Civil Procedure
Winter Term 2023

LECTURE NOTES NO. 8

DISCOVERY

> ... pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable.
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> *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8 at para. 24 (S.C.C.) per Binnie J.

INTRODUCTORY POINTS

Discovery is usually the most productive, most expensive, and most fought over stage in the civil litigation process.

In 2010, the Rules changed in substantial ways in respect of discovery:

- Introduction of the over-arching 'proportionality' principle and 'discovery plans';
- Changes to the standard of relevancy;
- Time limits on oral discovery (7 hours, except for simplified proceedings in respect of claims under $100,000 per defendant under R.76 in which 2 hours is the limit).

These changes were made in the hope that discovery will be faster, cheaper, and more efficient in future. Time will tell if the reforms have the desired effect.

The purposes of discovery:

- Re-enforce your theory of the case;
- Understand your opponent's theory of the case;
- "Discover" where evidence may be available to support your case;

- Assess the quality and quantity of documentary evidence and testimony supporting each side, and what further investigation needs to be done;

- Predict impact of key witnesses for and against your case;

- Obtain admissions respecting facts not in dispute, the content and authenticity of documents, the existence of other documents – this helps to narrow the issues;

- Commit your opponent's witnesses to their evidence;

- Put yourself in a position to make or respond to a settlement offer, to mediate, and to attend a pre-trial hearing with a judge

A. NON-DISCLOSURE: PRIVILEGE

Lawyer-Client (aka Solicitor-Client) Privilege relates to:

(i) communications between lawyer and client;
(ii) which entail the seeking or giving of legal advice; and
(iii) which are intended to be confidential by the parties.

Such communications are not discoverable or admissible. If the privilege is waived, the communications are both discoverable and admissible (if relevant).

Litigation / Legal Professional Privilege relates to:

(i) communications between lawyer and client;
(ii) generated for the dominant purpose of litigation.

The privilege attaches to any document that was prepared for the dominant purpose of litigation, regardless of intentions of confidentiality or the involvement of a lawyer. The privilege only is in respect of the litigation and the party's adversary.

[***Common interest privilege*** is not a separate category of privilege. Rather, it extends privilege to third parties where there is a common interest in anticipated or commenced litigation or even some transactions.]

Pritchard v. Ontario (Human Rights Commission)
2004 SCC 31 (S.C.C.)

A person made a complaint to the Ontario Human Rights Commission against her dismissal by her employer; the OHRC did not proceed with the complaint. In the course of judicial review and appeal, the complainant sought the advice given to the OHRC by its in-house lawyer. The opinion was privileged. The case sets out the rationale for the wide protection offered by the privilege and its applicability to in-house counsel.

Major J.:

> **14** **Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function**: see Smith v. Jones, [1999] 1 S.C.R. 455 (S.C.C.), at para. 46.
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> **15** **Dickson J. outlined the required criteria to establish solicitor- client privilege in Solosky v. Canada (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 837, as "(i) a communication between solicitor and client;**
> **(ii) which entails the seeking or giving of legal advice, and (iii) which is intended to be confidential by the parties."** Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see Solosky, supra, at p. 834.
>
> 16 **Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship.** The privilege, once established, is considerably broad and all-encompassing. In Descôteaux c. Mierzwinski, [1982] 1 S.C.R. 860 (S.C.C.), **the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established." The scope of the privilege does not extend to communications (1) where legal advice is not sought or offered, (2) where it is not intended to be confidential, or (3) that have the purpose of furthering unlawful conduct:** see Solosky, supra, at p. 835.
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> 17 As stated in R. v. McClure, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.), at para. 2:
>
> Solicitor-client privilege describes the privilege that exists between a

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

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

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

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

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

...

21 **Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in- house" does not remove the privilege, or change its nature.**

...

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

29 There is no applicable exception that can remove the communication from the privileged class. There is no common interest between this Commission and the parties before it that could justify

disclosure; nor is this Court prepared to create a new common law exception on these facts.

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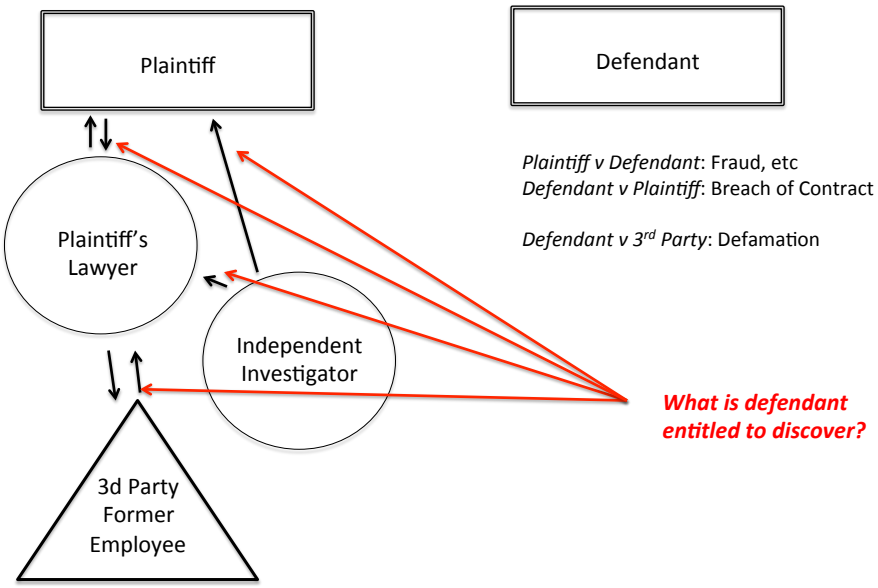
General Accident Assurance v. Chrusz
(1999), 45 O.R. (3d) 321 (Ont. C.A.)



This case considers the rationale and nature of solicitor-client and litigation privilege. It is also important in understanding when and how information can be discovered from third parties, and in what circumstances disclosure to third parties may result in the waiver of litigation privilege.

This was a dispute between an insurer (plaintiff) and a property owner (defendant, insured). The property, a hotel, was damaged by fire and the insurer initially suspected arson based on an independent investigator's report. Thereafter, the insurer seemingly accepted that it was liable to pay under the policy and advanced some funds to the insured. The extent of the insurer's liability had not yet been determined. A recently dismissed employee of the defendant then came forward and (i) produced a video that

he made in respect of his allegations to the plaintiff's lawyer; (ii) produced copies of business records to the plaintiff's lawyer relating to the defendant's business; and (iii) made a statement to the plaintiff's lawyer, under oath, implicating the defendant in causing the fire and making falsely inflated claims under the policy. The plaintiff's lawyer provided a transcript of the sworn statement to the employee and his lawyer and kept a copy of the video and the records. The day after the statement was made, the insurer brought an action in fraud and deceit against the insured to recover the money paid out. The defendant counterclaimed against the insurer under the policy, and, crossclaimed against the employee for defamation.

In its Affidavit of Documents, the plaintiff listed 'Note, blueprint, copies of photo, fax, drawing, report' and claimed privilege against a demand for discovery. At issue was the discoverability of the sworn statement, the video, the records, and the reports made by the independent adjuster to the plaintiff insurer.

(a) Principles:

Lawyer-Client Privilege

per Doherty J.A., dissenting, but in which Carthy and Rosenberg JJ.A. concurred:

> 88 **Client-solicitor privilege is the oldest and best established privilege in our law. It can be traced back some 400 years in English law**...
>
> 89 The criteria for the existence of client-solicitor privilege are well-established. In *Descôteaux c. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.) at 398, and again very recently in *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.) at 288, the Supreme Court of Canada adopted the following description of client-solicitor privilege by Wigmore (8 Wigmore, *Evidence* , § 2292, McNaughton Rev. 1961):
>
> > **Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.**
>
> 90 **The privilege extends to communications in whatever form, but does not extend to facts which may be referred to in those communications if they are otherwise discoverable and relevant**: *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 (Can. Ex. Ct.) at 34; *Grant v. Downs* (1976), 135 C.L.R. 674 (Australia H.C.) at 686; R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham: Butterworths, 1993) at 127-33. For example, even if Mr. Bourret's reports are privileged as a defendant by counter-claim, he may

be examined for discovery on steps he, or others on his behalf, took to investigate the fire as well as on observations made and information gathered in the course of that investigation.

91 **The rationale underlying the privilege informs the perimeters of that privilege. It is often justified on the basis that without client-solicitor privilege, clients and lawyers could not engage in the frank and full disclosure that is essential to giving and receiving effective legal advice. Even with the privilege in place, there is a natural reluctance to share the "bad parts" of one's story with another person.** Without the privilege, that reluctance would become a compulsion in many cases: *Anderson v. Bank of British Columbia* (1874), 2 Ch. D. 644 (Eng. C.A.) at 649; *Smith v. Jones* (1999), 22 C.R. (5th) 203 (S.C.C.) at 217, per
Cory J.; J.W. Strong, ed., *McCormick on Evidence* , 4th ed. (St. Paul, Minn.: West Publishing Co. 1992), vol. 1 at 353.

92 While this utilitarian purpose is central to the existence of the privilege, its rationale goes beyond the promotion of absolute candor in discussions between a client and her lawyer. **The privilege is an expression of our commitment to both personal autonomy and access to justice. Personal autonomy depends in part on an individual's ability to control the dissemination of personal information and to maintain confidences. Access to justice depends in part on the ability to obtain effective legal advice. The surrender of the former should not be the cost of obtaining the latter. By maintaining client-solicitor privilege, we promote both personal autonomy and access to justice**: *Goodman Estate v. Geffen* (1991), 81 D.L.R. (4th) 211 (S.C.C.) at 231-32, per Wilson J.; *Solosky v. Canada* (1979), 50 C.C.C. (2d) 495 (S.C.C.) at 510; *Descôteaux c. Mierzwinski* , *supra* , at 413-14; *A. (L.L.) v. B. (A.)* (1995), 103 C.C.C. (3d) 92 (S.C.C.) at 107-8, per L'Heureux-Dubé J.
(concurring); *R. v. Shirose* , *supra* , at 288; *Baker v. Campbell* , *supra* , at 118-20, per Deane J.

93 **The privilege also serves to promote the adversarial process as an effective and just means for resolving disputes within our society. In that process, the client looks to the skilled lawyer to champion her cause against that of her adversaries. The client justifiably demands the undivided loyalty of her lawyer.** Without client- solicitor privilege, the lawyer could not serve that role and provide that undivided loyalty. As the authors of *McCormick, supra* , write at pp. 316-17:

> At the present time it seems most realistic to portray the attorney-client privilege as supported in part by its traditional utilitarian justification,

> and in part by the integral role it is perceived to play in the adversary system itself. Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary . [Emphasis added.]

94 In summary, I see the privilege as serving the following purposes: promoting frank communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process. Each of these purposes should guide the application of the established criteria when determining the existence of client-solicitor privilege in specific fact situations.

Litigation Privilege

Per Cathy J.A. for the majority:

> 22 The origins and character of litigation privilege are well described by Sopinka, Lederman and Bryant in The Law of Evidence in Canada, (Toronto: Butterworths, 1992) at p.653:
>
> > **As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation.** Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, **it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.** Accordingly, it is somewhat of a misnomer to characterize this aspect of privilege under the rubric, (solicitor-client privilege), which has peculiar reference to the professional relationship between the two

individuals. [Footnotes omitted.]

23 R. J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in Law in Transition: Evidence , L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at 163. He stated at pp. 164-65:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, **solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege.** This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> **Rationale for Litigation Privilege**
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> **Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect — the adversary process — among other things, attempts to get at the**

> **truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.**
>
> ...

29 One historic precedent that in my view does have modern application but that has been given a varied reception in Ontario is the House of Lords' decision in **Waugh v. British Railways Board, [1979] 2 All E.R. 1169 (U.K. H.L.)** . That case concerned a railway inspector's routine accident report. It was prepared in part to further railway safety and

in part for submission to the railway's solicitor for liability purposes. It was held that while the document was prepared in part for the purpose of obtaining legal advice in anticipated litigation, that was not its dominant purpose and thus it must be produced.

30 After considering authorities that had protected documents from production where one purpose of preparation was anticipated litigation, Lord Wilberforce concluded at pp. 1173 and 1174:

> **It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it...**
>
> ...
>
> It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose, would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly...

This dominant purpose test has contended in Canada with the substantial purpose test. Appellate courts in Nova Scotia, New Brunswick, British Columbia and Alberta have adopted the dominant purpose standard...

31 **In Ontario, the predominant view of judges and masters hearing motions is that the substantial purpose test should be applied. This, of course, provides a broader protection against discovery than the dominant purpose test and, in my view, runs against the grain of contemporary trends in discovery...**

...

Common interest privilege

42 In some circumstances litigation privilege may be preserved even rise to this issue on the present appeal is the provision to Pilotte by the solicitor for the insurer of a copy of Pilotte's signed statement.

43 While solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation. It may not be inconsistent with litigation privilege vis-à-vis the adversary to communicate with an outsider, without creating a waiver, but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect.

..

(b) Application of the Principles

	Majority	**Dissent**
Communications between the insurer and its lawyer	All are lawyer-client privileged	Agree.
Investigator's communications to insurer	The reports and communications up to the retainer of a lawyer in contemplation of litigation are not privileged and are discoverable. They do not satisfy the 'dominant purpose' test. The insurer and insured were not adversaries at this point. Thereafter, litigation privilege attaches. Note that no solicitor-client privilege attaches; these are not privileged after termination of the litigation.	Agree. Also, as third party not a conduit of information between lawyer and insured, it is important to hold that no lawyer-client privilege attaches,
Sworn statement made by the former employee (original in the hands of the plaintiff's lawyer)	Made for the litigation and thus litigation privileged in the hands of the insurer, its lawyer, and its investigator.	Not privileged. Litigation privilege must be balanced against other societal interests and thus if the harm to the party seeking the information is more significant than the interests of the party seeking to maintain privileged, it can be limited. The defendant cannot

		get at this information which was very relevant otherwise. Moreover, it contains admissions by the third party employee which are admissible hearsay.
Sworn statement (copy)	Not privileged. No 'common interest' between plaintiff and third party employee, and, not made for the dominant purpose of the third party's litigation. Rather, provided to the third party employee for use as a witness at trial.	Not privileged. Given that the transcript should be produced by insurer, the copy is also discoverable.
'float book and additional time sheets'	Not made for the dominant purpose of the litigation and not privileged. Moreover, public documents are not privileged merely by being gathered together for the purposes of litigation.	A public document might be subject of litigation privilege and best to leave that question open.

Thus, at issue between the majority and dissent was less the application of litigation privilege than its limitation on a principled basis.

Blank v. Canada (Minister of Justice),
2006 SCC 39 (S.C.C.)

In this case the SCC discussed the distinctions between litigation and lawyer-client privilege and held authoritatively that litigation privilege terminates with the litigation (construed broadly to include related litigation in the same cause]. The 'dominant purpose' test was endorsed. The question of privilege attaching to otherwise public documents was left open. The facts involved a request for access to information respecting the prosecution of the applicant for *Fisheries Act* offences which were eventually stayed. The applicant brought an action against the government for the prosecution and sought the information to prove his allegations of improper prosecution. The Federal Court of Appeal held that the documents were discoverable given that the litigation had terminated and the SCC agreed.

Fish J.:

> 34 **The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended**
>
> **litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.**
>
> **35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield.** Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in Hickman, at p. 516.
>
> 36 I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege...
>
> 37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.
>
> 38 As mentioned earlier, however, the privilege may

retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended...

39 At a minimum, it seems to me, **this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.**

40 **As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate"**...

...

8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

9 The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

…

32 **Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel... A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the sine qua non of the solicitor-client privilege, is not an essential component of the litigation privilege.** In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in Waugh v. British Railways Board, [1979] 2 All E.R. 1169. It has been adopted in this country as well...

60 **I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be**

viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. As Royer has noted, it is hardly surprising that modern legislation and case law

> [TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend to limit the scope of this privilege [that is, the litigation privilege]. [p. 869]

Or, as Carthy J.A. stated in *Chrusz*:

> The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]

61 While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

Airst v. Airst

1998 CanLII 14647 (Ont. Sup. Ct.)

Two lawyer-client privileged documents were inadvertently disclosed to a mutual expert. Was privilege lost? It was held that recent authority allowing a judge to determine the issue on a voir dire is preferable to older cases that would hold that privilege has been lost.

Wein J.:

> **Case-law Relating to Waiver of the Privilege Upon Inadvertent Disclosure**
>
> [9] **The traditional common law approach, as set out in the English Court of Appeal in Calcraft v. Guest, [1898] 1 Q.B. 759, [1895-9] All E.R. Rep. 346 (C.A.), has been that the privilege is lost whether the disclosure is by accident or by design.** This traditional approach has been adopted by the Supreme Court of Canada in Descôteaux v. Mierzwinski, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, 141 D.L.R. (3d)
> 592.
>
> [10] However, **in the civil context, in cases where the disclosure is found to be inadvertent, more recent authority in this court and other courts has held that, Descôteaux notwithstanding, there is a discretion that may be properly exercised in favour of non-disclosure where the release of the documents or information has been found to be inadvertent**...
>
> [11] The competing policy interests are obvious. The basic rationale behind the solicitor-client privilege is to permit people to speak frankly and openly with their solicitors. Inadvertent disclosure should not logically override the privilege in all cases, though there may be some level of obligation upon the solicitor and the client to take steps to ensure that their communications remain confidential.
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> ...
>
> [14] The more recent trend in the authorities is to permit the courts to enquire into the circumstances by which the privileged information has come to the attention of the third party. Where a third party has obtained the information by improper means, courts have held that the privileged information ought not to be disclosed. On the other hand, Charter principles, applicable in criminal cases, may override traditional approaches to the law of privilege.
>
> [15] In the criminal law context where Charter principles have overlaid a rights-based matrix onto the development of law, it has been

fully recognized that interpretations of privilege and the scope of a waiver may be affected by Charter-based rights. So for example in R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 at p. 431, 103 C.C.C. (3d) 1 at p. 15,
it was noted that: "it must be recognized that any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence" (per Lamer C.J.C. and Sopinka J. dissenting on another point).

[16] This principled approach to the law of evidence must clearly be given application in the civil law context: it has been acknowledged that the common law should develop in accordance with Charter principles and values, even though the Charter may not have direct application to the case: "ensuring that the common law of privilege develops in accordance with 'Charter values' requires that the existing rules be scrutinized to ensure that they reflect the values the Charter enshrines"...

[17] In this context, that principle dictates that the rigid approach embodied in Calcraft v. Guest, supra, must be modified to reflect the fairness approach developed in more recent cases.

General Conclusions

[18] **In balancing the competing interests in a case involving inadvertent disclosure, the court must exercise a discretion and determine the issue based on the particular circumstances. Factors relevant to the court's consideration will include the way in which the documents came to be released, whether there was a prompt attempt to retrieve the documents after the disclosure was discovered, the timing of the discovery of the disclosure and, sometimes, the timing of the application, the number and nature of the third parties who have become aware of the documents, whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party, and the impact on the fairness, both actual and perceived, of the processes of the court.**

[19] In some cases of inadvertent disclosure there may be a limited risk that the information has become or will become widely known beyond the party to whom the disclosure was made. The information may not even have been fully released, as in cases where documents are released but not opened or read. In other circumstances, the balance may favour admission of the evidence, such as where the documents have come into the hands of the opposing party through the carelessness of the party claiming privilege, but not through any wrongdoing of the opposing party. In some such situations the failure to permit the introduction of the

evidence could leave the party with a sense that the court was denying itself the opportunity to assess conflicting information on a material point, and consequently could negatively reflect on the public perception of the administration of justice. In other cases the information might have been so widely distributed that it would be futile as a practical matter to attempt to prevent its admission. In every case there must be a balancing of the relevant factors in the individual circumstances of the case, thus no hard rule can be laid down.

Findings in this Case

[20] **In this case, there is no issue that the disclosure was inadvertent. A review of the documents confirms that solicitor-client privilege would apply to all of the content of the documents. Notwithstanding that the content may in some way be relevant to the issues before the court, in my view the equities favour the holding that the privilege has not been lost in this case. The release of the documents was entirely inadvertent, apparently through the carelessness of a party of advanced years required to find documents relating to many years of transactions. The disclosure was limited in scope and restricted to one individual retained in a capacity that may be broadly construed as confidential. There has been no "public" disclosure of the documents. The content of the documents does not**

bear in any direct way on the third party's assessment of the material he was retained to review. The court's ability to assess the facts underlying the issues in the case will not be impaired by lack of disclosure. To the contrary, release of the solicitor-client instructions might well be seen, in this case, as giving the opposing party an unfair "windfall" advantage of revealing tactical approaches taken at one point in time by the other side. Given the timing of the discovery of the issue, well after both parties had testified, disclosure at this time is additionally problematic. All of these factors are relevant to my consideration.

[21] Accordingly, in this case the letters will not be released to counsel for the wife. The court copies of the letters will remain sealed and are not to be opened without further court order.

White v. 123627 Canada Inc.
2014 ONSC 2682 (Ont. S.C.J.)

When should counsel who has been provided with privileged documents inadvertently be removed as counsel of record?

Ellies J.:

> [10] Our law has long protected documents created for the purpose of litigation from disclosure to opposing parties during the course of that litigation. Litigation privilege is based upon the need for a "protected area" within which to facilitate investigation in the preparation of a case for trial by the advocate, free from adversarial interference and without fear of premature disclosure: Blank v. Canada (Department of Justice), 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319, at paras. 27-28, adopting the academic writings of Sharpe J.A. in "Claiming Privilege in the Discovery Process," Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65.
>
> [11] Allowing a litigant to fully investigate the facts surrounding a matter free from fear that the results will be disclosed unnecessarily benefits our adversarial system of justice in a number of ways. Among them is the early resolution of claims which, once fully investigated, may not warrant a trial. Where matters are not resolved, the truth-finding function of the trial is facilitated by the degree to which the parties have been free to prepare within the protected area of litigation privilege.
>
> **[12] Where a privileged document finds its way to an opposing party, unfairness is often the result. The shield behind which the information contained in the document came into being may be turned into a sword in the hands of an opponent. The more often that is allowed to occur without court intervention, the more often the incentive**
>
> **will arise not to properly investigate a matter, or to improperly hide the results of it. For that reason, courts should not easily sweep away the protection afforded by litigation privilege and should, where necessary, take steps to enforce it, including removing opposing counsel who have inadvertently been granted access to privileged documents.**
>
> **[13] Where inadvertent disclosure has occurred, as it has in this case, there arises a tension between the need to fortify the protection granted to documents prepared for the purpose of litigation and the right of the "innocent" party to counsel of choice. In *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 (CanLII), [2006] 2 S.C.R. 189, a case in which solicitor-client privileged**

documents fell into the wrong hands, Binnie J. highlighted (at para. 56) the right of a plaintiff to continue to be represented by counsel of choice as an important element of our adversarial system of litigation, holding "that if a remedy short of removing the … solicitors will cure the problem, it should be considered." Binnie J. set out a number of factors to be considered in determining whether counsel should be removed as a result of a breach of solicitor-client privilege (para. 59). These factors include:

(1) the manner in which the documents came into possession of the party or its counsel;

(2) what the party and his counsel did upon recognition that the documents were potentially privileged;

(3) the extent of any review made of the privileged material;

(4) the contents of the privileged documents and the degree to which they are prejudicial;

(5) the stage to which the litigation has progressed; and

(6) the potential effectiveness of precautionary steps taken to avoid the effect of the breach of the privilege.

Applying the test, the lawyer in this case was removed principally on the basis of prejudice to the party on who behalf inadvertent disclosure was made of a confidential interview.

It is a convention of practice to extend the professional courtesy of not reading privileged documents inadvertently produced to you by your opponent and to return them at once.

Deemed Undertaking Rule

Unless information obtained on discovery is made public in a hearing, or subject of consent, or where the Court so allows, it cannot be used for any other purpose:

> 30.1.01.(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Kitchenham v. AXA Insurance Canada
2008 ONCA 877 (Ont. C.A.)

The plaintiff was injured in a car accident. She sued (i) the other driver in tort, and (ii) her insurer who refused her disability benefits arising from injuries sustained in the accident. In the course of the tort action, the plaintiff was required to undergo a medical examination. She was provided a copy of that report as part of disclosure. Also, the defendant in the tort action filmed the plaintiff surreptitiously. The plaintiff was provided with a copy of the tape as part of disclosure.

The defendant in the second action sought production of the report and the tape as part of discovery. The plaintiff refused arguing that the deemed undertaking rule prevented her from producing the report and the videotape. Ultimately the Court of Appeal held that the deemed undertaking rule applied to bar the production of the items but allowed the proceedings to continue in respect of R.30.01(8) [‘f satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.’.]

Doherty J.A.:

> 1 **Civil litigants are compelled in the discovery process to disclose information to their opponents. Forced disclosure can compromise a litigant's legitimate interest in maintaining the confidentiality of documents and information. However, interference with that privacy interest is justified as essential to a fair and accurate resolution of the litigation. Various judicial and legislative means have been developed to limit the interference with privacy interests to the confines of the litigation in which the disclosure is compelled. In Ontario, the deemed undertaking, created by Rule 30.1 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, protects privacy interests by controlling the use of information outside of the litigation in which it was obtained by way of compelled disclosure.** This appeal examines the application of the deemed undertaking rule where a plaintiff, who obtained information from a defendant in one action, seeks to withhold that

information from another defendant in the discovery process in a second action also commenced by the plaintiff.

…

(2) Analysis

(i) Who is Subject to the Deemed Undertaking?

...

26 An undertaking is a promise given by one party to another party to the lawsuit in exchange for obtaining something from that party. Thus**, in the discovery process, one party receives information from another party, and in exchange promises the other party that the information will not be used for any purpose other than the litigation at hand. The disclosed information flows in one direction, from the discovered party to the discovering party. The undertaking flows in the opposite direction, from the party obtaining the disclosure to the party giving the disclosure. That undertaking does not limit what the discovered party can do in the future with its own information. There is no reason for imposing an undertaking limiting future use of the information on the party who has suffered the burden of producing the information through compelled disclosure.** It is equally at odds with the accepted meaning of an undertaking to hold that parties who had no connection with the process in which the undertaking arose should, at some later time in some other litigation, find themselves bound by that promise or undertaking.

27 ... the rationale underlying the Rule, the language used in the Rule, and the jurisprudence of this court interpreting the Rule, all support an interpretation that is consistent with the way in which undertakings customarily work.

(a) Rationale underlying the Rule

28 Rule 30.1 came into force on April 1, 1996: O. Reg. 61/96, s. 2. It is a direct descendant of the common law implied undertaking doctrine recognized by this court in Goodman v. Rossi. The implied undertaking was recently described in these terms:

> One such safeguard is the implied undertaking of confidentiality, which circumscribes the use that a party receiving discovery may make of the information it obtains. *Where the implied undertaking exists, the party in receipt of information is deemed to give an undertaking to the court that it will not use that information for any collateral or ulterior purpose unrelated to the litigation at hand.* [Emphasis added.]

Cristiano Papile, "The Implied Undertaking Revisited" (2006) 32 Advocates' Q. 190, at p. 190.

29 The common law implied undertaking, as developed in Canada and England, limits the use that the recipient of the compelled disclosure could make of information obtained by that disclosure. The implied undertaking did not bind either the party who provided the disclosure or strangers to the litigation in which the disclosure was made...

30 The implied undertaking promotes the due administration of justice in the conduct of civil litigation in two ways. First, it encourages full and frank disclosure on discovery by the parties. It does so by interdicting, except with the court's permission, the subsequent use of the disclosed material by the party obtaining that disclosure for any purpose outside of the litigation in which the disclosure was made. Second, the implied undertaking accepts that the privacy interests of litigants must, subject to legitimate privilege claims, yield to the disclosure obligation within the litigation, but that those interests should be protected in respect of matters other than the litigation: Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc., at paras. 23-27; Richard B. Swan, "The Deemed Undertaking: A Fixture of Civil Litigation in Ontario" (Winter 2008) 27 Advocates' Soc. J., No. 3, p. 16.

...

32 The promotion of full and frank disclosure, and the protection of the privacy interests of those who are compelled to make disclosure during discovery are both served by restricting the use that the party obtaining the information can make of that information. Neither rationale for the implied undertaking justifies any restriction on the subsequent use of the information by the party who produced that information. To the contrary, wrapping all information produced in the discovery process in one action in a cloak of non-disclosure for any subsequent purpose, and requiring a court order to remove that cloak of secrecy would inevitably interfere with the effective operation of the discovery process.

(b) The language of the Rule

33 The language of Rule 30.1 confirms that it, like the common law implied undertaking, targets subsequent use by the recipient of information disclosed through the discovery process. Subrule (1) identifies the material captured by the deemed undertaking. Subrule (1)(a) refers to "evidence obtained under" the various discovery mechanisms described in subrule (1)(a). Subrule (1)(b) extends the Rule to cover information obtained from evidence described in clause (a).

34 The verb "obtained" signals that the Rule applies to evidence (and derivative information) received through the discovery process and not to information provided in that process. A party who receives evidence through compelled disclosure obtains that evidence. The party who provides evidence through compelled disclosure does not obtain that evidence under any accepted meaning of the word. Subrule (2) expressly excludes from the operation of the Rule any evidence (or derivative information) other than evidence obtained through the discovery process. Consequently, if a party called upon to disclose evidence (or derivative information) in a subsequent proceeding did not obtain that evidence through the discovery process, the Rule has no application.

...

37 Two other features of the Rule demonstrate that it applies exclusively to the party or parties who obtain the evidence on discovery. Subrule (4) excludes from the deemed undertaking provision in subrule (3) a use "to which the person who disclosed the evidence consents". An outright exclusion from the deemed undertaking rule based on the unilateral consent of the disclosing party makes sense only if the Rule exists exclusively to protect the residual privacy interest of that party in the information it revealed on discovery. An exclusion from the deemed undertaking based on the disclosing party's consent is inconsistent with an interpretation of the Rule that makes the disclosing party subject to the undertaking. On that reading, one subrule would make the disclosing party subject to the deemed undertaking, while another subrule would allow the disclosing party to escape the deemed undertaking, simply by consenting to the subsequent use. One can hardly be said to be bound by an undertaking if one's own consent can negate that undertaking.

38 Subrule (8) also assists in identifying the nature of the deemed undertaking rule. It provides that the court may order that the deemed undertaking in subrule (3) does not apply to evidence, or information obtained from it, "if satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence". Subrule (8) makes it clear that the party who disclosed the evidence through the compelled discovery process is the exclusive beneficiary of the protection afforded by the deemed undertaking. It is that party's privacy interests that can justify restriction on the use of information obtained through discovery outside of the litigation in which that information was obtained: see B.E. Chandler Co. v. Mor-Flo Industries Inc. (1996), 30 O.R. (3d) 139 (Ont. Gen. Div.), at p. 142.

...

(c) The case law

...

(ii) Did the Plaintiff Obtain a Copy of the Videotape and the IME Through the Discovery Process?

47 The tort defendant conducted surveillance of the plaintiff and recorded that surveillance by way of videotape. A copy of that videotape was produced to the plaintiff on discovery. The plaintiff clearly obtained a copy of the videotape during discovery. The fact that she is the subject of that videotape is irrelevant. The plaintiff is bound by the deemed undertaking not to use the videotape except as permitted by the Rule. The tort defendant, and not the plaintiff, is the beneficiary of that deemed undertaking. The deemed undertaking protects any privacy interest the tort defendant may have in the use of a copy of the videotape outside of the tort action.

48 Similarly, the plaintiff obtained the IME during discovery in that it was produced to her by the tort defendant pursuant to Rule 33. As with the copy of the videotape, the plaintiff is bound by the deemed undertaking not to use the IME in another proceeding and the tort defendant is the beneficiary of that undertaking.

...

(iii) Does the Deemed Undertaking Prohibit Production of Evidence on Discovery in a Subsequent Proceeding?

52 Subrule (3) proscribes use of evidence or information covered by the Rule "for any purposes other than those of the proceeding in which the evidence was obtained." The prohibition is drawn in very wide terms. Those terms are consistent with the scope of the common law implied undertaking that prohibited use for any purpose other than the conduct of the litigation in which the compelled disclosure occurred: Goodman v. Rossi, at pp. 374-75. The privacy rationale underlying the Rule also warrants extending the protection of the Rule to requests for disclosure of the information covered by the Rule in the course of discoveries in subsequent proceedings. Disclosure on discovery compromises the residual privacy interest of the party from whom the material was obtained by compelled disclosure in the earlier proceeding.

(iv) The Operation of Subrule (8).

56 Having concluded that the copy of the videotape and the IME were obtained by the plaintiff in the course of discovery in the tort action,

and that their disclosure on discovery by the plaintiff in the subsequent benefits action would constitute a use of that evidence, it follows that the material is

subject to the deemed undertaking created by the Rule. None of the exceptions enumerated in subrules (4) to (7) apply. AXA can obtain the material either by getting the consent of the tort defendant to the plaintiff giving the material to AXA, or by obtaining an order under subrule (8) lifting the deemed undertaking as it applies to the copy of the videotape and the IME.

57 Subrule (8) identifies the two competing interests which must be considered on a motion under that subrule. On the one side stands the "interest of justice". On the other side stands "prejudice" to the "party who disclosed evidence". The former interest must "outweigh" the latter before the deemed undertaking will be held not to apply to the information in issue. In the context of subrule (8), the "interest of justice" refers to factors that favour permitting the subsequent use of the information. Where the motion arises in the context of a party who seeks to use the information in subsequent litigation, the more valuable the information to the just and accurate resolution of the subsequent litigation, the more the interest of justice will be served by permitting the use of that information.

58 The interests of the party who was compelled to disclose the information are the only interests that can justify maintaining the undertaking. My reading of subrule (8) is consistent with an interpretation of the Rule that recognizes the party who gave up the information as the sole beneficiary of the protection afforded by the Rule. It is also consistent with subrule (4), which provides that the deemed undertaking has no application if the party who disclosed the evidence consents to its use.

59 On the view I take of subrule (8), the interests advanced by the plaintiff to justify her refusal to produce the copy of the videotape and the IME have no place in the exercise of the discretion contemplated in subrule
(8). The plaintiff contends that she has a privacy interest in the material. She also argues that AXA could obtain the same kind of medical information through other means. Unlike the motion judge (paras. 38 and 43-45) and the Divisional Court (para. 20), I do not think these interests carry any weight on a motion under subrule (8). The motion judge, at para. 38, mistakenly refers to the subrule as contemplating the balancing of the interest of justice against "any prejudice that would result to a party". As set out above, subrule (8) looks only at prejudice to the party who disclosed the evidence, in this case, the tort defendant. Claims based on the recipient of the information's privacy interests in the material (in this case,

the plaintiff) have nothing to do with whether a judge should permit use of evidence otherwise subject to the deemed undertaking.[FN4]

60 The discretion in subrule (8) must be exercised on a case-by-case basis. However, where the beneficiary of the undertaking resists relief from that undertaking, the undertaking should only be set aside in "exceptional circumstances". Those circumstances must be particularly compelling if a stranger to the undertaking seeks to use material protected by the undertaking: see Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc., paras. 38 and 53.

...

66 In the normal course, I would simply dismiss the appeal and uphold the order of the Divisional Court that Rule 30.1 applies to both the videotape and the IME, and that subject to a judge's order under rule 30.1.01(8), they cannot be disclosed by the plaintiff in the benefits action. However, while this appeal was pending, the parties proceeded with their motion under subrule (8). The motion judge ordered the plaintiff to produce the videotape, but refused to order production of the IME. Both sides have obtained leave to appeal from that order to the Divisional Court. The parties included a copy of the motion judge's endorsement in the appeal book. Those reasons must now be assessed in the light of these reasons.

67 If both parties are content, the appeals from the motion judge's order under subrule (8) should proceed in the Divisional Court in the normal course. One or both parties may, however, wish to make a motion under s. 6(2) of the Courts of Justice Act. That section would allow this court to hear the appeal from the motion judge as long as this appeal was still outstanding in this court. There was some discussion at the time of oral argument concerning the possible application of s. 6(2). I think the parties should have an opportunity to revisit their positions with respect to that section after reviewing these reasons.

68 Rather than dismissing the appeal immediately, I would release these reasons and allow the parties an opportunity to decide whether either or both wish to bring a motion under s. 6(2) of the Courts of Justice Act. The parties should inform this court within seven days of the release of these reasons whether any such motion will be brought. If the motion is to be brought, counsel may arrange a conference call with me to work out the details. If neither party decides to bring a motion under s. 6(2), an order can issue dismissing the appeal.