

**LITIGATION PRIVILEGE NARROWED BY COURT OF APPEAL:
FOUNDATION OF EXPERT'S OPINION MUST BE DISCLOSED
TO OPPOSING SIDE**

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In *Conceicao Farms Inc. v. Zeneca Group*, 2006 Carswell Ont 4558, heard July 14, 2006, the court of appeal broadened the scope of disclosure with respect to opinions of an expert retained for the purpose of litigation, simultaneously narrowing the scope of litigation privilege which previously applied to information gathered for the purpose of the expert's report.

This decision stemmed from an appeal motion for the production of a 24-page "memorandum", a transcription of a telephone conversation between former counsel for the respondent and an expert he retained on behalf of his client, a conversation that took place several months after the expert had been retained.

The scope of disclosure with respect to opinions of an expert upon examination for discovery is governed by Rule 31.06(3) of the *Ontario Rules of Civil Procedure*, which allows parties to obtain disclosure of findings, opinions and conclusions of an expert retained by the opposite side, except in circumstances where:

1. the findings, opinions and conclusions relating to a matter in issue were formed for the purpose of litigation, and
2. the party who retained the expert undertakes not to call him at trial.

Writing for the court, Justice Gillese relied on previous decisions of the court in the criminal proceedings in *R. v. Stone* and *R v. Chrusz*, where it was held that a witness who offers their expert opinion in a court room should be seen as offering that opinion to the court *and not* to the party that retained the expert. As such, the opposing side must be given access to the foundation of the opinions being proffered and be given an opportunity to test them prior to trial.

Following the recent line of case, *Stone* and *Cruz*, among them, the court carefully distinguished litigation privilege from solicitor-client privilege, noting that there is "nothing sacrosanct" about the former privilege. Justice Gillese concluded at paragraph 66 of his decision, "It is my view that our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert *before* the completion of a report of an expert whose

opinion is going to be used at trial.” Draft and preliminary reports of the expert were deemed subject to production to the opposite side. Any instructions sent to the expert with respect to preparation of his report including materials that were sent for the expert’s review were also held to be producible.

Justice Gillese offered the following test with respect to disclosure of experts’ findings, “if a finding is expressed in a sufficiently coherent manner that it can be used by counsel, then this is a finding that ought to be disclosed.”

This decision suggests that *any written communication* between the party and the expert they retain, which took place before the preparation of that expert’s report is subject to production to the other side. Notably, the decision focused on cases where the expert was going to be called at trial, implicitly leaving future decisions to deal with disclosure issues relating to experts’ findings where the party plans not to call that expert.