

LEGAL PRIVILEGE AND ITS APPLICATION TO APPRAISERS
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An important issue facing appraisers in the preparation of appraisal reports for any purpose is how the findings, conclusions and supporting factual foundations found in their opinions will be used and relied upon. Although an appraisal on its face, and in its standard limiting terms, is a confidential document that is not to be disclosed to anyone other than the client, except with the client's permission;¹ in reality, appraisal opinions and the information therein are often shared with, reviewed by and relied upon by third parties. These third parties may include financial institutions, parties on the other side of a transaction and adverse lawyers in litigation. It is essential that appraisers understand the limitation on the confidentiality of their reports and the information upon which they rely.

Once an appraiser's opinion becomes part of the litigation process, the confidentiality of the report, its underlying facts and the appraiser's analysis are governed by the rules of disclosure, as found in the *Rules of Civil Procedure*² and the common law of legal privilege.

¹ Canadian Uniform Standards of Professional Appraisal Practice, the Standards Committee, Appraisal Institute of Canada, effective January 1, 2005 ("CUSPAP Rules") at lines 129-130.

² *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, as amended.

In order for an appraiser to maintain his or her ethical and professional obligations to a client, an appraiser must properly understand the scope of and limits to confidentiality in the appraisal process. The appraiser must be able to identify areas where the confidentiality of sensitive information in their analysis may be compromised. It is incumbent on professional appraisers to inform clients of the restrictions and limitations on confidentiality in the appraisal process, so that clients or others acting on their behalf do not inadvertently or unnecessarily disclose information or opinions that ought to remain in confidence.

This discussion will briefly address the obligations of confidentiality on an appraiser, the forms of legal privilege in Canada and how privilege applies to appraisers when an appraisal opinion or report becomes part of the litigation process. This paper will also discuss the scope of disclosure obligations that apply to an appraiser, or any other expert, who is involved in litigation.

Confidentiality for Appraisers

One of the cornerstones of the professional and ethical obligations of an appraiser is to respect the confidentiality and sensitivity of information provided by a client and to ensure that their analysis, findings and conclusions remain the private property of the client to the exclusion of all others unless the client instructs otherwise. This principle is enshrined in the CUSPAP Rules, under the Ethical Standards, which read as follows (at lines 110, 129 and 130):³

³ CUSPAP Rules, *supra* note 1 at lines 110, 129 and 130.

“It is unethical for a **member**: ...

8. To **disclose** results of an assignment to anyone but the client, except with the client’s permission”.

The CUSPAP Rules elaborate on this duty at lines 604 to 621, which read as follows:

- “- members pledge to uphold the confidential nature of the appraiser/client relationship.
- a member must not disclose the analyses, opinions, or conclusions in an assignment to anyone other than:
 - the client and those persons specifically authorized by the client to receive such information;
 - third parties, when the member is legally required to do so by due process of law; or
 - an authorized Committee of the Institute.
- a member must not disclose information provided by a client on a confidential basis to anyone other than:
 - those persons specifically authorized by the client to receive such data;
 - third parties, when required to do so by due process of law; or
 - an authorized Committee of the Institute.
- when serving the Institute in any capacity, a member must not disclose or use confidential information obtained in connection with such service”.

As noted in the CUSPAP Rules, the appraiser’s obligation not to disclose his or her analyses, opinions or conclusions is tempered by the provision that this information is not protected when a member is legally required to disclose this information by due process of law. This requirement of disclosure “by due process of law” applies to disclosure and production requirements that exist in disputes before the court or other statutory bodies before whom disputes are resolved.

Legal privilege is distinct from ethical or equitable principles and duties of confidence.

This was expressed in *The Law of Evidence in Canada* as follows (at 716):⁴

“Although confidentiality is the corner stone for the protection of communications within particular relationships, confidentiality alone is not sufficient to attract privilege. Confidentiality may well attract other legal and ethical rights and obligations, but it does not have its foundations in the evidentiary doctrine of privilege”.

The assumption that information or opinions are privileged simply because they are delivered in confidence is often incorrect and can lead to undesirable consequences.

Legal Privilege

Legal privilege finds its origins in communications between a solicitor and client. This principle arose at the end of the sixteenth century and became the first category of confidential communications to be afforded a “privilege”. Privilege was originally based on the notion of confidence and honour and that a solicitor, as “a man of honour would not betray a confidence, and the judges as men of honour themselves would not require him to”.⁵ Although privilege was originally held by the solicitor, it is now held by the client and may only be waived by the client.⁶

Legal privilege falls into three principle categories that will be discussed in this analysis.

These categories are:

⁴ John Sopinka, Sidney N. Lederman, Alan W. Bryant, *The Law of Evidence in Canada*, 2nd (Toronto: Butterworths, 1990).

⁵ *D. v. National Society for the Prevention of Cruelty of Children*, [1977] All E. R. 589 at 611.

⁶ Ronald D. Manes, *Solicitor/Client privilege* (February 1988), 7 *Advocates’ Soc. J.* No. 1, 20.

- (1) Solicitor and client privilege;
- (2) Litigation privilege (work product privilege); and
- (3) Settlement privilege.⁷

Communications and opinions that attract legal privilege are protected from disclosure that would otherwise be required by the legal process, unless the privilege has been waived by the intention or conduct of the entity that holds this privilege.

The protection afforded by legal privilege applies only to the communication itself and not to the underlying facts or documents found in the communication. Simply because a document is found in the privileged file of a solicitor or a fact is revealed in a privileged communication does not render the fact or document privileged.⁸ An example of this principle was applied in the decision of *General Accident Assurance Co. v. Chrusz*,⁹ where the Court of Appeal held that documents in a lawyer's "brief" that would not otherwise be privileged did not attract privilege as a result of the document being copied, organized and included in a lawyer's litigation brief.¹⁰ Any expert assembling information for the purpose of litigation should be mindful of this limitation on legal privilege.

⁷ Other forms of recognized legal privilege exist, such as spousal communications and privilege against self-incrimination. This analysis will not elaborate on these areas of privilege. More information can be found on this topic in the *Law of Evidence in Canada*, *supra* note 4.

⁸ Margaret L. Waddell, *Litigation Privilege and the Expert: In the Aftermath of Chrusz* (Autumn 2001), 20 *Advocates' Soc. J.* No. 2, 10.

⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

¹⁰ *Ibid.* at para 38.

Solicitor and Client Privilege

Solicitor and client privilege protects communications passing between a lawyer and client when the communication is in confidence and for the purpose of obtaining legal advice. This privilege has been protected by the courts and recognized as a fundamental aspect of our legal system. As the Court stated in *Guelph v. Super Blue Box Recycling Corp.*,¹¹ (at para 76):

The functional purpose of solicitor-client privilege goes to the very heart of the administration of the legal system. All persons, whether natural, corporate, or governmental, must have access to expert legal counsel without fear that this recourse may be used to their detriment: *Smith v. Jones* at S.C.R. 474-475; *Fosty* at S.C.R. 289. Solicitor-client privilege is a “fundamental civil and legal right” (*Solosky*, at S.C.R. 839) and is “fundamental to the justice system in Canada” (*R. v. McClure*, [2001] 1 S.C.R. 445 (S.C.C.), per Major J.).

The definition of solicitor/client and privilege, as set out by J. H. Wigmore, and adopted by the Supreme Court is as follows:

(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived”.¹²

Solicitor and client privilege exists forever, unless it is waived by the client. A waiver of privilege can take place expressly or implicitly and applies to the entire subject matter of the communication. A party may not “cherry pick” privileged communications, disclosing what is helpful and claiming privilege over the remainder.¹³ A waiver occurs

¹¹ *Guelph v. Super Blue Box Recycling Corp.*, [2004] CarswellOnt 4488 (Ont. S.C.J.).

¹² J.H. Wigmore, *Evidence in Trials at Common Law*, McNaughton Rev., vol 8 (Boston: Little, Brown, 1961), at 554. Adopted by Supreme Court of Canada in *Solosky v. Canada*, [1980] 1 S.C.R. 821.

¹³ *Guelph v. Super Blue Box Recycling Corp.* *supra* note 11 at para. 78.

in an instance where the privilege has been revealed to a third party. In normal circumstances, courts are prepared to excuse “slips” which result in inadvertent disclosure on the basis that the disclosing party did not intend to waive privilege and the disclosure was a mistake and made without the appreciation of the effect of disclosure.¹⁴

Madam Justice McLachlin, who is now the Chief Justice of the Supreme Court of Canada, explained the waiver of privilege as follows in the decision of *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*¹⁵, when she was writing for the British Columbia Supreme Court (at 220):

“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 evidences an intention to waive the privilege. However, 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.”

It is also recognized that privilege can be lost in instances where public safety is at risk.¹⁶

Solicitor and client privilege applies not only to the lawyer and the client, but also to agents of either party who are communicating on behalf of the lawyer or client.¹⁷ The principle of solicitor and client privilege applying to agents can extend to experts acting on behalf of the solicitor or client, but with the limitation that it is only applicable in

¹⁴ *Ibid.* at para. 81.

¹⁵ *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁶ See discussion in David Layton, *R. v. Brown: Protecting Legal-Professional Privilege* (2002), 50 C.R. (5th) 37.

¹⁷ *The Law of Evidence in Canada*, *supra* note 4 at 742; *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860.

instances where the expert is acting as the “alter ego” of the solicitor or client or where the expert is performing a task of a translator or intermediary.¹⁸ When an expert is acting in an independent capacity and preparing an independent opinion, privilege does not apply even if the communication is part of a solicitor and client communication.¹⁹

Although certain instances may arise when an appraiser is acting as an “agent” of the client or the solicitor in conveying or interpreting information, appraisers are often performing these tasks in the context of their own analysis as well. Where the task is also for the benefit of the appraiser’s analysis then solicitor-client privilege will not protect the communication. Accordingly, caution should be exercised in assuming that a communication passing between the client, through the appraiser to a solicitor, or vice versa, will be protected by solicitor and client privilege.

Settlement Privilege

Communications made in furtherance of settlement are considered privileged and are protected from disclosure. The policy underlying settlement privilege is to encourage parties to resolve their private disputes without recourse to litigation and to encourage full, frank and uninhibited discussions by the parties to a dispute in order to resolve the matter.²⁰

¹⁸ *Litigation Privilege in the Expert, supra* note 8.

¹⁹ *The Law of Evidence in Canada, supra* note 4 at 743.

²⁰ *Ibid.* at 807.

Courts have recognized the existence of settlement privilege when the following conditions are present:²¹

- (1) A litigious dispute must be in existence or within contemplation;
- (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- (3) The purpose of the communication must be to attempt to effect a settlement.

Parties often label correspondence that is in furtherance of settlement with the phrase “without prejudice”. This label creates an inference that the communications are made for the purpose of settlement, but is not definitive of the issue.²² Despite a written communication having a “without prejudice” label on it, the determination of whether the communication attracts settlement privilege is based on the intention of the parties in making the communication. Similarly, if the “without prejudice” phrase is not included on a written communication, it may still attract settlement privilege if it is demonstrated that the intention of the parties was that the communication was in furtherance of settlement.

Settlement privilege over communications may be lost in instances where: (1) the communication is unlawful; (2) the communication is prejudicial to the recipient; (3)

²¹ *Costello v. Calgary* (1997), 152 D.L.R. (4th) 453 at 487 (Alta. C.A.).

²² *Peel Condominium Corp. No. 199 v. Ontario New Home Warranties Plan* (1988), 30 C.P.C. (2d) 118 at para. 32 (Ont. Div. Ct.).

when a determination must be made as to whether an actual settlement took place; (4) when issues relating to a limitation period are at issue; or (5) when a determination with respect to a claim for costs of an action is to be determined.²³

In certain instances, an expert opinion will be used to further a settlement and will be shared with a party for that purpose. In such a case, the expert opinion or report becomes part of the communication in furtherance of settlement and should attract settlement privilege. An expert opinion or report is subject to the same test as other settlement communications, in order to determine whether it is privileged.

The issue of settlement privilege applying to appraisal reports was addressed by the Ontario Municipal Board in *Gadzala v. Toronto and Region Conservation Authority*.²⁴ In this matter, the Respondent sought to claim privilege over two appraisal reports which were provided to the Claimants in negotiations for the purchase of their land, which was later expropriated by the Respondent. The Claimants submitted that the two appraisal reports were prepared for the Respondent for the purpose of negotiating a real estate transaction prior to the expropriation (and prior to the Respondent even obtaining the authority to expropriate) and were therefore not protected by settlement privilege. It was submitted by the Claimants that these reports were not made when the litigious dispute was within contemplation and the reports were actually for the purpose of negotiating a real estate purchase. Mr. R. A. Beccarea, writing for the Board, found that negotiations

²³ *The Law of Evidence in Canada*, *supra* note 4 at 815 to 818.

²⁴ *Gadzala v. Toronto and Region Conservation Authority*, [2001] O.M.B.D. No. 1142 (O.M.B.).

were already underway between the Claimant and the Respondent at the time these reports were prepared and that communications between the Claimant and the Respondent were structured in a way that contemplated a settlement of a potential expropriation, not a real estate negotiation.²⁵ Based on this finding, the Board concluded that both of the reports were protected by settlement privilege and were not to be disclosed in the context of the hearing.

Another case dealing with the application of settlement privilege to expert reports was *Gay (Guardian ad litem of) v. UNUM Life Insurance Co. of America*, heard by the Nova Scotia Supreme Court.²⁶ In this matter, the Defendant, an insurance company, sought production of expert medical reports that had been provided to the Plaintiff by the opposing party in a related proceeding. The related proceeding had settled, but the litigation between the Plaintiff and the insurance company continued. The Defendant in the related proceeding objected, on the grounds that these reports were used in the mediation and were therefore privileged. The Court, however, found that the medical reports were relevant and that they were served in advance of the mediation. The Court also concluded that these reports were served for purposes other than the mediation. Consequently, the reports did not attract settlement privilege.²⁷

However, there are some circumstances where settlement privilege will be recognized. For instance, the *Rules of Civil Procedure* in Ontario deem all communications at a

²⁵ *Ibid.* at paras. 16 to 21.

²⁶ *(Guardian Ad Litem of) v. UNUM Life Insurance Co. of America*, [2003] N.S.J. No. 442 (S.C.).

²⁷ *Ibid.* at paras. 26 and 27.

mediation session to be “without prejudice settlement discussions”, which attract settlement privilege.²⁸ It would appear, therefore, that if an expert report is restricted to a party’s communications at a mediation, that report would be protected by settlement privilege. In order to maintain settlement privilege over an expert report, the report must be prepared for the primary or exclusive purpose of bringing about a resolution to a matter and that intention should be made clear, in writing, at the time the report is served. An appraiser may also wish to include the purpose for which the report is prepared in the text of the report and label the report “without prejudice”.

Litigation Privilege

Litigation privilege protects the contents of a solicitor’s file when the file is prepared for the dominant purpose of litigation.²⁹ Litigation privilege has a number of distinctions from solicitor and client privilege. These distinctions were discussed by R.J. Sharpe, who is now a judge of the Ontario Court of Appeal, in a paper entitled “Claiming Privilege in the Discovery Process”,³⁰ in a passage that reads as follows:

“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

²⁸ Rules 24.1.14 of the *Rules of Civil Procedure*, *supra* note 2.

²⁹ Peter W. Atkinson, *Production Obligations: The Narrowed Scope of the Work Product Privilege* (August 1994), 13 *Advocates’ Soc. J.* No. 2, 6.

³⁰ R.J. Sharpe, “Claiming Privilege in the Discovery Process” in *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at 163, recently cited by the Supreme Court of Canada in *Blank v. Canada (Dept. of Justice)* (2006), 270 D.L.R. (4th) 280 (S.C.C.).

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 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)".

This passage was quoted by the Ontario Court of Appeal in the *Chrusz* decision. The policy underlying litigation privilege was articulated by the Ontario Divisional Court in the decision of *Ottawa-Carleton v. Consumers' Gas Co.*³¹ as follows (at 748):

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

Litigation privilege has also been referred to as "work product privilege", as it represents the entire work product the lawyer assembles in a brief, which constitutes the lawyer's

³¹ *Ottawa-Carleton v. Consumers' Gas Co.* (1990), 74 D.L.R. (4th) 742 (Ont. Div. Ct.).

labour and the sum total of the lawyer's knowledge, research and skill.³² When an expert report is prepared at the instance of counsel for use in litigation, it too attracts litigation privilege.³³

Privilege that applies to expert reports, advice or opinions in the litigation privilege is waived once an expert becomes a witness and offers his or her opinion for the assistance of the court. The court and the opposing party are entitled to test the opinion through cross-examination. Accordingly, documents in the possession of the expert which are relevant to the substance of the opinion or which are clearly relevant to his or her credibility must be produced to the opposing party before a fair cross-examination can take place.³⁴ The application of litigation privilege to an expert is also waived by operation of the *Rules of Civil Procedure*, which will be discussed in further detail below.

Disclosure of Experts' Findings and Reports under the *Rules of Civil Procedure*

The extent to which an expert opinion and the underlying facts and findings are to be divulged in the litigation process is set out in the *Rules of Civil Procedure*. Rule 31.06(3) governs the extent that an adverse party may examine on the findings, opinions and conclusions of an expert. Rule 31.06(3) reads as follows:

“(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined

³² *Flinn v. McFarland* (2002), 30 C.P.C. (5th) 183 (N.S. S.C.).

³³ *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49 at para. 15 (S.C.J.).

³⁴ *Williams v. Thomas Developments Corp.* (2003), 42 C.P.C. (5th) 381 at para. 12 (Nfld. S.C. – T.D.).

need not disclose the information or the name and address of the expert where,

- (a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
- (b) the party being examined undertakes not to call the expert as a witness at the trial”.

The Rule cited above governs the scope of discovery relating to an expert opinion prior to a trial. Normally, a party will have the opportunity to examine an adverse party prior to trial in an “Examination for Discovery”. The Ontario Court of Appeal has recently clarified that this rule applies only during the discovery stage of a proceeding and not at throughout the entire existence of the proceeding.³⁵

The application of Rule 31.06(3) and the scope of discovery relating to an expert opinion is tempered by the definition of the words “findings, opinions and conclusions” which are found in this rule. A broader interpretation of the words “findings, opinions and conclusions” allows for a wider scope of discovery in regard to the expert’s analysis. Courts in Ontario, with certain exceptions, have interpreted the words “findings, opinions and conclusions” broadly.³⁶ The broadening of this definition has, however, recently been tempered by a recent decision that will be discussed below.

³⁵ *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 272 D.L.R. (4th) 545 at 550 (Ont. C.A.), leave to appeal to the Supreme Court of Canada pending, [2006] S.C.C.A. No. 451.

³⁶ *Production Obligations*, *supra* note 29; *Browne v. Lavery*, *supra* note 33 at para. 47.

A statement defining the words “findings, opinions and conclusions” in Rule 31.06(3) was made by Mr. Justice Lofchik in *Turner (Litigation Guardian of) v. Dyck*,³⁷ which reads as follows (at para. 16):

“The scope of “*findings, opinions and conclusions*” in rule 31.06 is broad and includes information and data obtained by the expert, contained in documents or obtained through interviews on the basis of which conclusions are drawn and opinions are formed. The information and data can include research, documents, calculations and factual data and the words “*findings, opinions and conclusions*” are broad enough to include the field notes, raw data and records made and used by the expert in preparing his or her report to the extent that factual underpinnings in support of the opinions or conclusions are not set out in the report. To the extent that the opinions and conclusions in the report are based upon information communicated by counsel to the experts, even though the result of research and the work product of counsel, the provision of such information to the experts and the reliance upon same by the experts in coming to their opinions and conclusions waives any privilege which may attach to such information”.

The impact the *Rules of Civil Procedure* have on litigation privilege was commented on in *Chrusz*, where the Ontario Court of Appeal noted (at para. 26), “our modern rules certainly have truncated what would previously have been protected from disclosure”. The Court in *Chrusz* also noted (at para. 28), “in a very real sense, litigation privilege is being defined by the [*Rules of Civil Procedure*] as they are amended from time to time”. Rule 31.06(3) applies to all “findings” of an expert, which includes all communications to them. Accordingly, even if communications through the expert would have been protected by solicitor and client privilege, the communications are waived by the *Rules of Civil Procedure* if the expert is called at trial.³⁸

³⁷ *Turner (Litigation Guardian of) v. Dyck*, [2002] O.J. No. 4775 (S.C.J.).

³⁸ *Litigation Privilege and the Expert*, *supra* note 8.

Rule 31.06(3) does not compel an expert to produce their actual report during the discovery stage.³⁹ This rule only applies to the findings, opinions and conclusions underlying the report. As a practical matter, however, the expert report itself is often produced to discharge the obligations set out in Rule 31.06(3).⁴⁰

A party to litigation can also avoid immediately complying with Rule 31.06(3) at discovery in the event that the party is not yet certain whether they will rely on the expert report. This was addressed in the decision of *Hosh (Litigation Guardian of) v. Black*, where an Ontario Court Master ruled that Rule 31.06(3) does not force a litigant to make an “election” relating to whether they will use an expert at trial or not. The Court, therefore, permitted a party to defer this “election” until a reasonable period before trial.⁴¹

The Court then summarized the application of Rule 31.06(3) as follows (at para. 23):

“From my review of Rule 31.06(3) and the cases cited by counsel I conclude:

1. At discovery, a party must answer whether or not they have engaged an expert.
2. A party can be asked if they have received any preliminary findings, opinions or conclusions, even oral ones.
3. These findings, opinions or conclusions must be disclosed unless the party undertakes not to call that expert at trial.
4. At discovery, a party can be put to their election to not call their expert at trial and they can maintain any privilege over any report so long as that election is made.
5. Counsel can decline to answer the question on their undertaking to advise the examining party of their election within a reasonable period of time; generally in advance of the settlement conference.
6. In the absence of such an undertaking, the Court can require a party to answer the question or set a time limit for the election. This is a

³⁹ *Turner (Litigation Guardian of) v. Dyck*, *supra* note 37 at para. 13.

⁴⁰ *Conceicao Farms Inc. v. Zeneca Corp.*, *supra* note 35 at 549.

⁴¹ *Hosh (Litigation Guardian of) v. Black*, [2003] CarswellOnt. 2283 at para. 18 (Master).

necessary adjunct to the Court's power to set a date for the delivery of an expert's report in advance of the time periods prescribed by Rule 53.03".

Rule 53 of the *Rules of Civil Procedure* governs the use of expert reports at trial and reads as follows:

"53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert setting out his or her name, address and qualifications and the substance of his or her proposed testimony.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

- (a) a report served under this rule; or
- (b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial".

Rule 53 of the *Rules of Civil Procedure* also imposes the obligation on an expert to disclose their opinion and the basis for their opinion. An expert will not be permitted to testify on other fields not mentioned in their report, as a result of Rule 53.⁴² Administrative tribunals have the ability to make their own rules governing the advance disclosure of expert reports.⁴³ Certain administrative bodies, such as the Ontario

⁴² *Marchand v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 at 107 (C.A.).

⁴³ *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22, Section 5.4(1)(c).

Municipal Board in expropriation matters, incorporate the rules governing the exchange of expert reports from *Rules of Civil Procedure* into their own procedure.⁴⁴

As noted from the discussion above, the disclosure obligations relating to an expert are broad, even at early stages in litigation. Accordingly, an expert must be mindful of these obligations from the time they are retained in order to ensure that their client is not prejudiced by the disclosure or production of otherwise confidential information.

Scope of Producing Documents from an Expert's File

In the decision of *Browne (Litigation Guardian of) v. Lavery*, the Ontario Superior Court dealt with the waiver of litigation privilege as a result of an expert serving a report or providing evidence at a trial. In this case, the Court ruled that the disclosure of an expert report to another expert does not constitute a waiver of litigation privilege, but if a report is disclosed to the opposing side in a conflict, then privilege is waived.⁴⁵ If the disclosure of such a report to the opposing side is inadvertent and a genuine intention remains to preserve privilege over the report, the Court may relieve a party of this waiver.⁴⁶

⁴⁴ *Rules of Practice and Procedure* of the Ontario Municipal Board, Section 140. This section extends the time for the advance service of expert reports beyond that provided for in Section 28(1) of the *Expropriations Act*. Often the timing for the exchange of expert reports is set forth in a procedural order that is made on content of the parties or by order of the Board. For matters that do not concern expropriation, the O.M.B. *Rules of Practice and Procedure* address the filing of expert reports in Section 21.

⁴⁵ *Browne v. Lavery*, *supra* note 33 at paras. 16 and 17.

⁴⁶ *Windsor (City) v. MFP Financial Services Ltd.*, [2004] CarswellOnt 4990 at para. 14 (C.A.). In this case one of the lawyers for the Plaintiff had inadvertently provided an expert report to a lawyer who was no longer part of the Plaintiff's

The Court in *Browne* also held that if some of the information in an expert opinion or report is disclosed then privilege over the entire document is waived.⁴⁷ This decision was made in light of the Supreme Court of Canada's decision in *R v. Stone*,⁴⁸ where the Court ruled that when counsel in their opening address in a criminal trial makes reference to an expert report, privilege over the entire report is waived. The Court in *Browne* went on to favour a broad definition of "findings, opinions and conclusions" in the *Rules of Civil Procedure* and held that an expert should not only produce documents that they actually relied on, but should produce all documents that they had in their possession that could have been relied on.

In this case, a document in the expert's possession included a report of another expert who was retained but not relied upon. Although the report of the first expert was not relied upon, a copy of his report was provided to the second expert, whose opinion was relied upon. The Court ultimately held that the first expert's report had to be revealed to the opposing side as it was in the file of an expert whose opinion was put forward. In arriving at this decision, Mr. Justice Ferguson provided the policy behind the broad

counsel and was now a lawyer with a law firm involved in the proceeding as an adverse party. The Court of Appeal in this matter was satisfied that the disclosure of this report was in error and a genuine intention remained to preserve privilege over the report. The Court of Appeal therefore held that privilege had not been waived.

⁴⁷ *Browne v. Lavery*, *supra* note 33 at para. 18.

⁴⁸ *R. v. Stone*, [1999] 2 S.C.R. 290.

production obligation of documents found in an expert's file as follows (at paras. 58 to 60):

“The Supreme Court in *Stone* said that the purpose of the production is to permit opposing counsel to test the expert's opinions. It contemplated that the content of a report might contradict the opinion given in testimony. So might other information in the expert's possession. An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel -- for instance, by removing damaging content.

It is difficult to understand how a determination could be made as to what was influential. Would counsel decide? Would the expert decide? Why should this decision not be open to scrutiny? The expert might not realize or acknowledge the extent to which information provided has influenced his or her opinion.

It seems logical that if counsel sends the expert information counsel does so because he or she believes this information is relevant to the expert's task. If it is relevant to the task then it seems to me it should be available to counsel who must test the opinion”.

The Court in *Browne* went on to state that parties are required to produce all communications which take place between counsel and the expert before the completion of the report.⁴⁹ This case has been followed by the Court in *Aviaco International Leasing Inc. v. Bowing Canada Inc.*, where the Ontario Superior Court adopted the ruling in *Browne* and held that experts are required to produce their draft reports to the opposing side if requested to do so.⁵⁰ In this decision Mr. Justice Nordheimer stated, “...a party ought to be able to explore with an expert whether he or she changed her views from draft to draft and, if so, why. It is all part of testing the expert's conclusions”. The Nova Scotia Supreme Court in *Flinn v. McFarland*, also adopted the holding of the Ontario

⁴⁹ *Ibid.* at para. 66.

⁵⁰ *Aviaco International Leasing Inc. v. Bowing Canada Inc.*, [2002] O.J. No. 3799 at para. 16 (S.C.J.).

Court in *Browne* and held that draft reports of experts are producible.⁵¹ The Court in this case, however, found that if the expert had prepared a working draft which was amended, altered or revised without being revealed to any other parties, that draft does not have to be produced.⁵²

Courts in other provinces, as well as courts in Ontario have adopted the ruling of the Superior Court of Justice in *Browne* relating to the very broad production requirements imposed on an expert whose opinion will be relied upon in litigation.⁵³ It should be noted, however, that the holding of the Court in *Browne* (that virtually the entire content of an experts' file should be produced) is not entirely consistent with prior decisions of the Ontario Superior Court.⁵⁴ This fact is expressed in the body of this judgment by Mr. Justice Ferguson. The Court also states in its decision that "this area of the case law cries out for appellate review".⁵⁵

The appellate review came in *Conceicao Farms Inc. v. Zeneca Corp.*, where the Ontario Court of Appeal on a motion before a single judge was asked to order the production of a

⁵¹ *Flinn v. McFarland*, *supra* note 32 at paras. 10 to 15.

⁵² *Ibid.* at para. 9.

⁵³ See e.g. *Walker v. Baskin Robbins*, [2004] CarswellOnt. 1856 (Master); *Chapman Management & Consulting Services Ltd. v. Kernic Equipment Sales Ltd.*, [2004] CarswellAlta 863 (Q.B.).

⁵⁴ See e.g. *Bell Canada v. Olympia & York Developments Ltd.* (1989), 68 O.R. (2d) 103 (H.C.J.); *Mahon v. Standard Life Assurance Co.*, [2000] O.J. No. 2042 (S.C.J.).

⁵⁵ *Browne v. Lavery* at paras. 70 and 71. This judicial comment was also restated in *Flinn v. McFarland*, *supra* note 32 at para. 15.

memorandum that an expert had prepared for a lawyer early on in the proceeding, even though the trial had already taken place and the issue was now whether a new trial should be ordered.⁵⁶ The Court followed the holding of the Superior Court in *Browne v. Lavery* and ordered that the early memorandum be produced. This decision was appealed to a three judge panel of the Court of Appeal, which reserved the earlier ruling of the single judge to compel production of the expert's memorandum.

In arriving at its decision, the Court acknowledged that a party has the obligation to produce foundational information possessed by an expert as part of the discovery process.⁵⁷ The Court, however, did not find that the production obligation extended after the discovery process had been completed.⁵⁸ The Court also commented on the *Browne* decision and stated that it may have been overreaching in the disclosure it required (at 549):

There is an area of debate concerning the scope of information that may be obtained pursuant to this rule. It clearly encompasses not only the expert's opinion but the facts on which the opinion is based, the instructions upon which the expert proceeded, and the expert's name and address. How far beyond this the right to obtain foundational information (as our colleague called it) extends, need not be determined here. Suffice it to say that we are of the view that it does not yet extend as far as is tentatively suggested in *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49 (Ont. S.C.J.). We simply proceed on the basis that the rule entitles the appellant to obtain on discovery the foundational information for Dr. Grafius' final opinion. As will become clear, we need not decide in this case the precise extent of the information that is discoverable.

⁵⁶ *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 272 D.L.R. (4th) 532 (Ont. C.A.).

⁵⁷ *Conceicao Farms Inc. v. Zeneca Corp.*, *supra* note 35 at 550.

⁵⁸ *Ibid.*

This recent decision has been appealed to the Supreme Court of Canada. To date, the Supreme Court has not indicated whether leave to appeal will be granted. As a result of court decisions applying a somewhat inconsistent approach to what is or is not producible in an expert's file, the law in this area remains somewhat uncertain and may continue to be until the Supreme Court of Canada renders a decision in this area. Even if a decision is made concerning the scope of disclosure, the law will remain very fact specific, as is evidenced from the decisions referenced above.

Conclusion

It is imperative for an appraiser to understand the rules of legal privilege and how these rules interface with obligations of confidentiality to clients as well as the obligation to produce and disclose documents when involved in the litigation process.

When preparing an appraisal analysis outside of the litigation process, appraisers can assume that their work will be held in confidence unless the client authorizes its release to a third party. Once the opinion or report has been released to a third party, however, its confidentiality may be forever lost, depending on the use that a third party makes of the appraisal analysis.

When involved in the litigation process, an expert should be mindful of the fact that the information they are provided, as well as the analysis, conclusions and the report itself may attract legal privilege. This privilege is, however, waived once the expert or the

analysis is relied on in litigation. Once an expert report or opinion is relied on in litigation, an expert should assume that privilege relating to the entire file will be waived and the entire file will, therefore, be producible.

Although the law in Ontario remains somewhat in flux, as it relates to the production of documents in an expert's file, the law has at times favoured broad disclosure of an expert's file and at very least the foundational component of an expert's file. Consequently, experts should err on the side of caution and govern their affairs contemplating the possibility that significant portions of their file may end up being produced in the litigation. Three precautions that are advisable in light of this reality are:

- (a) Advise clients and any other parties involved in a matter of the potential production obligations relating to the appraisal file at the outset of the engagement so that a party is aware of the potential production of file documents;
- (b) Avoid requesting or accepting documents or communications that can be prejudicial or embarrassing to your analysis if produced and revealed; and
- (c) Attempt to maintain clear and complete records of observations, notes, communications and documents so that the contents of a file, if produced, will be revealed in its proper context and properly present the fairness of the appraisal analysis.

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