creswell*, 2000 BCCA 583 on the basis that it was a criminal case:

> [*R. v. Fast*, 2009 BCSC 1671] characterizes [*R. v. Creswell*, 2000 BCCA 583] as a criminal case addressing waiver on cross-examination. It distinguishes cases in the civil and criminal context. I am of the view this is an important distinction, as evidentiary issues are generally more strictly considered in criminal proceedings given that the presumption of innocence and an accused's personal jeopardy are involved. [*Souter v. 375561 B.C. Ltd.*, 1995 CanLII 843 (BCCA)], which may be seen to be in conflict with *Creswell* regarding waiver of privilege by a witness during cross-examination, is a civil case with similar circumstances to the case at bar. I rely on it as opposed to Creswell on the basis of this distinction. (*Biehl v. Strang*, 2011 BCSC 213 at para. 61).

In *Cross Lake Indian Band et al. v. Manitoba* (1984), 27 Man.R. (2d) 6 (C.A.) a solicitor was cross-examined on his opinion that an arguable case for appeal existed. During the cross-examination the solicitor referred to opinions prepared by him for the Province of Manitoba and to other government documents to support his opinion that an arguable case for appeal existed.
The Manitoba Court of Appeal held that the solicitor had not, merely by responding to questions on cross-examination, waived legal advice privilege.

Waiver by solicitor giving evidence

In *Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd.*, 1998 CanLII 3866 (BCSC) a lawyer swore an affidavit in support of a pre-judgment garnishing order and the court confirmed that if a lawyer submits an affidavit on behalf of a client, that may, depending on the contents of the affidavit, result in a waiver of privilege:

> Clearly, where a solicitor enters the fray and provides evidence in the form of affidavit his client may be taken to have waived the solicitor/client privilege

> (*Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd.*, 1998 CanLII 3866 at para. 16 (BCSC)).

The court referred to an Alberta case that explained that privilege is waived because the opposing party has the right to apply to cross examine the deponent on all matters relevant to the evidence given:

> Where a deponent is produced to give evidence on a motion, that deponent can be cross-examined on all matters relevant to the motion. Where the deponent produced is someone who possesses otherwise privileged information relevant to the issues on the motion, that information loses its status of being privileged, or the privilege is "waived".
> (*Stuart Olson Construction Inc. v. Sawridge Plaza Corp.* (1996), 8 C.P.C. (4th) 185 (Alta. Q.B.) cited in *Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd.*, 1998 CanLII 3866 at para. 9 (BCSC)).

The court followed that reasoning and held that privilege was waived and the lawyer would be subject to cross examination on the matters he had given evidence on:

> [The current situation deals] with information given by the plaintiff to its counsel, which formed the basis of the application for the garnishing order.
> …
> Clearly, where a solicitor enters the fray and provides evidence in the form of affidavit his client may be taken to have waived the solicitor/client privilege. In my view, it matters not that this affidavit was sworn under the provisions of a particular act. Once a party to litigation relies upon the affidavit evidence of his solicitor, then the privilege is waived and the deponent may be examined under Rule 28.
>
> (*Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd.*, 1998 CanLII 3866 at para. 13 and 16 (BCSC)).

In *United Furniture Warehouse LP v. 551148 B.C. Ltd.*, 2007 BCSC 68 the plaintiff brought an application for short leave for service and hearing of an application for an injunction. In support of its application, in-house counsel for the plaintiff swore an affidavit stating that she had reviewed certain documents and, on the basis of that review, believed the facts set out in the plaintiff's claims to be true, and the claims advanced, to be valid. Despite acknowledging that that in-house counsel's opinion on the merits of the plaintiff's claim was irrelevant, Pitfield J. ruled that fairness and consistency required disclosure of the documents that in-house counsel had reviewed in forming her opinion:

> I am mindful of the fact that the opinion was not necessary or relevant for the presentation of the short leave application. It was up to the court to decide on the basis of facts deposed to in affidavits whether the plaintiff's claims against the defendants disclosed a *prima facie* case. In fact, the affidavit was ruled inadmissible and excluded from the materials actually before the court at the hearing of the short leave application. Nonetheless, the plaintiff saw fit to rely upon an affidavit of counsel in the course of seeking equitable relief in the form of an injunction. That being the case, it would be unfair and inconsistent to deny the

> defendants access to the documentation by reference to which counsel formulated her opinion.
> (*United Furniture Warehouse LP v. 551148 B.C. Ltd.*, 2007 BCSC 68 at para. 19).

In *Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 (BCSC) plaintiff's counsel representing clients in a real estate dispute over a number of properties in Vancouver swore an affidavit when his clients were not available to do so. The plaintiffs argued that privilege should not be taken to be waived because the affidavit revealed no new information beyond that already contained in the pleadings and the parties' affidavits. However, the court found that by leading evidence in support of the allegations set out in the pleadings the affidavit sworn by the lawyer resulted in waiver of privilege:

> I am satisfied that both affidavits were indeed sworn with the intention of advancing evidence in support of the plaintiffs' case. The 1997 Affidavit dealt with substantive matters in issue. While parts of those affidavits were later reflected in an Affirmation executed by the plaintiffs in Hong Kong, it nevertheless remains the case that the Affirmation was inadmissible as sworn testimony in British Columbia. The 1999 Affidavit raises allegations that a Mr. Ngan contracted in his personal capacity with the plaintiffs. This clearly amounts to an admission about the existence of an oral contract between the parties, ancillary to the written contract of purchase and sale. The plaintiffs intended to use that evidence to add Mr. Ngan as a party to the action. In both cases, the information was indeed being used as a tactical "sword" in the sense that both affidavits supported either the appellants' opposition to the Rule 18 application or their pursuit of the Rule 15 application, all under the cover of solicitor-client privilege.
> (*Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 at para. 21(a) (BCSC)).

The court also held that the unavailability of the client was not a justification for the lawyer swearing the affidavit:

> Regarding the inconvenience of obtaining information from the plaintiffs in Hong Kong, I find that this issue of inconvenience cannot be an appropriate defence to a waiver of privilege. It cannot be appropriate for a party to conduct litigation through its solicitor simply because it is more convenient to do so and then to assert privilege in order to avoid the legal consequences which followed from that tactical choice.
> (*Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 at para. 21(c) (BCSC)).

In *Mayer v. Mayer*, 2012 BCCA 77 a lawyer representing a client in a dispute between shareholders of family corporations swore an affidavit presenting evidence (para. 177) relevant to his client's good faith in advancing certain claims, and the client's ability to meet the statutory requirement of good faith in seeking derivative relief under the *Business Corporations Act*, SBC 2002, c 57. The court confirmed that privilege may be waived by a solicitor entering the fray:

> Solicitor-client privilege, however, may be waived expressly or by implication. It will be implicitly waived when a solicitor "enters the fray" by providing affidavit evidence that goes to a matter of substance in the client's litigation…
> (*Mayer v. Mayer*, 2012 BCCA 77 at para. 179).

The court confirmed that what is a matter of substance is defined by the material facts set out in the pleadings and by the law that governs a party's claim:

> [W]hether privilege has been implicitly waived requires identification of matters of substance by reference to the material facts and law that governs the client's claim or defence, as well as an examination of considerations of fairness and consistency, and any litigation advantage that may arise from the enforcement of the privilege.
> (*Mayer v. Mayer*, 2012 BCCA 77 at para. 188).

Although the opposition had taken the position that the conduct of the claimant constituted bad faith and was an abuse of process, the lawyer's affidavit providing evidence on the client's good faith was filed before there were formal pleadings on the issue of good faith (para. 191). For those and other reasons the court found that the lawyer's affidavit was unnecessary (para. 184) and unexplained (para. 187). However, because the issue of good faith was not yet formally in issue the court found that privilege was not waived by the lawyer swearing the affidavit:

> Given the fundamental importance of solicitor-client privilege, it is my view that where it is alleged a solicitor has entered the fray and implicitly waived privilege by testifying to a matter of substance in his client's litigation, that matter must be something on which issue has been formally joined. Arguments and allegations alone, regardless of how firmly held or advanced they may be, cannot be sufficient to create a matter of substance. To hold otherwise would result in significant and unanticipated intrusions into solicitor-client privilege, create uncertainty, and work against the objectives of fairness and consistency that underpin the concept of implied waiver.
> …
> I am satisfied that while good faith may become an issue at the stage of remedy it is not a matter of substance at the pleading stage of an oppression claim.
>
> (*Mayer v. Mayer*, 2012 BCCA 77 at para. 192 and 209).

In *Greater Vancouver (Sewerage and Drainage District) v. Canadian National Railway Company*, 2012 BCSC 1929 privilege was waived where an associate lawyer swore, in support of a pre-judgment garnishing order, an affidavit that made representations as to the merits of his client's claim and stated a legal conclusion about a central issue to the dispute:

> To swear that the GVSDD is "justly" indebted to CN and that the debt is "justly" due and owing pursuant to the Encroachment Agreements, Mr. Lee must have concluded that CN's periodic adjustments to the rental rates were determined, as it pleads, in accordance with the terms of the Encroachment Agreements. By implication, Mr. Lee must have concluded that: the parties intended to adjust the rent in accordance with the fair market value of the encroachments; although not explicit, that intended term was implied in the three Encroachment Agreements which were otherwise silent as to the basis for the adjustment; and that the GVSDD is estopped by its conduct from denying the basis for the rental adjustments. These are the very issues in dispute between the parties.
> …

> In this case, where the GVSDD clearly put in issue whether it is indebted to CN for the amount of the rent demanded, the affidavit should have been sworn by the client. Mr. Lee's affidavits have resulted in him entering the fray.
>
> I conclude that: Mr. Lee's affidavits provide evidence intended for the specific legal purpose of obtaining pre-judgment garnishing orders in advance of a determination on the merits of CN's claim; make representations as to the merits of CN's claim; and state a legal conclusion about the central issue to this dispute. Mr. Lee's affidavit is, at least in part, based on information provided by CN's in-house counsel, which would otherwise be subject to solicitor-client privilege. By his affidavits, Mr. Lee has entered the fray and CN has implicitly waived privilege over it solicitor's file. Fairness and consistency require that CN produce to counsel for the GVSDD all documents in its solicitor's file, up to and including June 19, 2012, the date on which the Mr. Lee's last affidavit was sworn. CN shall produce the file within 21 days of the date of this order.
>
> (*Greater Vancouver (Sewerage and Drainage District) v. Canadian National Railway Company*, 2012 BCSC 1929 at para. 49 and 51-52).

A solicitor being called as a witness to provide merely factual witness may not result in waiver. In *Wang v. British Columbia Medical Association*, 2012 BCSC 152 the plaintiff called her previous counsel as a witness to provide a history of events and that was found to not result in waiver of privilege because the lawyer had merely provided factual evidence of what had occurred:

> It is not as though Mr. Woodall testified that he came to some conclusion, or gave some advice, on the basis of Dr. Wang having informed him of A, B and C. In that event, he could properly be cross-examined as to whether she had also advised him of D, E and F. But here, Dr. Wang did not call Mr. Woodall to justify her actions. Rather, she called him to describe what occurred.
> (*Wang v. British Columbia Medical Association*, 2012 BCSC 152 at para. 21).

WAIVER BY PLEADINGS

Pleading reliance on legal advice

In *Hub International Limited v. Tolsma*, 2008 BCCA 500 the British Columbia Court of Appeal confirmed the general rule that if a party raises reliance on legal advice as a part of its claim or defence privilege is waived over that advice:

> [W]here a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189.
> (*Hub International Limited v. Tolsma*, 2008 BCCA 500 at para. 23 citing *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CanLII 407 at para. 10 (BCSC) per McLachlin J. (as she then was)).

However, it has been held that state of mind being in issue combined with the possibility that legal advice was taken on the issue will not itself be enough to result in waiver of privilege, but rather

the pleading must include the further element of alleging reliance on legal advice when forming that state of mind:

> [O]n the question of postponement of the election, it is not enough to constitute a waiver that Doman's pleading puts its state of mind in issue and that its state of mind might have been influenced by legal advice, as the chambers judge concluded. There must be the further element that the state of mind involves Doman's understanding of its legal position in a way that is material to the lawsuit. In other words, it must appear from the pleading that legal advice would be relevant to the particular state of mind put in issue. Otherwise, it cannot be said that Doman has put its knowledge of the law in issue and that enforcing the privilege will deprive GMAC of information necessary to defend against Doman's allegation that it acted reasonably.
> (*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 512 at para. 28).

Subsequent cases have interpreted *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 512 to say that in order for there to be waiver on the basis that legal advice received is relevant to state of mind the waiving party must claim that it relied on legal advice as part of its case:

> [W]aiver of privilege does not result merely from a party placing its state of mind in issue or disclosing that it has received legal advice. The party must actually rely upon the fact that it received legal advice as part of its case.
> (*Morvay v. Warke*, 2012 BCSC 1696 at para. 44).

Similarly:

> [T]he presence or absence of legal advice itself must be material to the claims or defence to the law suit…To justify a party being required to answer questions about the content of privileged communications, that party must utilize the presence or absence of legal advice as a material fact in his or her claim or defence.
> (*Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 at para. 28-29).

In *Morvay v. Warke*, 2012 BCSC 1696, a family law dispute, the husband consulted a lawyer for the purpose of implementing a trust in connection with corporate reorganization of a business worth approximately $13.2 million. The wife alleged that trust was designed to deprive her of a share of the business as a family asset, and the husband responded by pleading that the trust was created for estate and tax planning purposes, and not for the purpose of defeating the wife's claim to a share of the family assets. The wife argued that such pleading put the husband's state of mind in issue and resulted in a waiver of privilege over lawyer client communications related to establishment of the trust. The court applied, the rule from *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 512 that privilege is not waived where state of mind is raised on an issue that legal advice was received on unless the party raising state of mind goes further and actually pleads reliance on legal advice:

> In this case, Mr. Warke has never relied on the fact that he received and acted on legal advice from Ms. Thériault and he has not voluntarily put in issue his

> instructions to her or the advice he received from her. He has simply responded to the positions put forward by Ms. Morvay.
> (*Morvay v. Warke*, 2012 BCSC 1696 at para. 46).

Reliance on representation or act of opposing party (estoppel and misrepresentation)

Because an element of estoppel is reliance, and an assertion that a party relied on an act of another raises questions as to what other factors that were at play, a plea of estoppel often results in waiver:

> Frequently, a plea of estoppel will make the party's state of mind material in a way that manifests an intention to waive solicitor-client privilege: see, e.g. *Allarcom Ltd. v. Canwest Broadcasting Corp.* 1987 CanLII 2484 (BCSC), (1987), 19 B.C.L.R. (2d) 167 at 170-71 (S.C.). That is because such a claim usually raises the question of whether the party asserting estoppel received legal advice from its solicitors that would negate the assertion that it relied to its detriment on the representations of the other party.
> (*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 512 at para. 34).

Similarly, a pleading of negligent misrepresentation will raise the issue of reliance and may result in waiver of privilege:

> If the claim had been framed as one of negligent misrepresentation, the plaintiff would have to prove that it relied on those representations and that its reliance was reasonable in the circumstances. The plaintiff's subjective understanding and any legal advice on which that understanding was based might well be relevant to those issues. In such circumstances, disclosure of legal advice might, for example, reveal that the plaintiff had been warned that it could not rely on the alleged representations.
> (*International Container Terminal Services Inc. v. British Columbia Railway*, 2009 BCSC 150 at para. 12).

In *Allarcom Ltd. v. Canwest Broadcasting Corp.*, 1987 CanLII 2484 (BCSC) there was an issue as to the expiry date of an agreement and the defendants alleged that they relied on conduct of the plaintiff when deciding a course of action in relation to the expiry date. The court ordered counsel for the defendants to answer questions relevant to advice given to the defendants in order to allow the plaintiff the opportunity to explore whether the defendants truly relied on the plaintiff's conduct or whether they relied on legal advice they had received:

> [Those questions asked] of Mr. Asper relate, in whole or in part, to advice given by the defendants' solicitors as to what the expiry date was under the terms of the letter agreement, or to other matters directly related to the determination of the expiry date. The plaintiff contends that, having put their state of mind in issue by pleading that they relied upon the plaintiff's conduct to their detriment, the defendants cannot now raise the barrier of solicitor-client privilege to prevent the plaintiff from showing that the defendants had advice and opinions which effectively negate the allegation of reliance upon the plaintiff's conduct. On the authority of the Court of Appeal in *Rogers v. Bank of Montreal*, 1985 CanLII 141 (BCCA) the plaintiff is on sound ground.

> (*Allarcom Ltd. v. Canwest Broadcasting Corp.*, 1987 CanLII 2484 at para. 4 (BCSC)).

In *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 512 the defendant bank reduced the credit available to the plaintiff. A prerequisite to the contractual right of the defendant bank to reduce the available credit was that the bank had to declare an event of default by the borrower (plaintiff). The plaintiff said that there had not been any such declaration and therefore the bank was estopped from saying that the plaintiff had committed an event of default. Because the foundation of the estoppel was the failure of the bank to give notice, rather than a statement made by the bank which might have weighed on the mind of the plaintiff, the court found that pleading estoppel did not waive privilege:

> Doman's pleading is essentially that it relied on GMAC's failure to trigger a contractual provision that it says must have been triggered for a breach to have occurred, not that it relied on GMAC's representation as to a legal state of affairs upon which Doman might have received advice from its own solicitors. The material issue raised is whether, on a correct interpretation of the contract, GMAC was required to make such a declaration for Doman to be in breach. Doman's state of mind is not relevant to that interpretative task. This distinguishes the instant case from the type of estoppel claim at issue in [*Allarcom Ltd. v. Canwest Broadcasting Corp.* 1987 CanLII 2484 (BCSC)].
> (*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 512).

Postponement of a limitation period

A party may waive privilege by pleading postponement of a limitation period.

In *Harry v. British Columbia*, 2001 BCSC 1566 the defendant claimed that the plaintiffs' action was barred by the *Limitation Act*, R.S.B.C. 1996, c. 266 and that the defence of laches applied. In response to those defences pleaded by the defendant, the plaintiffs claimed that commencement of the limitation period was postponed and expressly pleaded that they had not obtained appropriate legal advice or a sufficient measure of certainty as to the reasonable prospect of success of their claim until a certain point in time. It was held that by pleading those facts the plaintiffs waived privilege over the legal advice they sought in relation to the right to bring an action:

> It is not the pleas of the *Limitation Act*, laches and acquiescence which entitle the defendants to claim an ability to examine otherwise privileged communications. It is specifically the plea of postponement which raises that entitlement. By that plea of postponement, the plaintiffs say they lacked the knowledge which would have allowed them to commence proceedings at an earlier date. This raises obvious questions. When did they get appropriate advice and acquire sufficient knowledge? What is the period of postponement?
> (*Harry v. British Columbia*, 2001 BCSC 1566 at para 15).

Vickers J. held that the defendants were entitled to inquire into the knowledge acquired by the plaintiffs to test when they obtained knowledge which should reasonably have alerted to them to the existence of a claim. The judgement of Vickers J. was upheld by the British Columbia Court of Appeal: *Harry v. British Columbia*, 2002 BCCA 557.

In *Homalco Indian Band v. British Columbia*, 2002 BCCA 557 the British Columbia Court of Appeal held that the plaintiff Indian Band had waived solicitor-client privilege up to the date that it had commenced an action, by reason of its plea of postponement of a limitation period. Because an affirmative plea of postponement of a limitation period places in issue what facts were within the plaintiff's means of knowledge as well as the plaintiff's personal circumstances in determining whether it could reasonably have brought an action in time, waiver is required to allow the defendant to explore those issues:

> In this case, the plaintiffs have pleaded that they were not reasonably able to sue until they obtained "access to information ... in or about February 19, 1993". On that date, it appears, the Band Council executed a resolution instructing a lawyer, in the words of the appellants' factum, to "undertake certain steps which led, after research, to the issuance of these pleadings". At times, counsel for the plaintiffs seems to assert that 19 February 1993 was the date to which the cause of action was postponed but at other times, as in the words just quoted, his position is that they were not in a position to launch an action until some unspecified later date.
> …
> The test, while ultimately the objective one of "the reasonable person", requires consideration of the plaintiff's subjective knowledge of "his or her own circumstances and interests". I see no error in the judge's statement that:
>
> > Here the trial judge will have to consider the actions of a reasonable person in the particular plaintiff's circumstances: *Novak v. Bond*, 1999 CanLII 685 (SCC), [1999] 1 S.C.R. 808.
>
> (*Homalco Indian Band v. British Columbia*, 2002 BCCA 557 at para. 14 and 17).

In *Camosun College v. Peterson*, 2012 BCSC 699, a construction case related to restoration of a building, postponement of a limitation period was pleaded and the court acknowledged that disclosure of the plaintiff's communications with its counsel may be required if the issue was not resolved through ordinary document discovery (which was yet to take place), and so deferred resolution of that issue until after document discovery:

> Given the high regard the law gives to the solicitor-client privilege, and the fact that it does not appear that any solicitor-client communication is as yet in play, I decline to order production of the solicitor's file at this stage. The issue of the plaintiff's knowledge at the material times may well be resolved through the discovery process. The relevant evidence may well be available through document production or examinations for discovery and, if so, it will be unnecessary to intrude into areas caught by solicitor-client privilege.
> …
> While I find that the plaintiff has put its state of mind in issue so as to waive solicitor-client privilege, I decline to order production of its solicitor's file at this point. The defendants in the Second Action have liberty to renew the application for production after the discovery process has been completed if it is still necessary.
>
> (*Camosun College v. Peterson*, 2012 BCSC 699 at para. 35 and 37).

Pleading of good faith

If a party merely denies that it acted unlawfully that will generally not result in waiver of privilege. However, if it goes further and alleges that it acted in good faith on legal advice that may, assuming good faith is relevant to a viable claim or defence, result in waiver of privilege:

> [T]he mere denial by a defendant of the claims made by the plaintiff does not create any waiver over the legal advice the defendant may have received. A defendant who, as in this case, asserts in its pleadings or otherwise, that it acted "properly", "within its statutory jurisdiction' or "lawfully" is merely responding to the allegations it faces. If, however, that defendant seeks to bolster its plea, by coupling its assertion of lawful conduct to the legal advice it received or by otherwise putting its state of mind in issue, then the disclosure of otherwise privileged communications which are relevant to that state of mind will likely be required.
> (*Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 92).

In *Reid v. British Colombia (Egg Marketing Board)*, 2006 BCSC 346 it was alleged that the defendant had put its state of mind and reliance on legal advice in issue, but that argument was rejected because the defendant merely pleaded that it had acted lawfully and did not assert that it acted in good faith or on legal advice:

> Paragraph 29(e) pleads that as a matter of law the Board had statutory authority to conduct itself as it did. It does not, as the plaintiffs submit, put into issue the Board's reliance on legal advice and therefore the nature and content of the advice. The Board's position as pleaded is not dependent on any legal advice the Board may have received.
>
> Nothing in the Board's pleadings or in those portions of Mr. Whitlock's examination for discovery filed in support of this application indicate that the Board relies on legal advice as itself refuting the plaintiffs' allegations of improper conduct and bad faith. Mr. Whitlock was cross-examined at some length about the Board's pricing policy and gave substantive answers; he did not refer to legal advice sought or given.
>
> The Board's denials of the plaintiffs' allegations of unlawful conduct and bad faith are simply that. Its pleadings do not put into issue the content of legal advice it received; rather, the Board appears to rely on the inherent legal merit of its position.
>
> The Board's pleadings do not constitute an implied waiver of solicitor-client privilege.
>
> (*Reid v. British Colombia (Egg Marketing Board)*, 2006 BCSC 346 at para. 30-33).

In *Froese v. Montreal Trust Co. of Canada*, 1993 CanLII 1958 (BCSC) the plaintiff sued the defendant pension plan trustee for breach of trust. The trustee pleaded a statutory provision that relieved it of the consequences of any breach of trust so long as it acted "honestly and reasonably and ought fairly to be excused." The court held that the pleading waived solicitor-client privilege

over the legal advice the trustee received relating to the actions alleged to constitute the breach of trust:

> Surely it must be relevant to the question whether or not the defendant acted honestly and reasonably to know what legal advice the defendant sought or was given concerning the winding up of the plan and the purchase of the annuities and the ramifications of the actions which were contemplated and undertaken.
> (*Froese v. Montreal Trust Co. of Canada*, 1993 CanLII 1958 (BCSC)).

In *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 512 the British Columbia Court of Appeal approved of, and further explained, the reasoning in that case:

> [B]y making its state of mind as to its legal position material, the trustee in [*Froese v. Montreal Trust Co. of Canada*, 1993 CanLII 1958 (BCSC)] must be taken to have waived the privilege. If it knew or ought to have known that its actions amounted to a breach of trust, the protection provided by the statute may not have been available to it. Legal advice it received on these questions would have been relevant to its state of mind and fairness and consistency required that the privilege be waived, since this information was necessary to enable the plaintiff to defend against the trustee's allegation that it acted in good faith.
> (*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp*., 2004 BCCA 12 at para. 30).

Raising knowledge of the law as an issue

If a party makes its knowledge of the law relevant to its claim, or to a defence, such that fairness entitled the opposition the right to explore that issue, waiver may occur:

> [A] party waives privilege by its pleadings only when it has pled its case in a way that will allow or require it to give evidence at trial of its subjective understanding, including its understanding of its legal position, at the time of the events or transactions at issue. If so, that party would gain an "unfair litigation advantage" if the opposite party was denied the opportunity to fully explore that issue on discovery.
> (*International Container Terminal Services Inc. v. British Columbia Railway*, 2009 BCSC 150 at para. 11).

In *Rogers v. Bank of Montreal*, 1985 CanLII 141 (BCCA) the bank and the receiver it appointed were sued by shareholders who had suffered a loss because the receiver was allegedly appointed prematurely. The receiver and the bank filed third party claims against each other and the bank claimed that it acted on the receiver's advice in putting the customer into receivership. The British Columbia Court of Appeal found that the bank had put its state of mind in issue by claiming that it had relied on the receiver's advice and so ordered disclosure of communications between the bank and its counsel in relation to the appointment of the receiver. The disclosure was limited to the communications dealing with the right to appoint a receiver.

> There do not appear to be any decided cases in Canada that raise the facts that we have in this case. Cases have been referred to us from jurisdictions in the United States and I have found one decision in particular to be persuasive. I refer

to *United States v. Exxon Corporation* [1981] 94 F.R.D. 246, a decision of the District Court of Columbia.

> Most courts considering the matter have concluded that a party waives the protection of the attorney-client privilege when he voluntarily injects into the suit the question of his state of mind. For example, in *Anderson v. Nixon*, 444 F.Supp. 1195, 1200 (D.D.C. 1978), Judge Gesell stated that "as a general principle" a client waives his attorney-client privilege when he brings suit or raises an affirmative defence that makes his intent and knowledge of the law relevant
> …
> There is no other reasonable way for plaintiff to explore Exxon's corporate state of mind, a consideration now central to this suit.

What underlines both that defense and the defense in this case is that the party claiming the privilege relied upon the advice, in one case of the Government, and in the other case of the Receiver, and acting on that reliance took certain steps. That necessarily involves an enquiry into the corporate state of mind of the Bank when it was induced and decided to act.

(*Rogers v. Bank of Montreal*, 1985 CanLII 141 (BCCA)).

In *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2004 BCCA 512 the plaintiff had a financing agreement with the defendant and the defendant reduced the amount of credit available to the plaintiff. The plaintiff found alternative financing and then sued the defendant for fees and other expenses it had paid pursuant to the loan agreement. There was an issue as to the plaintiff's delay in terminating the agreement after the alleged breach by the plaintiff in reducing the available credit, and in its pleading the plaintiff said the following on that issue (para. 5):

> Doman had no choice but to postpone accepting the Defendant's repudiation of the Credit Agreement, such as to put an immediate end to the Credit Agreement, pending arranging alternate financing.

The Court of Appeal held that this pleading did not result in a waiver of privilege because it did not raise any issue as to the plaintiff's knowledge of the law:

> [O]n the question of postponement of the election, it is not enough to constitute a waiver that Doman's pleading puts its state of mind in issue and that its state of mind might have been influenced by legal advice, as the chambers judge concluded. There must be the further element that the state of mind involves Doman's understanding of its legal position in a way that is material to the lawsuit. In other words, it must appear from the pleading that legal advice would be relevant to the particular state of mind put in issue. Otherwise, it cannot be said that Doman has put its knowledge of the law in issue and that enforcing the privilege will deprive GMAC of information necessary to defend against Doman's allegation that it acted reasonably.
> (*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2004 BCCA 512 at para. 28).

The Court of Appeal held that Doman's state of mind as to its business options was in issue, but its state of mind as to its legal rights was not. Doman had pleaded its financial position, but not legal advice, as an explanation for its delay in accepting repudiation and the court found based on that distinction that privilege had not been waived: para. 31.

In *Procon Mining & Tunnelling Ltd. v. McNeil*, 2009 BCCA 281 the plaintiff company sued previous employees for damages for deceit and conspiracy in respect of secret commissions allegedly made by the defendants (while employees) and their associated company when performing work in the mining industry. The plaintiffs also sought to recover settlement payments and employment bonuses previously paid to the defendants. In paragraph 23 of their Amended Statement of Claim the plaintiff's pleaded that (para. 13):

> Such payments would not have been made to McNeil or Bonnar by the Plaintiffs if the Plaintiffs had been aware of the Defendants ongoing fraudulent conduct.

The British Columbia Court of Appeal held that although the plaintiff had technically put its state of mind in issue it had done so on a point of fact, not law, and that the defendants did not require disclosure of solicitor-client communications on that issue in order to properly respond to that pleading:

> Paragraph 23 of the Amended Statement of Claim in this case does not place Procon's knowledge of the law in issue.
>
> … It may be that Procon has, strictly speaking, put its "state of mind in issue", but nothing about the allegation suggests that any legal advice Procon might have received would be in any way relevant to that state of mind.
>
> As this Court emphasized in [*Doman Forest Products Ltd. et al v. GMAC Commercial Credit Corp.-Canada*, 2004 BCCA 512], "a mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege". (See *Doman* at para. 19).
>
> To establish waiver, the disclosure sought must be "vital" or necessary to the opposing party's ability to answer an allegation.
>
> (*Procon Mining & Tunnelling Ltd. v. McNeil*, 2009 BCCA 281 at para. 16-19).

In *Order of the Oblates of Mary Immaculate (British Columbia) v. Dohm, Jaffer & Jeraj*, 2007 BCSC 1412 the plaintiff sued its former lawyers over legal fees that had been charged to it. One issue in the case was whether, as alleged by the law firm, the entire dispute was previously settled. In response to the allegation that there had already been a settlement the client pleaded that if there was a settlement it should be set aside because the client was not aware of the legal significance of certain facts. The court found that the plea that the client was unaware of the legal significance of certain facts resulted in a waiver of privilege and required the client to disclose its communications with the lawyer it hired to assist it with its fee dispute with the defendants:

> [T]he question of the plaintiff's understanding of its legal position will be a central consideration in relation to the issues the plaintiff raises in reply. The determination of these issues will require an exploration of what was known and unknown to the plaintiff at the relevant times. To this end, advice received by the

> plaintiff from Mr. Levy and Mr. Wu in the course of their respective investigations is clearly germane. The plaintiff pleads that it was not aware at all material times of the legal significance of certain facts; for example, the propriety of certain billing practices and hourly rates. Such pleas clearly put its knowledge of the law at issue and the advice it received with respect to these issues.
>
> …The legal and accounting advice received by the plaintiff is relevant to the issues relating to settlement and whether any settlement should be set aside. The information is necessary to enable the defendants to defend against the allegations raised by the plaintiff in its reply.
>
> (*Order of the Oblates of Mary Immaculate (British Columbia) v. Dohm, Jaffer & Jeraj*, 2007 BCSC 1412 at para. 75-76, emphasis added).

In *Gill v. Canada (Attorney General)*, 2012 BCSC 1807 a government department revoked certain licences of an aviation company after an aeroplane crash occurred. The company sued for wrongful revocation of the licence and alleged that the government owed them a duty of care. In their pleading the defendants said that they did not owe the plaintiff any duty of care and that they did not know that the suspension of the plaintiff's licence was unlawful. The plaintiff argued that by pleading that they did not owe the plaintiff a duty of care and had no knowledge that the suspension was unlawful the defendants put their state of mind in issue and waived privilege, but that argument was rejected and there was no waiver:

> [T]he defendants have not relied on legal advice received by Mr. Heryet as part of their defence to the claim. Their responsive positions that they did not owe a duty of care to the plaintiff or that, if the Suspension was unlawful, they had no knowledge that it was so, do not amount to an affirmative defence based on legal advice…In the absence of such an affirmative defence, these responsive positions do not have the effect of the defendants waiving privilege.
> (*Gill v. Canada (Attorney General)*, 2012 BCSC 1807 at para. 29).

WAIVER IN DISPUTE BETWEEN LAWYER AND CLIENT

Dispute between lawyer and client: allegations of solicitor misconduct or incompetence

A client making a complaint to the Law Society leads to a waiver to the allow lawyer to respond to the allegations, but will not result in a general waiver that would allow disclosure of such information more broadly:

> The fact that a lawyer may be able to give information to protect him or herself does not waive the client's privilege as against the world.
> (*Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310 at para. 16).

Similarly, solicitor-client privilege is only lost to a limited degree when solicitor-client communications are reviewed by the Law Society during a practice review:

> While the petitioner argues there is a distinction between the Society's review of a file resulting from a complaint and a practice review since the client who makes a complaint waives privilege, I do not agree that there is a distinction. A client who makes a complaint to the Society does not waive privilege. There is no such

> distinction recognized in the Act or the Rules. In my view, the client's privilege is preserved and the client's interests are protected both where the file is inspected because of a complaint and where the file is inspected during a practice review.
> (*Greene v. Law Society of British Columbia et al.,* 2005 BCSC 390 at para. 52).

Allegation of lawyer error in context of dispute with third party

Where a client in litigation with third parties alleges wrongdoing by his lawyer, that may result in a waiver of privilege.

In *Bank Leu AG v. Gaming Lottery Corp*, [1999] O.J. No. 3949 (Ont. S.C.J.), aff'd [2000] O. J. no. 1137 (Ont. S.C.J. (Div. Crt.)) the defendant borrowed money from the plaintiff using certain share certificates as security. The shares behind those certificates had in fact not been paid for, or issued, and the defendant was investigated by the Unites States Securities and Exchange Commission (SEC) in relation to the dealings with the shares. The defendant third partied their former Canadian counsel, Cassels, saying that they should have warned Gaming of the risks of the stock roll program and the court found that resulted in a waiver of privilege over the communications between the defendant and its former counsel:

> [B]y alleging breach of duty by [Cassels] in failing to warn of the risks involved in the subject transaction on Reg S stock roll programs, [Gaming] is deemed to have waived privilege with respect to all documents relating to advice or information provided to [Gaming] with respect to the risks inherent in entering into the subject transaction…
> (*Bank Leu AG v. Gaming Lottery Corp*, [1999] O.J. No. 3949 (Ont. S.C.J.), at para. 11).

The court held that by alleging a breach of duty by Cassels, Gaming had also waived privilege over the communications with the American counsel subsequently retained because such communications would reveal what Gaming actually did when it became fully aware of risks of the stock roll program and were therefore relevant to what Gaming would have done if they had been aware of those risks from the outset:

> [D]ocuments relating to the issue of what advice [Gaming] did receive as to the risks of Reg S stock roll programs and relating to its participation in other Reg S stock roll transactions after the time of the alleged failure by [Cassels] to warn of the risks are relevant to the issues of causation and quantum of damages and any privilege with respect to such communications is deemed to be waived. This would apply to documents reflecting communications between [Gaming] and its U.S. counsel and communications to and from [Gaming's in-house counsel] which are relevant to [Gaming's] knowledge at various times of the risks involved in participating in such programs and to its participation in such.
> (*Bank Leu AG v. Gaming Lottery Corp*, [1999] O.J. No. 3949 (Ont. S.C.J.) at para. 14).

In the English case of *Lillicrap and another v. Nalder & Son*, [1993] 1 All E.R. 724 the plaintiffs sued their former solicitor for failing to notify them of a right of way over a parcel of land purchased with the solicitor's assistance. The defendants argued that the plaintiffs would have purchased the land even if they had known about the right of way, and sought permission to disclose evidence of six other transactions that the defendants had advised the plaintiff on, and

on which the plaintiffs had failed to follow the defendants' advice. The court accepted the defendants' argument and held that the waiver extended to the six unrelated transactions. The court in *Bank Leu AG v. Gaming Lottery Corp*, [1999] O.J. No. 3949 (Ont. S.C.J.) considered *Lillicrap and another v. Nalder & Son*, [1993] 1 All E.R. 724 when Cassels argued for disclosure of communications on other transactions it had acted for Gaming on, but *Lillicrap* was distinguished on the basis that Cassels had not taken the position that Gaming had historically ignored Cassels' advice and the court held that evidence of the related transactions remained privileged.

If a party changes its story, and blames its lawyer, waiver may be found.

In *Souter v. 375561 B.C. Ltd*., 1995 CanLII 843 (BCCA) the plaintiff brought on a summary trial application in a shareholder loan dispute (para. 7). The plaintiff relied on two affidavits sworn by the defendant Mr. Nonis, but Mr. Nonis said that there was an error in one of them and blamed the lawyer who prepared that earlier affidavit (para. 21):

> That Affidavit was drafted by a junior solicitor in Mr. Berge's office, in Mr. Berge's absence, who was not completely familiar with the various numbered companies involved and when I swore the Affidavit I did not detect the error.

The British Columbia Court of Appeal held that by blaming his previous counsel the defendant Mr. Nonis had waived privilege and that the plaintiff was entitled to cross examine the lawyer Mr. Nonis had sworn the previous affidavit before (para. 1 and 26). The court explained that fairness required providing the plaintiff the opportunity to explore the veracity of the assertion that the lawyer had made a mistake:

> The master concluded Mr. Nonis had waived solicitor-client privilege, having put the state of the instructions given to the solicitors at issue. The chambers judge agreed, as do I, with this characterization and the legal consequence that followed.
> …
> By necessary implication he is saying: "I gave the solicitor the correct instructions. He was responsible for a mistake which misrepresented the true state of affairs." It does not require extended discussion to conclude that when a party identifies his solicitor as responsible for a material mistake in an affidavit sworn by that party and claims solicitor-client privilege in respect of his knowledge and that of the solicitor, he is using the confidentiality protected by privilege as a sword rather than as a shield.
>
> (*Souter v. 375561 B.C. Ltd*., 1995 CanLII 843 at para. 19 and 22 (BCCA)).

In *Suhl et al v. Larose et al*, 2006 BCSC 1264 the plaintiff claimed repayment of a loan. The defendant Larose initially filed a statement of defence which denied the existence of a loan, but then later took the position that a loan was made but that the actual advances made under the loan were less than the face amounts on the promissory notes. With respect to the change of position the defendant told the court (para. 19):

> At all times, I've given all the material facts to my then attorney, I hid nothing back. I don't know about the pleadings that they made, I really don't understand the system but at all material times they knew exactly what I know.

The defendant took the position that he should not be bound by the statement of defence. Credibility was a key issue in the case and the plaintiff alleged that defendant was concocting evidence (para. 25):

> The plaintiff submitted that this issue was relevant to Mr. Larose's credibility. If Mr. Nicoll's (the lawyer's) evidence was that Mr. Larose did not give him the facts recently alleged by Mr. Larose, and therefore the statement of defence did not include them, then the plaintiffs would be in a position to submit to the court that Mr. Larose's affidavit before Mr. Justice Barrow was a recent concoction only.

In the circumstances the court found that defendant could not fairly blame his lawyer for the allegedly incorrect statement of defence without allowing the plaintiff the opportunity to explore the validity of the assertion that the lawyer had made a mistake:

> Mr. Larose put his state of mind in issue at the time he instructed Mr. Nicoll for the purpose of his statement of defence when he alleged that he told Mr. Nicoll everything for the purpose of his defence and Mr. Nicoll was solely responsible for the statement of defence. He cannot now use the confidentiality protected by privilege as a sword rather than a shield by claiming solicitor/client privilege over these communications to deny access to Mr. Nicoll's evidence. I consider it immaterial that Mr. Nicoll prepared the statement of defence rather than Mr. Larose swearing to it, as was the situation in [*Souter v. 375561 B.C. Ltd.*, 1995 CanLII 843 (BCCA)], when Mr. Larose gave his explanation of why he should not be bound by his statement of defence filed.
> (*Suhl et al v. Larose et al*, 2006 BCSC 1264 at para. 36).

In *Transportaction Lease Systems Inc. v. Virdi et al*, 2007 BCSC 132 a Ferrari was leased by Jaspal Singh Virdi, the son of Jasvir Virdi. There was default in payments under the lease and the plaintiff lessor sought to repossess the vehicle. However, the lessee would not cooperate with handing the vehicle over and refused to tell the lessor where the vehicle was. The lessor sued both the father (Jasvir Virdi) and son. On February 25, 2006 counsel for the lessee, Mr. Watson, wrote an email to the lessor stating that "(a) my client knows where the car is located; (b) the car has been repaired and remains in great condition…" (para. 9). The father, Jasvir Virdi, then swore an affidavit stating that he did not where the vehicle was, and when cross examined on the affidavit said that he never knew of any repair or the location of the vehicle (para. 15). The court found that the affidavit, and evidence on cross examination, contradicting the statement of facts in the February 25, 2006 letter resulted in waiver of privilege over communications between lawyer on client with respect to the facts put in issue:

> I am satisfied that the knowledge of Mr. Watson and why he stated that his client knew where the Vehicle was located has been put in issue as a result of the July 19, 2006 Affidavit of Jasvir Virdi as well as his October 30, 2006 cross-examination…
>
> While I am satisfied that Jasvir Virdi on his own behalf and on behalf of Pan Pacific has not generally waived all solicitor client privilege, I am nevertheless satisfied that he has waived it for all purposes relevant to the issues and facts that he has now put in issue.

> (*Transportaction Lease Systems Inc. v. Virdi et al*, 2007 BCSC 132 at para. 29 and 30).

In *Biehl v. Strang*, 2011 BCSC 213 the plaintiff claimed damages for breach of a loan agreement for $1.6 million, or, if there was no loan agreement, unjust enrichment. The defendant Mr. Strang said at discovery that he did not agree with the contents of the pleading which had been filed on his behalf (para. 7)

> At trial, the plaintiff read in a portion of Mr. Strang's examination for discovery, in which he resiled from aspects of the statement of defence, in particular a reference to a letter that purports to confirm the terms of the loan agreement between himself and the plaintiff.

Considering it to be unfair for the defendant to refer to the nature of the communications with his lawyer without allowing the plaintiff to explore that issue, the court found that waiver had occurred by the defendant taking the position that the statement of defence filed on his behalf was not accurate:

> Intention to waive privilege can be inferred. Mr. Strang denied that he provided instructions to Mr. Johnson that informed the content of the statement of defence filed on his behalf. In doing so, he was opened the door to further inquiry and evidence in that regard. This constitutes waiver of privilege.
>
> … privilege is waived where the instructions given by a client to their solicitor are put in issue when a client denies that any such instructions were given. That is the case here.
>
> Alternatively, even if Mr. Strang's statements did not evince a voluntary intention to waiver privilege, waiver may occur in the absence of intention where fairness and consistency so require. In the present case, fairness and consistency require a finding of implied waiver of privilege. As discussed in [*Souter v. 375561 B.C. Ltd.*, 1995 CanLII 843 (BCCA)] solicitor-client privilege does not permit a client to disclose otherwise privileged information for their own benefit in litigation while protecting the full content of that information from discovery by the other side. This is, in fact, what Mr. Strang did.
>
> (*Biehl v. Strang*, 2011 BCSC 213 at para. 53-55).

COMMON INTEREST EXCEPTION TO WAIVER OF PRIVILEGE

The general rule is that privilege is waived when privileged information is intentionally shared with a third party. The common interest exception to waiver of privilege varies that general rule and provides that the disclosed information remains privileged if the party the information is disclosed to has a common interest with the original privilege holder (and the information is shared on a confidential basis)

The test for the common interest exception to waiver of privilege

The common interest exception to waiver of privilege is often referred to simply as "common interest privilege". While that shorter name may be used for convenience, it is important to keep in mind that the particular communication or information must first be protected by some valid privilege before the common interest exception to waiver of privilege will apply. The common

interest concept does not make information privileged, it merely preserves an existing privilege despite disclosure of the privileged information to a third party.

In order to establish common interest privilege over particular information:

- the information must be subject to some valid privilege (e.g. legal advice privilege); and
- the party the information is shared with must share a common interest in relation to the information shared, and the information must be shared confidentially.

The requirement for confidential sharing has been referred to as follows:

> The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them.
> (*Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 51 at para. 14, emphasis added).

The interests of the two parties need not be identical in order to meet the commonality requirement of the common interest exception to waiver of privilege:

> The issue in law, as I understand it, is not whether the position of the two defendants is identical, it is whether there was a sufficient common interest between them to preserve the privilege regardless of the sharing. In this case, on the face of the pleadings, I accept the proposition that the fundamental proposition by each of the defendants is adverse to the plaintiff. It is only in a secondary sense that they point the finger at one another. There is a significant common interest between them in defeating the plaintiff's case before they turn to pointing the finger at one another.
> (*Lessard (Public Trustee of) v. Canosa*, [1995] B.C.J. No. 3054 at para. 13 (S.C.) (QL)).

Parties may have a common interest despite the fact they have retained separate counsel:

> In deciding if the persons that have exchanged the information have a common interest, it is their interest in the litigation rather than the fact that they have separate counsel that is determinative…
> (*Wade v. Ray*, 1997 CanLII 1030 at paras. 18 (BCSC)).

In the litigation context the pleadings are considered when assessing whether there is a common interest:

> To determine whether there is a common interest, I must have regard to the pleadings.
> (*Sauvé v. ICBC*, 2010 BCSC 763 at para. 39).

In *Maier v. Fischer*, 2004 BCSC 196 the court held that in order for the common interest exception to waiver of privilege to apply (in that case to witness statements and independent adjuster reports), there documents must relate to an issue on which the parties sharing the documents have a common interest:

> [I]t would seem to me that there must be some connection between the type of documents where the privilege is claimed and the commonality of interest. In other words, if the reports deal with a situation which is entirely extraneous to the areas where there is the commonality of interest, it seems to me that the waiver would apply.
> (*Maier v. Fischer*, 2004 BCSC 196 at para. 11).

Common interest exception to waiver of legal advice privilege

The common interest exception to waiver of legal advice privilege originally arose in the context of two parties jointly consulting one solicitor:

> The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor.
> (*Human Right Commission)*, 2004 SCC 31 at para. 23 citing *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), per Martin J.A., at p. 245).

In *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 51 the plaintiff, applied for production of a draft opinion letter (the McEwan draft), prepared for the defendants. The plaintiff acknowledged that the McEwan draft was originally protected by legal advice privilege, but claimed that privilege had been waived when one of the defendants shared it with a third party. The British Columbia Court of Appeal was satisfied that the disclosure met the two requirements of common interest and confidentiality and held that privilege had not been waived:

> In the instant case the McEwan draft was produced within the recognized solicitor-client privileged relationship. The common interest privilege issues arise in response to a plea of waiver of that privilege. The common interest privilege is an extension of the privilege attached to that relationship. The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them….Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.
> (*Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 51 at para. 14).

In *Vancouver Hockey Club Ltd. v. National Hockey League*, 1987 CanLII 2430 (BCSC) a hockey coach, Quinn, left the L.A. Kings to coach the Vancouver Canucks. The NHL fined and suspended Quinn for breaking his contract with the Kings and the Canucks sued for a declaration that the fines and suspension were improper. Quinn's California lawyers disclosed certain documents relevant to the dispute to the Canucks. Although conceding that the documents were initially protected by legal advice privilege, the NHL argued that by Quinn's lawyers disclosing them to the Canucks privilege was lost, but the court held that the common interest exception to waiver of privilege applied:

> Quinn is now under contract to the plaintiff. He is operating under a coaching suspension imposed by Ziegler. He, like the plaintiff, has been fined for

> "dishonourable" conduct. He has a common interest with the plaintiff in setting aside Ziegler's decision and orders. He never contemplated that his solicitor-and-client privilege would be waived by his lawyers disclosing the documents in question to the solicitors for the plaintiff to assist them in this litigation. I find that such privilege has not been lost.
> (*Vancouver Hockey Club Ltd. v. National Hockey League*, 1987 CanLII 2430 (BCSC)).

In *Holman v. Nguyen*, 2000 BCSC 1915 the court held that the common interest exception to waiver of legal advice privilege did not apply with respect to an examination for discovery report from a previous, resolved, claim (the Bernoe accident), when ICBC passed it on to defence counsel in a case brought by the same plaintiff in relation to a subsequent accident (the Nguyen accident):

> In this case, the document was created for the purpose of the litigation between the plaintiff and Bernoe. There is no question that Nguyen had no interest whatsoever in that litigation.
> …
> Surely any common interest between the defendant in this action, and the defendant in the Bernoe action has to be more than the involvement of ICBC in both actions.
>
> I therefore find that the defendant has failed to prove his claim for privilege over the document in question.
>
> (*Holman v. Nguyen*, 2000 BCSC 1915 at paras. 15 and 18 - 19).

Common interest exception to waiver of litigation privilege

Lord Denning famously explained the rationale for extending common interest privilege to litigation privilege as follows:

> There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each

> can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.
>
> (*Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 at 483-484 (C.A.)).

Buttes Gas and Oil has been applied many times in Canada.

In *Sauvé v. ICBC*, 2010 BCSC 763 the plaintiff was injured when the vehicle she was driving collided with another vehicle. The plaintiff also sued ICBC as a nominal defendant on account of the negligence of an unidentified driver. The defendants both pleaded that the accident was the fault of the plaintiff and the court found that the defendants had sufficient common interest to prevent waiver of privilege when an independent adjuster's report was shared between them:

> [In this case the] claim that the accident was caused by the negligence of the plaintiff is not simply alternative to his claim of negligence on the part of an unidentified driver. Those allegations stand on an equal footing. In my opinion, there is sufficient commonality of interest between the two defendants in their assertion that the accident was caused by the negligence of the plaintiff to support the common interest exception to waiver. Further, I am satisfied the reports in issue relate to that common issue. I conclude, therefore, that privilege over the reports has not been lost and they need not be produced.
> (*Sauvé v. ICBC*, 2010 BCSC 763 at para. 41)

In *Maier v. Fischer*, 2004 BCSC 196 the plaintiff was a passenger in a vehicle driven by one defendant, and the other defendant was the driver of the vehicle their van collided with. Although the defendants had a common interest on certain aspects of the plaintiff's claim (e.g. arguing that her injuries were minimal), because the witness statements in that case would primarily relate to an issue (who ran the red light?) on which the defendants' were adverse the court found that there was no commonality and waiver had occurred through the defendants sharing copies of the witness statements and independent adjuster reports:

> The documents, as I have indicated, are reports of accident investigators or adjusters and statements taken from eye witnesses to the accident. Given the fact that the plaintiff is not asserting that she was wearing some sort of restraining device, there is really nothing, on the face of it, that the witness statements would have to say about that; nothing on the face of it why the adjusters would have to investigate that issue at all.
>
> In the circumstances, I can only conclude that their reports and the witness statements dealt with other issues, principally liability as between the two defendants, each of whom is asserting that the other ran through a red light.
> …
> Accordingly, I rule that even if the documents were privileged, the privilege was waived by disclosure to co-defendants who had no common interest in the issues dealt with by the documents.

(*Maier v. Fischer*, 2004 BCSC 196 at para. 18-19 and 22).

Waiver where dispute between parties relying on common interest exception

Where two parties who initially have a common interest share documents in circumstances where the common interest exception to waiver of privilege does apply, but then later become adverse in interest, the common interest exception may no longer apply and the previous disclosure may result in privilege being lost.

In *Maritime Steel and Foundries Ltd. v. Whitman Benn & Associates*, 1994 CanLII 4317 (NSSC) two engineering firms were involved in the design of the bridge, and were sued by the owner when problems with the bridge arose. The two engineering firms were insured by the same insurer, and before appointing counsel the insurer retained an expert to prepare a report. The report was then provided to each of the two engineering firms, and one wanted to disclose the report but the other did not want to disclose it. The court held that once the engineering firms became adverse in interest either of them had the option to waive privilege over the report:

> The mutuality of interests necessary to maintain confidentiality and extend any joint claim of privilege no longer exists. WBA and VEA became adversaries in the litigation. Joint privilege was lost. It was then open to either WBA or VEA to waive its privilege, as it saw fit, and without requiring the consent of the other.
>
> I do not accept that to refuse the present application will be to chill any willingness on the part of co-defendants to participate in joint settlement discussions. On the contrary it will simply remind insurers to be thoughtful of the consequences when distributing or sharing the results of its investigations. As well, co-defendants who are insured by the same insurer, will be aware that a report prepared in the course of the insurer's investigation, by its agent, to assist in litigation and with a view towards advancing a settlement proposal, may well risk disclosure by a defendant whose interests are, or turn out to be, adverse to the other.
>
> (*Maritime Steel and Foundries Ltd. v. Whitman Benn & Associates*, 1994 CanLII 4317 (NSSC)).

In *Peters v. Paterson*, 2010 BCSC 210 a windsurfer was injured by operators of a rented motorboat. The motor boat rental company promptly hired a lawyer who arranged for signed statements to be taken from the operators of the boat. The rental company and the operators were both sued by the windsurfer and the rental company third partied the operator defendants. The court held that even if the statements were privileged there was no commonality of interest after the rental defendants third partied the operator defendants and so the statements were producible:

> In my view, by the very nature of the Third Party Notice and the allegations made in it, there has been a severing of the commonality of interest of the defendants. In the result, therefore, there is no common interest privilege which can be maintained, and, accordingly, the statements taken from the four motorboat defendants are no longer privileged and must be turned over to the plaintiff.
> (*Peters v. Paterson*, 2010 BCSC 210 at para. 23).