REPORT OF THE LAW REFORM COMMITTEE

ON

REFORMING LEGAL PROFESSIONAL PRIVILEGE

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

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Authors/Sub-committee Members:

Harpreet Singh Nehal, S.C. (Chairman)
Tan Yock Lin
Yvonne Tan
Ho Hock Lai
Vincent Leow

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

See Executive Summary below.

Comments and feedback on this report should be addressed to:

Law Reform Committee
Attn: Law Reform Co-ordinator
Singapore Academy of Law
1 Supreme Court Lane, Level 6, Singapore 178879
Tel: +65 6332 4459
Fax: +65 6334 4940
Website: www.sal.org.sg

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I. Executive Summary

1 In or around 2005, the Law Reform Committee ("the Committee") selected three aspects of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") for possible reform, namely hearsay, opinion evidence and legal professional privilege. In 2007, the Committee published its recommendations to reform the statutory provisions dealing with hearsay evidence in civil proceedings before the law courts. In 2009, the Committee discussed various recommendations for reform on opinion evidence and will likely release that report in 2011. The present report, which discusses recommendations for the reform of legal professional privilege, completes the process of reform of the Evidence Act which began in 2005. The key recommendations contained in this report are summarised below.

2 We recommend that the statutory rules of legal professional privilege contained in the Evidence Act be applicable to affidavits presented to the court. The statutory rules of legal professional privilege contained in the Evidence Act are applicable to adduction of evidence in judicial proceedings but not to affidavits presented to the court. This inconvenient and undesirable dichotomy between the trial stage of litigation, where the statutory rules are applicable, and the pre-trial stage, where the common law legal professional privilege is applicable, should be abrogated by making appropriate amendments to the Rules of Court.

3 Insofar as the claim for privilege in judicial contexts is concerned, we make the following recommendations:

A. That the common law litigation privilege should be codified alongside legal advice privilege

4 At common law, it is now widely, if not universally, accepted that there are two separate categories of legal professional privilege, namely legal advice privilege and litigation privilege. Different rationales underpin these two categories of legal privilege. There is, however, some uncertainty as to whether the Evidence Act recognises the distinction between these two independent categories of legal privilege. Indeed, neither sections 128(1) nor 131(1) of the Evidence Act expressly refer to the distinction between legal advice and litigation privilege. In our view, both on common law authority and principle, the distinction between legal advice and litigation privilege is sound and should be clearly embodied in the Evidence Act. The codification should set out the essential lines of difference between these two categories of privilege, and leave it to the law courts to develop litigation privilege independently of legal advice privilege within these parameters and according to the purposes disclosed.

B. That the codified provisions on litigation privilege should specify that, like legal advice privilege, litigation privilege lasts indefinitely, unless waived by the client

5 Different jurisdictions have adopted different rules as to the duration of litigation privilege. Under Canadian law, "*litigation privilege expires when the litigation ends*". In contrast, in England, the general rule, applicable to both sub-heads of legal professional privilege, is that a communication that is protected by privilege continues to be protected forever, unless the privilege is waived by the client. We are concerned that if the Canadian position is adopted, *inter alia*, the codification would need to specify the qualified circumstances under which the privilege would persist beyond the cessation of litigation, and that it may not be possible to achieve this in a satisfactory, practical and intellectually convincing manner. As such, we recommend adopting the neat and clear position that litigation privilege lasts forever, unless waived by the client.

C. That section 128 of the Evidence Act, requiring express consent for waiver of privilege, be abrogated so as to provide for the possibility of implied waiver of both categories of legal privilege

6 In our view, the existing codification of waiver of the statutory legal advice privilege is deficient and in need of reform. At common law, the waiver of privilege by consent may be express *or implied*. Further, it may be entire or restricted. The current section 128 of the Evidence Act does not, on its face, provide the requisite flexibility. We do not, however, recommend replicating the common law rule by an independent provision setting out its terms as this could lead to premature ossification when there is every reason to maintain flexibility. Instead, in order to benefit from the common law experience in this area, we recommend repealing the present section 128 and providing that the common law rules on waiver shall be applicable.

D. That the Evidence Act be further amended to clarify that a party may claim both legal advice and litigation privilege, and that a waiver (express or implied) under one sub-head of privilege will result in a waiver under both sub-heads of privilege

7 A view which has recently acquired currency is that legal advice privilege and litigation privilege are mutually exclusive, and that once "*litigation is in prospect or pending*", a party would have to pin its claim to privilege under litigation privilege. We consider that the better view is that, where litigation is pending or in prospect, a party may simultaneously claim both legal advice and litigation privilege. In this regard, we are also of the view that while a party may make a privilege claim under both sub-heads, the waiver of one will amount to a waiver of the other.

E. That the Evidence Act be amended to clarify that third party communications created or generated for the dominant purpose of seeking legal advice should be privileged, even if the communications or material are not forwarded to the lawyer by the third party or the client, and even if the third party is not the client's authorised agent for communications with the lawyer

8 With the complexity of modern day commerce, it is increasingly necessary for clients to secure the assistance of experts and other third parties to assist in preparatory works related to the eventual seeking of legal advice. These include the preparation of working documents or summaries or other information such as investigative reports for submission to the legal adviser. In some cases, such documents although originally intended to be laid before the legal adviser are withheld and other documents are forwarded instead. Different jurisdictions have formulated different rules as to the availability of legal privilege over these third party communications. A minority of the Committee is not persuaded by the reasoning in favour of extending legal advice privilege to such third party communications. A majority of the Committee is, however, of the view that although the public interest in disclosure of these third party communications is important, it is not paramount and ought to give way to the legitimate needs of a client who finds it more economical or expedient or desirable to employ a third party to prepare its materials for the purposes of seeking legal advice. As such, a majority of the Committee recommends that the Evidence Act be amended to clarify that legal advice privilege extends to third party communications generated or created for the dominant purpose of seeking legal advice. For the reasons set out more fully in this report, the majority of the Committee is of the view that such privilege should apply even if the material so generated is not eventually communicated to the lawyer by the third party or by the client. Similarly, the privilege should apply where the relevant material is forwarded to the lawyer by the third party, even if the third party is not the client's authorised agent for communications with the lawyer.

F. That common interest privilege should also be codified in the Evidence Act alongside litigation and legal advice privilege

9 In our view, it is desirable that common interest privilege should be codified alongside litigation and legal advice privilege. The common law rules on common interest privilege should not, in our view, be imported under section 2(2) of the Evidence Act, which should only be relied upon to deal with truly residual matters. As with our recommendation on waiver of privilege, we recommend that the Evidence Act be amended to provide that the common law rules on common interest privilege shall be applicable.

G. That the Evidence Act be amended to provide for a calibrated extension of privilege to communications with in-house counsel

10 Various developed jurisdictions have extended legal privilege to internal communications with in-house counsel. Given these legal developments and the realities and demands of modern day commerce, a majority of the Committee recommends that legal privilege be extended to communications with in-house counsel

provided (i) the material communication is created in circumstances of confidentiality, and (ii) there is proof of intention to seek independent legal advice and proof of objective capacity on the part of the in-house counsel to provide independent legal advice. The majority recommendation would require consequential changes to the Legal Profession Act (Cap 161, 2009 Rev Ed) ("Legal Profession Act") so as to provide for in-house counsel who are advocates and solicitors of the Supreme Court of Singapore to opt in and be subject to the Legal Profession (Professional Conduct) Rules. In the case of in-house counsel who are not advocates and solicitors of the Supreme Court of Singapore, the requirement of independence is satisfied upon proof that he / she is ethically bound to provide independent legal advice and is subject to the disciplinary jurisdiction of an appropriate foreign bar for breach of duty.

11 The majority also recommends that where advice is sought and obtained from in-house counsel, third party communications for the dominant purpose of seeking and obtaining that advice from in-house counsel will not be privileged. In the view of the majority, efficiency considerations are insufficient to overcome or outweigh the risks of abuse of privilege in such circumstances.

II. Introduction and Terms of Reference

12 The Evidence Act, a well established and long standing codification governing the proof of facts in judicial proceedings,[1] is a statute of great importance; the greater the clarity, and accessibility of its provisions, the higher will be the quality of justice administered in the country's courts of law.

13 As a code of non-exhaustive character, the Act has an impressive coherence and rationality, which compares favourably with the common law's uncoordinated "patchwork of disparate elements".[2] The disadvantage of the Act however is that it lacks the flexibility of the common law; as a result, in particular areas of application, its rationality has failed to stand the test of time. For practitioners and the courts alike, problems of fitting out or trimming and squaring the developments in the common law with the Act in these areas have exacerbated this fundamental difficulty.

14 In about 2005, the Committee discussed particular areas of application of the Act which had given rise to persistent difficulties. Three such areas were selected for reform, namely Hearsay, Opinion Evidence, and Legal Professional Privilege.

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1 Cap 97, 1997 Rev Ed. This has been little amended since its first enactment in 1893.

2 At least two common law jurisdictions, Australia and New Zealand, have codified their respective laws of evidence for the sake of these benefits of codification.

15 In 2007, this Committee published its recommendations to reform the provisions dealing with hearsay in civil proceedings before the courts of law.

16 In 2009, this Committee discussed the report on Opinion Evidence containing recommendations for reform and will likely release the report in 2011.

17 This report on Legal Professional Privilege therefore completes the process of the reform initiated in 2005. In this report, we make recommendations for the reform of legal professional privilege ("the privilege" for short). Our report is substantially divided into three parts, each part being intended to be as self-contained as possible for the sake of ease of reading. Part III considers the dualism in the law of privilege made inevitable by the Evidence Act and makes recommendations to reduce it to an extent. Part IV discusses the key provisions on the privilege in judicial proceedings, identifies and makes recommendations on the main substantive issues for reform. Part V considers the extension of the privilege to communications between corporations and their in-house lawyers. The recommendations which it contains are made after an extensive survey of the rules in major jurisdictions, including that of the European Union.

18 Our Report does not deal with the question of the extent to which privilege should be available outside of the context of judicial proceedings ("extra-curial privilege" for short) or to put it more fully, the extent to which legal advisers should be entitled to claim legal advice privilege on behalf of their clients when required by investigatory authorities to disclose documents and other communications made in the course and for the purposes of giving legal advice to their clients. This important question involves recent characterisations of the privilege as a fundamental common law right, as to which the Evidence Act is silent.[3] As our proposals of reform are intended to make improvements to the Evidence Act, they are therefore limited to application of the privilege in judicial proceedings.

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3 See *eg R (Morgan Grenfell & Co Ltd) v Special Comrs of Income Tax* [2003] 1 AC 563 at [31] where the House of Lords considered that *Parry-Jones v Law Society* [1969] 1 Ch 1 was wrongly decided (albeit not on its facts) and preferred the judgment of the Supreme Court of New Zealand in *Comr of Inland Revenue v West-Walker* [1954] NZLR 191 which pointed out that the privilege was "not merely a rule of evidence but a substantive right founded on an important public policy". The Singapore High Court in *Yap Sing Lee v MCST Plan No 1207* [2011] SGHC 24 at [14] has also held that "at common law, legal advice privilege is not (or more accurately, no longer …) regarded as merely a rule of evidence, restricted to judicial or quasi-judicial proceedings, but is now considered a substantive legal right that may be claimed outside these areas."

III. Narrowing the Dualism Created by the Evidence Act

A. What are judicial proceedings?

19 Over the past 100 years or more, the common law rules of privilege have developed impressively in response to developments in relation to the rule of law while the rules contained in our Evidence Act have remained stagnant. Two reasons explain that it is necessary to examine carefully the widening differences between the Evidence Act and the common law in dealing with the scope and limits of the privilege. Some of these developments are of a piecemeal nature and of little relevance to Singapore. Others reflect changing conceptions unsuitable for Singapore. The widening changes accordingly are not of themselves valid reasons for reform unless they are clearly important, valuable, reflect vital principles and their absence represent a serious disadvantage or impediment to the administration of justice. Our basic approach in making recommendations for reform of the privilege has therefore been to focus not so much on ossification of a codified rule as such but ossification that has produced unfairness, injustice and arbitrariness in outcome. Alignment to the common law has been sought not for its own sake but only where the result will be fairer to and in the interests of parties to a dispute in which evidence is sought to be produced or given.

20 Inevitably the codification of the law of evidence in the Evidence Act has created a dual system of the law of legal professional privilege in which the statutory law is applicable to admissibility of evidence in a trial and the common law in all other situations unless it is statutorily abrogated. This dualism resulting in two categories of privilege means that we are faced with one overarching consideration when making recommendations as to reform; namely to what extent should the dualism be eliminated? Considered in the abstract, dualism is undesirable because it complicates the task of the legal adviser and the greater the non alignment between the statutory law and the common law, the higher the risk that the complication will adversely affect the fairness of a trial.

21 Of all the dualisms we consider in this Report, it can be said that the most basic is that presented by section 2(1). Section 2(1) of the Evidence Act states that "Parts I, II and III shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator". Applied to the provisions of the Act relating to the privilege, the effect of section 2(1) is that the statutory privilege contained in Part III does not apply to affidavits presented to any court or officer. The statutory privilege plainly applies and is intended to apply to the adducing of evidence in judicial proceedings, such as the giving of testimony or the production of other evidence in the course of a hearing in a court of law or justice.[4] But

4 It should also be pointed out that ss 128 and 131 and related provisions are located in that part of the Evidence Act that is headed "Witnesses". Read as a whole, the sections seem to envisage a trial setting or the setting of a court hearing in which either the client or the lawyer is called as a witness and questioned about lawyer-client communication. See Jimmy Yim, "Developments in Legal Privilege – A Review of the

(*cont'd on the next page*)

where pre-trial discovery is sought, it is arguably the common law privilege which is applicable, and not the statutory privilege. Likewise is this the case when privilege is claimed in respect of the answering of interrogatories, and in respect of materials used in drawing a pleading or an affidavit.[5]

22 To some extent, where documents to be discovered are also admissible in evidence or where documents are subpoenaed to be immediately produced, it is arguable that the common law privilege must be applied consistently with the statutory privilege so that in effect in the event of any conflict it is the latter which must be applied by derivation. However, where discoverable documents are not admissible in evidence (for example, where they merely contain information affecting the manner in which a party may decide to conduct proceedings) or documents are subpoenaed before commencement of trial, application of the unmodified common law privilege is inevitable, creating the difficulties of dualism.[6]

23 It appears that in practice, it is assumed or taken for granted that the statutory privilege may be claimed at the pre-trial stage of litigation and before questions of adducing evidence have arisen as long as application of the privilege to an affidavit presented to the court is not involved. Order 24 rule 13 for instance refers to objections to production on grounds of privilege, without specifying whether the privilege in the case of legal professional privilege is the common law or the statutory privilege.

24 The difficulties of maintaining two categories of privilege for the pre-trial and trial stage of litigation respectively have surfaced in Australia in Uniform Evidence Act ("UEA") jurisdictions. UEA jurisdictions are those which have enacted the UEA which codifies the law of evidence, but limits the scope or ambit of the codification to the adducing of evidence in a court of law. The effect of codification in this manner is, as the High Court of Australia held in *Mann v Cammell*,[7] that there are now two systems of privilege, the statutory privilege which is applicable to admissibility of evidence and the common law privilege which is applicable to the pre-trial stage of litigation. As part of the mandated 10-year review, the Australian Law Reform Commission ("ALRC") considered that having two sets of privilege applying at different stages of what is

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Decisions in *The Three Rivers* case" *The Singapore Law Gazette* (May 2005) at p 22. See also Jimmy Yim, "Developments in Legal Privilege" Drew & Napier LLC Legal Update (June 2005), Vol 6, Issue 4 at p 9 available at http://www.drewnapier.com/pdf/legal_june05.pdf. See also Michael Hwang, "President's Message" *The Singapore Law Gazette* (June 2008) at p 1.

5 In a series of cases it has been held that the privilege in respect of a document is not waived by the mere reference to that document in pleadings (see *Roberts v Oppenheim* [1900] 1 Ch D 724; *Buttes Oil Co v Hammer (No. 3)* [1981] QB 223) or in an affidavit (see *Lyell v Kennedy* [1881–1885] All ER Rep 798; *Infields Ltd v P Rosen & Son* [1938] 3 All ER 591).

6 Considered apart from the provisions of s 2(2), the statutory privilege arguably could otherwise similarly and derivatively be invoked in respect of materials used in drawing up a pleading or affidavit in some, if not many circumstances. However, s 2(2) makes it clear that the statutory privilege may not be invoked in all circumstances.

7 (1999) 201 CLR 1.

essentially one proceeding was an undesirable situation.[8] The ALRC also agreed with the observations of Kirby J in that case that a "great deal of inconvenience would be avoided if the bringing forward of evidence for use in a later trial (as by responding to an order for discovery, a subpoena or some other ancillary process) were held to fall within the Act."[9]

B. Options for reform

25 We consider that there is no longer any warrant to disapply the statutory privilege to affidavits presented to the court. Affidavits may now be admissible as evidence-in-chief under prescribed circumstances and it would be anomalous to continue to maintain two systems of privilege in respect of such affidavits. Indeed, Order 38 rule 2(5) provides for the statutory privilege to apply by saying that "Nothing in this Rule shall make admissible evidence which if given orally would be inadmissible." However, affidavits which are filed or presented for ancillary purposes such as discovery of documents or in respect of interlocutory proceedings would continue to be subject to developments in the common law privilege. Where these developments are not aligned with the statutory law of privilege, this could be a source of significant inconvenience and confusion.

26 There are three options of reform.

27 The first is to amend section 2(1) so as to repeal the disapplication of the statutory privilege to affidavits presented to the court in pre-trial stages of litigation. This option, however, is not advisable. It is fraught with huge drafting difficulties and the simple expedient of deleting the last phrase in section 2(1) referring to affidavits presented to the court or any officer is not available. The deletion of the phrase would eliminate the disapplication of all other privileges to affidavits presented to the court, such as the privilege against self-incrimination. Without a more thorough study of the matter, the simple expedient could produce undesirable or unexpected results.

28 The second option involves introducing a provision in the Evidence Act requiring the statutory privilege to be available as an objection to disclosure of communications where required as if the objection to production were an objection to giving or adducing evidence. Again, there will be huge drafting difficulties. Given the more limited scope of our reform (*ie* its restriction to improving the Evidence Act), it will be necessary to confine the scope of the extension of the statutory privilege to pre-trial processes issued by the court at the least. But it may be less easy to define what is pre-trial and what is trial and to specify what other pre-trial situations should be covered by the notional extension of the statutory privilege.

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8 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005).

9 (1999) 201 CLR 1 at 45.

29 We recommend that section 2(1) should be left as it is and that the statutory privilege should be extended through the rules of court. This third option which involves more limited extension of the Evidence Act can be achieved simply by clarifying that references to legal professional privilege in the rules of court where they already exist are references to the statutory privilege. Where such references do not presently exist in relation to any pre-trial process, the extension of the statutory privilege can be effectuated by introducing an appropriate provision to that effect in the rules of court. This approach will avoid the difficulties of relying on general distinctions between what is pre-trial and trial. It will also have the advantage of leaving the position in relation to criminal matters unaltered for the time being.

IV. Claiming Privilege in Judicial Contexts

A. Two categories of legal professional privilege

30 Turning to more substantive issues of the nature of the privilege, we consider that the first of the vital common law principles of legal professional privilege is the distinction between legal advice and litigation privilege and that any uncertainty as to whether the same distinction exists under the Evidence Act is a serious disadvantage. Its clarification on the other hand is necessary to strengthen the commitment to the rule of law, improve access to adversarial justice, and strike a proper balance between efficient corporate access to legal advice and the public interest in disclosure.

31 In this part of the Report, we consider and make recommendations as to codification of the litigation privilege in the Evidence Act. This will remove all doubts as to whether it is recognised as fully as legal advice privilege as well as ensure that there will be no doubts as to what it is.

B. Background

32 At common law, it is now widely, if not universally, recognised that there are two categories or "sub-heads" of "legal professional privilege".[10] To use the terminology adopted by the Singapore Court of Appeal,[11] they are: (a) legal advice privilege; and (b) litigation privilege.

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10 In *Blank v Canada* [2006] 2 SCR 319 at [7], the Canadian Supreme Court expressed the view that it was "preferable…to recognise that we are dealing here with distinct conceptual animals and not with two branches of the same tree" since they have "different scope, purpose and rationale". The reference to sub-heads is that of Lord Carswell in *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610, [2005] 4 All ER 948 at [105].

11 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9, [2007] 2 SLR(R) 367 at [1].

33 These sub-heads may attach to different materials. As Lord Jauncey said in *In re L (a Minor) (Police Investigation: Privilege)*:[12]

> There is…a clear distinction between the privilege attaching to communications between solicitor and client and that attaching to reports by third parties prepared on the instructions of a client [or lawyer] for the purposes of litigation. In the former case the privilege attaches to all communications whether related to litigation or not, but in the latter case it attaches only to documents or other written communications prepared with a view to litigation. (Words in brackets inserted)

34 To elaborate on this a little, legal advice privilege covers two classes of communications, namely the communications between a lawyer and his client and a lawyer and a third party who is the client's agent to communicate with the lawyer.[13] Litigation privilege covers three classes of communications, namely the communications between a lawyer and his client and a lawyer and a third party and any communication (including communications between the client and a third party) brought into existence for the dominant purpose of conducting litigation.[14]

(1) Differences in rationale

35 Different rationales underpin legal advice privilege and litigation privilege respectively. The rationale of legal advice privilege is that it serves and fosters the rule of law while that of litigation privilege is to advance access to adversarial justice.[15] The latter rationale includes the more general one of protecting the preparation of materials for litigation undertaken without legal representation.[16] Litigation privilege thus can be claimed by a litigant in person over communications between him and others for the purposes of conducting litigation and enabling him to give himself legal advice. Legal advice privilege in contrast cannot be claimed by a person over communications with others for the purposes of giving himself legal advice in relation to non contentious matters.

36 In the words of the Supreme Court of Canada in *Blank v Canada*[17] which the Singapore Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*[18] endorsed:

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12 [1997] AC 16 at 24–25.

13 See *Dadourian Group Intl Inc v Simms* [2008] EWHC 1784 (Ch), [2008] All ER (D) 343 (Jul) at [83].

14 *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610, [2005] 4 All ER 948 at [27] *per* Lord Scott of Foscote.

15 Thus litigation privilege cannot be relied on in non adversarial legal proceedings: *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16, [1996] 2 All ER 78, [1996] 2 WLR 395.

16 See *Ventouris v Mountain* [1991] 1 WLR 607 at 612; *M & W Grazebrook Ltd v Wallens* [1973] ICR 256 at 259. See also *The Law of Privilege* (B Thanki ed) (Oxford University Press, 2006) at pp 149–151.

17 [2006] 2 SCR 319.

> The solicitor-client privilege… recognises that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
>
> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.[19]

(2) The Evidence Act

37 We consider that the distinction between legal advice privilege and litigation privilege no longer needs to be defended but that the problems which need to be resolved are essentially source of law problems. Sections 128(1) and 131(1) of the Evidence Act provide respectively as follows:

> 128(1) – 'No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.'
>
> 131(1) – 'No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.'

38 Neither section evidently refers to the distinction between legal advice and litigation privilege.[20]

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18 [2007] SGCA 9, [2007] 2 SLR(R) 367 at [23].

19 [2007] SGCA 9, [2007] 2 SLR(R) 367 at [26]–[27].

20 It is difficult to locate the source of litigation privilege in the Evidence Act. As one writer has observed, the "Evidence Act does not address litigation privilege". The reason for this, he suggests, has probably to

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39 In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*,[21] ("*Skandinaviska*") the Singapore Court of Appeal ruled that the source of litigation privilege was the common law. Andrew Phang Boon Leong JA delivering the judgment of the Court said:

> …litigation privilege exists by virtue of *the common law*. Since… *section 131* of the Act… clearly envisages the concept of *litigation* privilege, there is no inconsistency between the common law and the statutory provisions. Accordingly, section 2(2) of the Act would apply to confirm the applicability of litigation privilege at common law in the local context… as there is no inconsistency between litigation privilege at common law and sections 128 and 131 read together.[22] (Emphasis original.)

40 Incidentally, we note that this ruling accords with the position already taken in practitioners' reference texts on Singapore law,[23] treating common law litigation privilege as applicable in Singapore and referring extensively to common law (predominantly English) authorities.[24]

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do with the fact that "the statute was based on the Indian Evidence Act of 1872 (introduced to Singapore in 1893), which was formulated at a time when the privilege had not yet been fully established": J Pinsler *Evidence, Advocacy, and the Litigation Process* (LexisNexis, 2nd Ed, 2003) at p 199. With respect the true history was the other way round. "In the earliest cases the privilege from compulsory production was confined to information (principally documentary) that was created where legal proceedings were in contemplation. That type of legal professional privilege has become known today as 'litigation privilege'. But, in two landmark cases in 1833, Lord Brougham LC held that legal professional privilege extended to communications where legal advice was sought and given when no litigation was contemplated. (*Greenough v Gaskell* (1833) 1 M & K 98 at 103; *Bolton v Liverpool Corporation* (1833) 1 M & K 88 at 94." See *Winterthur Swiss Insurance Co and another v AG (Manchester) Ltd (in liquidation)* [2006] EWHC 839 (Comm) at [67]. It should be noted that, while there is no *general* statutory provision for litigation privilege, some statutes do provide for it within the specific scope of their respective applications. See for example, s 35(2) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) which provides that:

> In sections 30, 32 and 34 [*dealing with production orders and authority for search*] —
>
> … 'items subject to legal privilege' means —
>
> (a) communications between an advocate and solicitor and his client or any person representing his client made in connection with the giving of legal advice to the client;
>
> (b) communications between an advocate and solicitor and his client or any person representing his client or between such an advocate and solicitor or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings;….

21 [2007] SGCA 9, [2007] 2 SLR 367.

22 [2007] SGCA 9, [2007] 2 SLR 367 at [67].

23 The authors justify the applicability of the common law litigation privilege in Singapore under s 2(2) of the Evidence Act and on the basis that it is not inconsistent with the provisions of that Act. See eg, *Singapore Civil Procedure* (Sweet & Maxwell, 2007) at para 24/3/13. For a minority view that the privilege is provided for in s 128(1), see Tan Yock Lin *Law of Advocates and Solicitors etc* (Butterworths Asia, 2nd Ed, 1998).

24 *Eg*, *Singapore Civil Procedure 2007* (Sweet & Maxwell, 2007) at paras 24/3/13 *et seq*; *Halsbury's Laws of Singapore*, vol 10(2) (LexisNexis, 2006 reissue) at para 120.420. In India, it has been held that no

(*cont'd on the next page*)

C. Issues for reform

41 In our view, the fact that the sub-heads of the privilege are presently derived from disparate sources in Singapore (*ie* common law in one case and the Evidence Act in the other) gives rise to unnecessary and avoidable complications.

42 The first involves the fact that the existing formulation of the legal advice privilege in the Evidence Act fails to draw the right boundaries of legal advice privilege, leading to unjustifiable overlap with litigation privilege. Even if litigation privilege should be kept in its common law state, it will in any case be necessary to revise and amend the present statutory rule of legal advice privilege.

43 The second complication is that as long as two parallel sources of the sub-heads of privilege exist, the common law litigation privilege will have to be tested for consistency with the statutory privilege in all cases where it is claimed. There is no *a priori* rule that the common law privilege will in all circumstances be consistent with the statutory privilege. Consequently, questions of possible inconsistency in details will remain possible issues for debate and contention, possibly leading to unnecessary and avoidable delays in litigation.

44 Responding to these difficulties, we identify the first issue for reform as being whether the distinction should be codified, instead of being left to the common law subject to the condition of consistency with the Act. If reform is necessary or desirable, it will further be necessary to ask whether the lines of separation between the sub-heads of legal professional privilege should be drawn more clearly than they are presently drawn under the common law and the Evidence Act.

D. Codification of litigation privilege

45 We consider that there are ample reasons to codify the rule of litigation privilege alongside that of legal advice privilege. First, parallel codification of the rule would allow us to make the unavailability of litigation privilege in non adversarial contexts clear without detracting from the availability of legal advice privilege over communications for the purposes of legal advice. Secondly, our recommendation would put an end to misunderstandings over the Court of Appeal's clarification that the source

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provision in her Evidence Act (which is similar to the Singapore Evidence Act) provides for litigation privilege but the court has the power under the Civil Procedure Code to protect from disclosure certain third-party documents obtained for the purpose of getting legal advice on a litigation: *Vishnu v New York Insurance Co* (1905) 7 Bombay Law Reporter 709. The court relied on s 130 of the Civil Procedure Code which stated: "the Court may… order the production by any party … of such of the documents in his possession or power relating to any matter in question in such suit or proceeding as the Court thinks right…." This is the only Indian authority cited in *Sarkar's Law of Evidence: in India, Pakistan, Burma & Ceylon* (MC Sarkar, SC Sarkar and Prabhas C Sarkar eds) (Nagpur: Wadhwa & Co, 16th Ed, 2007) at 2219. For related discussion on whether litigation privilege is a privilege at all or merely a rule of procedure or practice, see Richard Mahoney, "Reforming Litigation Privilege" (2001) 30 Common Law World Review 66 at pp 78–82 and *Meaney v Busby* (1977 15 OR (2d) 71.

of litigation privilege is the common law. There is already evidence of such misunderstanding. According to the Singapore High Court in *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyers Pte Ltd*, "section 131 of the Evidence Act… has been interpreted by the Court of Appeal in *Skandinaviska* as incorporating litigation privilege".[25] The High Court also took the Court of Appeal to have held that "litigation privilege exists in section 131 of the Evidence Act by virtue of the common law".[26] In our view, it is unclear that the Court of Appeal in *Skandinaviska* meant to treat section 131 as the source of litigation privilege in Singapore. The Court of Appeal merely observed that section 131 "envisages the concept of litigation privilege". While section 131 clearly envisages that the privilege may be claimed in court, and therefore in the context of litigation, the privilege it provides for is legal advice privilege rather than litigation privilege: section 131 covers only communication between lawyer and client (and not third-party communication) and it does not require that the communication be made for the dominant purpose of litigation. Accordingly, the better view of the ruling by the Court of Appeal is that the common law on litigation privilege applies in Singapore by virtue of section 2(2) of the Evidence Act and not that the source of litigation privilege is section 131 of the same Act.

46 A third and more important reason to support codification of the litigation privilege is that codification would eliminate the need to test litigation privilege claims for consistency with the codified provisions of the Evidence Act. This is because the codified litigation privilege would stand on an equal footing with and alongside the statutory legal advice privilege. So long as this codification set out the essential lines of difference, the courts would be able to develop litigation privilege independently of legal advice privilege within these parameters and according to the purposes disclosed.

47 We are not unmindful that retaining the common law litigation privilege has the advantage of flexibility since the common law is more flexible and more easily adaptable to meet changing circumstances than a statute. It could be argued that given the differences in rationale, there is in principle no objection to having two different regimes, a statutory one (in the Evidence Act) for legal advice privilege and a common law regime for litigation privilege. Other familiar arguments in support of two parallel sources of law rely on the drawbacks of codification. It may bring about unforeseen problems of interpretation. Further, the ossification that comes with it may result in a loss of nimbleness in responding to developments and issues unforeseen at the time of enactment, by cutting off a rich resource of common law judgments and academic writings.

48 On balance, as it is an irreversible fact that the Evidence Act is already a codification limiting the richer but also potentially more confusing recourse which

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25 [2009] SGHC 235, [2010] 1 SLR 833 at [31].

26 [2009] SGHC 235, [2010] 1 SLR 833 at [12] and [32]. In *Yap Sing Lee v MCST Plan No 1207* [2011] SGHC 24, [2011] 2 SLR 998 at [14] the High Court cited *Skandinaviska* for the proposition that "ss 128 and 131 of the Evidence Act … covered both species of LPP".

Singapore lawyers would otherwise have to common law cases, it would be more consistent with the codification policies of rationality, coherence and ease of recourse to codify the litigation privilege. If section 2(2) was left to serve as the vehicle for recourse to the common law litigation privilege, there could be misunderstanding as to why a supposedly residual provision was nevertheless more significant than it seemed to be. It is also important to remember that the administration of justice in Singapore is in some respects borderless. Foreign litigants would likely find it easier to determine the merits of litigation in Singapore if litigation privilege was set out in its own distinctive terms alongside the statutory legal advice privilege. They would not be surprised to find that a so-called residual provision actually served to establish rules and principles of coordinate importance to the codified rules and principles.

E. Duration of privilege

49 Our proposal for codifying the litigation privilege requires a selection of its essential or distinctive elements so that the fundamental lines of separation between the sub-heads of legal professional privilege are clear and any overlap incontrovertible. We identify five issues which touch on these fundamental lines, namely, duration of privilege, waiver, commencement of privilege, coverage of third party communications and identity of corporate clients.

50 At common law, legal advice privilege is of an absolute character in quality and duration. It is a little uncertain whether this is also true of litigation privilege. In England, the general rule, applicable to both sub-heads of legal professional privilege, is that a communication that is protected by the privilege continues to be protected forever, unless the privilege is waived by the client, who alone has the right to waive privilege. Under Canadian law, however, legal advice privilege is enduring, "once privileged, always privileged", but "litigation privilege expires when the litigation ends".[27] The fundamental reason for this difference is that legal professional privilege is not regarded as absolute in Canada. Canadian courts are thus entitled to re-examine the interest in the privilege and to weigh it against the larger interest in seeing that justice is done.

51 As a matter of strict logic, a privilege which serves the ends of access to adversarial justice should expire when litigation is over unless there is a realistic possibility that the privilege holder will be involved in further related litigation. It follows that if the Canadian rule was adopted, the codification would need to specify the qualified circumstances in which the privilege would persist beyond the cessation of litigation. We are not confident that this can be done in a satisfying, practicable and intellectually convincing manner. More importantly, we agree that while the privilege is absolute (see the discussion in Part IV), providing for an endless litigation privilege would not seriously impair the administration of justice if it was made clear that the privilege would be lost upon implied waiver.

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27 *Blank v Canada* [2006] 2 SCR 319 at [37] and [58].

52 We therefore recommend that the codification of litigation privilege should specify that it is absolute but that like legal advice privilege may be waived.

F. Waiver of privilege

53 We consider that it is necessary to make provisions with respect to waiver of litigation privilege for two reasons. The first has already been alluded to. It is that the element of waiver importantly qualifies the fundamental issue of duration of the privilege. Secondly, the existing codification of the waiver of the statutory legal advice privilege is unsatisfactory and is in any case in need of reform.

54 At common law, no lawyer can waive the privilege on his client's behalf without his client's consent. This consent cannot be overridden and the lack of it, *ie* the refusal to consent, cannot be questioned or investigated by the court.[28] The waiver of privilege by consent may however be express or implied. It may further be entire or restricted. A client can waive all of his privilege by agreement or unilaterally with the effect that the privilege is lost completely. He can equally set limits to his disclosure of privileged materials according to the purpose for which disclosure is to be made. In that event, he remains entitled to claim privilege for any other purpose.[29]

55 Under the Evidence Act, however, the clarity of the common law evidenced by the foregoing propositions is missing or unachievable without distorting the language and sense of the Act. Section 128 refers to the express consent of the client and it was held in a Malaysian case[30] that this means that waiver cannot be implied and further that the consent must be given in writing. The added gloss is doubtful. Be that as it may, it appears to be debatable whether the statutory privilege can be waived on behalf of the client by implication. The other relevant sections such as section 130 which touch on waiver do not in fact support an argument that the implied waiver on behalf of the client exists.[31] They merely make provisions for ensuring that privilege is lost only if there is substantial inconsistency between the client's testimony in court and the privileged communications. On the other hand, we note that the courts in Singapore have in recent cases been prepared to recognise some forms of implied waiver without

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28 *R v Derby Magistrates' Court, ex parte B* [1996] 1 AC 487 at 503, [1995] 4 All ER 526, [1995] 3 WLR 681 *per* Lord Taylor CJ. *Cf* Lord Nicholls of Birkenhead who said that he was "instinctively unattracted" to a rule that a client can insist on maintaining privilege, when the client no longer has any interest in asserting it and where the non-disclosure would prejudice a third party.

29 *B v Auckland District Law Society* [2003] 2 AC 736 at [69] *per* Lord Millett.

30 *Dato' Seri Au Ba Chi v Koh Keng Kheng* [1989] 3 MLJ 445. See also Tan Yock Lin "Waiver of Legal Professional Privilege" [1991] SJLS 8.

31 Section 130 states that: "If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in s 128; and if any party to a suit or proceeding calls any such advocate or solicitor as a witness, he shall be deemed to have consented to such disclosure, only if he questions such advocate and solicitor on matters which but for such question he would not be at liberty to disclose."

the benefit of citing section 128.[32] The basis for this would not appear to be Order 24 rule 19 of the Rules of Court which gives the court discretion to "restore" the privilege which has been lost as a result of counsel's inadvertence in allowing the other side to inspect a privileged document.

56 While it is helpful and important, Order 24 rule 19 does not go far enough to replicate the common law rule on implied waiver.[33] It only applies where there is loss of privilege through inadvertence. We recommend that the codification of the litigation privilege should make it clear that it is lost if the lawyer representing the client has so conducted himself as to represent to the opposite party that his client has consented to disclosure of privileged communications, irrespective of actual subjective consent. It is hard to see how justice can be done to the opposite party in litigation unless litigation privilege may be waived impliedly on the client's behalf. We further recommend abrogating the requirement of express consent to waiver which is presently stipulated by section 128 so as to recognise the possibility of implied waiver of legal advice privilege on the client's behalf. As the common law experience indicates, recognition of implied waiver would not be unfair to the privilege holder but among other things would enable justice to be done in disputes between a client and his lawyer where the former refuses to consent to disclosure of relevant communications between them, although he would give his version of communications with his lawyer.[34]

57 However, we do not recommend replicating the common law rule by an independent provision spelling out its terms.[35] This could prematurely lead to its ossification when there is every reason to maintain flexibility. Implied waiver, as eminent courts in the Commonwealth have acknowledged, is at bottom a principle of fairness.[36] In order to benefit from the common law experience as to how the effect of fairness should be measured and how considerations of fairness should be weighed, we recommend instead that the Act should simply be amended by repealing the reference to express consent of the client and inserting a provision to make the common law rule of waiver applicable. In this manner as well, it will be unnecessary to determine whether to adopt the view that has emerged that it is only in relation to legal proceedings that implied waiver with its associated judgment as to fairness can be

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32 See *Info-Communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] SGHC 119, [2002] 2 SLR(R) 136 in which the High Court held that if privilege is waived in respect of a solicitor's letter of advice, it is also waived in respect of the letter of instruction that brought forth that advice. See also *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2008] SGHC 136, [2009] 1 SLR(R) 42.

33 In fact this rule does not say much since it does not tell us how the court should exercise its discretion.

34 See *Mann v Carnell* (1999) 201 CLR 1.

35 *Eg* along the lines of s 122 Uniform Evidence Act (Cwth) which employs a concept of implied waiver "based on disclosure of the document's substance or more fundamentally, on inconsistency between the conduct of the client and the maintenance of confidentiality": *Singapore Airlines v Sydney Airports Corp* [2004] NSWCA 47 affd [2005] NSWCA 47.

36 See *Mann v Cammell* (1999) 201 CLR 1.

made.[37] The decision can be made by the courts as and when the need arises and in accordance with weight of the common law authorities as may then be established.

G. Extent of overlap of privilege

58 We must also address the question whether the codified litigation privilege should be allowed to overlap the statutory legal advice privilege. The latest edition of *Phipson on Evidence* states that "from the moment" "litigation is in prospect or pending", "any communications between the client and his solicitor… will be privileged if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation…."[38] It would seem that, while a lawyer-client communication made before "litigation is in prospect or pending" may attract legal advice privilege, once "litigation is in prospect or pending", any further communication from this point onwards, at least where it is made in connection with the litigation, would have to seek protection under litigation privilege instead. This seems to be the position taken by the Singapore High Court in *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd*.[39] In this case, it did not in the end matter whether the communication in question was protected under legal advice privilege or litigation privilege because the Court held that the so-called "fraud" exception to legal advice privilege applied equally to litigation privilege.

59 Since "the central case of legal advice privilege is indeed advice rendered in connection with… litigation",[40] and since the avowed rationale for legal advice privilege (namely, to encourage the client to make full and frank disclosure) applies most strongly in the litigation context,[41] it is difficult to see why litigation privilege should, as it were, take over from lawyer-client privilege once litigation is in prospect or pending, and it is also unclear what practical implications would flow from this take-over.[42] It is highly arguable that, under the scheme of the Evidence Act, lawyer-client

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37 It is only in legal proceedings that a judgment can be made, *inter alia*, about considerations of fairness. Such considerations of fairness cannot operate at large: *Mann v Cammell* (1999) 201 CLR 1 at [29].

38 *Phipson on Evidence* (Malek *et al* eds) (Sweet & Maxwell, 17th Ed, 2010) at paras 23–89.

39 [2009] SGHC 235; [2010] 1 SLR 833, following the decision of the English Court of Appeal in *Kuwait Airways Corpn v Iraq Airways Co (No. 6)* [2005] EWCA Civ 286; [2005] 1 WLR 2734. But contrast *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 at [27] *per* Lord Scott: "If [legal advice] is sought or given in connection with litigation, then the advice would fall into *both* of the two categories." (Emphasis added).

40 Colin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 11th Ed, 2007) at p 483.

41 In *Three Rivers D C v Bank of England (No 5)* [2003] QB 1556 at [26], Longmore LJ noted that the need for a client to make full and frank disclosure is "paramount when litigation either exists or is contemplated". He added that: "It is by no means clear that, in the absence of contemplated litigation, there is any temptation for the client not to offer a clean breast [of the facts] to his legal adviser. He wants advice and the prospect of winning or losing a particular case will normally do nothing to cloud his judgment as to what facts he places before his legal adviser."

42 As noted in an earlier edition of *Phipson on Evidence* (Howard *et al* eds) (Sweet & Maxwell, 15th Ed, 2000) at para 20-06: "The precise definition of litigation privilege is open to debate. Whilst it is treated here under the heading of 'litigation privilege' on the basis that it protects communications in furtherance

(*cont'd on the next page*)

communications made when litigation is in prospect or pending continue to be governed by legal advice privilege. Section 128 of the Evidence Act, which has been judicially recognised as the source of legal advice privilege in Singapore,[43] contains the following illustration of the rule stated in section 128(2)(a) (under this provision, any lawyer-client communication that is made in furtherance of an illegal purpose would not be protected from disclosure):

> (*b*) *A*, a client, says to *B*, a solicitor: 'I wish to obtain possession of property by the use of a forged deed on which I request you to sue'.

This communication being made in furtherance of a criminal purpose is not protected from disclosure.

60 In this illustration, the lawyer-client communication was made with a view to litigation. The reasonably clear implication is that, but for the fact that it was made in furtherance of a criminal purpose, the lawyer-client communication would have been covered under legal advice privilege and this is notwithstanding that it was made while litigation was in prospect. It can therefore be argued, contrary to the decision in *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd*,[44] that the Evidence Act does not draw a distinction between lawyer-client communications that are made while litigation is pending or in prospect and lawyer-client communications that are made while litigation is neither pending nor in prospect. In either case, the applicable law is legal advice privilege and not litigation privilege. The implication which follows is that contrary to the assumptions in *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd* the common law litigation privilege must be rejected to the extent that it replaces or excludes legal advice privilege. It attaches to third party communications which is not covered by the statutory privilege but cannot attach to lawyer-client communications that are made for the purposes of obtaining legal advice in connection with pending litigation since these are already covered by the statutory legal advice privilege. This will be one of the examples of inconsistency to which we have alluded earlier. As we have said, any inconsistency must be resolved in favour of the statutory privilege but the issue for reform is whether the codification of a self-standing litigation privilege should cover both lawyer-client communications and third party communications. If so, there will be a degree of overlap between the two categories of privilege.

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of litigation, such communications as between client and lawyer will in any event be protected by legal advice privilege."

43 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9, [2007] 2 SLR(R) 367 at [1] and [21]; *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd* [2009] SGHC 235, [2010] 1 SLR 833 at [12] ("Legal advice privilege is contained in s 128 of the EA.")

44 [2009] SGHC 235, [2010] 1 SLR 833.

(1) Options for reform

61 There are two options for reform:

(a) Keep the lines distinct and do not allow any overlap so that once litigation is pending or in reasonable contemplation, advice will be protected exclusively by litigation privilege.

(b) Permit a degree of overlap so that privilege may be claimed over advice in connection with litigation under either or both sub-heads of privilege, save that where litigation privilege is impliedly waived, it will no longer be possible to make the alternative claim based on legal advice privilege and *vice versa*.

62 We consider that the second option should be adopted. This would ensure that where litigation privilege was unavailable or inapplicable (as in non adversarial proceedings), legal advice privilege would continue to be available. The rule of law rationale for protecting legal advice remains valid when contentious proceedings are non-adversarial and the first option of providing for litigation privilege to be exclusive once litigation is in prospect could pose a risk to fulfilment of the rule of law rationale. Further, our recommendation would ensure neutrality as between litigation in Singapore and elsewhere. In cross-border litigation, the Singapore courts should only be concerned with the access to adversarial justice in Singapore. The preservation of legal advice privilege over legal advice given in connection with the litigation would ensure that should related or similar litigation be pursued in another jurisdiction, the rule of law rationale would remain unimpaired. The courts in that other jurisdiction would be free to give effect to the statutory legal advice privilege where the applicable law is Singapore law although the litigation privilege in Singapore would be irrelevant to those courts.

63 Our recommendation to allow the two sub-heads of privilege to overlap should have the effect that the waiver of one will amount to waiver of the other. This could be argued to be deducible from both recommendations relating to implied waiver and the overlap. In any event, however, we also recommend for the avoidance of doubt that the Act so provide by an express enactment in those terms.

H. Third party communications

64 At common law, the difference in scope between legal advice privilege and litigation privilege has been blurred because it has been held in Australia that third-party communications may also fall under legal advice privilege. In *Pratt Holdings Pty*

Ltd v Commissioner of Taxation,[45] ("*Pratt Holdings*") the Australian Federal Court held that legal advice privilege was capable of extension to a third-party communication not laid before the lawyer. This case involved a dispute over the applicability of legal advice privilege to a report prepared by an accounting firm for a corporation. The corporation needed the report for the purpose of taking legal advice on a corporate reconstruction programme. Litigation privilege did not apply in this case because no litigation was in existence or in contemplation at the relevant time. In the court below, the judge had held that the report was a third-party communication and legal advice privilege could not be claimed over a third-party communication. On appeal, the Australian Federal Court held that "legal advice privilege is capable of extending to non-agent, third party authored documentary communications".[46] But such a third-party communication which need not be laid before the legal adviser can fall under legal advice privilege only if it was made to the client for the dominant purpose of obtaining legal advice.

65 *Pratt Holdings* was considered by Australian, New South Wales and Victorian Law Commissions in a Joint Report in 2005.[47] The three law commissions agreed with Stone J in *Pratt Holdings* that "there remain crucial differences between the two types of client legal privilege ['client legal privilege' is the name commonly used in Australia for legal professional privilege]. Legal advice privilege exists to protect the relationship between a lawyer and client; litigation privilege respects the important functions of the adversarial system. Therefore the distinction should not be abandoned." While the law commissions were of the view that there should remain separate provisions in the uniform Evidence Acts for legal advice privilege and litigation privilege, they recommended that section 118 of the uniform Evidence Acts, which provides for legal advice privilege, "be amended to provide that the legal advice privilege extends to information provided by a third party to the client or lawyer for the dominant purpose of providing legal advice."[48] This amendment has been enacted in New South Wales,[49] Victoria,[50] and, at the Federal level, by the Australian Parliament.[51] The amended section 118(c) of the Evidence Act in these jurisdictions allows legal advice privilege to be claimed over a "confidential document (whether delivered or not) prepared by the

45 [2004] FCAFC 122, (2004) FCR 357. See Ho Hock Lai, "Legal Advice Privilege and the Corporate Client" [2006] SJLS 231 at p 237; Jan O'Neill, "Loosening the Shackles on Advice Privilege" (2004) 42(8) Law Society Journal 60.

46 [2004] FCAFC 122, (2004) 136 FCR 357 at 369. This decision is discussed by Chin Tet Yung, "Extending the Scope of Legal Advice Privilege" (2007) 19 SAcLJ 133.

47 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005). The discussion of *Pratt Holdings* in this joint report is referred to in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, 2007) at para 3.33 *et seq*.

48 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) at para 14.122.

49 Evidence Amendment Act 2007 (Act 46 of 2007) (NSW), s 3 and para 56 of Schedule 1.

50 Evidence Act 2008 (Act 47 of 2008) (Vic), s 118.

51 Evidence Amendment Act 2008 (Cth), s 61.

client, lawyer *or another person* for the dominant purpose of the lawyer… providing legal advice to the client."[52]

66 *Pratt Holdings* was strongly endorsed by way of *obiter dicta* in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*.[53] According to the Singapore Court of Appeal:

> …the reasoning in *Pratt Holdings* appears sound and provides a sensible and a workable basis for balancing the need for complete confidentiality in a solicitor and client relationship with the need for disclosure of information which is not communicated for the purpose of obtaining legal advice. The approach in *Pratt Holdings* is principled, logically coherent and yet practical. [54]

67 Canadian law in this area seems to be narrower than the Australian. In *General Accident Assurance Co v Chrusz*,[55] Doherty JA laid down the following principle:

> the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. 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.[56]

68 This would also cover the situation where the third party is authorised by the client "to direct a solicitor to act on behalf of the client, or … the client authorises the third party to seek legal advice from the solicitor on behalf of the client".[57] However, "[i]f the third party is authorised 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

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52 According to a leading commentator on the uniform evidence legislation, while s 118 (legal advice privilege) now "extends to documents provided by a third party to the client or lawyer for the dominant purpose of providing legal advice", it is still the case that it does not extend to "communications with a third party.": S Odgers, *Uniform Evidence Act* (Law Book Co, 8th Ed, 2009) at 566, para [1.3.10560]. See also Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) at para 14.122: "Section 118(c) should be amended to provide that the legal advice privilege extends to information provided by a third party to the client or lawyer for the dominant purpose of providing legal advice. It is not recommended to extend the privilege to all communications with a third party as suggested by the Law Society of New South Wales as this may extend unduly the scope of the privilege and result in a greater blurring of the advice and litigation privileges."

53 [2007] SGCA 9, [2007] 2 SLR 367. The *ratio* was that the communications in question were, on balance, for the purposes of aiding litigation. As to the requirement of dominant purpose, see *Brink's Inc v Singapore Airlines Ltd* [1998] SGCA 33, [1998] 2 SLR(R) 372.

54 [2007] SGCA 9, [2007] 2 SLR 367 at [53]–[65].

55 (1998) 37 OR (3d) 790.

56 (1998) 37 OR (3d) 790 at [120] (Westlaw para number).

57 (1998) 37 OR (3d) 790 at [121].

is retained to act on legal instructions from 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."[58]

69 The English position is certainly narrower than the Australian. The English Court of Appeal in *Three Rivers DC v Bank of England (No 5)*[59] ("*Three Rivers (No 5)*") concluded that legal advice privilege could not be claimed for documents other than those passing between the client and his legal adviser and evidence of the contents of such communications. Thus, it does not extend to third party communications that are to be shown to the lawyer for the purpose of obtaining legal advice.[60] In a further application for disclosure (see *Three Rivers DC v Bank of England (No 6)*[61]) the High Court agreeing with the *obiter* of the Court of Appeal in *Three Rivers (No 5)* held that it was the dominant purpose of obtaining legal advice about legal rights and liabilities which was the touchstone of legal advice privilege. On appeal, the Court of Appeal affirmed the dominant purpose test for claiming legal advice privilege. The House of Lords however eventually rejected it.[62] The English position therefore is that legal advice privilege can only be claimed for communications passing between a lawyer and his client made in confidence for the purpose (which need not be the dominant purpose) of obtaining legal advice or assistance.

70 In the European Union, a stricter test applies whereby documents not submitted to the legal adviser, including third party communications, are privileged only if prepared exclusively for the purpose of seeking legal advice. This test was applied by the European Court of Justice in *Akzo Nobel Chemicals Ltd v Commission of the European Communities*[63] where the court concluded that preparatory documents, not exchanged with a lawyer or created for the purpose of being sent physically to a lawyer, were also covered by legal professional privilege, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer (in that case, in exercise of the rights of the defence). The court considered that the public interest in disclosure provided sufficient justification for treating a preparatory document as covered by legal professional privilege restrictively.[64]

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58 (1998) 37 OR (3d) 790 at [122].

59 [2003] 3 WLR 667.

60 See [2003] 3 WLR 667 at [19] and [21] *per* Longmore LJ.

61 [2003] EWHC 2565.

62 *Three Rivers (No 6)* [2005] 1 AC 610.

63 [2008] Bus LR 348.

64 At stake was the Commission's powers of investigation to uncover and penalise infringements of the competition rules.

(1) Under the Evidence Act

71 Under the Act, it is unclear whether the extension of legal advice privilege to third-party communications can be justified by a liberal interpretation of the existing terms of section 128 of the Evidence Act. The first limb of section 128(1) refers not only to communication made by the client to his lawyer but also to communication made "on behalf of" the client to the lawyer. If traditional English principles are applied to the interpretation of this limb of section 128(1), a communication is considered to have been made by a person "on behalf of" the client under that provision only if that person had acted as "a mere conduit of communication" and was not "a creator of information".[65]

72 In Singapore, does a third-party report of the kind seen in *Pratt Holdings* fall under the first limb of section 128(1)? Is it a communication made "on behalf of" the client to the lawyer? The answer is probably not, at least, not without a stretch of the statutory language. In *Pratt Holdings*, the report was written by an accounting firm and sent by the accounting firm to the client. Even on a liberal reading of "on behalf of" in the first limb of section 128(1), it is difficult to see how the report was in itself a communication by the accounting firm "on behalf of" the client *to* the lawyer. This may be contrasted with the situation which arose in the Canadian case of *Susan Hosiery Ltd v Minister of National Revenue*.[66] In this case, as summarised by the Ontario Court of Appeal in *General Accident Assurance Co v Chrusz*,[67] the client's financial advisers "were intimately familiar with the client's business" and, at the client's instruction, "met with the solicitor to convey information concerning the business affairs of the client" for the purpose of obtaining legal advice. According to the Ontario Court of Appeal, "the accountants served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer." If the facts in *Susan Hosiery* were to arise in Singapore, it is arguable that the accountants would be considered to have made communication "on behalf of" the client for the purpose of the first limb of section 128(1). But the same cannot be said of *Pratt Holdings*.

73 It is perhaps more promising to rely on the second limb of section 128. This limb extends legal advice privilege to any "document with which [the advocate or solicitor] has become acquainted in the course and for the purpose of his professional employment". This phrase is very wide, and if read literally, could potentially cover a third-party report of the type seen in *Pratt Holdings*. But we would caution against too wide an interpretation of this limb of section 128 in view of the potential costs highlighted below (at [77]) of extending legal advice privilege to third-party communications. It is eminently clear that this limb of section 128 cannot be read literally as otherwise a client could cloak all pre-existing incriminating documents with

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65 [2007] SGCA 9, [2007] 2 SLR(R) 367 at [52].

66 [1969] 2 Ex C R 27.

67 (1998) 37 OR (3d) 790 at [111] (Westlaw para number).

the privilege by the simple expediency of forwarding them to his or her lawyer for safe-keeping.[68]

74 In the light of this discussion, the issue we would frame for the purposes of reform is as follows: Should the question of what materials are covered by privilege be determined solely by reference to the purposes for which they are created so that as long as the materials are generated for the requisite purpose they will be privileged irrespective of actual transmission to the lawyer? If so, should the purposes for which they are created be predominantly directed to obtaining legal advice or should they be exclusively so directed? The significance of these questions is greater the more complex the documentation which must be prepared before legal advice is possible. Where the legal advice to be sought ultimately requires sifting through voluminous documents and other information not readily available, it will be common for the client to prepare working documents or summaries or other information for submission to the legal adviser. Also commonly, agents are roped in to help prepare such preparatory documents. In some cases, such documents although originally intended to be laid before the legal adviser are withheld and other documents are exchanged instead. More exceptionally, such documents will not be exchanged but are also created so as to facilitate the client in familiarising the legal adviser with the nature, context and implications of the facts.

(2) Options for reform and recommendations

75 There are four options for reform:

(a) Stipulate that third party communications do not attract legal advice privilege even if created for the dominant purpose of seeking legal advice.

(b) Clarify that legal advice privilege applies to communications between lawyer and client made for the purposes of seeking legal advice which need not be dominant as well as provide that third party communications not made on behalf of a client to the lawyer must be made for the dominant purpose of obtaining legal advice.

(c) Stipulate that legal advice privilege applies to communications between lawyer and client as well as third party communications laid before the lawyer if they are made for the dominant purpose of obtaining legal advice.

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68 At common law, the privilege does not go so far. It has been held that "the solicitor holds the document in the right of his client and can assert in respect of seizure no greater authority than the client himself or herself possesses": *R v Justice of the Peace for Peterborough, ex parte Hicks* [1977] 1 WLR 1371 at 1374.

(d) Stipulate that all communications for the dominant purpose of obtaining legal advice are privileged whether or not they are laid before the lawyer.

(e) Stipulate that third party communications for the exclusive purpose of obtaining legal advice are privileged whether or not they are laid before the lawyer but that all communications for the dominant purpose of obtaining legal advice in adversarial litigation are privileged.

76 We are unanimously of the view that this subject of reform is ultimately a matter of policy. A minority of the Law Reform Committee is not persuaded by the reasoning in favour of extending legal advice privilege to third party communications for these reasons. In coming to its decision, the Federal Court in *Pratt Holdings* observed that the "complexity of present day commerce means that it is increasingly necessary for a client to have the assistance of experts" and emphasised that legal advice privilege should be adapted "to ensure that the policy supporting [it] is not sabotaged by rigid adherence to form that does not reflect the practical realities".[69] With respect, even if it is true that it is increasingly necessary for corporations to engage third parties to assist in preparatory works related to the seeking of legal advice, it does not follow that *therefore* it is good policy for the law to confer legal advice privilege on the third party communications or reports. Some further argument must be supplied to warrant this conclusion. The further argument may take the form, for example, that by this extension of legal advice privilege, corporate clients will, as a whole, be more willing to seek legal advice, will consequently be better able to comply with the law, and will make decisions that are more legally informed. These claims are at best speculative.[70]

77 Moreover, from the angle of "practical realities" (to quote from the judgment), it is debatable whether, in *Pratt Holdings*, it was sound policy to have allowed the corporation to obstruct the tax audit by hiding pertinent information from the Commissioner of Taxation.[71] More generally, critics have warned that extension of legal advice privilege to third party communications may encourage corporate misconduct and increase the zone of secrecy in opposition to open discovery rules. One should also be wary about the abuse of the privilege; the lawyer may be roped in on

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69 [2004] FCAFC 122, (2004) FCR 357 at 386.

70 It has recently been argued that "the privilege's role in encouraging corporate clients to comply with the law has been overtaken by laws and policies designed to force corporate agents to do the very same thing: achieve compliance. This shift in policy focus, putting less emphasis on voluntary compliance and more on regulation, has substantially reduced the need for a corporate privilege because corporations and their agents already have sufficient incentives to obtain accurate legal advice even without a privilege.": A Higgins, "Legal Advice Privilege and its Relevance to Corporations" (2010) 73 Mod L Rev 371 at 373.

71 For a critical discussion on the extent to which we should allow the privilege to thwart a tax investigation, see Law Commission of New Zealand, *Tax and Privilege* (Report No 67) (Wellington, 2000).

third party consultation only as a "façade to achieve secrecy"[72] and "to cover up damaging information that might otherwise be discoverable."[73] A particularly insidious form of corporate abuse of privilege is "information funnelling; this involves "[d]eliberately concealing sensitive business information that would otherwise be compellable by transmitting the information through lawyers".[74] *Pratt Holdings* is also at odds with judicial suggestions made elsewhere that we should *reduce* the current scope of the privilege that confers secrecy over third party communications.[75] Important considerations to bear in mind in deciding whether Singapore law should adopt *Pratt Holdings* are the costs which the adoption is likely to incur in terms of loss of corporate transparency and accountability and its effect on the openness of the litigation process as a whole. As noted by one commentator:

> Critics of the corporate attorney-client privilege in general, and specifically of its application to third-party consultants, contend that 'corporations will attempt to funnel [more] corporate communications through their attorneys in order to prevent subsequent disclosure.' This risk likely grows with the scope of the doctrine. Further, scholars argue that when corporations know that something will not be discoverable, they are more likely to misbehave.[76]

The author further observes that protecting third party communication in the present context "lends less transparency to the public. This, in turn, may reduce confidence in the economy, which has been prone to failure lately. The recent sub prime mortgage scandals and the collapse of key investment banks are great examples."[77]

78 A majority of the Law Reform Committee however agrees that legal advice privilege should be extended to third party communications for the following reasons. Although the public interest in disclosure is important, it is not paramount and ought to give way to the legitimate needs of a client unable to prepare its materials for the

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72 M Beardslee, "The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants" (2009) 62 SMU L Review 727 at p 771.

73 M Beardslee, "The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants" (2009) 62 SMU L Review 727 at p 733.

74 A Higgins, "Corporate Abuse of Legal Professional Privilege" (2008) 27 CJQ 377 at 382.

75 In *Secretary of State for Trade v Baker* [1998] Ch 356 at 366, Sir Richard Scott held that "there was no general privilege that attached to documents brought into existence [by third parties] for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If [the] documents … did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery and no privilege." Followed in *The "Patraikos 2"* [2000] SGHC 86, [2000] 2 SLR(R) 21 at [14] and [15]. See also *Three Rivers D C v Bank of England (No. 6)* [2004] UKHL 48, [2005] AC 610 at [29]; *Phipson on Evidence* (Malek *et al* eds) (Sweet and Maxwell, 16th Ed, 2005) at pp 639–641. *Secretary of State for Trade v Baker* and *The Patraikos 2* are criticised by J Pinsler, "New Twists in Legal Professional Privilege: Communications for the Purpose of Litigation and Between the Lawyer and Client" (2002) 14 SAcLJ 195 at pp 200–208.

76 M Beardslee, "The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants" (2009) 62 SMU L Review 727 at p 794.

77 M Beardslee, "The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants" (2009) 62 SMU L Review 727 at p 777.

purposes of obtaining legal advice or who finds it more economical or expedient to employ a third party for this purpose. This will ensure that costs of legal advice do not become inflated because a corporate client is artificially constrained to employ only authorised agents to communicate with their lawyer on their behalf. Moreover, this will better serve the rule of law rationale by encouraging corporate clients to secure the best information that third parties can provide at affordable prices in keeping with their priorities in seeking legal advice. While it may seem that extending the privilege would not encourage third parties who have no interest in the client's legal problem to be candid in providing the information, the important point is that the client should know that the information will be privileged. For then, it will seek out the best third parties for its purposes with a view to reposing candour in its legal adviser. This is important. Even where a company minded to create privilege over third party communications can expediently authorise the third party as agent to communicate with its lawyer, it would be wrong to deprive the client of the advantage of using third parties otherwise than as authorised agents. Authorising an agent to communicate means making it privy to the client's legal matters and this may affect the choice of third parties available to the client who wishes to keep those matters away from third parties.

79 As for the risks of abuse, they are exaggerated. Unless the third party communications are intended to be kept confidential, they will not be privileged even if created for the dominant purpose of seeking legal advice. By the same token, unless they are kept confidential after creation, they will likely lose their privileged character as a consequence of implied waiver. The fact that third party information must be kept confidential sets a limit on information funnelling since information not intended to be kept confidential in the first place cannot be made privileged by confidential communication to a legal adviser afterwards.

80 For the reasons stated in [78] and [79], a majority of the Committee therefore recommends that the second option be adopted. This means that the Evidence Act should be amended to provide that third party communications for the dominant purpose of seeking legal advice should be privileged. The circumstance of laying the communications before the client's lawyer or of not doing so should not be specified as a condition of attaching the privilege. However, it will be a factor to be taken into account when the court is determining whether to draw the inference that the dominant purpose in creating the communication was to seek and obtain legal advice. In some cases, the proper inference when the third party communication is not laid before the lawyer will be that there was no such dominant purpose in creating it in the first place. Under the second option, the Evidence Act should also be amended to clarify that so far as concerns direct communications between lawyer and client, including communications on behalf of the client, it will be sufficient that a substantial purpose in creating the communications was to seek and obtain legal advice.

81 We are of the unanimous view that the rule of law rationale as it applies to direct communications between lawyer and client should not be weakened by requiring that these must also have been created for the dominant purpose of seeking and obtaining legal advice. For this reason, the third option should be rejected. Similarly, we would reject the fourth option. It would not promote candour in the lawyer-client relationship and would be self-defeating to protect information and other materials

which the client has prepared for the dominant purpose of seeking and obtaining legal advice but which were not eventually laid before the lawyer. As for the fifth option, a majority thinks that a requirement that third party communications must have been created exclusively for the purpose of seeking and obtaining legal advice could be too restrictive. It would preclude the client from using the third party communications for other non-dominant purposes and could leave the client with no real option but to employ the third party as their authorised agent to make communications direct to the lawyer. We would also reject this option.

I. Common interest privilege

82 In our view, it is also necessary, if the litigation privilege is to be codified, to specify at minimum the relationship between common interest privilege and both sub-heads of the privilege. Although the concept of "common interest" privilege pre-dates the enactment of the Evidence Act in 1893,[78] it was not picked up in the precursor of the Act which was the Indian Evidence Act 1817 and was likewise omitted from the Singapore enactment. Despite its pedigree, the common interest privilege can be said to be a late 20th century development. It owes its modern expression to the English Court of Appeal's decision in *Buttes Gas and Oil Co v Hammer (No 3)*[79] where Brightman LJ said:

> …if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each.[80]

83 By common interest is meant the common interest in the confidentiality of the communication[81] and by common interest privilege is meant both the shield and the sword that it affords. A person may resist the application of a third party for production of communications (the shield), or obtain disclosure of those communications from a party with whom he shares a common interest (the sword) even though, as against third parties, the communications would be privileged from production by virtue of legal professional privilege.[82] Both shield and sword aspects may thus be used to extend the protection given by legal advice and litigation privilege alike.[83]

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78 It derives from *Jenkyns v Bushby* (1866) LR 2 Eq 547.

79 [1981] 1 QB 223; particularly *per* Lord Denning MR at 243 and Brightman LJ at 267–268.

80 [1981] 1 QB 223 at 267.

81 Such as may be found between insured and insurer and insurer/reinsured and reinsurer. See *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027; *Commercial Union v Mander* [1996] 2 Lloyd's Rep 640. The shared interest must exist at the time the communication was created: *Cia Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598 at 615.

82 *Cia Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598; *Commercial Union Assurance Co plc v Mander* [1996] 2 Lloyd's Rep 640.

83 *Svenska Handelsbanken v Sun Alliance and London Insurance plc* [1995] 2 Lloyd's Rep 84 at 88.

(1) Options for reform and recommendations

84 The question which arises in connection with common interest privilege is whether it should also be codified alongside the two sub-heads of the privilege. Consistent with our argument that section 2(2) of the Evidence Act should be left to deal with truly residual matters, our view and recommendation is that the common interest privilege which is hardly residual in nature should also be codified. The common interest privilege is an argument for extending both sub-heads of the privilege but unlike the sub-heads, the extension it provides operates importantly as a sword and not merely a shield. This is an argument that its relevance should be recognised in the codification. Its development however should be left to rest on the common law. There are no issues of inconsistency which would necessitate the codification spelling out the essential features of the common interest privilege. It is intrinsically consistent with the statutory legal advice privilege and its development would not require further clarification by codification. Additionally, the question of common interest would not appear to be capable of strict definition or definite exactitude for the moment. This implies that the recourse to common law would allow the common interest privilege to remain open-ended and capable of being moulded by the courts in an incremental manner.

85 We therefore recommend that a provision should be inserted in the Evidence Act to confirm the existence and applicability of common interest privilege as it exists under the common law.

J. Who is the corporate client

86 In our discussion of third party communications above we drew attention to the existence of serious concerns about loss of corporate transparency and accountability and its effect on the openness of the litigation process as a whole if third party communications should also be recognised as privileged communications for the purposes of legal advice privilege. These are also relevant and important concerns with respect to the definition of a corporate client. A broad definition will spread the coverage of privilege widely, leading to loss of corporate transparency and accountability and affect the ability of a non corporate party to pursue litigation against a corporate party. Responding to these concerns, the English Court of Appeal in *Three Rivers DC v Bank of England (No 5)*,[84] ("*Three Rivers (No 5)*") adopted a narrow definition of the corporate client for the purposes of attaching the common law privilege. It was held that, in the case of a corporate client, legal advice privilege would not attach to communications to the legal adviser by either employees who were not part of the directing mind and will of "the client" or by others who were not "the

84 [2003] EWCA Civ 474, [2003] QB 1556, [2003] 3 WLR 667.

client".[85] The result was that the privilege did not attach to memoranda supplied by employees for the purpose of being sent to the client's solicitor.

87 Under the Evidence Act, the word "client" is not defined. Neither is it defined by the Interpretation Act (Cap 1, 2002 Rev Ed). There is apparently a lacuna as to what the word means when a corporate body seeks legal advice and the question posed is whether it should be clarified.

(1) Background

88 We think it will be helpful to explain in more detail the nature of the problem. The case of *Three Rivers (No 5)* revolved around the collapse of the Bank of Credit and Commercial International SA ("BCCI") in 1991 as the result of wide spread fraud committed by the management of BCCI. An inquiry was set up by the Chancellor of the Exchequer and the Bank of England ("BOE") to investigate the supervision of BCCI by the BOE. In turn, the BOE appointed three of its officials (the Bingham Inquiry Unit or "BIU") to deal with all communications between the BIU and the BOE and the lawyers. The BOE also engaged Freshfields as its solicitors and the BIU obtained advice from Freshfields on all the communications made with the BIU. As part of its work, the BIU coordinated the collation of information from within the BOE and obtained reports from many of their colleagues in the BOE. Most of these reports were shown to Freshfields who advised the BIU on dealing with the inquiry.

89 The liquidators and creditors of BCCI subsequently sued the BOE for misfeasance in public office. They based their claim substantially on the final report of the BOE and sought discovery and inspection of the documents prepared by the BOE in connection with the inquiry, in particular the internal documents prepared by the employees of the BOE (who were not the three members of the BIU) on the instructions of and for the BIU.

90 The disclosure of these documents was resisted by the BOE on the basis of legal advice privilege only as BOE accepted that litigation privilege did not apply since the legal position in England was that the inquiry was not considered litigation.

91 The Court of Appeal rejected the BOE's claim of legal professional privilege. There are two key points that it made in coming to this decision. First, it held that BIU was the client in question and the employees of the BOE who had created the various documents were third parties to the solicitor-client relationship between BIU and Freshfields. Secondly, it held that legal professional privilege only applies to communications passing between a client and its legal adviser and documents

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85 A petition for leave to appeal was rejected by the Appeal Committee of the House of Lords. Note also that in *Three Rivers (No 6)* [2005] 1 AC 610 the House of Lords heard arguments impugning the correctness of the Court of Appeal's holding but declined to comment on the decision.

evidencing such communications, but not documents communicated to a client or his solicitor for advice to be taken upon.

92 The applicability of *Three Rivers (No 5)* to these provisions came up for discussion in Singapore in the case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*.[86] An employee of Asia Pacific Breweries (Singapore) Pte Ltd ("APB") had used APB's name to obtain and use credit and loan facilities from several banks. The employee was subsequently charged and convicted of several cheating charges. After APB discovered the fraud, a special committee was set up and this committee appointed PricewaterhouseCoopers ("PWC") and Drew and Napier LLC ("D&N") to investigate into the fraud. Draft reports were prepared by PWC although a final report was never issued.

93 The banks which sued APB sought discovery of the PWC draft reports. APB asserted privilege – both litigation and legal professional privilege. An assistant registrar dismissed APB's claim to privilege, but Belinda Ang J allowed the appeal. In her grounds of decision, the learned Judge dealt squarely with the case of *Three Rivers (No 5)* by stating that it was inconsistent with the provisions of section 128 of the Evidence Act, which expressly states that the privilege applies to communications made to the solicitor "by or on behalf of his client", and was therefore inapplicable by virtue of section 2(2) of the same Act.

94 The Court of Appeal dismissed the appeal. However, the Court of Appeal took a different tack towards the applicability of the *Three Rivers (No 5)* definition of "client". In delivering the judgment of the Court of Appeal, Andrew Phang Boon Leong JA disagreed with Belinda Ang J's treatment of *Three Rivers (No 5)* and stated that:

> *Three Rivers (No 5)* should be read in the context of the court's finding that the BIU (and no one else) was authorised to communicate with the bank's solicitors. In so far as section 128 of the [Evidence] Act is concerned, the company cannot itself make the communication to its solicitors: only individuals can do so, and those individuals would be those authorised to do so, expressly or impliedly. The words 'by or on behalf of his client' in this particular provision embody, statutorily, the proposition just mentioned. Accordingly, we see no inconsistency between *Three Rivers No 5* and section 128 of the [Evidence] Act.[87]

95 In other words, the Court of Appeal's view was that if an employee was not authorised to communicate with the company's solicitors for the purpose of obtaining legal advice, then that employee's communication would not protected by legal advice privilege.

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86 [2007] SGCA 9, [2007] 2 SLR 367.

87 [2007] SGCA 9, [2007] 2 SLR 367 at [42].

96 The Court of Appeal then shifted its discussion to whether the draft reports which were prepared by third parties (which would include employees who are not authorised) would be protected – the relevant question being whether it could be shown that the draft reports were made for the dominant purpose of aiding litigation. On the facts, the Court held that they were. We have already considered the observations of the Court as to the extension in *Pratt Holdings* of legal advice privilege to third party communications made for the dominant purpose of seeking and obtaining legal advice. See [66] and [71] above.

(2) Academic criticisms of Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd

97 At least, one academic writer has expressed the view that the Court of Appeal glossed over the point of the holding in the English case.[88] The English case decided that having authorised the BIU to communicate with the Bank's legal advisers, the BIU became the directing mind and thus the "client" for the purposes of seeking of legal advice (the "specific directing mind" test). The Court of Appeal however thought that the need to narrow the concept of a corporate client was already catered to by the provisions of section 128 extending the privilege to authorised communications, such authorisation to be validated according to agency principles. In effect, there was no need to narrow the concept of corporate client to the persons authorised by the Board of Directors to communicate with the legal adviser for the purposes of seeking and obtaining legal advice. The directing mind or client would be the Board of Directors (the "general directing mind" test) and the persons authorised to communicate with the lawyer would be communicating with him by or on behalf of the Board of Directors. The results of applying the English reasoning and the reasoning of the Court of Appeal are in fact different. In the English case, the client is the BIU and it is the BIU which can authorise agents to communicate with the legal adviser. Under the analysis of the Court of Appeal, the client is always the Board of Directors and it is the Board which can authorise agents to communicate with the legal adviser.

(3) Options for reform, discussion and recommendation

98 Arising out of the foregoing discussion, we identify two options for going forward:

(a) Maintain the status quo leaving any final resolution to the courts; or

(b) Provide a narrower definition of the "corporate client".

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88 Tan Yock Lin, "Legal Profession" in Teo Keang Sood (ed) *Annual Survey of Singapore Cases* (SAL, 2008) vol 8, ch 19 at paras 19.14 *et seq*.

99 It is important to appreciate that under the common law the impact of adopting the narrow definition of the corporate client appears largely where legal advice privilege is sought. A claim to litigation privilege covering third party communications is unexceptionable since that privilege already attaches to such communications. Moreover, for purposes of claiming litigation privilege, the court is not concerned with who the client is but seeks to ascertain the person or authority that directed the creation of the communication.[89] As a result of a narrow definition of corporate client, communications between a company's employees will not count as lawyer-client communications although made for the purposes of obtaining legal advice but will in effect be third party communications and protected only by litigation privilege. The important point is that there is a large degree of coincidence in rationale between the question of extension of privilege to third party communications and that of defining the corporate client. Much the same rationale for restricting third party communications argues for a narrow definition of corporate client.

100 In favour of maintaining the status quo as observed in the *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*,[90] there are four arguments. These are essentially arguments against narrowing the definition of corporate client. First, a narrow definition could result in a loss of candour in communications between employees or corporate officers who are not part of the "client group" of persons. It could eliminate candour in situations where candour should be encouraged; as where diverse members of the corporate entity would be proactively seeking to defuse potentially litigious situations, for example, conducting a review of a potentially defective product or running an environmental assessment check in a situation where no customer has complained. Secondly, a narrow definition will raise a plethora of questions. For instance, the issues that remain unanswered with respect to the definition in *Three Rivers (No 5)* are numerous. Among them are these: how can this "client group" be identified short of an express authorisation by the Board of Directors? When can members outside of this "client group" provide information or should the "client group" be the only ones responsible for all collation of data and communications? Thirdly, the consequences of a narrow definition would be especially stark in large corporate organisations, especially transnational organisations where it is necessary, by sure dint of size, for organisations to designate and entrust the collation of data to delegated individuals or managers in each country. Yet, this economically beneficial approach to the collation of data is challenged by the narrow definition espoused in *Three Rivers (No 5)* since prudence would require that the "client group" of employees obtain all the relevant information themselves instead of delegating this duty downwards. Fourthly, it is unfair to restrict the ability of a corporate entity to investigate allegations of fraud or negligence by requiring the corporate entity to constantly guard against its own employees being compelled into disclosing sensitive or inconvenient information.

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89 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 at 1037.

90 [2007] SGCA 9, [2007] 2 SLR(R) 367.

101 However, there are also valid arguments for a narrow definition. Instead of repeating the arguments already made in [76] and [77], it suffices here to provide the gist of those arguments, namely that the public interest in disclosure does not warrant an enlargement of the privilege to protect a corporate client against disclosure of internal communications which though created for the purposes of obtaining legal advice are not communicated to the lawyer. Moreover, the difficulties posed by the specific directing mind test should not be exaggerated. Its adoption would not usually pose practical problems for external counsel since they generally deal with those who are part of the specific directing mind or authorised by the Board of Directors of the company in relation to the matter for which their legal advice is sought.

102 If a narrow definition of corporate client is thought appropriate, further consideration must be given to the two alternative possible tests, both developed in the jurisprudence arising in the United States. These are: first, the control group test and secondly, the subject matter test.

103 The control group test would limit the corporate client to "those individuals who play a substantive role in deciding and directing the corporation's response to the legal advice given". The test has been criticised on the basis that it creates uncertainty as to who can be identified as a member of the group which undermines the entire rationale for the privilege, which is to encourage the corporate client to disclose the situation fully. It has also been rejected by the United States Supreme Court in *Upjohn Co v United States*.[91]

104 The Supreme Court preferred the subject matter test which postulates that privilege will apply where an employee makes the communication to the company's lawyers for the purpose of obtaining legal advice, at the directions of his superiors, provided that the subject matter upon which the lawyer's advice is sought is within the duties of the employee's employment and provided that the communication is not subsequently disseminated beyond those persons who need to know its contents.

105 Compared with the subject matter test, the specific directing mind test has the merit of avoiding references to subsequent dissemination. It would be awkward to posit post-advice dissemination as an ingredient of the existence of the privilege as it is understood in Singapore. Post-advice dissemination is relevant, if at all, to a question of waiver of the privilege. Compared with the group control test, the specific directing mind test is stricter since it is based on authorisation by the Board of Directors, and therefore less uncertain. In any case, factual difficulties should not be overstated since it is open to a corporation acting by its Board of Directors to determine by resolution the identity of the directing mind in relation to any matter or class of subject matter and hence remove all factual uncertainties arising out of an implied authorisation. If therefore it was necessary to adopt a narrow definition of client for the purposes of the

91 449 US 383 (SC 1981).

privilege, we would prefer the specific directing mind test to either the control group or the subject matter tests.

106 On the whole, however, we think that reform on this matter is unnecessary for the moment. The problem of the corporate client is essentially a question of the extent to which internal communications between members of a company should be protected by the privilege. These are *ex hypothesi* unauthorised communications. There is no doubt that if internal communications are authorised by the Board of Directors of a company to be laid before the lawyer, they will be privileged; and so the question is whether internal communications which are not so authorised should also attract the privilege as long as they are created for the dominant purpose of seeking and obtaining legal advice. These would clearly be third party communications. See [72] and following above. Since a majority of us takes the view that third party communications should be protected by the privilege if they arise for the dominant purpose of seeking and obtaining legal advice, it would be pretty much otiose to recommend a narrow definition of the corporate client by adopting the specific mind test.[92] The narrower test would only give rise to more third party communications which would in any case be protected by the recommended extension to third party communications. We therefore conclude that reform is unnecessary in view of our recommendation at [81] and do not make any recommendations to adopt a narrow definition.

V. Extension of Privilege to In-House Lawyers

A. Introduction

107 Under the codification of litigation privilege which we have recommended in Part IV of this Report, communications with in-house counsel for the dominant purpose of conducting litigation will be privileged because litigation privilege covers third party communications and the position that the third party holds as in-house counsel is immaterial. There are serious doubts, however, whether legal advice privilege extends to communications with in-house counsel for the purposes of obtaining legal advice. We therefore turn to consider this question in Part V of this Report and to make recommendations as to extension of legal advice privilege to such communications. As with the question of the concept of corporate client, however, our recommendation to extend the privilege to third party communications will have the effect of reducing the significance of the reform immediately under consideration. This is because even if communications with in-house counsel remain unprotected by legal advice privilege, they will be protected as third party communications if they arise for the dominant purpose of seeking and obtaining legal advice from external counsel. The significance of the reform immediately under consideration will be felt where no external counsel

92 Another writer has correctly noted the significant degree of overlap between the question of identity of the corporate client and that of third party communications in the judgment of the Court of Appeal. See Ho Hock Lai, "Legal Advice Privilege and the Corporate Client" [2006] SJLS 231.

will be engaged and the company seeks and obtains the legal advice of in-house counsel alone.

B. Comparative survey

(1) Common law of England

108 In the seminal case of *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)*,[93] ("*Alfred Crompton*") the English Court of Appeal first paved the way for extension of legal advice privilege to communications with in-house counsel. Lord Denning MR said that it was essential for in-house counsel to have acted in an independent capacity:

> It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.[94]

109 In *Alfred Crompton* at 129, Lord Denning spoke to any concerns there might be that the in-house counsel might abuse such privilege:

> There is a safeguard against abuse. It is ready to hand. If there is any doubt as to the propriety or validity of a claim for privilege, the master or the judge should without hesitation inspect the documents himself so as to see if the claim is well-founded, or not.[95]

110 Apart from this case, there has been little other case law in the UK on the issue. The reason is that there is seldom any issue about the independence of a salaried legal adviser in the UK as such adviser is subject to the same duties to his client and to the court. In Lord Denning MR's words:

> They [in-house counsel] are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court.[96]

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93 [1972] 2 QB 102 affd [1974] AC 405 at 430–431 (HL(E)).

94 [1972] 2 QB 102 at 129.

95 [1972] 2 QB 102 at 129.

96 [1972] 2 QB 102 at 129.

111 Interestingly, we note that in *Goodridge v Chief Constable of Hampshire*,[97] the court observed that communications between the police and the Director of Public Prosecutions for the purposes of obtaining legal advice would attract the privilege.[98] It was apparently sufficient that one of the functions of the Director was to give advice to the police at the latter's behest and no reference was made to the requirement that the Director should owe duties to the court. In our view, the privilege which was involved in that case was litigation privilege and the case is therefore of no direct relevance to us.

(2) Australia

112 In Australia, communications with in-house counsel are also privileged if certain conditions are met.

113 In *The Attorney General for the Northern Territory of Australia v Kearney*,[99] the High Court of Australia approved of the principles enunciated in the English case of *Alfred Crompton*. The case highlighted certain open issues. One was whether the advice would be privileged only if the lawyer who gave it had been admitted to practice and remained subject to the duty to observe professional standards and the liability to professional discipline. This was an open issue as it was not explored in argument before the court.[100] Another was whether legal advice privilege covered communications between a public authority and its legal advisers in connection with the making of regulations in the exercise of its law-making powers. Still another was whether communications with a legal adviser who was not independent of the client were capable of attracting legal advice privilege. This was also an open issue as there was no dispute that the Northern Territory Department of Law stood in the same independent position as Crown Solicitors of the States or the Australian Government Solicitor as buttressed by the laws relating to the public service and sometimes by specific legislation.[101] In *Waterford v The Commonwealth*,[102] the High Court of Australia confirmed its commitment to the element of independence, explaining that it is a question of fact whether in any particular case the relationship is such as to give rise to the privilege. The court characterised the requirement of independence in terms

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97 [1999] 1 WLR 1559.

98 Outside of England, the Supreme Court of Ireland has also approved of the law as stated in *Alfred Crompton*. In *Geraghty v The Minister for Local Government* [1975] IR 300, the court held that communications between the defendant as Minister, his parliamentary secretary and the officials of the Department of Local Government and the permanent legal advisers to the department for the purpose of obtaining or giving advice respectively were privileged.

99 (1985) 158 CLR 500.

100 (1985) 158 CLR 500 at 510 *per* Gibbs CJ. See also Wilson J's decision, concurring largely with Gibson J at 521–522. See also Dawson J at 530–531, who although in dissent with regard to another issue, also approved of the view in *Alfred Crompton*.

101 (1985) 158 CLR 500 at 517 *per* Mason and Brennan JJ.

102 (1987) 163 CLR 54.

of the advice to be given: "It must be a professional relationship which secures to the advice an independent character notwithstanding the employment."[103]

114 Evidently, the requirement of independence of advice is insisted on by the highest *dicta*. In the lower courts, it has been held that there must be proof of independence. In *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2)*,[104] it was held that there was no proof of independent advice if there was a risk of the advice "being compromised by virtue of the nature of his employment relationship with his employer". In *Vance v Air Marshall McCormack*,[105] it was held at first instance that the advice must have been given by an in-house lawyer who had a right to practise. This decision was reversed in the Court of Appeal.[106] The appellate court preferred a more open-ended test for determining independence of advice given which would include considering other factors such as the employment structure, the chain of command and reporting, the existence and terms of any directions from superior officers and attitudes and occurrences within the employment environment. Additionally, it appears that the courts will also look at the general nature of the legal advice which was sought in considering whether the in-house counsel was able to give independent advice.[107]

(3) Canada

115 In Canada, the Federal Court of Appeal in *IBM Canada Ltd v Xerox Canada Ltd*,[108] held relying on the English case of *Alfred Crompton* that privilege attached to communications with in-house counsel.

116 Similarly, the Ontario Supreme Court in *Children's Aid Society of Hamilton-Wentworth v AL*[109] held that notes of conversations concerning a legal case taken by a social worker when discussing with his in-house counsel, were covered by solicitor-client privilege. The court rejected an argument based on subject matter functionality, saying that:

> …the fact that some societies may use court workers who are not lawyers should not result in the court's concluding that, if a children's aid society employs in-house counsel, those persons should be categorised as ordinary

103 (1987) 163 CLR 54 at 62 *per* Mason and Wilson JJ.

104 2007 FCA 1445.

105 (2004) 154 ACTR 12.

106 [2005] ACTA 35.

107 *Rich v Harrington* [2007] FCA 1987.

108 (1978) 1 FC 513.

109 (2000) CanLII 22573.

> employees without benefit of solicitor-and-client privilege where the substantial purpose of the contact is to provide legal advice.[110]

117 In the landmark case of *R v Campbell*,[111] the Supreme Court of Canada held that:

> …[t]he [police] must be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Here, the officer's consultation with the Department of Justice lawyer fell squarely within this functional definition, and the fact that the lawyer worked for an 'in-house' government legal service did not affect the creation or character of the privilege.[112]

118 The Court then spelt out the test to determine when communications between a lawyer and a client are privileged as follows:

> 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.[113]

119 More recently, in *Pritchard v Ontario (Human Right Commission)*,[114] the Supreme Court had to decide whether the privilege applied to "advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law". The Court reiterated the holding in *R v Campbell* that:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.[115]

120 Based on the *Campbell* rule, the Court concluded that the privilege applied with equal force in the context of advice given to an administrative board by in-house counsel as it did to advice given in the realm of private law.[116]

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110 *Children's Aid Society of Hamilton-Wentworth v AL* 2000 CanLII 22573 at [6].

111 [1999] 1 SCR 565

112 *R v Campbell* [1999] 1 SCR 565

113 *R v Campbell* [1999] 1 SCR 565 at [50].

114 [2004] 1 SCR 809.

115 *Pritchard v Ontario (Human Right Commission)* [2004] 1 SCR 809 at [20].

116 *Pritchard v Ontario (Human Right Commission)* [2004] 1 SCR 809 at [21].

(4) Under the Evidence Act

121 The silence of the Evidence Act on this point has given rise to conflicting academic opinions and speculations. We do not find it necessary to rehearse the main lines of argument because one thing is clear. That omission is simply the result of 19th century conditions which no longer obtain so that whatever interpretation is relied on, the result will be equally unsatisfying, probably too expansive, and fraught with difficulties.

C. Options for reform

122 There are three options for reform, and a number of issues:

(a) Unrestrained extension of the privilege to communications with in-house counsel

(b) Reject the extension

(c) Extend the privilege restrictively

123 For a majority of us, the first and second options are extreme measures. The first option would give too much deference to the corporate client and expose the administration of justice to the risk and dangers of information funnelling and other abuse of the privilege. In-house counsel are variously involved in giving legal advice in circumstances in which the advice and the materials on which advice is predicated are not confidential. In not a few instances, the in-house counsel is expected to give mixed advice of which the legal advice is of small relevance or in his capacity as an employee with a view to advancing the company's overall interests, as opposed to strict legal interests, and in which the materials created for obtaining advice are summaries of existing unprivileged materials. No jurisdiction will easily tolerate attaching legal advice privilege to all such communications between an employee or group of employees comprising a business unit and in-house counsel. A majority among us therefore does not recommend that Singapore should.

124 The second option, on the other hand, would give too little. By rejecting the availability of "internal" legal advice privilege, it would compel corporate clients to seek "external" legal advice which is costly at all times. Large corporate clients could justly complain that they cannot possibly compete efficiently if in order to fall within the law of privilege they must incur external legal costs including the considerable costs of creating consultative materials and educating the external lawyer in the niceties and particularities of their trade. Swift legal advice would also be unlikely to be available from external lawyers where it is necessary. Where for instance it is important for the company to be advised whether an officer of the company or a director is conflicted and whether if so, he should make disclosure of particular matters in which he is implicated, recourse must be had to external lawyers whose advice is more likely

to come too late since he must be educated laboriously in the background matters before he can venture any meaningful advice.

125 A majority of us supports the third option of restricted extension of the privilege. This means in turn addressing specific issues of confidentiality and independence. As to the first, the corporate client should not be permitted to claim the privilege where the materials lack confidentiality in two senses, namely where they are accessible to the public and where they have not been created in circumstances of confidentiality. It is not uncommon for in-house counsel to share office premises with non legal employees or for employees to participate in meetings which generate the materials to which a claim of privilege is later made. Such a claim will not succeed under the proposal because the requirement of confidentiality will not be met. Moreover, under the proposal it is not sufficient that the circumstances in which the alleged privileged materials are created satisfy the requirement of confidentiality. There must also be proof that the materials including the advice if any that is given were afterwards also kept confidential and out of limits to employees other than those comprising the corporate client in relation to the legal advice which was sought. In this regard, where employees of the corporate client are entitled to consult in-house counsel on personal matters or mixed personal and corporate matters, a majority of us favours exclusion of the extension of privilege irrespective of confidentiality.

126 A majority of us considers further that the requirement that in-house counsel must have been instructed for his independent advice, as if he were an external lawyer, is vital. The privilege is intended to serve the rule of law, not to serve the client so much as the client's right to insist on the benefits of the rule of law. That right must be exercised in the first place in accordance with the principle that legal advice is to be given by qualified lawyers. It is not an unqualified right. A person may not insist on being defended by anyone who is not a qualified lawyer. Though he is free to defend himself, there is no half-way house.

127 From these premises, it is deducible that it is not the possession of a practising certificate or of adequate insurance coverage which is critical but the assurance of independence of representation embodied in the lawyer's ethical and professional responsibility to give independent legal advice in the best interests of his client. Accordingly, it should not matter that in-house counsel does not have a valid practising certificate. If he is otherwise ethically bound to provide independent legal advice when instructed in that capacity and subject to the disciplinary jurisdiction for breach of duty, we think that he should be regarded as satisfying the requirement of independence. Under the majority recommendation, there must be proof of intention to seek independent legal advice and proof of objective capacity to provide independent legal advice. If the former exists, what matters is that objectively the in-house counsel is under an ethical duty to provide the advice. He may subjectively feel that he is acting as counsel and not employee but that will not be material if objectively the advice sought of him and given by him would not be asked of an external lawyer if the corporate body had no in-house counsel and if the advice would not be regarded by external counsel as falling within the ordinary scope of his practice.

128 The majority recommendation would require consequential changes to the Legal Profession Act so as to provide an option for in-house counsel who are advocates and solicitors of the Supreme Court of Singapore to opt in and be subject to the Legal Profession (Professional Conduct) Rules. Presently, in-house counsel who are advocates and solicitors of the Supreme Court of Singapore are not subject to those Rules unless they hold a practising certificate. The fact that advocates and solicitors are officers of the court is insufficient guarantee of the capacity to act independently and the majority recommendation is that the Legal Profession Act should be amended to allow in-house counsel to obtain a limited practising certificate and hence to be subject to the Rules.

129 The recommendation to extend legal advice privilege would leave an area of judicial determination since the elements of confidentiality and independence are contextual. This contrasts sharply with the Canadian rule which is even more open-ended and which we noted above; since according to that rule, whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

130 A minority of us finds it seriously objectionable that the restrictions designed to guarantee independence of the in-house counsel giving legal advice may be hard to administer or that there may be not a few doubts as to their exact scope.

131 The criticism advanced by the minority has some validity. However, a majority of us feels that the proposed reform merely affords the corporate client an option. The corporate client has to make a judgment whether the option will be beneficial to the corporate client in any case. The real reference point is that if privilege did not extend to communications with in-house counsel, the corporate client would always have to retain external counsel if it wished to claim the privilege. The merit in the recommendation is that it would confer an advantage of cautious extension of the privilege without taking away the client's safety net. The cautious extension would ensure that on no account would a "corporation … be permitted to insulate its files from discovery simply by sending a '*cc*' to in-house counsel."[117] Or render everything said or done at that meeting privileged by having in-house counsel attend it.[118] It would only confer the advantage of privilege if the client desired it and set about ensuring both confidentiality and independence. Where there are reasonable doubts as to either confidentiality or independence, it would be open to the corporate client to retain external counsel for advice.

132 A majority of us also recommends that where advice is sought and obtained from in-house counsel, third party communications for the dominant purpose of seeking and obtaining that advice will not be privileged. In such instances, there are few

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117 See *United States Postal Service v Phelps Dodge Refining Corp* 852 F Supp 156 at 163 (EDNY 1994).

118 *Miner v Kendall* 1997 WL 695587 (D Kan 1997).

considerations of efficiency and effective reliance on the rule of law to overcome or outweigh the risks of abuse of privilege and the costs to justice of non disclosure. The rationale for seeking legal advice from in-house counsel is that there will be no need to incur the costs of educating external counsel in the matters which call for legal advice, including the preparation of third party reports. To be faithful to this rationale, the privilege should only to extend to direct communications between the directing mind of the corporate client and in-house counsel, including such reports as in-house counsel may call for and as the client may authorise.