2026 Hfx No. 554688

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

IN THE MATTER OF: The Receivership of Kooshie Cushions of Canada Limited

Between:

Business Development Bank of Canada

Applicant

and

Kooshie Cushions of Canada Limited

Respondent

REPLY WRITTEN SUBMISSION OF THE APPLICANT

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Service List.

1. This is the submission of the Applicant, Business Development Bank of Canada ("**BDC**") in reply to the submission of the Respondent, Kooshie Cushions of Canada Limited (the "**Company**") and in further support of the court appointment of Deloitte Restructuring Inc. as the Court-appointed Receiver and Manager (the "**Deloitte**") over the assets, properties and undertakings of the Company.

2. There is nothing in this record that should invalidate the appointment of Deloitte.

3. It is accepted that when a debtor is in default in payment or breach of some other non-monetary provision, the secured creditor may decide to first appoint a financial advisor for a "look see" into the debtor's finances. This is usually an accounting firm with licensed insolvency practitioners. Frank Bennett, *Bennett on Bankruptcy*, 26^{th} ed. (Toronto: Lexis Nexis, 2025) at p. 922.

4. Once that has occurred, the secured creditor can choose whether to appoint a private receiver or seek Court appointment of that receiver. It is the secured creditor under either scenario that would choose the receiver.

5. The Company did not cooperate with the Deloitte under its private appointment, so BDC is seeking to have Deloitte appointed by this Court. The Company has not nominated any other receiver, only that Deloitte should not be appointed because the "receivership is contested".

6. With respect, this is not the test to determine whether this Court should appoint Deloitte as the Court-appointed Receiver. The test is set out in BDC's written submission. A few lines however are warranted on the role of a Court-appointed receiver.

7. There is no evidence that Deloitte will not conduct its mandate as officer of this Court honestly and *bone fide*. See, *Guarantee Co. of North America v. Beasse*, 1991 CarswellAlta 577, [1997] A.J. No. 1199 at para. 55. The evidence presented by the Company is only a plea for more time, nothing more.

8. The Court appoints a receiver even though the secured creditor initiates the motion. *Guarantee Co. of North America, supra,* at para. 55. The receiver once appointed is not an agent of the secured creditor but the "eyes and ears" of the Court.

9. A Court appointed Receiver is separate and distinct from a private receiver. Court-appointed Receivers are officers of the Court and must report to the Court on their activities, as well as seek the approval of Court when appropriate or required throughout the court of the receivership. The Court-appointed receiver has a fiduciary relationship to the debtor and all creditors and must exercise such reasonable care and control of the debtor's property as he would his own. See, *Guarantee Co. of North America, supra,* at para. 55. See also, para. 30 of BDC's written submission.

10. The enforcement process is not disrupted or materially imperfect.

11. The demand letter and notice of intention to enforce security was forwarded to the Company on April 7, 2026. The Company admitted it received it. See, affidavit of Mark Shelley ("**Shelley Affidavit**") sworn on June 23, 2026, at para. 6.

12. Following the issuance of the demand letter and notice to enforce security, the full balance of the mortgage became due and owing. See, affidavit of Marius Cassie sworn on June 12, 2026, at Exhibit "B" – Mortgage, Events of Default.

13. At the time the Company received the demand letter and notice of intention to enforce security, it did not raise any objection. Indeed, on April 22, 2026, the Company requested a stay of enforcement of the same in an effort to cure its default with BDC. See, Shelley Affidavit at Exhibit "B" at p. 3.

14. In requesting the stay of enforcement, the Company put forward a plan to pay the arrears. Ibid.

15. Only after BDC rejected the offer put forward by the Company did the Company challenge the notice of intention to enforce security. The purpose and object of the notice of intention to enforce security was met as set out at paragraph 20 of BDC's written submission filed on June 16, 2026.

16. The Company was provided with an opportunity to react, negotiate and reorganize its financial affairs. It was not able to do so to the satisfaction of BDC.

17. There are no less intrusive alternatives, and the appointment of Deloitte will protect the assets, properties and undertakings of the Company.

18. The Company did not cooperate with Deloitte in the first instance. Disclosure of documentation will not remedy the default which continues to accrue. In any event, the documentation is attached to the affidavit of Cassie. BDC has the contractual right to seek a Court-appointed Receiver to protect its security and that of the other stakeholders. BDC respectfully requests that its application be granted in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30 day of June 2026.

BOYNECLARKE LLP

Joshua J. Santimaw

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The Guarantee Company of North America (plaintiff) v. Roger Beasse, Shirley Beasse, Robdale Contractors Ltd., 239223 Alberta Ltd., Henlo Enterprises Ltd., Robdale Roadbuilders Ltd., Lester Sorenson, Greg Charette and Beasse Charette Sorenson Equipment Leasing Ltd. (defendants)

Beasse Charette Sorenson Equipment Leasing Ltd. (plaintiff by counterclaim) v. Robdale Contractors Ltd. and The Guarantee Company of North America (defendants by counterclaim) and Robdale Contractors Ltd., Roger Beasse, Shirley Beasse, 239223 Alberta Ltd. and Henlo Enterprises Ltd. (third parties by counterclaim)
(Action No. 8501-16233)

Robdale Contractors Ltd. (plaintiff) v. The Guarantee Company of North America (defendant)
(Action No. 8703-12813)
(Consolidated Action No. 8701-16630)

Indexed As: Guarantee Co. of North America v. Beasse et al.

Alberta Court of Queen's Bench
Judicial District of Calgary
Rooke, J.
June 25, 1991.

Counsel:
W.G. Geddes, for the applicants;
J.C. van der Lee, for the respondent.

This application was heard before Rooke, J., of the Alberta Court of Queen's Bench, Judicial District of Calgary, who delivered the following judgment on June 25, 1991.

I Introduction

[1] **Rooke, J.**: The matter under consideration in this decision is whether or not privilege extends to any or all of some 140 individual documents (and certain solicitor and client correspondence files) in the hands of the Guarantee Company of North America ("Guarantee") or its counsel. Denial of production on the basis of privilege has been claimed by Guarantee. This decision follows from a Special Chambers Application by Robdale Contractors Ltd. ("Robdale") for an order directing the production thereof. The application was heard May 13, 1991, and further submissions were received in writing from counsel on May 15, May 17 and June 17, 1991.

[2] Before getting directly to the issue, some background of several intertwined actions needs to be clarified, but only in so far as is necessary to this Memorandum.

II Background

[3] This Consolidated Action No. 8701-16630 originates from two actions. The first, commenced in Calgary under Action No. 8501-16233 (Action #1) in July of 1985, is by Guarantee (as surety) against Robdale et al., pursuant to a Deed of Indemnity by the defendants in favour of Guarantee, as consideration for a performance bond issued by Guarantee on behalf of Robdale applicable to a contract entered into in April 1984 between Her Majesty the Queen in Right of Canada as Represented by the Minister of Public Works ("Public Works Canada") and Robdale (a general contractor) relating to road "reconstruction" on the Bow Valley Parkway (Highway #1A) in the Banff National Park. Guarantee's action under the Deed of Indemnity seeks a recovery of monies it claims to have expended under the performance bond on behalf of Robdale to pay unpaid subcontractors and to complete the road reconstruction contract left partially uncompleted at the end of 1984 when Robdale suffered financial difficulties. The second action, Edmonton Action No. 8703-12813 (Action #3 [see footnote 1]), was commenced in May 1987 by Robdale against Guarantee, wherein Robdale alleges a breach of duty by Guarantee under the performance bond and claims damages as a result. In

August 1987, the court directed that Action #3 be transferred to Calgary and consolidated into this Consolidated Action No. 8701-16630.

[4] There are three other actions (involving, inter alia, the parties) that have been consolidated in the Judicial District of Edmonton under Consolidated Action No. 8703-28353. The first, commenced in January 1986 in Calgary under Action No. 8601-01420, is by Guarantee against Robdale et al., wherein Guarantee claims certain fraudulent preferences and conveyances, pursuant to which it later obtained a mareva injunction, as well as an Order (the "Receivership Order") of the court appointing the chartered accountant firm (that is now known as) Deloitte and Touche Inc. ("Deloitte" or "Receiver") as Receiver of Robdale (Action #2). Pursuant to the Receivership Order, inter alia: Deloitte was appointed "Receiver ... of the present and future property, assets and undertakings of ..." Robdale; Deloitte was authorized to "appoint and employ such agents, assistants and professional advisors as it deems necessary for the purpose of performing its duties ..."; costs of Deloitte were to be paid by Guarantee; all property and records of Robdale were to be delivered to Deloitte; and Deloitte was

> "... ordered and directed to provide reasonable access to the books and records of [Robdale], by [Robdale] and its directors, officers and agents for the purpose of present and future litigation."

In the second, Edmonton Action No. 8703-12327 (Action #4) of May 1987, the officers of, and a corporation related to, Robdale brought an action against, inter alia, Guarantee claiming damages flowing from an alleged improper obtaining of the aforesaid mareva injunction. In the third, Edmonton Action No. 8703-19418 (Action #5) in August 1987, the officers of Robdale claimed damages against Guarantee for alleged breaches of fiduciary and other duties, flowing, inter alia, from the actions taken by Guarantee in honouring the performance bond and attempting to recover its costs under the Deed of Indemnity. In November 1987, Action #3 was directed by the court to be transferred to the Judicial District of Edmonton, to proceed to trial at the same time as Actions #4 and 5, under Consolidated Action No. 8703-28353.

[5] There were applications taken to strike certain portions of the Statements of Claim in the aforementioned actions (with varying degrees of success), defences were filed, and extensive examinations for discovery were undertaken. In this Consolidated Action No. 8701-16630, a pre-hearing conference was held before Mr. Justice Hutchinson in September 1990, and he directed, inter alia, that a Certificate of Readiness be signed. After further clarification of the directions from the September pre-hearing conference obtained in October 1990, this Consolidated Action No. 8701-16630, was set down from trial for four weeks commencing May 13, 1991, with directions for the exchange of expert reports. Pre-trial conferences in the Consolidated Action No. 8703-28353 were held in June and September 1990, but those actions have not yet been set down for trial.

[6] Two other actions (currently unconsolidated) were commenced in Edmonton, flowing out of the appointment of Deloitte, as Receiver. In Action No. 9003-21375 (Action #6) commenced in November 1990, Robdale et al. sought relief against, inter alia, Deloitte (the actions against Guarantee and Public Works Canada were struck and discontinued respectively) with respect to extras alleged to be owing under the construction contract with Public Works Canada. In Action No. 9003-24349 (Action #7) commenced in December 1990, Robdale

et al. brought an action against certain employees and officers of Deloitte with respect to the Receivership of Robdale. These actions have not been consolidated or entered for trial.

[7] In the course of the pre-trial procedures relating to Action #6, Robdale obtained an Order in April 1991 from Master Breitkreuz directing Deloitte to produce some 29 documents, for which production was denied by Deloitte on the basis of privilege claimed by Guarantee in, inter alia, this Consolidated Action No. 8701-16630. However, that Order was subsequently stayed later in April by two Orders of Justice Perras and Justice Agrios.

[8] An application was brought by Robdale before Chief Justice Moore on April 29, 1991, for an adjournment of the trial of this Consolidated Action No. 8701-16630 (scheduled for four weeks commencing May 13, 1991), for a consolidation of the two consolidated actions aforementioned and for the production of the 29 documents. Chief Justice Moore denied the application for further consolidation, adjourned the trial to a four-week period commencing September 30, 1991, and directed that the question of production of the 29 documents be heard in Special Chambers scheduled for May 13, 1991. Counsel were directed to file briefs relevant thereto.

[9] On May 7, 1991, counsel for Robdale filed an application, returnable on May 13, 1991, seeking a direction that Guarantee, in this Consolidated Action No. 8701-16630, file a further and better Affidavit of Production than the one filed in October 1989. On May 9, 1991, Guarantee did file a Further and Better Affidavit on Production (hereinafter the "Revised Affidavit") disclosing, for the first time, some 140 documents, listed as numbers 1 through 133 and 135 (there are two documents listed in each of numbers 99, 100, 123 and 131 and three documents listed in 135), plus correspondence files of Guarantee (document number 134) and the correspondence files of counsel for Guarantee (document number 136) [see footnote 2]. All of these are listed in the Second Part of the First Schedule of the Revised Affidavit and objection to production is claimed by Guarantee based on privilege on the basis that the documents consist of

> "... correspondence between Guarantee and its solicitors; or between the parties and expressly or impliedly without prejudice; or prepared by Guarantee's solicitors to conduct the prosecution of this action; or prepared or obtained after the litigation was contemplated for the dominant purpose of obtaining and for furnishing to Guarantee's solicitors evidence and information to conduct this action, ..."

[10] When the Special Chambers Application was argued on May 13, 1991, Robdale's claim for production of the 29 documents (which was the only issue to which counsels' briefs were filed) was modified (and argued by agreement) as an application for the production of the 140 documents plus two files, which included the aforementioned 29 documents (with two categories of exceptions). The first exception related to three of the 29 documents (identified by reference numbers 16, 95 and 99 from the Deloitte Affidavit), apparently in the possession of Deloitte but never received by Guarantee nor its counsel (and therefore not within their power). As a result of this advice, Robdale abandoned its application for the production of the three documents. The second category of exception relate to documents (identified by reference numbers 40 and 81 from the Deloitte Affidavit) for which Guarantee, in its Revised Affidavit, did not claim privilege and produced them as two of the 593 odd documents listed in the First Part of the First

Schedule (identified in the Revised Affidavit as numbers 254 and 302).

[11] It should be noted that there are extensive further facts and allegations in the numerous cases of action that may have some background value but which I find of no assistance in determining the matters in issue in this application. By way of example, is the extensive interrelationship between parties (set out in the style of cause herein) associated with Robdale (described herein collectively as "Robdale et al."). Furthermore, there were two private appointments of Receivers prior to the court appointment of Deloitte. However, as aforementioned, further delineation of these, or other, facts and allegations, except as delineated herein, would not be of assistance.

III Issues And Summary Of Positions

[12] As aforementioned, what remains to be decided by this decision from the Special Chambers Application (as modified by agreement of counsel and with my concurrence) is which (if any, or all) of the aforementioned 140 documents and two files for which privilege is now claimed should be protected from production by the maintenance of the claim for privilege or should be directed to be produced.

[13] Counsel for Guarantee, for the purpose of the "modified" Special Chambers Application, broke down the 140 plus documents into five categories and argued the basis for the claim of privilege in each category on a "macro" basis - that is counsel did not argue the privilege/producibility with respect to each document, but only in each category. This "macro" approach was the best way to handle the application, but will necessarily result in me leaving open the possibility of an opportunity for further arguments on individual documents that may flow from the order that is to follow from this Memorandum. The areas of privilege relied upon by counsel for Guarantee relate, either expressly, or implicitly, to: "solicitor and client" communication between Guarantee and its counsel; Guarantee's counsel's "lawyer's brief"; and "without prejudice" (and other) communication in contemplation of litigation. The categories (five in number) to which Guarantee's counsel separated the 140 plus documents, the identification of the documents in each category (as argued explicitly or implicitly by Guarantee's counsel and categorized herein on the basis of those arguments and my examination of the documents pursuant to rule 194(2) of the **Alberta Rules of Court**), the position of Robdale, and my decision in respect of each, will be discussed infra.

IV The Law Of Privilege And Analysis Of The Privilege Claimed

1. General Principles

[14] **Wigmore on Evidence** [see footnote 3] ("Wigmore") has long been considered the leading textual authority on the privilege exception to the general rules of admissibility and compellability as part of the law of evidence. That the basic principles with respect to evidence and the privilege exception are still the basis for our case law is seen in decisions in this jurisdiction including the Court of Appeal. In **Strass v. Goldsack**, [1975] 6 W.W.R. 155 (Alta. C.A.), the Appellate Division reconfirmed the validity of the evidentiary principles and exceptions set out in **Wigmore** in this regard. At pp. 158-159, Clement, J.A., after referring to the rules applicable to examinations for discovery, relied on **Wigmore** for the basic rules:

> "I note here that under our **Rules** it is well established that an examination for discovery has the scope of a wide-ranging cross-examination on everything that is

relevant to the issues. In the penultimate paragraph of his reasons for judgment [see footnote 4] (in which Jessup, J.A., concurred) Arnup, J.A., said [p. 698]:

> 'Having in mind the scope of oral discovery, the scope of the liability to produce documents before trial should be the same. Subject to the existing well-recognized grounds of privilege, the test is relevancy to "any matter in question in the action" (Rule 347).'

"This brings me to the principle to which a claim of privilege is an exception. It is stated in para. 2192, p. 70, of **Wigmore on Evidence**, 3rd ed. (1961), vol. 8 [see footnote 5]:

> 'For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'

"In para. 2193, p. 74, it is applied to the production of documents:

> 'This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to every form and material of evidence whatever.
>
> 'In particular it applies to such evidential material as exists in a person's hands in the form of documents.'

"It is this purpose that is served by the **Rules** on discovery and production of documents. As is pointed out by Moir, J.A., the ascertainment of truth in the administration of justice is a prime function of a court, whether constituted by a judge and jury or by a judge alone. When evidence is withheld, the ascertainment of truth may be impeded in some measure, and justice may be led astray."

[15] Clement, J.A., went on then to discuss the issue of privilege and the rules in that regard. Continuing on from the passage quoted above, he said, at pp. 159-160:

> "It is on this basis that **Wigmore** turns to the general principle of privileged communications in para. 2285, p. 527:
>
> 'Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception (§§ 2192 and 2197 supra), four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications.'
>
> "There follow the four conditions set out by D.C. McDonald, J. (ad hoc), and as a matter of convenience and to emphasize their importance I repeat them:
>
> '(1) The communications must originate in a *confidence* that they will not be disclosed.
>
> '(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> '(3) The *relation* must be one which in

the opinion of the community ought to be sedulously *fostered*.

'(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.' (The italics are mine.)

"These conditions for the establishment of a privilege received the sanction of Spence, J., speaking for the Supreme Court of Canada in **Slavutych v. Baker**, [1975] 4 W.W.R. 620. **Wigmore** continues [pp. 527-28]:

'Only if these four conditions are present should a privilege be recognized.

'That they are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain why certain privileges have failed to obtain the recognition sometimes demanded for them. In the privilege for communications between attorney and client, for example, all four are present, the only condition open to any dispute being the fourth.'

"Thus, it is the communications by a client to his solicitor that are privileged because of the relationship between them, not necessarily the whole of the solicitor's file. Documents created by a solicitor himself in the course of his professional duties to his client also clearly come within the solicitor-client privilege, if it could be said that they are within the possession or power of the client. Privilege claimed for documents gathered by or for a solicitor from other sources must be tested by the judge in the light of the applicability and operation of the four conditions in the particular circumstances of a claim.

"To me, the sanction give to these four conditions as the test for a claim of privilege provides a most useful and helpful rationale which should serve well the general public interest in determining such claims. Not only does it provide a rationale: it also leaves room by the third and fourth conditions for adaptation of the principle to changing needs and conditions of society which is essential to the proper function of the common law."

[16] It is by these basic principles that the documents for which privilege is claimed in this case should be examined.

2. Communication Between Solicitor And Client

[17] The documents for which counsel for Guarantee, in oral argument, claimed privilege under this heading can be identified to include the 45 following document numbers (as described in Guarantee's Revised Affidavit [see footnote 6]), namely: 2, 5-10, 12-13, 17, 22-23, 27, 32, 36-37, 39-42, 44-48, 51, 54-56, 61, 66, 71, 73-81, 83, 85, 87-88, and 115. Presumably the majority of documents 134 also fits into this category (identified as "Solicitor/client correspondence (Guarantee's file)"), as does some of 136 (identified as "Solicitor's file including solicitor/client correspondence, notes and memoranda to file and information and documents obtained for the litigation from December 1985 to present").

[18] While the majority of these documents are described as being between Guarantee and its Calgary counsel, some are between Guarantee and its Vancouver counsel, or between the respective counsel on Guarantee's behalf. Five documents are identified in these latter two categories, namely, numbers: 40, 42, 45, 47 and 51. While this may be different than the usual situation, I am of the opinion that this differentiation is not of any material significance in this case.

[19] The law relating to this claim of privilege is well recognized - see **Strass v. Goldsack**, supra. Furthermore, while the case dealt with communications between counsel and other advisors, **Susan Hosiery Ltd. v. Minister of National Revenue**, [1969] C.T.C. 353 (Ex. Ct. - Jackett, P. (as he then was)) was relied upon by Guarantee's counsel, and is generally recognized, as one of the leading Canadian authorities with respect to solicitor and client privilege. McGillivray, C.J.A., in dissent, and D.C. McDonald, J., (ad hoc) referenced this case in **Strass v. Goldsack**, to point out the two branches of the privilege - communications between solicitor and client (which I will discuss in this section) and "lawyer's briefs" (to which I will return in the next section). Jackett, P., referred to the common base of authority for both issues at pp. 356-357:

> "The basic principles on which the appellant relies for his objection to the production of these documents are, in effect, as I understand them, unchanged from the time when they were authoritatively enunciated by Lord Blackburn in **Lyell v. Kennedy (No. 2)** (1883), 9 App. Cas. 81, where he said:
>
> '... the law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him.
>
> 'This further rule has been established that the other side is not entitled, on discovery, to require the opponent to produce as a document those papers which the solicitor or attorney has prepared in the course of the case, and has sent to his client ... He may shew it if he pleases; but it is a good answer to a discovery to say, "It was prepared for me by my legal advisor, my attorney, confidentially, and it is my privilege to say that you shall not read it;" and I think that it is hardly disputed that on a discovery of documents you could not discover that brief.
>
> 'The principles had been discussed in an illuminating way in an earlier decision of the Court of Appeal in **Wheeler v. Le Marchant** (1881), 17 Ch. D. 675. In that case, it was accepted as clear
>
> (a) that confidential communications between a client and his legal adviser were privileged, and
>
> (b) that documents obtained by a legal advisor for the purpose of preparing for litigation, actual or anticipated, were privileged;
>
> but an attempt to extend the privilege concerning documents obtained by a legal advisor to documents obtained in situations where litigation was not contemplated was rejected.'"

[20] I pause to note that the limit imposed of the contemplation of litigation would appear, from this statement, to apply only to the latter form of solicitor and client privilege, namely the "lawyer's brief". While I make no comment on the appropriateness of this limit for this branch of the privilege, it would seem reasonable not to apply it to the former type of solicitor-client privilege, namely communication between solicitor and client, because the existence or contemplation of litigation is not a prerequisite to such communication. Furthermore, such a limitation would be irrelevant here in any case after July 1985 (perhaps before on the contemplation of litigation) when Action #1 was commenced. However, it was argued by counsel for Robdale that the communication between Guarantee and it's counsel was not in the context of a solicitor-client relationship (or in contemplation of litigation), but rather was communication in the context of Guarantee (and its counsel, as agent on its behalf) taking steps to carry out the balance of the road construction contract as required under the performance bonds issued by Guarantee in favour of Public Works Canada, on behalf of Robdale - in other words, counsel were not providing legal advice, but merely acting as Guarantee's alter ego, or agent in carrying out this purpose. Later in this section, I shall review the applicable documents to determine whether or not there are any that come within this argument, and if so, the effect thereof.

[21] Jackett, P., also directed his attention to looking at the distinction between solicitor-client communication per se and that known as the "lawyer's brief". He had this to say, at p. 359:

> "As it seems to me, there are really two quite different principles referred to as solicitor and client privilege, viz:
>
> (a) all communications, verbal or written, of a confidential character, between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and
>
> (b) all papers and materials created or obtained specially for the lawyer's 'brief' for litigation, whether existing or contemplated, are privileged.

In considering the ambit of these principles, it is well to bear in mind the reasons for them.

> "In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of legal assistance that the law contemplated that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist if what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing."

[22] I have reviewed all of the documents aforementioned for which solicitor-client privilege, based on communication between Guarantee and its counsel (or between counsel) is claimed. In the main, they represent correspondence providing information and instructions from Guarantee to its counsel, and reporting and advice from counsel back to Guarantee. In all cases where documents are forwarded from Guarantee or its counsel to the other, enclosing correspondence and documents with third parties, it appears that this material has been produced in the Revised Affidavit, or is irrelevant, unless otherwise the subject of a claim of privilege of a different class as discussed infra. However, there is some documentation between Guarantee and its counsel which falls into the category argued by Robdale's counsel - that is, not related to solicitor-client communication of the type defined by Jackett, P., at p. 359, but rather, related, in whole or part, to counsel, in effect, being the agent for Guarantee in settling or paying claims of sub-contractors under the road construction contract. I see no reason why this latter documentation fits within the solicitor-client privilege, and accordingly I am of the opinion that, prima facie, it should be produced. However, some of these items represent whole letters or documents, and some only certain paragraphs thereof, being interspersed with material that is clearly privileged. In a couple of occasions the privileged and non-privileged information is inextricably interwoven in the same paragraph - e.g. all except the first paragraphs of documents 81 and 85. In this latter case, I hold that the total paragraph is privileged.

[23] Because, as aforementioned, these issues were argued on a "macro" basis, and not on a document by document basis, I do not wish to merely direct, without the right of review on an individual document basis, that the documentation that I find is not, prima facie, privileged be directed absolutely to be produced. Rather, I hereby direct Guarantee to review the following material and produce it on or before July 5, 1991, unless by that date Guarantee provides notice to Robdale, by way of a Notice of Motion returnable before me on July 22, 1991 (or such other date as I may set upon application), or re-attendance before the court, to show cause (and stating the grounds therefore) why, on any basis not inconsistent with this decision, any individual document in the group should not be produced without being subject to privilege. In so far as a document contains both privileged and producible material, I direct that a photocopy of the producible portion of the document only be produced. The material to be produced, subject to the aforementioned limitations, includes the documents, or parts thereof, as follows: 44, 55, 56, 71 (excluding paragraphs numbered 2, 4, and 6), 73, 76-77, 78 (excluding the second paragraph), 79, 81 (first paragraph only), 83 (first and last paragraphs only), 85 (first paragraph only), and 87 (first paragraph only).

3. Lawyer's Brief

[24] The documents which, by description, potentially invite consideration of a claim for privilege under this heading include some 61 (as described in Guarantee's Revised Affidavit), namely: 1, 3-4, 11, 14-16, 18-21, 24-26, 28-31, 33-35, 38, 43, 49-50, 52-53, 57-58, 60, 62-65, 67-70, 72, 82, 84, 86, 97-98, 99a-100, 101-109, 114, 117-119, and 126-127. I have reviewed each of these documents. They include typewritten and handwritten (some of the latter quite indecipherable as to either the words or significance) memoranda to counsel's file relating to: conversations with other parties (including Guarantee); internal instructions within counsels' firm; briefs of law; and counsel's thoughts, plans and strategies, check lists, and reminders, etc. Certain documents (e.g. Documents 19, 24-26, and 119), being counsel's/counsel's secretary's memoranda of meetings/conversations with the counsel/secretaries for Robdale et al. (although not specifically so claimed in oral argument by Guarantee's counsel) may well come within a "Without Prejudice" communication, because they certainly appear to fall within that category, at least in part. However, because they also fall within the "lawyer's brief" category, I will not deal with this additional category of privilege. Presumably the majority of document 136 (being that part of the solicitor's file that is

relevant, but which has not already been produced or is already described in one of the other specifically enumerated documents) also fits, at least in part, into this category.

[25] As is clear from the aforementioned section, the **Susan Hosiery** case is equally applicable to the question of the "lawyer's brief". Jackett, P. also described (at p. 359) what is contained within that designation, which (to repeat) extends the privilege to:

> "... all papers and materials created or obtained specially for the lawyer's 'brief' for litigation, whether existing or contemplated ..."

Later, at p. 359, he describes the rationale for this branch of the privilege, utilizing the following words:

> "Turning to the 'lawyer's brief' rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system."

See also: **Warunki v. Warunki** (1983), 44 A.R. 135; 24 Alta. L.R.(2d) 266 (Q.B. - Dea, J.); **Griffiths v. Mohat**, [1981] 5 W.W.R. 477 (B.C.S.C. - MacKinnon, L.J.S.C.; and **McGregor v. Dorn et al.** (1988), 92 A.R. 45; 63 Alta. L.R.(2d) 378 (Q.B. - Master Quinn), relied upon by counsel for Guarantee and relevant to the lawyer's brief privilege.

[26] I am of the opinion that the attitude that should be taken of a counsel's file is that, absent of some demonstration that the counsel's role is something other than a solicitor-client role vis-à-vis that client (e.g. in this case as an agent of Guarantee to carry out certain of Guarantee's activities, but outside the solicitor-client relationship, at least vis-à-vis Robdale [see footnote 7]), and provided that the 4 **Wigmore** principles are not abused, the whole file should be regarded, in so far as it is relevant, as privileged. This would include most communication by counsel with any other person (there may be some exceptions, and I will later in this Memorandum review the status of communication by counsel for Guarantee with the Receiver of Robdale, appointed on the application of counsel's client) for the purpose of learning information that may assist his client or him in giving advice to his client. Further thereto, I am of the opinion that a lawyer should, in general, feel free to have unrestricted communication with others (or internally) and to document such communication on counsel's file without having to analyze it to determine if it should be produced for some litigation purpose (except in the certain exceptional cases, such as in a suit between a client and its former counsel). I am not of the opinion that it is the function of other counsel, or the court, absent such demonstration, to delve into, or attempt to delve into, counsel's file. This does not mean that in all cases the information itself is privileged, but rather that counsel's collection and organization of it is. This, in my opinion, is consistent with the statements in **Susan Hosiery** and other relevant authorities.

[27] I say "in so far as relevant", because, in my view, much of the material disclosed in affidavits on production, including the Revised Affidavit, appear to have no relevance to the issues before the court - that is, using the words of rule 186(2) of the **Alberta Rules of Court**, it is not material "relating to all matters or questions in the cause or matter" in dispute between the parties. For example, what relevance is there to administrative correspondence between counsel (e.g. to set up discovery dates, etc.), or messages from one's receptionist that the other counsel (or anyone else) called and left a message [see footnote 8].

[28] Returning to the "demonstration" aforementioned, if counsel is acting in a capacity other than on a solicitor-client basis, as is alleged here, counsel should maintain separate files (in so far as possible) for the separate roles. When counsel does not, as would appear to be the case here, counsel's total file may be the subject of the review by the court.

[29] In light of the issues in this case, some of the internal memoranda require close examination because they relate, at least in part, to notes on Guarantee's counsel's files of communication with the Receiver. These are identified as numbers 100, 101-102, 104, 106, 108-109, and 117-118. Normally those notes would come within the "lawyer's brief" privilege rule and not be subject to disclosure. The question here is whether they relate to communication between Guarantee and the Receiver (albeit through Guarantee's counsel, but in the role as agent of Guarantee, not in a solicitor-client context) that pertains to Guarantee's relationship to Robdale as surety? I have reviewed these documents and none appear to relate to Guarantee's counsel preforming such an agency role.

[30] In accordance with the above principles there is, prima facie, no entitlement of Robdale to the production of documents which fall within the heading "lawyer's brief" which would, again, prima facie, include the memoranda of lawyer's to their file. Further thereto, I have reviewed each of the documents described above in this category and, with the exceptions mentioned infra, find none of the documentation falls outside of the privilege that is contemplated. This would also apply to such part of document number 136 as is not already produced or included in other categories listed herein.

[31] The exceptions aforementioned are memoranda of information on Guarantee counsel's file which, as in the case of certain documents claimed as subject to solicitor-client privilege, appear to relate in whole or in part to counsel, in effect, being the agent for Guarantee in settling or paying claims of sub-contractors under the road contract. As with the exceptions to privilege found in the previous section, I see no reason why this information fits within the "lawyer's brief" privilege. Some of these items represent the whole of a memorandum, and some times only certain paragraphs thereof, being interspersed with material that is clearly privileged. Also, in a couple of occasions (e.g. documents 33 and 58) the privileged and non-privileged information is inextricably interwoven in the same paragraph (in which case I hold that the total paragraph is privileged).

[32] As these matters were argued in a "macro" sense (as in the previous section), I do not wish to merely direct that the documentation be produced. Rather, I hereby direct Guarantee to review the following material and produce it subject to a similar right to show cause in an individual document basis. Again, in so far as a document contains both privileged and producible

material, I direct that a photocopy of the producible portion of the document only be produced. The material to be produced (some of which appears to be of questionable relevance, but has been admitted to be relevant by virtue of its inclusion in the Revised Affidavit, an admission that I have not been asked to rule on in this Application), subject to the aforementioned limitations, includes the documents, or parts thereof, as follows: 3 (page 1 only), 4, 15 (excluding paragraph 3), 21 (paragraph 3 only), 28 (first paragraph only), 34, 57, 64, and 86.

4. Documents Prepared In Contemplation Of Litigation/Legal Profession Privilege

[33] At issue under this heading are "Reports (3 volumes)" identified as number 135. These reports were prepared by what appears to be an independent third party, at the request of Guarantee. While the Revised Affidavit does not reflect it, the reports in question relate to instructions received and work performed in and after December 1985, after some litigation was under way between Guarantee and Robdale. The reports are clearly related to certain investigations pertinent to the then existent litigation or in contemplation of litigation that materialized in early 1986.

[34] The law with respect to "documents prepared in contemplation of litigation" is commonly referred in Canada as the "legal profession privilege". The leading case on the subject in this jurisdiction is **Nova, An Alberta Corp. v. Guelph Engineering Co. et al. and Daniel Valve Co. et al.** (1984), 50 A.R. 199 (C.A.). The privilege is similar to, but not the same as, the British "solicitor's brief" (referred supra as the "lawyer's brief"). The distinction between the two is that the material described as part of the "legal profession privilege" is narrower than the "lawyer's brief" privilege. However, material that fits into the former category (such as an expert opinion for counsel, or counsel's client in contemplation of litigation and outside the normal course of the client's business, may also be found on counsel's file with all the other material that forms the counsel's brief (including counsel's notes of strategies, advice, research, etc.). I believe that this distinction, but similarity is what is described by Mason, J., in the case of **Johnson (S.E.) Management Ltd. v. Pigott Construction Ltd. et al.** (1988), 87 A.R. 260 (Q.B.), when he had this to say, after referring to the **Nova** case, at p. 63:

> "*The privilege afforded the legal profession in Alberta is not unlike the British 'solicitor's brief'*, as discussed by Williams in the article **Discovery of Civil Litigation Trial Preparation in Canada** (1980), 58 Can. Bar Rev. 1 at pp. 37ff, nor the protection of the lawyer's 'work product' in the United States (see **Hickman v. Taylor** (1947), 67 S.Ct. 385; 329 U.S. 495; 91 L.Ed. 4910. *Legal professional privilege is subject to the same exception as is the 'solicitor's brief'*; I adopt Jackett, P.'s, oft quoted remarks in **Susan Hosiery Ltd. v. Minister of National Revenue** (1969), 2 Ex. C.R. 27, case, at p. 34 [see footnote 9]:
>
> > 'What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. *The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, other-*

> *wise, the party would be bound to give discovery of them'.*" (Emphasis added.)

[35] Stevenson, J.A., (as he then was) in the **Nova** case appears to support this distinction in a couple of references. Indeed, he goes even further to make the point that the "legal profession privilege" as such is not really a matter of privilege but a matter of exemption. He states at p. 188:

> "Indeed, it may be misleading to talk about the rule which protects documents from production as a privilege. The expression 'legal profession privilege' is termed inaccurate by Lord Wilberforce in **Waugh**. **Wigmore** also recognizes the anomalous nature of the rule and divorces it entirely from his discussion of privilege. This point is emphasized in a case comment on **Strass v. Goldsack, Discovery - Production of Documents - Claim of Privilege to Prevent Disclosure**, by S.N. Lederman in (1976), 54 Can. Bar Rev. 422. *What we are talking about is an exemption from discovery apart entirely from the solicitor-and-client privilege*. The legal professional privilege with which we are concerned is discussed by Lord Wilberforce in **Waugh**. It arises, firstly, from the exigencies of the adversary system under which a litigant is not required to disclose the nature of his case, and secondly, from a need to encourage candour. Lord Simon also founds the privilege on the adversary system's protection of material which is *part of the lawyer's brief or file*."

Later, at p. 189, he states:

> "I note that while the true solicitor-client privilege may have fed the development of the special legal profession privilege which we are considering, I doubt that it is the sole source."

Finally, at 191, he talks about the rationale for the principle:

> "That rationale is not easy to ascertain. It is not confidentiality, because there is no need for the document to be produced in confidence, nor is the 'privilege' that of the maker. There is a helpful discussion by Williams, **Discovery of Civil Litigation Trial Preparation in Canada** (1980), 58 Can. Bar Rev. 1, who points out that *there are several overlapping rules and several sources which feed the protection of information in the hands of a party*. Lord Wilberforce finds the rationale in the exigencies of the adversary system and the encouragement of candour. The validity of the latter ground may be questioned. Had these documents been prepared solely for the purpose of advising management to fix internal responsibility and prevent recurrences in the public interest, no privilege would have attached although the encouragement of candour would be highly desirable. Lord Wilberforce makes the very point in **Waugh**. Confidentiality, per se, would not found a privilege - that is clear from the discussion in **Strass v. Goldsack**." (Emphasis added)

If I have misinterpreted these comments as recognizing two branches of a similar privilege (or exemption), and it is rather only one by two different names ("legal profession privilege" and "lawyer's brief"), the result is the same.

[36] Returning to the substance of the **Nova** case, the principle it espouses applicable to the legal profession privilege or exemption, is set out most succinctly in the headnote in the following terms:

> "The privilege accorded to documents prepared in contemplation of litigation arises only if the purpose of instructing

solicitors is the 'dominant purpose' for the preparation of the documents in question, and not merely a 'substantial purpose'."

The Court of Appeal dismissed the appeal from the judgment of Brennan, J., ((1983), 48 A.R. 241; 27 Alta. L.R.(2d) 268), who, as Stevenson, J.A., stated at p. 186:

> "... applied the test prescribed by the House of Lords in **Waugh v. Br. Ry. Bd.**, [1980] A.C. 521, [1979] 3 W.L.R. 150, [1979] 2 All E.R. 1169. Under that authority a party need not produce a document otherwise subject to production if the dominant purpose for which the document was prepared was submission to a legal advisor for advice and use in litigation (whether in progress or contemplated). Such documents are shielded from production by what is usually described as legal professional privilege. Applying the **Waugh** test the documents under consideration are not protected from production."

See also: **Opron Construction Co. v. Alberta** (1989), 100 A.R. 58 (C.A.), and **Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co. et al.** (1988), 88 A.R. 107; 57 Alta. L.R.(2d) 182 (Q.B. - Wachowich, J.), reversed in part: (1988), 90 A.R. 323; 61 Alta. L.R.(2d) 319; 22 C.P.R.(3d) 290 (C.A.).

[37] It is clear that document 134 meets the dominant purpose test required by the **Nova** case, and is therefore not subject to production on the basis of the legal profession privilege or exemption. In the alternative, it is protected by the "lawyer's brief" privilege.

[38] Stevenson, J.A., in the **Nova** case also held that the court's earlier decision in **Strass v. Goldsack**, supra, does not decide the case of communications by non-parties with a legal advisor. With this principle by way of background, it is now appropriate to move onto the last area for which privilege is claimed, involving communication with non-parties.

5. Documents With Third Parties

[39] Counsel for Guarantee argues that other communication between Guarantee's counsel and certain third parties is also subject to privilege under the principle of the "lawyer's brief". This deals with the 29 documents that were originally in dispute, being communication between Guarantee's counsel and Deloitte, plus one other third party, both being connected to the matters in dispute, but neither parties in this Consolidated Action.

[40] Counsel for Robdale argued, with respect to both branches of the solicitor-client privilege, that, while, the documents may exist to provide protection from production in one context (in effect in the way in which they are communicated or organized), the actual facts, information and material contained therein (as opposed to the form of the communication) may not be privileged and therefore should be produced. In other words, while, on the one hand, he supported these branches of the privilege in principle, he sought the information behind the privileged communication. In essence, I interpret his position to be that documents and information, not subject to privilege, that were otherwise obtained or learned could not become privileged as a result merely of the same documents or information being included in solicitor-client communication or being placed on counsel's file.

[41] This argument presents an interesting dilemma, because a ruling in either direction is potentially open to abuse. On the one hand, as attractive a distinction as the logic behind it may suggest, such a differentiation would appear to be contrary to the very rationale for the privilege as set out at p. 359 of the **Susan Hosiery** case. On the other hand, to hold such documents and information privileged, would seem to open up the potential for other abuses. One could hold that documents or information not privileged must be produced, but that any discussion about such documents in solicitor-client communication or in memo (or other form) on counsel's file would be privileged. However, the potential for abuse is that counsel might be encouraged never to obtain such information in writing and to immediately convert any oral communication into a memorandum on counsel's file. However, I find that the approach is the better one, at least in the first instance. That is, one has to examine the issue in two steps - the first whether the source information is subject to privilege. If it is, presumably that ends the issue. If, however, it is not privileged, can it become privileged under this rational. I am of the opinion that the better answer is that it is not, in so far as it can be separated from a counsel's privileged comments thereon, but that, in the final analysis, it is a matter for a decision in each case, to make certain, on the relevant facts, that no abuse is taking place.

(a) Parties Unrelated To Robdale

[42] There is only one document with any party unrelated to Robdale for which Guarantee claims privilege and that is identified as document number 59, being described as "Copy of without prejudice letter dated August 15, 1985, Atkinson McMahon to Public Works Canada".

[43] Absent of some exception amounting to privilege, it would seem trite that there would be no privilege attached to a document between a party and third party, if the document is of relevance to litigation between the parties - see the general rule in **Wigmore**, supra. However, in this case document number 59, being correspondence between counsel for Guarantee and Public Works Canada, is specifically qualified by the words "Without Prejudice" which appear on its face. What is the significance of the qualification "Without Prejudice"? Does it amount to such an exception? For the purposes of this decision, it might be reasonable to conclude that Guarantee might be able to claim privilege vis-à-vis Public Works Canada (that is, in litigation between Guarantee and Public Works Canada - see Sopinka and Lederman, **The Law of Evidence in Civil Cases**, (Toronto: Butterworths, 1974) ("Sopinka and Lederman"), at pp. 196-199), but does it establish privilege as against a third party, namely in this case, Robdale?

[44] From an examination of the document, it obviously takes positions vis-à-vis Public Works Canada that are related to settlement and which are clearly intended to be without prejudice to the rights of Guarantee vis-à-vis Public Works Canada, but, of more relevance to this case, also takes positions as to Guarantee's rights vis-à-vis Robdale.

[45] The answer to the question, on the authorities, would appear to be that, in these circumstances, a "Without Prejudice" communication, protected as privileged between Guarantee and Public Works Canada, is also protected as privileged between Guarantee and Robdale, and I so hold.

[46] The root authority of relevance in support of this conclusion is **Waxman (I.) & Sons Ltd. v. Texaco Canada Ltd.,** [1968] 1 O.R. 642; 67 D.L.R.(2d) 295 (H.C.), affd. [1968] 2 O.R. 452; 69 D.L.R.(2d) 543 (C.A.). In discussing the trial decision of Fraser, J., **Sopinka and Lederman,** at p. 199 stated [see footnote 10]:

"The principle of 'once privileged, always privileged' is applicable to communications made with a view to settlement. This is illustrated in **I. Waxman & Sons Ltd. v. Texaco Canada Ltd. et al.** The issue in that proceeding was whether or not production could be compelled of letters, written 'without prejudice' and with a view to settlement of the issue between A and C, upon the demand of B, in subsequent litigation between A and B on the same subject matter. Fraser, J., whose decision was affirmed by the Ontario Court of Appeal, concluded that a party to correspondence within the 'without prejudice' privilege is protected from being required to disclose it on discovery or trial in proceedings, by or against a third party."

The Ontario Court of Appeal said as much in its oral judgment affirming the decision of Fraser, J., the **Waxman** case has been considered in a number of other cases since 1968. In this jurisdiction, Wachowich, J., whose "thoughtful reasons" the Court of Appeal affirmed, in the case of **Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co. et al.** (1990), 105 A.R. 4; 72 Alta. L.R. 330 (Q.B.) [see footnote 11], affd. (1990), 74 Alta. L.R.(2d) 271 (C.A.), relied upon the **Waxman** case to come to the same conclusion as I have on the exact same issue that now faces me as to Document Number 59.

[47] Accordingly, I hold Document No. 59 is privileged.

(b) Parties Related To Robdale

[48] Part of the documentation for which privilege was claimed in Guarantee's Revised Affidavit is in reference to the same documentation for which the application was originally filed, namely correspondence between Guarantee's counsel and the Receiver, Deloitte, appointed by the court over the assets of Robdale, on the application of Guarantee. There are 30 documents that fit into this category, namely [see footnote 12]: 89-96 [82, 75, 68, 54, 60, 43-4, and 41.4], 99 [94], 100a [93], 110-113 [67-65], 116 [47], 120-125 [42, 39, 38, 36, 33, 32, and 31], and 128-133 [29, 23, 22, 21, 17, and 15]. Guarantee acknowledges in its Revised Affidavit that these documents are relevant to the litigation between it and Robdale, but maintains that the documentation is privileged vis-à-vis Robdale.

[49] A review of these documents discloses that the documents consist of: (a large percentage) reporting by Deloitte to Guarantee (through it's counsel - i.e. Guarantee's counsel appears involved in this communication as agent for Guarantee), or instructions from Guarantee (through its counsel) in respect of the receivership, or enquiries by Guarantee's counsel for information from Deloitte (Document Nos. 89-99, 110, 116, 120, 123a, parts of 128, 129-130, and 133) - although the last three paragraphs of 93 and all except the first two paragraphs of 95 relate to contemplated litigation against Deloitte, for which Deloitte seeks advice of Guarantee's counsel (in the context of also potentially becoming Deloitte's counsel) relevant to that contemplated litigation; mere forwarding of non-privileged documents between Deloitte and Guarantee's counsel, including "blind" carbon copies of correspondence from Deloitte to others, or copies of correspondence from others to Deloitte (Document Nos. 101a, 111-113, 121-123, 125, and parts of 128); advice of changes of personnel in Deloitte's office (Document Nos. 124, 131b, and 132); and advice as to documentation of Robdale held by Deloitte and its examination by Guarantee's counsel (Document Nos. 131-131a).

[50] As a result of the examination of this documentation, I can see, prima facie, no basis for privilege of any of it, except the parts of documents 93 and 95 prepared in contemplation of litigation and for which, in effect, Deloitte is seeking Guarantee's counsel's advice in the role as also being counsel to the Receiver. The Receiver is clearly entitled to privilege in this regard - see inter alia, **SLP Resources Inc. v. Sorrel Resources Ltd.** (1987), 65 C.B.R.(N.S.) 288 (Alta. Q.B. - O'Leary, J.). As a result of this examination, I am prepared to direct production, with the exception of the aforementioned parts, unless there is some other reason why privilege may be upheld, vis-à-vis Robdale.

[51] The question is therefore whether there is any status applicable to Deloitte that would make its communication with Guarantee's counsel privileged vis-à-vis Robdale. In so far as Deloitte stands in the position of a third party, there would seem to be no basis for privilege. None of the communication is expressed to be "without prejudice", nor is any such privilege implied directly or in the context of the documents. Therefore, there would appear to be no privilege such as is justified by the **Waxman** or **Miller** cases. Furthermore, except as noted supra, none of the communication is privileged solicitor-client communication. In so far as the documentation is communicated to Guarantee by its counsel, that communication may be considered solicitor-client privileged communication, but that is not the nature of the documentation here. Finally, the documentation, by itself, is not part of the "lawyer's brief", although the use, by counsel of the information may merit more consideration.

[52] In so far as the information from the documentation is used by Guarantee's counsel as part of the "lawyers brief" for litigation vis-à-vis Robdale, it might be so protected, but even though much of the documentation was exchanged (it is primarily correspondence and attachments) during litigation with Robdale, again that is not the nature of the documentation. Furthermore, in that case, it is arguably not privileged in the sense that the Receiver "stands in the shoes" of Robdale, "in Receivership". The real nature of the documentation is instructions from Guarantee to the Receiver and advice to Guarantee from the Receiver in the context of the administration of the estate of Robdale, again "in Receivership", albeit through Guarantee's counsel, as its agent for this purpose. In this context, the documentation is really no different than if it were between Guarantee and the Receiver directly. The question is therefore, in reality, whether communication between a Receiver and the party at whose behest the Receiver is appointed by the court is subject to some privilege, as against the party in receivership? The status of Deloitte, in this context, is as "standing in the shoes" of Robdale, as a court appointed receiver. In so far as Robdale (in receivership) is adverse in interest to Guarantee, there might be a right, in some circumstances, of privilege between Deloitte and Guarantee, but neither appears to claim privilege on this basis, and even if one of these parties were to so claim, surely that would not be a privilege vis-à-vis Robdale, in its position a "remainder man" in respect of its position after the receivership, which is the nature of Robdale's status in this litigation.

[53] What, in effect, was the position argued by Guarantee's counsel is that the Receiver was an agent for Guarantee, and therefore the communication between Guarantee, and its agent (Deloitte), should be privileged vis-à-vis Robdale's remaining position. While this has some basis vis-à-vis outsiders (e.g. Public Works Canada), that is not the case here.

[54] Counsel for Robdale argues that communication involving Deloitte should be released on the basis of the very nature of the status of Deloitte as a Receiver. Counsel for Robdale referred to a number of propositions relative thereto and quotes numerous authorities in support.

[55] His main argument was that Deloitte, as a court appointed receiver, is an officer of the court and a servant of the court for the benefit of all parties, having a fiduciary responsibility to represent neither the debtor nor the secured creditor, but "instead all interested parties". As his primary source on this point, he referred to The Law Society of Upper Canada, **Bar Admission Course Materials - Creditors' and Debtors' Rights 1987-88,** Section Head: Frank Bennett (Carswell: 1988), at p. 131 to describe the role of the receiver appointed by the court. There, the noted author Frank Bennett stated:

> "The duty of a court-appointed receiver and manager is a duty to the court as an officer to discharge his powers honestly and in good faith. His duty is also that of a fiduciary to all interested parties involving the debtor's assets, property and undertaking.
>
> "In **Parsons v. Sovereign Bank of Canada,** [1913] A.C. 160 at p. 167 (P.C.), Viscount Haldane stated:
>
>> 'A receiver and manager appointed, ... is agent neither of the debenture-holders whose credit he cannot pledge, nor the company, which cannot control him. He is an officer of the court put into discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs.'
>
> "The receiver and manager is appointed by the court notwithstanding that the motion is initiated by the security holder. The receiver, as a court officer, is therefore not agent of the security holder nor that of the debtor company. His duties are essentially to comply with the powers provided in the order, not only to the court, but to all interested parties.
>
> "In view of the fiduciary relationship of the court-appointed receiver to the debtor and to the creditors, the receiver has a duty to exercise such reasonable care and control of the debtor's property as an ordinary man would give to his own. If he fails to provide that high standard of care, the court-appointed receiver may be liable for negligence (**Plisson v. Duncan** (1905), 36 S.C.R. 647)."

[56] He also relies upon Picarda, **The Law Relating to Receivers and Managers**, (London: Butterworths, 1984), at pp. 272-273 as follows:

> "Status Of Receiver
>
> "The status of a receiver appointed by the court has been defined and analyzed on many occasions. He is of course first and foremost an officer of the court. A receiver, in the words of Viscount Haldance [sic] LC, 'in an officer of the court put in to discharge certain duties prescribed by the order appointing him' [**Parsons v. Sovereign Bank of Canada** [1913] AC 160]. 'Unquestionably a receiver is an officer of the court, because appointed by the court' [**McMeckan v. Aitken** (1895), 21 V.L.R. 65 at p. 69 per Holroyd]. He is 'nothing more than the hand of the court' [**Wilkinson v. Gangadhar Sirkar** (1871), 6 B.L.R. 486, Ind.] and 'is a servant of the court and has only such power and authority as the court may choose to give him' [**Manick Lall Seal v.**

Surrut Coomaree Dassee [(1895), I.L.R. 22 Calc 648, Ind.]. Statements such as these tell the truth, but not the whole truth. 'Usually the receiver appointed by the court is an officer of the court and represents neither the plaintiff nor the defendant' [**Trusts and Guarantee Co. v. Grand Valley Rly. Co.** (1915), 24 D.L.R. 171 at p. 173, per Hodgins, J.A.]. He is in addition appointed for the benefit of all parties to the action' [**Davis v. Duke of Marlborough** (1819), 2 Swan 108 at p. 118; **Searle v. Smales** (1855), 25 L.T.O.S. 106; 3 W.R. 437 ...]. In some cases he has been described as being in a sense in the position of trustee or quasi-trustee to all, but these descriptions are heterodox.

"The traditional view is that until the rights and wrongs have been determined he is neither agent nor trustee for either party ... The receiver is appointed by the order of the court and is responsible to the court and cannot obey the directions of the parties in the action, and in no sense does he stand in the position of agent to the parties who are interested at the suit of whom or one of whom he has been appointed [**Bacup Corpn. v. Smith** (1804), 9 Ves. 335; **Bacup Corpn v. Smith** (1890), 44 Ch. D. 395; 59 L.J. Ch. 518, C.A.]."

[57] See also, in support of these statements and of similar effect, the following further authorities cited by counsel for Robdale, namely **McMeckan v. Aitken** (1895), 21 V.L.R. 65 (Aus.), at p. 69, per Holroyd, J.; **Trusts and Guarantee Co. v. Grand Valley Railway Co.** (1915), 24 D.L.R. 171 (Ont. H.C.), at p. 173, per Hodgins, J.A.; **Newdigate Colliery Co.; Re**, [1912] 1 Ch. 468 (C.A.), at pp. 477-478; Alderson, **Law of Receivers**, 1905 Edition, at pp. 326-327: **Kerr on the Law and Practice as to Receivers and Administrators**, 17th Ed. by Sir Raymond Walton (London: Sweet & Maxwell, 1989), at pp. 5-6, 130 and 145; Bennett, **Receiverships**, (Toronto: Carswell, 1988), 370-371; Robinson, **Receivership**, Paper presented to the Canadian Bar Association, Alberta Branch, 1983, Mid Winter Meeting, at pp. 212-221; **Ostrander v. Niagara Helicopters Ltd.** (1973), 19 C.B.R.(N.S.) 5 (Ont. S.C.), at p. 11; **Royal Bank v. Vista Homes Ltd.** (1984), 54 C.B.R.(N.S.) 124 (B.C.S.C.); and **Fotti v. 777 Management Inc.**, [1981] 5 W.W.R. 48; 9 Man.R.(2d) 142 (Q.B. - Wilson, J.) at p. 54.

[58] Bennett, in his text **Receiverships**, makes reference to the case of **Newhart Development Ltd. v. Co-operative Commercial Bank Ltd.**, [1978] Q.B. 814; [1978] 2 All E.R. 896 (C.A.), relevant to the company maintaining an action when the Receiver does not. That appears to be the situation in this case. There, in referring to the **Newhart** case, Bennett stated at p. 370:

"A receiver and manager is given powers by the terms of the security instrument, and in cases of court appointments, from the order appointing him ...

. . . . .

"Where the receiver and manager is appointed by the court, he is neither the agent of the security holder nor of the debtor. He is a principal entrusted to discharge the powers granted to him honestly and bona fide pursuant to the terms of the order. Therefore, the court-appointed receiver and manager will have a duty to comply with such powers, and his standard of care will be comparable to the 'reasonable care, supervision and control as an ordinary man would give to the business were it his own.' [**Plisson v. Duncan** (1905), 36 S.C.R. 647]. Where the receiver fails to provide such a standard of care, he may be liable for his breach of duty."

[59] The **Royal Bank v. Vista** case (supra) deals with the receiver's duty to disclose information to and communicate with all parties. It makes a very important distinction between the role of a court appointed receiver (as Deloitte is here) and a receiver appointed by a debenture holder under a debenture. Without suggesting that Deloitte in this case falls into the criticism attributed to the receiver in the **Vista** case, I note the comments of Macdonald, J., at p. 125:

"The background of this motion is the commonplace attitude of a receiver-manager who, despite appointment as an officer of the court, feels some greater or special duty to the plaintiff which applied for its appointment. That attitude, coupled with the fact that the receiver-manager has, until very recently, relied upon the solicitors for the plaintiff for its legal advice in these proceedings, has produced considerable dissatisfaction in the applicants.

. . . . .

"A clear distinction must be drawn between the duties and obligations of a receiver-manager appointed under the terms of a debenture and one appointed by the court. In the latter case, the authority of the receiver-manager is derived from the court and not the instrument. He becomes an officer of the court and acts in a fiduciary capacity to all parties involved in the litigation: **Ostrander v. Niagara Helicopters Ltd.** (1973), 1 O.R.(2d) 281; 19 C.B.R.(N.S.) 5; 40 D.L.R.(3d) 161 at p. 166 (H.C.) ... He is not subject to the control or direction of the secured creditor who applied to the court for his appointment: **Royal Trust Co. v. Montex Apparel Indust. Ltd.**, [1972] 3 O.R. 132; 17 C.B.R.(N.S.) 45; 27 D.L.R.(3d) 551 at p. 555 (C.A.)."

[60] The **Fotti** case (supra) makes the following comments about the duty of a receiver at p. 54:

"Appointed as he was by order of this court, the receiver is an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed."

[61] On the basis of these authorities, it is clear that a court appointed Receiver is not an agent of the party on whose application (Guarantee's, in this case) the Receiver is appointed, and therefore Guarantee cannot, without some other basis for privilege, maintain a claim for privilege in communication between it and the Receiver, in litigation between Guarantee and the party in receivership (Robdale, in this case). Even more elementary, having regard to the aforementioned principles applicable to this court appointed receiver, Deloitte, in the aforementioned factual situation, none of the basis for privilege set out in **Wigmore** can be supported: (1) the communications *did not* originate in a *confidence* that they will not be disclosed; (2) *no* element of *confidentiality is essential* to the full and satisfactory maintenance of the relations between the parties - in fact, the opposite is the case; (3) *no special relation with the receiver* is one which in the opinion of the community

ought to be sedulously fostered; and (4) the *injury* that would inure to the relation by the disclosure of the communications *is not greater than the benefit* thereby gained for the correct disposal of litigation - in fact it is less. These fundamental prerequisites having been found wanting, and no other basis for privilege being claimed, I do not see how Guarantee can maintain a privilege of its correspondence with the Receiver of Robdale, to the exclusion of Robdale and its principals and related companies that are, in effect, the "remainder men" of what remains of Robdale after the receivership has ended. This is especially so when the very order appointing Deloitte provides:

> "6. The Receiver is ordered and directed to provide reasonable access to the books and records of the defendant, Robdale ..., by the said defendant [Robdale] and its directors, officers or agents for the purpose of present and future litigation."

Surely, in its administration of the estate of Robdale under the receivership order, any correspondence and records of Deloitte that are not "personal" to its private rights as a corporation providing receivership services (as, with the exceptions noted, the documents in dispute would appear not to be), are part of the "books and records" of Robdale. Accordingly, I direct that all of the above identified 30 documents, except the last three paragraphs of 93 and all, except the first two paragraphs, of 95, be produced.

[62] The cases are clear that if that information between counsel for Guarantee and Deloitte is later described by counsel in communication to the client that description any memorandum to his file is privileged under the solicitor-client privilege or the lawyer's brief privilege aforementioned. However, the facts upon which it is based are not so restricted. The principle needs to be made clear as it was in this, sometimes subtle, distinction as set out by Jackett, P., in the **Susan Hosiery** decision at pp. 360-361 in the following words:

> "What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. *The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them.* This appears clearly from the following passage in the judgment of Lord Blackburn in **Lyell v. Kennedy (No. 2)** ..." (Emphasis added).

Veit, J., made the same distinction in the case of **Flegel Construction Ltd. v. Cambac Financial Projects Ltd. and Pierlot Yakinowick Donald Engineering Ltd. et al.** (1983), 44 A.R. 181 (Q.B.), at p. 187, pointing out in the process that often lawyers have more than one role:

> "While the privilege of compromise must be broadly applied, surely we cannot go so far as [to] protect every meeting in which a lawyer is involved especially *given the broad range of business functions performed by lawyers in our society*.
>
> . . . . .
>
> "However, having disposed of the two grounds of privilege as I have, the solicitor's brief claim remains a bare claim on

its own. If all five people at the meeting had developed written memos concerning what occurred at the meeting as soon as they returned to their officers, would such memos be subject to discovery? I believe the answer is yes. The answer surely does not depend on whether such memos could themselves be independently introduced into evidence ... It is obvious that documents prepared by parties and relating to the issues raised in the lawsuit could be potentially useful to opposite parties in cross-examination, and perhaps even in the origination parties as a way of refreshing their memory concerning events ... Does the situation change merely because certain of the parties are solicitors? In my view it does not. It may be that such records are, in fact, able to be introduced independently as being professional records; although I am of the view that such a discussion is too remote for consideration here.

"The central issue is whether this memorandum arises as a result of specific work undertaken by a solicitor. Clearly this is not so. A solicitor has no property in a meeting which he attends ... A solicitor ... is, again, surely no different from the testimony given by any other witness. I should emphasize that in this case I am dealing only with a record of what happened at the meeting. A lawyer's estimate of various litigation-centred issues such as the credibility of certain witnesses, the strength of the arguments raised by them in the context of the existing law, tactics concerning a trial, or advice to be given to a client as a result of a meeting are not the subject of this application."

[63] The distinction that these cases make with respect to the privilege is that information that is learned (whether in document form or otherwise) is not to be privileged but the communication of that information between solicitors and client or as forming a part of the "lawyer's brief" may be privileged, depending on the role the lawyer is playing in each case, and the type of information that is being communicated.

[64] Since the preparation of the lion share of this decision, I have been advised by counsel for Robdale that Wilson, J., in a recent case, relying upon inter alia, **Royal Bank v. Vista** (supra) and Lederman, '**Discovery - Production of Documents - Claim of Privilege to Prevent Disclosure**' (1976), 54 C.B.R. 422, dealt quite directly and concisely with this issue, coming, in substance to the same decision as I have in this case: **Royal Bank of Canada v. Lee & Fishman** (Unreported - Edmonton Action No. 8503-31160 - June 3, 1991).

VI Affidavit On Production

[65] As mentioned earlier, Guarantee failed to include the Second Part, First Schedule and the Second Schedule of its Affidavit on Production. There is not much evidence on the record as to whether this was raised in argument by counsel for Robdale earlier than this application, but in this application counsel for Robdale makes reference to the suggestion that the schedules were intentionally left out and were later described as being left out due to a clerical error. In any event, whether due to intention or inadvertence (which, on the material before me (see footnote 2) is the conclusion to which I have arrived), these documents were not described until the Revised Affidavit. It is clear, as counsel for Robdale points out, that under rule 186(2) of the **Alberta Rules of Court**, in circumstances such as this, Guarantee would be required to discover in its Affidavit of Production "all relevant documents", whether producible, privileged, or otherwise - see **Re\Max Real Estate (Ed-**

monton Ltd. et al. v. Border Credit Union Ltd. (1988), 90 A.R. 15; 60 Alta. L.R.(2d) 356 (Q.B. - Master Funduk), especially at pp. 359 and 364. Furthermore, such documents must be properly described - see, inter alia, **Hamilton and Malm v. Alberta (Minister of Public Works, Supply and Services) et al.** (1991), 118 A.R. 267 (Q.B.); relying upon **Creaser v. Warren and Warren** (1987), 77 N.S.R.(2d) 429; 191 A.P.R. 429; 36 D.L.R.(4th) 147 (C.A.); and **Brampton Engineering Inc. v. Alros Products Ltd.** (1986), 8 C.P.C.(2d) 48 (Ont. Master).

VII Conclusion On Privilege

[66] On the basis of the above analysis, I find that all of the documents listed in Guarantee's Revised Affidavit are privileged with the exception of those described (supra and infra) which I direct be produced and removed from the Second Part of the First Schedule and placed in the First Part of the First Schedule. Because, as aforementioned, these issues were argued on a "macro" basis, and not on a document by document basis, I do not wish to merely direct, without the right of review on an individual document basis, that the documentation that I find is not, prima facie, privileged be directed absolutely to be produced. Rather, I hereby direct Guarantee to review the following material and produce it on or before July 5, 1991, unless by that date Guarantee provides notice to Robdale, by way of a Notice of Motion returnable before me on July 22, 1991 (or such other date as I may set upon application), of re-attendance before the court, to show cause (and stating the grounds therefore) why, on any basis not inconsistent with this decision, any individual document in the group should not be produced without being subject to privilege. In so far as a document contains both privileged and producible material, I direct that a photocopy of the producible portion of the document only be produced. The material to be produced, subject to the aforementioned limitations, includes the documents, or parts thereof, as follows: (1) 44, 55, 56, 71 (excluding paragraphs numbered 2, 4, and 6), 73, 76-77, 78 (excluding the second paragraph), 79, 81 (first paragraph only), 83 (first and last paragraphs only), 85 (first paragraph only), and 87 (first paragraph only); (2)3 (page 1 only), 4, 15 (excluding paragraph 3), 21 (paragraph 3 only), 28 (first paragraph only), 34, 57, 64, and 86; and (3) 89-96 (except the last three paragraphs of 93 and all, except the first two paragraphs of 95), 99, 100a, 110-113, 116, 120-125, and 128-133.

VII Costs

[67] In light of: the failure of Guarantee to properly initially identify and disclose these documents (now specifically admitted relevant) in its Affidavit on Production; the action that has had to be taken by Robdale to secure identity of those documents; and the finding that a considerable number are not, prima facie, privileged; Robdale is entitled, immediately and in any event of success at trial, to is full costs of this application, pursuant to the applicable column of Schedule C of the **Alberta Rules of Court**, including preparation of a brief, no limiting rule to apply.

Order accordingly.

Footnotes

1. I have classified this action as Action #3 because it is the third action commenced in time chronology.

2. In "Summary of Facts and Proceedings" filed by counsel for Guarantee in the Special Chambers Application, Guarantee's counsel indicated that while Guarantee claimed privilege of all these documents in paragraph 3 of its original Affidavit of Production dated october 23, 1989, on the basis that the documents were "made after the litigation was contemplated in view of assisting its solicitor in the conduct of this action, or [were] documents expressly or impliedly without prejudice", but that the Second Part of the First Schedule, which should have identified these documents, and the Second Schedule, were "inadvertently omitted from the Affidavit".

3. The most recent revision is cited as **Wigmore on Evidence**, Fourth Edition, (Toronto: Little, Brown and Company, various revision dates).

4. In **Perini Ltd. v. Toronto Parking Authority** (1975), 52 D.L.R.(3d) 683 (Ont. C.A.).

5. These references to **Wigmore**, while subject to revision by "Pocket Supplement" up to 1991, would appear to have remained unrevised to date.

6. All references to document numbers, unless specifically stated to be to the contrary, are to the numbers in the Second Part of the First Schedule of Guarantee's Revised Affidavit.

7. An example of this would be that Guarantee arguably should, in any dispute which Robdale be required to disclose any information relating to the contract between Guarantee and road contractors retained by Guarantee to take over the Robdale contract, and Guarantee should not be any more able to avoid disclosing that information by retaining its Counsel to act on its behalf in this regard than if Guarantee took the steps itself or retained any other agent or consultant to do it.

8. I also believe that it is a good practice for counsel, having concluded that any material on a party's file is not relevant, and not protected by some privilege, to informally make that material available for examination to the opposite party (at least on a "without prejudice" basis), so that there can be no dispute that any relevant material is being hidden. This avoids any interpretation problems on what is relevant (if the opposite party believes a document that has been categorized as irrelevant is, in fact, relevant it can then be produced, or placed before the court for a determination of relevance), but at the same time, avoids the production of material that is really irrelevant, but which counsel may disclose only out of an abundance of caution.

9. See also [1969] C.T.C. 353, at p. 360.

10. Footnote references omitted.

11. Not to be confused with the case of the same name, also decided by Wachowich, and reversed, in part, by the Alberta Court of Appeal, also on the subject of privilege, and referenced in this latter decision of Wachowich, J., and (supra) herein: (1988), 57 Alta. L.R.(2d) 182; 88 A.R. 107 (Q.B.); 61 Alta. L.R.(2d) 319; 22 C.P.R.(3d) 290; 90 A.R. 323 (C.A.).

12. The numbers in parenthesis (e.g. "[ ]") represent the numbers which I was advised had been assigned to the documents in the Deloitte Affidavit of Production in Action #6 or #7, there being some potential inconsistencies or cross-reference numbering - see also the exceptions referenced in para. 10 hereof.