IS THERE A QUALIFIED PRIVILEGE AT COMMON LAW FOR NON-TRADITIONAL CLASSES OF CONFIDENTIAL COMMUNICATIONS? MAYBE

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Until fairly recently, the common law has established a rather rigid set of classifications of communications which will ordinarily attract a privilege and, in order to be excluded from evidence, confidential communications usually have to fall within these established classes. The classes of communications traditionally recognized by the common law as privileged are communications between a solicitor and client and between a husband and wife, without-prejudice communications for the purpose of settlement and communications dealing with matters of national security or other interests of state. There is no general privilege protecting communications given in confidence.[1]

In 1975 the seminal case of *Slavutych* v. *Baker*[2] introduced a new flexibility by establishing the principle that privilege may attach to non-traditional classes of confidential communications in certain circumstances. In *Slavutych* the courts considered whether Wigmore's four fundamental conditions[3] required to establish privilege were satisfied by the communication in question and found that the document, prepared in confidence but not falling within the traditional classifications, was privileged and thus inadmissible in evidence. The four conditions set out by Wigmore as necessary for the establishment of a privilege are that:

(1) the communications must originate in a *confidence* that they will not be disclosed;

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1 *R.* v. *Fosty* (1989), 46 C.C.C. (3d) 449, [1989] 2 W.W.R. 193 at p. 203, 55 Man. R. (2d) 289 (C.A.), leave to appeal to S.C.C. granted 48 C.C.C. (3d) vi, 63 Man. R. (2d) 240*n*, 103 N.R. 316*n*; *Alfred Crompton Amusement Machines Ltd.* v. *Customs & Excise Com'rs (No.2)*, [1974] A.C. 405.

2 (1975), 55 D.L.R. (3d) 224, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620.

3 8 Wigmore on Evidence, 3rd ed. (McNaughton Rev., 1961), para. 2285.

(2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

(3) *the relation* must be one which in the opinion of the community ought to be sedulously *fostered*, and

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

Subsequent judicial consideration of *Slavutych* has frequently given rise to the application of a qualified privilege at common law which holds that a non-traditional confidential communication which satisfies the four Wigmore conditions is privileged and thus inadmissible in evidence.

The courts of the various provinces have taken different approaches to the application of *Slavutych*. Perhaps the broadest approach to the application of *Slavutych* is that is has "left it open to the courts, in the exercise of their judicial discretion, to recognize and give effect to new categories of privilege on a case-by-case basis".[4]

A case claiming a qualified privilege at common law to exclude a non-traditional confidential communication has again made its way to the Supreme Court of Canada: *Moysa* v. *Alberta (Labour Relations Board)*.[5] In this case, a journalist claimed that she had the right to protect her sources of information on the basis of a qualified privilege at common law established by *Slavutych*. In considering the appeal, the Supreme Court of Canada declined to decide whether or not there was such a qualified privilege at common law, and simply stated that: "Even if such a qualified testimonial privilege exists in Canada this appeal must be dismissed as the appellant here does not fall within any of the

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4 This approach was submitted by the appellant to the Ontario Court of Appeal in *R.* v. *S. (R.J.*) (1985), 19 C.C.C. (3d) 115, 45 C.R. (3d) 161 at p. 177, leave to appeal to the S.C.C. refused 16 N.R. 266*n*.

5 (1989), 60 D.L.R. (4th) 1, [1989] 1 S.C.R. 1572, 89 C.L.L.C. ¶14,028.

possible tests which have been proposed as establishing the conditions necessary to justify a refusal to testify".[5a]

This hesitancy of the Supreme Court of Canada in *Moysa* to give approval to the qualified privilege claimed has injected some doubt as to whether the qualified privilege exists. In view of *Moysa* it is difficult to assess whether non-traditional confidential communications can be excluded from evidence on the basis of a qualified privilege at common law; the Supreme Court of Canada has left us with the answer "maybe".

This article will briefly review the state of the law with respect to privileged communications prior to *Slavutych*; take a closer look at the decision of Spence J. in *Slavutych*, and overview the different approaches taken by the provincial courts to the application of *Slavutych*. It will conclude with a brief review of the decisions in *Moysa*.

2. Pre-Slavutych v. Baker Approach to Confidential Communications

Although the common law has developed to create traditional classes of communications which are privileged, the courts have been increasingly pressed by litigants to extend the application of privilege to exclude non-traditional communications made in confidence. These cases usually present circumstances where the court would be inclined to be sympathetic to the claim for privilege, for example, with respect to communications between physicians and patients and between priests and penitents. In response to these pressures, the English courts, in several cases, have purported to exercise their judicial discretion to exclude confidential communications if the court concluded that more harm than good would result from compelling the disclosure of the evidence. This application of judicial discretion was in some cases stated to be a recognition of new claims to privilege.[6] In *Attorney-General* v. *Clough* Lord Parker C.J. stated:[7]

[5a] *Ibid*., at p. 12, 233 C.L.L.C., *per* Sopinka J.

[6] See John Sopinka and Sidney N. Lederman, *The Law of Evidence in Civil Cases*, (Toronto, Butterworths, 1974), pp. 217-19.

[7] [1963] 1 All E.R. 420 (Q.B.).

> As I have said, it seems to me that certain classes of communication have been recognized as privileged. In the rest of a vast area, it seems to me that it must be for the court to ascertain what public policy demands. If, in the circumstances of any particular case, it became clear that public policy demanded a recognition of some claim to privilege, then, as I conceive, it would be the duty of this court to give due effect to public policy and recognize the claim.

A similar exercise of judicial discretion has been made by some Canadian courts, as exemplified by *Cronkwright* v. *Cronkwright*.[8] In this case, an Anglican clergyman sought to be exempted from giving evidence as he had acted to effect a reconciliation of the parties to the divorce action. The court recognized that the information gained by the clergyman was gained while he was in a position of confidence but held that the communications were not privileged. Wright J. stated that he would not order the clergyman to answer the questions put to him "not by recognizing a legal right or a status, but in the exercise of my discretion to refuse to receive evidence otherwise admissible".[9]

3. Slavutych v. Baker

In *Slavutych*, the issue of when the law precludes the admission of evidence simply because its source is confidential was brought squarely into issue.[10] In this case, a University professor, Slavutych, was invited to fill out a "tenure form sheet" commenting on his colleague. The head of Slavutych's department had indicated to him that the tenure form sheet would be held in confidence and destroyed after its use. On this basis, Slavutych completed the tenure form sheet with comments that were highly derogatory of his colleague. University officials then took steps to have Slavutych dismissed from his position on grounds that included the comments that he had made in the tenure form sheet.

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8 (1970), 14 D.L.R. (3d) 168, [1970] 3 O.R. (2d) 784, 2 R.F.L. 241, (H.C.J.); see also *Dembie* v. *Dembie* (1963), 21 R.F.L. 46 (Ont. S.C.).

9 *Ibid*., at p. 170 D.L.R.

10 *Per* Sinclair J.A. in *Slavutych* v. *Baker* (1973), 41 D.L.R. (3d) 71 *sub nom. Slavutych* v. *Board of Governors of University of Alberta*, [1973] 5 W.W.R. 723 at p. 729 (Alta. C.A.).

An application was brought to quash the decision of the arbitration board which had ordered his dismissal on the basis that the confidential tenure form sheet could not be used in evidence against him. The courts were asked to consider whether the arbitrators misdirected themselves or otherwise erred in law in considering the confidential document. Sinclair J.A. characterized the issue before the Alberta Court of Appeal as: "In what circumstances does the law preclude the admission of evidence simply because its source is confidential?"[11] He made reference to Wigmore's four conditions and further stated:[12] "It is clear, nevertheless, that the types of evidence to which privilege will be ascribed have not been settled once and for all." He then quoted the above set-out passage of Lord Parker C.J. in *Attorney-General* v. *Clough*,[13] and stated:[14]

> To adopt the words of Lord Parker C.J. in the circumstances of the present case, is it clear that public policy demands a recognition of the appellant's claim to privilege because the tenure form sheet was secured from him on a confidential basis?

Sinclair J.A. concluded that a privilege should not be extended to the tenure form sheet as it could not be supported on the grounds of public policy. He further concluded that the comments made by Slavutych in the tenure form sheet were unsupported and not made in good faith. The appeal was dismissed.

The matter was further appealed to the Supreme Court of Canada, and the judgment of the court was delivered by Spence J. He noted that Sinclair J.A. had directed himself to Wigmore's four conditions and further noted his conclusion that an extension of the privilege could not be supported on the grounds of public policy. Spence J. then stated that: "On the other hand, if the matter be considered on the question of privilege, I am not of the same view."[15] He proceeded to consider whether the conditions set out by Wigmore were met and, having concluded that they were, stated that: " . . . under the

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11 *Ibid*.
12 *Ibid*., at p. 730 W.W.R.
13 See, *supra*, footnote 7.
14 *Supra*, footnote 10, at p. 731 W.W.R.
15 *Supra*, footnote 2, at p. 260 S.C.R.

doctrine of privilege as so ably considered in Wigmore the confidential document should have been ruled inadmissible."[16]

Spence J. went on to render his comments *obiter dicta*, however, by holding that the tenure form sheet should have been excluded from evidence on the basis of the equitable principle of breach of confidence. He stated this principle to be that: " '. . . a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication . . .'".[17]

The Supreme Court of Canada quashed the decision of the arbitration board and ended the matter by concluding that no charge could be based on the tenure form sheet.

4. Application of Slavutych v. Baker[18]

Slavutych has perhaps been best received in Western Canada where it has been applied as authority to exclude evidence of non-traditional confidential communications where Wigmore's four conditions are met. Moreover, the Alberta Court of Appeal has also held that communications which fall within the traditional classifications of privilege must be re-examined to assess whether they satisfy Wigmore's four conditions.

In *Strass* v. *Goldsack*[19] the plaintiff/appellant in the motor vehicle accident litigation gave a statement to the adjuster of the third party insurer. The plaintiff/appellant sought production of the statement; the insurer claimed that it was a privileged confidential communication. Clements J.A., writing for the majority of the

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16 *Ibid*., at pp. 261-2.

17 *Ibid*., at p. 262.

18 I am grateful to Peter Sim for his article, "Privilege and Confidentiality: The Impact of Slavutych v. Baker on the Canadian Law Evidence" (1984-85), 5 Adv. Q. 357 at pp. 357-9, for the many of the ideas expressed.

19 (1975), 58 D.L.R. (3d) 397, [1975] 6 W.W.R. 155 (Alta. C.A.).

court, referred to Wigmore's four conditions as having received the attention of the Supreme Court of Canada in *Slavutych*.[20] He stated:[21]

> To me, the sanction given to these four conditions as the test for a claim of privilege provides a most useful and helpful rationale which should serve well the general public interest in determining such claims. Not only does it provide a rationale: it also leaves room by the third and fourth conditions for adaptation of the principle to changing needs and conditions of society which is essential to the proper function of the common law. Former decisions on privileged documents must now derive their authority or guidance from their apparent conformity to the conditions, and on this view many must be passed over.

The Alberta courts have continued to apply the four conditions of Wigmore, citing *Slavutych* as authority, when considering claims of privilege for confidential communications.

The British Columbia courts have also been consistent in their application of Wigmore's four conditions, on the authority of *Slavutych*, in considering claims of privilege for non-traditional confidential communications. A recent decision of the British Columbia Court of Appeal indicates that the British Columbia courts have extrapolated from Wigmore's four conditions to formulate a "test" of when the privilege should be found to exist. In *Hacock* v. *Vallaincourt* statements made to a city official investigating the conduct of city employees were claimed to be privileged. Hinkson J.A., writing for the court, referred to the court's earlier decision in *Bergwitz* v. *Fast* wherein Taggart J.A. had stated:[22]

> I think that the rules referred to by Spence J. at p. 260 of the *Slavutych* judgment, while forming useful guides when considering whether a claim of privilege such as the one advanced here should be acceded to, ought not to dominate the judges' consideration of that request. Rather . . . one should consider whether "the public interest in the proper administration

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20 *Ibid*., at p. 59 W.W.R.

21 *Ibid*., at p. 160 W.W.R.

22 *Hacock* v. *Vallaincourt* (1989), 63 D.L.R. (4th) 205, 40 B.C.L.R. (2d) 83 at p. 86 (C.A.), quoting Taggart J.A. in *Bergwitz* v. *Fast* (1980), 108 D.L.R. (3d) 732, 18 B.C.L.R. 368 at p. 369 (C.A.).

> of justice outweighs in importance any public interests that might be protected by upholding the claim for privilege.

Hinkson J.A. concluded that the test outlined by Taggart J.A. was the one to be applied.

The Saskatchewan courts have also been consistent in applying Wigmore's four conditions on the authority of *Slavutych* to assess whether the confidential communications in issue should be excluded as privileged.[23]

Other courts have been more hesitant to apply *Slavutych* as authority to extend the application of privilege to non-traditional confidential communications. In the recent case of *R.* v. *Fosty*, Twaddle J.A., writing for the Manitoba Court of Appeal, applied Wigmore's four conditions in assessing whether a privilege attached to the confidential communications, but warned against the adoption of this approach. He stated:[24]

> For the purpose of deciding this case, I am willing to consider whether, on the facts, the accused Gruenke's statements meet [Wigmore's] four conditions. I will do so, however, without deciding the extent to which Wigmore's principle is part of the law of Canada. I am not satisfied that the obiter comments of Spence J., found in his judgment delivered for the Supreme Court of Canada in *Slavutych* . . . were intended as an acceptance of Wigmore's principle for all purposes, including the exclusion of confidential communications, otherwise admissible, from evidence in criminal trials. I share the view expressed by Professor McLachlin . . .
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> > ". . . while Spence J. approved Wigmore's approach, his reasons do not evince an awareness that the Court was changing the law of evidence on privilege. While this omission is not crucial in itself, it gives rise to doubts of how thoroughly the issue was canvassed and how carefully it was considered."
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> Even if the Wigmore conditions apply, it is important to note that "confidentiality" alone is insufficient to justify a claim to privilege.

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23 *Finley* v. *University Hospital Board* (1986), 33 D.L.R. (4th) 200, [1987] 2 W.W.R. 40, 14 C.P.C. (2d) 87 (Sask. Q.B.); *Sambasivam* v. *Sambasivam* (1988), 73 Sask. R. 23 (C.A.), *per* Tallis J.A.

24 *Finley* v. *University Hosptial Board* (1986), 33 D.L.R. (4th) 200, [1987] 2 W.W.R. 40, 14 C.P.C. (2d) 87 (Sask. Q.B.); *Sambasivam* v. *Sambasivam* (1988), 73 Sask. R. 23 (C.A.), *per* Tallis J.A.

The Ontario courts have in many cases applied Wigmore's four conditions on the authority of *Slavutych* in assessing whether a privilege applied to non-traditional confidential communications,[25] but have also sounded a warning against applying *Slavutych* to extend the privilege applicable to confidential communications from their traditional classifications. For example, in the 1987 case of *Pryslak* v. *Anderson*[26] Killeen L.J.S.C. noted that *Slavutych* was in fact decided on the ground of breach of confidence and stated:[27]

> I make this comment about the true rationale for the holding in *Slavutych* because there has been considerable controversy about the reach of this decision in the later case law and academic literature. In my view, Canadian trial Courts should be wary about using the Wigmore doctrine as a basis for creating or identifying new situations of privilege bearing in mind that the Supreme Court has not utilized it in any later case as a basis for analyzing privilege issues . . . .

However, Killeen L.J. S.C. went on to state that: "Spence J's comments on the Wigmore doctrine are binding on me even if they were made obiter",[28] and proceeded to apply Wigmore's four conditions.

It should be noted that, although the courts of the various provinces have fairly consistently applied *Slavutych* and considered whether Wigmore's four conditions were met with respect to non-traditional confidential communications (albeit in some cases grudgingly), the application of *Slavutych* has not, in effect, significantly broadened the classes of confidential communications considered to be privileged. In all but a very few cases the courts have ultimately concluded that Wigmore's four conditions were not met and that the non-traditional confidential communication were therefore admissible as evidence.

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25 See *R.* v. *S. (R.J.)* (1985), 19 C.C.C. (3d) 115, 45 C.R. (3d) 161 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused 61 N.R. 266*n.*

26 *Pyrslak* v. *Anderson* (1987), 57 O.R. (2d) 788, 15 C.P.C. (2d) 79 at p. 83 (H.C.J.).

27 *Ibid*., at p. 84 C.P.C.

28 *Ibid*., at p. 85 C.P.C.

A privilege has been extended to communications with a mediator in a domestic lawsuit,[29] confidential communications given in a peer-evaluation process[30] and documents of a credentials committee investigating the conduct of a doctor.[31]

The courts have found that claims to privilege with respect to the following confidential communications did not satisfy Wigmore's four conditions: documents gathered by a hospital in the course of inquiring into an allegation of medical malpractice,[32] a report prepared by a committee of the College of Dental Surgeons investigating a complaint against a dentist,[33] a special nursing audit committee report,[34] documents evidencing complaints made against a psychiatrist in the possession of the College of Physicians and Surgeons,[35] statements given to investigators of the Toronto Stock Exchange,[36] internal police reports,[37] a videotape of a family counseling session,[38] and a confession made to a church pastor.[39]

5. Moysa v. Alberta (Labour Relations Board)[40]

In *Moysa*, a reporter had written an article about efforts to unionize the employees of the Hudson's Bay Company and, within a week of the article's publication, a number of these employees were dismissed. The union claimed that the Hudson's Bay Company had engaged in unfair labour practices and a hearing before the Alberta Labour Relations Board was commenced. The reporter was summoned to appear and was asked to state who she had spoken with prior to writing the article. The reporter claimed that these

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29 *Sambasivam* v. *Sambasivam, supra*, footnote 23, *per* Tallis J.A.
30 *University of Guelph* v. *Canadian Assn. of University Teachers* (1980), 112 D.L.R. (3d) 692, 29 O.R. (2d) 312 (H.C.J.).
31 *Smith* v. *Royal Columbian Hospital* (1981), 123 D.L.R. (3d) 723, 29 B.C.L.R. 99 (S.C.).
32 *Finley* v. *University Hospital Board, supra*, footnote 23.
33 *Bergwitz* v. *Fast, supra*, footnote 22.
34 *British Columbia (Attorney General)* v. *Messier* (1984), 8 D.L.R. (4th) 306, 53 B.C.L.R. 84 (S.C.).
35 *F.* v. *a Psychiatrist* (1984), 54 B.C.L.R. 319 (S.C.).
36 *Merrill Lynch* v. *Granove*, [1985] 5 W.W.R. 589, 35 Man. R. (2d) 194 (C.A.).
37 *Basse* v. *Toronto Star Newspapers Ltd.* (1985), 1 C.P.C. (2d) 105 (Ont. S.C., Master).
38 *R.* v. *S. (R.J.), supra*, footnote 25.
39 *R.* v. *Fosty,, supra*, footnote 1.
40 (1986), 28 D.L.R. (4th) 140, 71 A.R. 70, 45 Alta. L.R. (2d) 37 at p. 42 (Q.B.).

confidential communications were the subject of a common law privilege and relied on *Slavutych* as establishing the privilege.

In assessing this claim to privilege, McCallum J. of the Alberta Court of Queen's Bench appears to have confused the principles set out in *Slavutych*, and cites Wigmore's four conditions as establishing that: "The presence of these factors gives rise to the equitable principle of breach of confidence and the court (in *Slavutych*) applied this principle in quashing the decision of the arbitration board."[41]

McCallum J. then proceeded to distinguish *Slavutych* on the basis that:[42]

> . . . the party who abused the confidentiality in the *Slavutych* case was the University of Alberta, who was in fact the party who had made the firm commitment that the confidentiality should be absolute. In this case, of course, it is the Edmonton Journal reporter who presumably made the promise of confidentiality, but she seeks to honour that promise rather than to use the information against the source, so the equitable principle of breach of confidence has no application to our case.

McCallum J. went on to consider whether a claim to privilege could be supported by s. 2 of the *Canadian Charter of Rights and Freedoms* and concluded that: "The applicant has no privilege, either at common law or under the Charter, to refuse to testify before the board and, accordingly, her application for certiorari is dismissed.[43]

The case was appealed to the Alberta Court of Appeal and McClung J.A., writing for the court, simply stated that:[44]

> We agree with the reasoning and conclusion of the Chamber Judge that there is here no common law privilege, qualified or absolute, marking the relationship of journalist and source which would excuse the appellant

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41 *Ibid*., at p. 42 Alta. L.R.

42 *Ibid*.

43 *Ibid*., at p. 48 Alta. L.R.

44 *Moysa* v. *Alberta (Labour Relations Board)* (1987), 43 D.L.R. (4th) 159*n*, 52 Alta L.R. (2d) 193, 17 C.P.C. (2d) 91 at pp. 92-3 (C.A.).

> from providing relevant evidence and which might involve source disclosure . . .
> We are of the view that the creation of any new category of privilege for reporters and their sources must be of legislative origin.

The case was appealed to the Supreme Court of Canada and the decision of the court was given by Sopinka J.[45] He stated that: "The issue in this case is the right of the appellant, a journalist, to refuse to answer relevant questions in a proceeding before the Alberta Labour Relations Board. The refusal was grounded in part on an alleged right to protect sources of information on the basis of a qualified privilege either at common law or under s. 2*(b)* of the *Canadian Charter of Rights and Freedoms.*"[46]

Sopinka J. noted that the Alberta Labour Relations Board had considered the journalist's argument that a qualified privilege at common law applied to the evidence on the authority of *Slavutych*. The board held that Wigmore's four conditions were not in fact satisfied.

Sopinka J. then stated:[47]

> *Even if such a qualified testimonial privilege exists in Canada* this appeal must be dismissed as the appellant here does not fall within any of the possible tests which have been proposed as establishing the conditions necessary to justify a refusal to testify.
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> . . . the appellant failed to satisfy several of the necessary criteria propounded by Wigmore. Therefore, *even if a qualified form of privilege exists*, the appellant's claim on the facts of this case must fail. [Emphasis added.]

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45 *Moysa* v. *Alberta (Labour Relations Board)* (1989), 60 D.L.R. (4th) 1, [1989] 1 S.C.R. 1572, 89 C.L.L.C. ¶ 14,028.

46 *Ibid*., at pp. 12, 231-2 C.L.L.C.

47 *Ibid*., at p. 12, 233 C.L.L.C.

Sopinka J. then stated that he would not consider the constitutional questions raised in the appeal as the facts of the case did not warrant an answer to the broad and important constitutional questions raised.[48]

Thus, *Moysa* has introduced some uncertainty in considering whether there is a qualified privilege at common law which allows privilege to apply to non-traditional confidential communications. *Slavutych* has frequently been applied to allow an extension of privilege to non-traditional confidential communications, provided that Wigmore's four conditions were met. The recent reticence of the Supreme Court of Canada in *Moysa* to acknowledge this qualified privilege at common law has brought the application of *Slavutych* into question. Is the court retreating from the position taken by Spence J. in *Slavutych*? Has *Slavutych* been inappropriately applied as authority to allow the courts to treat non-traditional confidential communications as privileged where they meet Wigmore's four conditions?

It seems that we will have to wait until the issue is again brought before the Supreme Court of Canada in the hope that the court will then take the opportunity to clarify these issues.

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[48] *Ibid*., at p. 12, 234 C.L.L.C.