Citation: ***College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*** 2002 BCCA 665

Date: 20021212

Docket: CA028608

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA

APPELLANT
(PETITIONER)

AND:

THE INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA

RESPONDENT
(RESPONDENT)

AND:

DR. DOE

RESPONDENT

AND:

THE APPLICANT

RESPONDENT

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Low
The Honourable Madam Justice Levine

D. Martin	Counsel for the Appellant
P. Dickie and C. Buchanan	Counsel for the Applicant
W. Clark	Counsel for Dr. Doe
M. Baird	Counsel for the Law Society of British Columbia
Place and Date of Hearing:	Vancouver, British Columbia September 24 & 25, 2002
Place and Date of Judgment:	Vancouver, British Columbia December 12, 2002

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The appellant, the College of Physicians and Surgeons, claims that documents created in the course of its investigation of a complaint of professional misconduct are exempt from disclosure under the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165, as amended (the "***Act***"), because they are subject to solicitor client privilege or are "advice or recommendations developed...for a public body". At the heart of the appeal is the assertion that a "zone of confidentiality" is essential to the efficacy of the College's complaints review process.

[2] The appeal is from the order of a Justice of the Supreme Court, who dismissed the College's application for judicial review of the order of the Commissioner of Information and Privacy (the "Commissioner"). The Commissioner ordered the College to disclose to the respondent, the Applicant, experts' reports obtained by the College's in-house lawyer in the course of investigating the Applicant's complaint (the "Documents").

Factual Background

[3] In January 1997, the Applicant complained to the College, alleging misconduct by her employer, a physician (the respondent, Dr. Doe). Between July 1997 and April 1998, the lawyer for the College obtained the opinions of four experts, two in writing and two orally, to assist the College in assessing the basis for the complaint. The lawyer prepared memoranda summarizing the oral opinions. The Documents comprise the two written opinions (Documents 1 and 2), the two memoranda prepared by the College's lawyer summarizing the oral opinions (Documents 3 and 4), and a letter received by the College from one of the experts whose opinion had initially been given orally (Document 5).

[4] Documents 1 through 4 were reviewed by the Sexual Conduct Review Committee ("SMRC") of the College between April and June 1998. The SMRC decided not to proceed with an inquiry to determine if any disciplinary action should be taken against the physician. The College's lawyer wrote to the Applicant summarizing the opinions contained in Documents 1 through 4, explaining that the SMRC had concluded that the evidence would not support any action against the physician.

[5] Document 5 was received by the College in January 1999, after the decision of the SMRC and the summaries of the opinions were provided to the Applicant. A copy of Document 5 was sent by the writer to the Applicant's doctor and has been seen by the Applicant. The Applicant has also seen a letter written in February 1999 by the other expert whose opinion had initially been given orally.

[6] In March 1999, the Applicant requested that the College disclose the Documents to her. The College refused. The Applicant applied to the Commissioner for review of the College's refusal. The College provided copies of the Documents to the Commissioner for his review. The Commissioner received written submissions from the College, the physician and the Applicant. The College claimed the opinions were exempt from disclosure, *inter alia*, under s. 14 of the ***Act***, as they were subject to solicitor client privilege, and under s. 13 of the ***Act***, as advice or recommendations developed for a public body.

[7] The Commissioner held that the opinions were not subject to solicitor client privilege, on the following grounds:

(a) the lawyer had not obtained them in her capacity as a lawyer, but as an investigator for the College, which was under a statutory requirement to investigate complaints made to it concerning physicians' conduct;

(b) the opinions were not communications between the client, the College, and the lawyer, but between third parties and the lawyer, and the third parties were not agents of the client;

(c) there was no litigation in reasonable prospect or in progress in relation to the complaint at the time the opinions were obtained, or if there was litigation, it had ended;

(d) if part of Document 3 was privileged, that part could be severed and the balance of the document disclosed.

[8] The Commissioner also held that the Documents were not protected from disclosure by s. 13 of the ***Act***.

[9] The chambers judge upheld the Commissioner's decision on these grounds.

[10] The Commissioner held further that, if the Documents were subject to solicitor client privilege, the College had not waived the privilege by providing summaries of the opinions to the Applicant. This part of the Commissioner's order was

overturned on the judicial review. The chambers judge found that the Commissioner's finding that the privilege had not been waived was unreasonable, and held that the privilege had been impliedly waived. Relying on the two letters received by the College (including Document 5) after the date of the last summary provided by the College to the Applicant, the chambers judge found that the summaries were inaccurate and thus unfair.

[11] I am of the view that the Documents are not privileged, so waiver is not an issue. In my opinion, however, in finding that the College had waived its privilege, the chambers judge misconstrued the facts and made a clear error of law. The College's lawyer prepared the summaries well before the College received the two letters which formed the basis for the chambers judge's finding that the summaries were inaccurate. In finding that the summaries were inaccurate, the chambers judge needlessly impugned the integrity of the College's lawyer.

[12] The Documents were reviewed by the Commissioner and the chambers judge, and were provided to this Court for review in a "Supplemental Appeal Book In Camera". Of the parties, only the College has seen all of the Documents, except for Document 5, which has been seen by the Applicant. The Applicant claims that the College stated in one of its submissions that one of the Documents was disclosed to Dr. Doe, which the College and counsel for Dr. Doe deny.

[13] The Applicant's knowledge of the Documents (other than Document 5) is derived from the description of the Documents in the reasons for judgment of the chambers judge.

Issues on Appeal

[14] The issues on the appeal are succinctly stated in the Applicant's factum, as follows:

(a) Did the Court below err in finding that the Documents were not protected by solicitor client communications privilege?

(b) Did the Court below err in finding that the Documents were not protected by litigation privilege?

(c) Did the Court below err in finding that if the Documents were originally privileged, any such privilege was waived?

(d) Did the Court below err in upholding the Commissioner's decision to order production of a severed portion of Document 3?

(e) Did the Court below err in finding that the Documents were not exempt from disclosure pursuant to s. 13 of the ***Act***?

Fresh Evidence Motions

[15] The College and the Applicant brought motions to admit fresh evidence on the appeal.

[16] The College sought to have admitted into evidence two affidavits. The first affidavit concerns the date that Document 2 (one of the expert's written reports) was received by the College. The second affidavit denies that the College provided one of the expert's reports to Dr. Doe, as stated in the Applicant's factum, referring to a statement made in one of the College's written submissions to the Commissioner.

[17] The Applicant sought an order of this Court requiring the College to produce to the Court for review four memoranda prepared by the College's in-house lawyer. These memoranda recently came to light after the Applicant requested that the College produce any documents not previously disclosed to the Commissioner and the chambers judge relating to the communications between the lawyer and the experts concerning the Applicant's complaint. The College refused and the Applicant wrote to the Commissioner. The Commissioner's office commenced an investigation, during which it identified the four memoranda. The investigation by the Commissioner's office was on-going at the time of the hearing of the appeal. The College deposited copies of the four memoranda with the Court, pending the decision on the Applicant's motion.

[18] In my view, the fresh evidence should not be admitted. The "fresh evidence" of the College was available prior to the hearings before both the Commissioner and the chambers judge. The only explanation for not producing it is that no issue was raised to which it was relevant. In my view, it is not relevant to the issues on the appeal, and would not change the result.

[19] The existence of the four memoranda that are the subject of the Applicant's fresh evidence motion was not known to her before either of the previous hearings. They are not, however, in issue on the appeal, but raise new issues. I am of the view that the Commissioner's investigation should not be short-

circuited by reference to this Court, but should be allowed to continue.

[20] I would dismiss both applications to admit fresh evidence.

Solicitor Client Privilege

[21] Section 14 of the ***Act*** provides:

> **14** The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[22] In ***R. v. McClure***, [2001] 1 S.C.R. 445 at 455, the Supreme Court of Canada confirmed that solicitor client privilege is a "fundamental civil and legal right" and (at p. 459) that while it is not absolute, it

> ...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.

[23] The Supreme Court of Canada affirmed this principle in ***Lavallee, Rackel & Heintz v. Canada (Attorney General); White Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink***, 2002 SCC 61, [2002] S.C.J. No. 60 (QL) at para. 36.

[24] Section 14 of the ***Act*** imports all of the principles of solicitor client privilege at common law: see ***Legal Services Society v. B.C. (Information and Privacy Commissioner)*** (1996), 140 D.L.R. (4th) 372 at paras. 25-6 (B.C.S.C.), where Lowry J. said:

> Certainly the purpose of the [***Freedom of Information and Protection of Privacy] Act*** as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one

> of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.

[25] Thus, the issue of solicitor client privilege raised on this appeal does not involve balancing the interests of the parties in disclosure or confidentiality. The issue is not whether the College has an obligation to disclose the Documents, either now or at some later time in another proceeding, under civil rules of procedure or on the application of the principles of ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326, (see ***Hammami v. College of Physicians and Surgeons of British Columbia*** (1997), 36 B.C.L.R. (3d) 17 at 32-9 (S.C.) and ***Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)*** (1993), 115 D.L.R. (4th) 279 at 284-5 (Ont.Div.Ct.)). Nor, on the other hand, does this appeal raise the question whether the College may claim privilege on a "case-by-case" basis, on an application of the four "Wigmore" criteria (see ***McClure*** at pp. 456-7 and ***Ontario (Human Rights Commission)*** at pp. 282-3). The question is only whether the Documents are subject to solicitor client privilege as defined at common law.

[26] Solicitor client privilege at common law, and thus for the purposes of s. 14 of the ***Act***, includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice (see ***Descoteaux v. Mierzwinski*** (1982), 141 D.L.R. (3d) 590 (S.C.C.)), and the privilege that attaches to documents gathered and prepared by a solicitor for the dominant purpose of litigation (see ***Hodgkinson v. Simms*** (1988), 33 B.C.L.R. (2d) 129 at 136 (C.A.)).

[27] The Ontario and Manitoba Courts of Appeal have recently analyzed the two types of privilege in the context of investigations in which a lawyer was involved: see ***General Accident Assurance Co. v. Chrusz*** (1999), 180 D.L.R. (4th) 241 (Ont.C.A.) and ***Gower v. Tolko Manitoba Inc.*** [2001] M.J. No. 39 (Man.C.A.)(QL), 2001 MBCA 11. The explanations by those Courts of the different underlying rationales and conditions for solicitor client privilege are helpful in this case.

[28] For the purposes of these reasons, I will use the phrase "legal advice privilege" (as used in ***Gower***) to refer to the privilege that attaches to communications between solicitor and client for the purposes of obtaining legal advice, and "litigation privilege" (as used in ***Gower*** and ***Chrusz***) to refer to

the privilege that attaches to communications and material produced or brought into existence for the dominant purpose of being used in the conduct of litigation.

[29] This case raises the issue of the scope of both types of solicitor client privilege. The question is whether either of these types of solicitor client privilege extends to communications between a solicitor and third parties made in the course of an investigation conducted by the solicitor on behalf of her client.

[30] Each of the two types of privilege has a different scope because they serve different purposes. Legal advice privilege serves to promote full and frank communications between solicitor and client, thereby facilitating effective legal advice, personal autonomy (the individual's ability to control access to personal information and retain confidences), access to justice and the efficacy of the adversarial process (see ***Gower*** at para. 15; ***Chrusz*** at paras. 91-4). Litigation privilege, on the other hand, is geared towards assuring counsel a "zone of privacy" and protecting the lawyer's brief from being poached by his or her adversary (see ***Chrusz*** at paras. 22-4).

[31] In considering whether privilege attaches to a particular communication, the differing underlying rationales dictate the key questions to consider. Because legal advice privilege protects the relationship of confidence between solicitor and client, the key question to consider is whether the communication is made for the purpose of seeking or providing legal advice, opinion or analysis. Because litigation privilege facilitates the adversarial process of litigation, the key question to consider is whether the communication was created for the dominant purpose of litigation, actual or contemplated.

[32] The fact that the Documents were created during the investigation of a complaint to the College is central to both analyses. Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client (see ***Gower*** at paras. 36-42). In this case, the question is whether legal advice privilege extends to communications between the lawyer and third parties. As discussed by Doherty J.A. in ***Chrusz***, the privilege is extended to third party communications only in limited circumstances.

[33] Litigation privilege, on the other hand, arises where litigation is in reasonable prospect or in progress. It applies to communications between the lawyer and the client, and also between the lawyer and third parties, where the dominant purpose for the communication is litigation. The question in this case is whether litigation was in reasonable prospect when the College was investigating the Applicant's complaint. Authorities relied on by the College that address this issue are ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.***, [1988] A.J. No. 810 (Alta.C.A.)(QL); ***Bank Leu AG v. Gaming Lottery Corp.***, [2000] O.J. No. 1137 (Ont.Div.Ct.)(QL); and ***In Re Sealed Case***, 856 F.2d 268 (D.C.Cir. 1988).

Legal Advice Privilege

[34] There are two questions that arise in considering whether legal advice privilege applies to the Documents. The first is whether in receiving or creating the Documents the College's lawyer was acting as a lawyer and not an investigator. The second is whether the Documents, which are communications between third parties and the College's lawyer, are communications of legal advice, opinion or analysis between the lawyer and the College.

Investigator or Lawyer?

[35] The Commissioner and the chambers judge concluded that, in obtaining the experts' reports, the College's lawyer was acting as an investigator, not a lawyer. They noted that the ***Medical Practitioners Act***, R.S.B.C. 1996, C. 285 ("***MPA***"), requires the special deputy registrar of the College to investigate and make recommendations to the SMRC concerning a complaint of sexual misconduct. The chambers judge stated that the College could not, "merely because its counsel conducted the investigation," claim legal advice privilege over the documents.

[36] The Commissioner described the work involved as "work in relation to a statutorily mandated investigation" in contrast to "work in relation to, and integral to, a confidential solicitor client relationship". He concluded that:

> The College's solicitor client relationship with its lawyer serves to enable the College to discharge its duties and functions; the investigation process under the MPA does not exist to serve a solicitor client relationship between the College and its lawyer.

[37] In my view, the Commissioner's reasons reveal a misunderstanding of the function of the lawyer in the investigative process.

[38] In ***R. v. Campbell***, [1999] 1 S.C.R. 565, the Supreme Court of Canada pointed out (at para. 50): "It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege." After describing the varying functions performed by government and in-house lawyers, the Court stated:

> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[39] In my view, the fact that an investigation is mandated by statute is irrelevant to the functional analysis of the lawyer's role. Lawyers must often undertake investigative work in order to give accurate legal advice. In this respect, investigation is integral to the lawyer's function.

[40] The nature of investigative work undertaken by a lawyer was discussed in ***Gower*** (at para. 19):

> ...legal advice is not confined to merely telling the client the state of the law. It includes advice as to what should be done in the relevant legal context. It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services. As the United States Supreme Court acknowledged:
>
> > The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.
> >
> > [Upjohn Co. v. United States 449 U.S. 383 1981) (S.C.) at para. 23]

[41] In this case, the SMRC had to make legal decisions about how to proceed. The special deputy registrar of the College deposed in his affidavit that one of the lawyer's professional duties was to advise the SMRC on legal issues, to assess whether complaints to the College could be proved before an inquiry committee, and to gather evidence to be used as part of the College's case in the event that the charges proceeded to a hearing. Moreover, the College's lawyer explained in one of her letters to the Applicant:

> The Committee...is required to determine if, on the basis of all of the evidence, there is sufficient information to warrant the issuance of disciplinary charges. In making this decision the Committee has to weigh whether it is reasonable to conclude that a disciplinary charge could be proven to the requisite standard of proof. As we have discussed, while the College is not required to meet the criminal standard, it is required to have clear, cogent and convincing evidence in order to prove a charge of unprofessional conduct. It is the current view of the Committee, with the benefit of legal advice, that the evidence available in this case will not meet that standard. [Emphasis added.]

[42] In my opinion, the Commissioner and the chambers judge erred in finding that the College's lawyer was not acting in her capacity as a lawyer when she investigated the Applicant's complaint. She was acting on her client's instructions to obtain the facts necessary to render legal advice to the SMRC concerning its legal obligations arising out of the complaint. As such, she was engaged in giving legal advice to her client.

Third Party Communications

[43] Having concluded that the College's lawyer was engaged in rendering legal advice when she obtained the experts' opinions, the next question is whether those communications fall within the scope of the privilege. That is, did the communications take place within the relationship between the lawyer and her client, the College? In my view, they did not.

[44] To support her allegation that Dr. Doe had hypnotized her, the Applicant provided information to the College concerning the conduct of Dr. Doe, and tapes, notes and gifts she had received from him during the course of her employment. In order to

understand this information, and to determine whether it supported the Applicant's allegations, the College required experts to interpret it and assess whether there was evidence that the Applicant had in fact been hypnotized. The lawyer's role was to obtain the experts' reports and, with their assistance, advise the SMRC of the legal implications of the complaint.

[45] The College claimed confidentiality for its investigative process on the grounds that experts may refuse to participate if their reports are not kept confidential. Legal advice privilege does not, however, exist to protect a relationship of confidentiality between the College and the experts. The rationale for legal advice privilege is the protection of the confidentiality of the relationship between the College and its lawyer. Whether communications involving third parties are protected within the context of that relationship is the real issue to be considered.

[46] In ***Chrusz***, Doherty J.A. analyzed the extension of legal advice privilege to third party communications. In that case, an insurance company retained an independent claims adjuster to investigate a claim for loss of a motel damaged by fire and a lawyer to advise it concerning the claim. The adjuster provided his reports to the lawyer. Several months after the insurer had advanced partial payment of the claim, a former employee of the motel owner made a statement alleging that the owner had inflated the claim. The insurer sued the owner. The owner counterclaimed against the insurer and the adjuster, made a claim in defamation against the former employee, and sought disclosure of the adjuster's reports and the former employee's statement. The insurance company claimed privilege over the reports and the statement.

[47] In his discussion of the application of legal advice privilege to third-party communications (at paras. 104-117), Doherty J.A. noted that although it is "well-settled" that legal advice privilege can extend to communications between a solicitor or a client and a third party, the case law is not extensive or well-developed. He stated (at para. 106) that the authorities establish two principles:

- not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and

- where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege so long as those communications meet the criteria for the existence of the privilege.

[48] For cases where the third party does not act as a conduit or channel of communication between the client and the lawyer, Doherty J.A. proposed (at paras. 120-5) a functional analysis to determine whether legal advice privilege applies to the communications between the third party and the lawyer. In principle, legal advice privilege ought to extend only to third party communications that are in furtherance of a function which is essential to the existence or operation of the relationship between the solicitor and the client. Doherty J.A. illustrated this principle (at paras. 120-22):

> . . . If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.
>
> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of a client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

[49] Doherty J.A. tied the existence of the privilege "to the third party's authority to obtain legal services or to act on legal advice on behalf of the client" (at para. 125). He reasoned that:

> In either case the third party is empowered by the client to perform a function on the client's behalf which is integral to the client-solicitor function. The agent does more than assemble information relevant to the legal problem at hand.
>
> [Emphasis added.]

[50] In summary, third party communications are protected by legal advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client. I find this analysis persuasive.

[51] Applying this analysis to the communications between the College's lawyer and the experts from whom opinions were obtained in this case, I conclude that the experts did not perform a function on behalf of the client which was integral to the relationship between the College and its lawyer. The experts were not authorized by the College to direct the lawyer to act or to seek legal advice from her. The experts were retained to act on the instructions of the lawyer to provide information and opinions concerning the medical basis for the Applicant's complaint. While the experts' opinions were relevant, and even essential, to the legal problem confronting the College, the experts never stood in the place of the College for the purpose of obtaining legal advice. Their services were incidental to the seeking and obtaining of legal advice.

Gower *and* ***Upjohn***

[52] The College argued that ***Gower*** and ***Upjohn*** are relevant and supportive of its claim that the experts' opinions are protected by legal advice privilege.

[53] Neither ***Gower*** nor ***Upjohn***, however, dealt with whether legal advice privilege would apply to communications between a lawyer and third parties.

[54] In ***Gower***, the Manitoba Court of Appeal held that an "investigative report leading to legal advice" from a lawyer to her client was the subject of legal advice privilege. The report concerned the lawyer's investigation of a complaint of sexual harassment, and contained witness statements and findings of fact, as well as legal analysis and legal advice. The question was whether the information gathered by the lawyer in the fact-finding investigation was received within the context of a solicitor-client relationship. The Court held that the lawyer's retainer included both fact-gathering and rendering legal advice. As the report to the client contained both the fruits of her investigation and her legal advice, the entire report was privileged.

[55] It is not clear from the reasons for judgment of either Schulman J. of the Manitoba Court of Queen's Bench or of Steel J.A. of the Manitoba Court of Appeal whether the lawyer interviewed anyone who was not an employee of the client. From my reading of the reasons, I would infer that all of the witnesses were employees of the client.

[56] In ***Upjohn***, the company's general counsel conducted an investigation into allegations that a foreign subsidiary had made questionable payments to foreign government officials. Counsel obtained information from company employees, which was later sought by the Internal Revenue Service in the course of its investigation into the tax consequences of the payments. Counsel claimed solicitor client privilege. The United States Supreme Court upheld the claim, deciding that solicitor client privilege applied to communications between counsel and all corporate employees where counsel was conducting an investigation for the purpose of giving legal advice to the corporation.

[57] The decision that solicitor client privilege applied turned on the fact that the communications in question were between the corporation's counsel and its employees.

[58] In this case, the communications, both written and oral, were with third parties, not employees or agents of the client. For the reasons set out above, I am of the view that those communications are not subject to legal advice privilege.

Experts' Reports - Documents 1, 2 and 5

[59] Documents 1, 2 and 5 are not similar to the lawyer's report in ***Gower***. They are reports or letters written by the experts and do not contain legal advice.

The Memoranda – Documents 3 and 4 – Severance

[60] Documents 3 and 4, on the other hand, are memoranda prepared by the College's lawyer. Document 3 has two parts: a summary of the information and opinions obtained by the lawyer in a meeting with an expert, and her comments concerning that information. Document 4 records the information obtained during a meeting with another expert. Both meetings were attended by other members of the College.

[61] The Commissioner decided that the memoranda were not privileged, with the exception of the portion of Document 3 containing the lawyer's comments concerning the expert's opinion, which could be severed. The chambers judge upheld the Commissioner's decision, interpreting the severance provision in s. 4(2) of the ***Act*** in the context of "policy considerations" found in the ***Act*** and the ***MPA*** that, in his view, favoured access to the documents.

[62] Section 4(2) of the ***Act*** provides:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part [in which s. 14 is found], but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[63] In ***British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*** (1995), 16 B.C.L.R. (3d) 64 (S.C.), Thackray J. (as he then was) held that a document that is subject to solicitor client privilege cannot be subject to severance. He overturned an order of the Commissioner that required factual information in two privileged documents be disclosed to the applicant. The College argues that this case is authority that s. 4(2) cannot apply to a document any part of which is subject to solicitor client privilege and thus exempt from disclosure under s. 14 of the ***Act***.

[64] The documents in question in ***British Columbia (Minister of Environment, Lands and Parks)*** were an opinion prepared by a lawyer and minutes of a meeting attended by the lawyer during which he provided legal advice. Both documents contained communications between the lawyer and the client. As in ***Gower***, the entire documents were found to be privileged.

[65] The application of the severance provision of the Ontario ***Freedom of Information and Protection of Privacy Act***, R.S.O. 1990, c. c. F.31 as am., to documents subject to solicitor client privilege was considered in ***Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)***, [1997] O.J. No. 1465 (Ont.Div.Ct.)(QL). The Court held that the Commissioner wrongly interpreted the scope of solicitor client privilege as narrowed under the ***Act.*** Sharpe J. (as he then was) said (at para. 17):

> Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.

[66] He continued, however, (at para. 18):

> I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. ...documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: Ontario (Attorney General) v. Hale (1995), 85 O.A.C. 299 (Div.Ct.).

[67] In my view, that part of Document 3 that records the communications of the expert to the lawyer and other representatives of the College, and Document 4, are the same as Documents 1, 2 and 5. They are communications by third parties, who were not agents or representatives of the client to obtain legal advice, but provided information used by the lawyer to render legal advice. They are not subject to legal advice privilege.

[68] The two parts of Document 3 are not intertwined. The part of Document 3 that records the lawyer’s comments is privileged. I am of the view that the severance provision of the ***Act*** may be applied where, as here, part of the document is not subject to

legal advice privilege and a separate part is privileged. In such a case, the non-privileged part can "reasonably be severed".

[69] I do not agree with the reasons of the chambers judge, however, that "policy considerations" are relevant to whether part of a document that is privileged may be severed from another part of the document that is not privileged. If a document is privileged, no part of it may be subject to disclosure under the ***Act***.

Summary of Legal Advice Privilege

[70] The Documents were obtained by the College's lawyer in her capacity as a lawyer and not as an investigator. However, they are third party communications that were not integral to the confidential solicitor client relationship. The third parties were not giving or receiving legal advice on behalf of the College, but were providing information to the lawyer to be used by her in rendering legal advice to the client.

[71] The Documents, except for the part of Document 3 that contains the lawyer's comments, are not subject to legal advice privilege.

Litigation Privilege

[72] Litigation privilege protects from disclosure materials created or gathered by a lawyer, including communications between a lawyer and third parties, where litigation was in reasonable prospect at the time of the communication, and the dominant purpose of the communication was litigation: see ***Hamalainen v. Sippola*** (1991), 62 B.C.L.R. (2d) 254 at 260 (C.A.). This privilege does not exist to protect the confidential relationship between solicitor and client, but to facilitate the adversarial process of litigation. Thus, even non-confidential material may be protected if the dominant purpose for its existence is litigation in reasonable prospect or in progress: see ***Chrusz*** at paras. 22-4.

[73] The question in this case is whether the investigation by the College's lawyer of the Applicant's complaint was litigation, either in prospect or in progress. The College, relying on ***Ed Miller Sales & Rentals***, ***Bank Leu AG***, and ***In Re Sealed Case***, all *supra,* submits that when a regulatory agency undertakes an investigation that may result in the imposition of penalties or sanctions, litigation has commenced.

[74] In both ***Ed Miller Sales & Rentals*** and ***Bank Leu AG***, the "target" of an investigation by a regulatory agency claimed privilege over documents prepared by it or on its behalf in anticipation of or in response to the investigation. Disclosure of the documents was requested in later civil litigation between the target and another party. In both cases, the courts held that the investigation by the regulatory agency was litigation and the documents were subject to litigation privilege.

[75] In ***In Re Sealed Case***, one of the parties to civil litigation sought disclosure of documents from the United States Securities and Exchange Commission created during an investigation by the SEC of insider trading. The SEC disclosed about 40,000 pages of documents, but refused to answer questions or produce certain other documents, claiming law enforcement investigatory privilege (not in issue in this case) and "attorney work product immunity" (similar to litigation privilege). The Appellate Court held that the SEC was entitled to claim work product immunity with respect to its attorneys' recollections and impressions of witness interviews.

[76] The Commissioner distinguished ***Ed Miller Sales & Rentals*** and ***Bank Leu AG*** on the grounds that, in those cases, the privilege was claimed by the target of the investigation, while in this case, the privilege was claimed by the regulatory body. He did not consider ***In Re Sealed* Case** (which was not cited in the College's written submissions to the Commissioner).

[77] The Commissioner concluded that the investigation by the College's lawyer of the Applicant's complaint was not undertaken either in contemplation or in the course of actual litigation. The chambers judge agreed with the Commissioner that litigation was neither in reasonable prospect nor in progress, and in addition, held that the Documents were not created for the dominant purpose of litigation.

[78] The College, Dr. Doe and the intervenor, The Law Society of British Columbia, all argued that from the outset of an investigation of a complaint against a member of the College, the College is in an adversarial relationship with the member, because he or she is potentially subject to a charge of professional misconduct, an inquiry or hearing to determine whether he or she is guilty of the charge, and serious sanctions and penalties if convicted. On this basis, they reasoned that all parties to the complaint, including the College, are in an adversarial relationship, as there must be a *lis* between parties and mutuality in the relationship.

[79] I do not disagree that the interest of the member being investigated is adversarial to that of the College and the complainant. That is the ratio of ***Ed Miller Sales & Rentals*** and ***Bank Leu AG,*** which I accept.

[80] However, when the College is investigating a complaint, its interest in the outcome of the investigation is not adversarial in relation to either the complainant or the member. Its duty, mandated by statute, is "to serve and protect the public" and "to exercise its powers and discharge its responsibilities...in the public interest" (s. 3(1) of the ***MPA***). The College's objects (set out in s. 3(2) of the ***MPA***) include: to superintend the practice of the profession; to establish monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst members; and to establish, monitor and enforce standards of professional ethics amongst members (ss. 3(2)(a), (d) and (g)).

[81] At the investigative stage, the College is not seeking to impose penalties or sanctions against the member, but (through the special deputy registrar acting under s. 21(2) of the ***MPA***) to make findings on which to base a recommendation to the SMRC as to how it should proceed (under s. 28(2) of the ***MPA***). The SMRC has a range of actions available to it, including: directing a further investigation; referring the complaint to the council, executive committee or a committee; directing the special deputy registrar to attempt to resolve the complaint informally; appointing an investigating committee for the purpose of investigating whether a member has adequate skill and knowledge to practise medicine (under s. 51 of the ***MPA***); appointing an inquiry committee to inquire into a charge or complaint made against a member and take disciplinary proceedings (under ss. 53 and 60 of the ***MPA***); or taking no further action.

[82] In its submissions to the Commissioner, the College stated that it investigates and addresses an average of 1,300 complaints per year pertaining to medical treatment and physician conduct, the vast majority of which do not result in disciplinary action.

[83] In ***Hamalainen***, Wood J.A. for the Court stated the following test for determining whether litigation is "in reasonable prospect" (at para 20):

> In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that

> peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet.

[84] Given the range of actions available to the SMRC after a complaint has been investigated and the small number of complaints that actually proceed to disciplinary action, it would not be reasonable to conclude, at the outset of the investigation, that it was unlikely that the matter would not be resolved without disciplinary action. It would be more reasonable to conclude that, in all likelihood, no disciplinary action would be taken, as is the case with most complaints. Thus, litigation could not be said to be "in reasonable prospect" at the time the Documents were created.

[85] If litigation was not "in reasonable prospect", then the the Documents were not produced for the dominant purpose of litigation.

[86] The content of the Documents supports this conclusion. The experts were asked to consider the allegations of the Applicant and advise the College whether, on her evidence, hypnosis had occurred. As Wood J.A. pointed out in ***Himalainen*** (at para. 24):

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation.

[87] In my view, attempting to discover the cause of an accident is analogous to attempting to assess the evidentiary foundation of an allegation of misconduct. The College was attempting to discover whether there was a medical basis for the Applicant's complaint. It was not, however, at the point of preparing for litigation against Dr. Doe.

[88] This case does not concern a claim of privilege by Dr. Doe over documents that came into the hands of his counsel in anticipation of disciplinary proceedings by the College. Assuming that he would be entitled to claim litigation privilege

over such documents, neither law nor logic requires a finding that the College is similarly entitled.

[89] The Commissioner characterized the role of the College in investigating a complaint as having "more in common with law enforcement officials and prosecutors upholding the law than it does with the role of a party to civil litigation." I agree. During an investigation of a complaint, it is neither its own advocate or anyone else's. The College is involved as a neutral body in discovering and analysing the facts and circumstances of the complaint and determining, within its statutory mandate, how to proceed.

[90] I do not find ***In Re Sealed Case*** of much assistance. The case reveals little of the course of the SEC investigation and the stage it was at when the attorneys interviewed witnesses and presumably recorded their impressions. It may be that in another case, where the College has proceeded to a later stage of its investigative process, involving some action by the SMRC, litigation privilege would apply to the documents gathered by its lawyer. Furthermore, it may be that legal advice privilege would apply to the information that was found to be "attorneys' work product" in ***In Re Sealed Case***, as was found to apply to the College's lawyer's comments contained in Document 3.

Summary of Litigation Privilege

[91] Litigation privilege does not apply to the Documents as litigation was not "in reasonable prospect" when they were created and the dominant purpose for their creation was not litigation. The College was not engaged in an adversarial process when it investigated the Applicant's complaint.

Solicitor Client Privilege - Conclusion

[92] It is worth noting again that at the heart of the College's claim for solicitor client privilege is its desire to protect the confidentiality of its peer review and investigative process. Its expressed concern is not the confidentiality of the information it disclosed to its lawyer or the advice she rendered to it; both of these were effectively disclosed to the Applicant in the summaries of the experts' opinions provided by the College's lawyer to the Applicant.

[93] The College's expressed concern is the confidentiality of the experts' names and opinions. In recognition of this concern, the Commissioner ordered that the experts' names were exempt from disclosure under s. 22(1) of the ***Act***.

[94] The preservation of confidentiality of experts' names or opinions is not the purpose of solicitor client privilege. The College's perceived need for a "zone of confidentiality" around its investigative process does not come within the rationale for either legal advice or litigation privilege, and therefore there is no principled basis for exempting the experts' reports from disclosure under s. 14 of the ***Act*** (except for the severed portion of Document 3).

[95] As I have found that solicitor client privilege does not apply to the Documents, there is no need for me to consider whether privilege had been waived or litigation had ended. As noted earlier, however, I am of the view that the chambers judge erred in finding that the College had waived privilege on the grounds of unfairness.

Advice or Recommendations

[96] Section 13(1) of the ***Act*** provides the following exemption from disclosure:

> **13** (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[97] The Commissioner held that the experts' reports were not "advice or recommendations" for the purposes of s. 13(1). He described the experts' reports as "technical, or medical, findings, opinions or conclusions...as to whether a particular medical procedure was or was not used on the applicant."

[98] The Commissioner found that the reports were not "recommendations" because the experts did not "lay out alternatives for the SMRC to consider....Nor did they recommend any courses of action."

[99] In finding that the experts' reports were not "advice", the Commissioner applied the definition of "advice" found in ***The Canadian Oxford Dictionary*** (Toronto: Oxford University Press, 1998): "words offered as an opinion or recommendation about future action; counsel." He acknowledged that the principles of statutory interpretation dictate that the word "advice" has a meaning that does not duplicate "recommendations", but nonetheless concluded that advice involves a communication "as to which courses of action are preferred or desirable". He found that "advice" meant more than "information", in light of the

exclusion in s. 13(2)(1) of "factual information" from the ambit of s. 13(1), other decisions under the ***Act*** and the Ontario equivalent, and a policy manual issued by the Province's Information, Science and Technology Agency for use by public bodies.

[100] The chambers judge agreed with the Commissioner's interpretation of the word "advice" and also provided the following interpretation (at para. 129):

> The term "advice", as it is used in the ***Freedom of Information Act***, must be interpreted to mean advice given to the College by its counsel in the course of carrying out her duties as counsel on a day to day basis.

[101] If the chambers judge intended that "advice" as used in s. 13(1) refers only to advice given by counsel, he is in error. Section 13(1) is clearly not so limited. If he meant, however, that counsel's advice is an example of a communication that would be considered "advice", he is correct. But that does not address the question in issue.

[102] The chambers judge held that the experts' reports were not provided to the College "for the purpose of advising or recommending a specific course of action or range of actions available to the College", but for the "primary purpose of investigating the Applicant's complaint".

[103] In my view, both the Commissioner and the chambers judge erred in their interpretation of the word "advice", by requiring that the information must include a communication about future action and not just an opinion about an existing set of circumstances.

[104] The Commissioner acknowledged in his reasons that s. 13(1):

> ...is intended to allow for full and frank discussion within the public service, preventing the harm that would occur if the deliberative process were subject to excessive scrutiny.

[105] In my view, s. 13 of the ***Act*** recognizes that some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focussed on the substantive issues, free of disruption from extensive and

routine inquiries. The confidentiality claimed by the College has a similar objective: to allow it to thoroughly investigate a complaint with the open and frank assistance of those experts who have the knowledge and expertise to help in assessing a complaint and deciding how to proceed.

[106] By defining "advice" so that it effectively has the same meaning as "recommendations", the Commissioner and the chambers judge failed to recognize that the deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action. Their narrow view of the nature of the complaint investigation process was similarly reflected in their characterization of the function of the College's lawyer in the investigation and in their conclusions that she was not acting as a lawyer but as an investigator, which I have previously rejected.

[107] The Commissioner acknowledged the principles of statutory interpretation, but did not apply them. Those principles not only mandate that different words contained in a statute be given different meanings, they also dictate that the same word be given the same meaning (see Ruth Sullivan, ***Driedger of the Construction of Statutes***, 3rd Edition (Toronto: Butterworth's, 1994) at pp. 163-4; ***Thomson v. Canada (Deputy Minister of Agriculture)*** (1992), 89 D.L.R. 4th 218 at 243-4 (S.C.C.)).

[108] The need for deliberative secrecy, with reference to the cabinet and its committees, is dealt with in s. 12 of the ***Act***, in which the words "advice" and "recommendations" are also found. Section 12(1) exempts from disclosure by a public body:

> ...information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
>
> [Emphasis added.]

[109] Section 12(2)(c) excludes from the ambit of subsection (1), in certain circumstances:

> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees

> for its consideration in making a decision... [Emphasis added.]

[110] In my view, it is clear from s. 12 that in referring to advice or recommendations, the Legislature intended that "information...the purpose of which is to present background explanations or analysis...for...consideration in making a decision..." is generally included. There is nothing in s. 13 that suggests that a narrower meaning should be given to the words "advice" and "recommendations" where the deliberative secrecy of a public body, rather than of the cabinet and its committees, is in issue.

[111] The Commissioner noted that s. 13(2)(a) excludes from the ambit of s. 13(1) "any factual material". Section 13(2) also excludes many other kinds of reports and information. If the Legislature did not intend the opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice" for the purposes of s. 13, it could have explicitly excluded them.

[112] In ***J.R. Moodie Co. Ltd. v. Minister of National Revenue***, [1950] 2 D.L.R. 145 at 148 (S.C.C.), it was recognized that the word "advice" is not limited to a communication concerning future action. Rand J. said:

> The word "advice" in ordinary parlance means primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence....Now, [the matters on which the Minister was to be satisfied] are in one sense, matters of fact, but they also involve the exercise of judgment in the weight and significance to be attributed to the special circumstances and conditions of the business....The advice to be furnished by the Board would, then, ordinarily contemplate at least its opinion on the main question and the facts or reasons upon which it was based.

[113] I am similarly of the view that the word "advice" in s. 13 of the ***Act*** should not be given the restricted meaning adopted by the Commissioner and the chambers judge in this case. In my view, it should be interpreted to include an opinion that

involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.

[114] In any event, the experts' reports did provide "advice", even if that word were given the Commissioner's narrow interpretation. The experts were expressly asked by the College's lawyer for their opinions of whether hypnosis had been performed and for suggestions for further investigation of the complaint. Two of the experts expressly commented on whether the evidence was sufficient to support the Applicant's allegations, and one provided his view on whether Dr. Doe's explanation was "acceptable and reasonable". Thus, the reports contain advice on whether the College should take further action, bringing them within the meaning of "advice" as found by the Commissioner.

[115] For all of the above reasons, I am of the view that the College may refuse to disclose the Documents pursuant to s. 13 of the ***Act***.

Summary and Conclusions

[116] In my view, s.14 of the ***Act*** applies only to that part of Document 3 that contains the comments of the College's lawyer, but the balance of the Documents are not subject to solicitor client privilege.

[117] The College may refuse to disclose the Documents to the Applicant pursuant to s. 13 of the ***Act***.

[118] I would allow the appeal.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Mr. Justice Low"