Federal Court  Cour fédérale

Date: 20110930

Docket: T-3134-91

Citation: 2011 FC 1102

BETWEEN:

**ALPHEUS BRASS, FLOYD GEORGE,
RALPH THOMAS, RAYMOND CATT,
STEVE YOUNG, WILLIAM JOHN THOMAS,
SAM GEORGE, DORIS GEORGE,
REGINALD WALKER, ROBERT WALKER,
FRANK TURNER, ALBERT PACKO
AND CLARENCE EASTER,
SUING ON THEIR OWN BEHALF
AND ON BEHALF OF
ALL OTHER MEMBERS OF THE
CHEMAWAWIN FIRST NATION, AND THE
CHEMAWAWIN FIRST NATION (NOW
KNOWN AS CHEMAWAWIN CREE NATION)**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

and

THE GOVERNMENT OF MANITOBA

Third Party

REASONS FOR ORDER

LAFRENIÈRE P.

Background

[1] The motions before the Court concerns three files: *Brass et al v HMTQ* (T-3134-91) (brought by the Chemawawin Cree Nation (Chemawawin)), *Ross et al v HMTQ* (T-299-92) (brought by the Opaskwayak Cree Nation (OCN)), and *Mercredi et al v HMTQ* (T-300-92) (brought by the Grand Rapids First Nation (Grand Rapids)). For ease of reference, the proceedings shall be

referred to as *Brass*, *Ross* and *Mercredi* in these reasons. Chemawawin, OCN and Grand Rapids shall jointly be referred to as either the Plaintiffs or the First Nations.

[2] Although the waters have been muddied with an excess of arguments by counsel, the issue at hand is essentially one of the existence and waiver of privilege. During the course of a protracted discovery process, the Plaintiffs came into possession of almost 100 documents alleged to be privileged by the Defendant, Her Majesty the Queen (Canada). Canada maintains that the majority of the documents were inadvertently produced after being included in Schedule I of their Affidavit of Documents. The balance of the documents are said to have been obtained by the Plaintiffs by other, unknown means.

[3] Canada seeks an order for the return of all their privileged documents. The Plaintiffs have in turn brought their own motion for an order requiring Canada to produce a number of other documents over which Canada has claimed privilege and has not produced.

[4] The parties' motions were heard together on common evidence. Consequently, these reasons, with such variations as required to account for particular circumstances applicable to each group of Plaintiffs, will also apply to *Ross* and *Mercredi*, and a copy shall be placed in both files.

[5] For the reasons that follow, I conclude that the Plaintiffs' motions should be dismissed, and that Canada's motions should be allowed in part. In summary, while Canada has failed to properly establish litigation brief or settlement privilege in regards to certain documents produced to the Plaintiffs, all documents subject to solicitor-client privilege should be returned to Canada.

[6] Since it appears that documents were produced by Canada through inadvertence, I also find that there was no waiver of privilege, and certainly no implied waiver, requiring further production of privileged materials. Further, the Plaintiffs cannot rely on their illegitimate possession of privileged documents to justify further production.

[7] An order disposing of the parties' motions, consistent with these reasons, shall be issued in each file.

I. Facts

[8] This case's history is long and, for the purposes of the motions, is divided into two distinct periods. The first is the time period leading up to actual litigation, where the parties were both dealing with the fallout of the Manitoba Rapids Hydro Project. The dispute in the present motions centres on the relationship between the parties, how and if information was shared, and the intent behind the creation of a significant number of documents. The second period began in 1992, when the Plaintiffs filed a claim against Canada. During this time, significant issues arose regarding the production of documents, specifically why privileged documents were produced by Canada to the Plaintiffs, how the Plaintiffs managed to obtain other privileged documents, and whether they should have access to more.

A. 1960- 1992

[9] The genesis of the dispute originated half a century ago. While the basic facts are not contentious, how they should be interpreted is at the crux of the debate. In the 1960s, Manitoba

Hydro undertook to build a dam on the Saskatchewan River. At that time it was known that the dam would cause flooding to reserve land held by Canada for what is now the OCN (previously known as The Pas Indian Band), the Chemawawin and the Mosakahiken Cree Nation (known then as the Moose Lake Indian Band). During construction of the dam, the Province of Manitoba (Manitoba) wanted to extend a provincial highway and run a transmission line through the reserve of the Grand Rapids First Nation (also known as the Misipakisik Cree Nation).

[10] Canada required Manitoba and Manitoba Hydro to enter into compensation agreements with the affected bands for the lands use and the negative effects which flowed from that. These negotiations took place during the early 1960s. The agreements were contained in letters of intent. Canada, acting through the Department of Indian Affairs and Northern Development (DIAND), arranged the necessary expropriations of land and formalized additions to reserves pursuant to the compensation arrangements. In the case of Grand Rapids, some arrangements were made without the involvement of Canada.

[11] Almost immediately after the deal closed, the First Nations involved made it known that they felt the arrangements were not satisfactory and that all the negative effects of the hydro project were not being compensated. In order to seek a better deal, the First Nations secured funding from Canada for, at the very least, research and related activities. A Contribution Agreement outlined the conditions attached to this funding.

[12] Some level of negotiations between the First Nations, Manitoba and Manitoba Hydro took place. The First Nations set up the Special Forebay Committee (SFC) to represent their interests. Its

purpose was to act in a variety of capacities, including negotiation, litigation and the provision of information. At first, Canada had some role in the negotiations, but by the time they broke down was no longer involved.

[13] In May of 1980, the First Nations filed a statement of claim against Manitoba and Manitoba Hydro. Canada was notified by the First Nations in a letter dated May 2, 1980, that Manitoba and Manitoba Hydro intended to file Third Party Claims against Canada.

[14] Around this time, the First Nations obtained legal counsel through Mr. John Wilson, who is the principal affiant for the Plaintiffs in the present motions. In March 1982, Mr. Wilson authored a forma legal opinion received by both the First Nations and Canada. As explained later in these reasons, the parties disagree as to who actually retained him to do so. While indicating that he was retained to institute an action against Manitoba and Manitoba Hydro, Mr. Wilson states that in his legal opinion that: "the Federal Government is without a doubt a responsible party and in all likelihood must be joined as a defendant in the action by the first two defendants on a third party notice…": Exhibit G to the Affidavit of Glenn A. Bloodworth affirmed on September 23, 2009 (Bloodworth Affidavit).

[15] Over this period, there were a number of other indications, via letter, position papers and other communications, that the First Nations considered Canada to be liable. Without avoiding involvement in the affair completely, Canada continued to maintain that it was not liable. For instance, in a letter dated December 23, 1983, the Minister of DIAND responded to concerns recently expressed in a position paper submitted by the First Nations: Bloodworth Affidavit,

Exhibit J. In his letter, the Minister underlined the need for negotiations, designating a member of Parliament, a government lawyer, Mr. Craig Henderson, and Mr. Glenn Bloodworth as federal representatives, who could assist the Bands in bringing resolution to the issue. The Minister also wrote as follows: "Should definitive evidence arise during the negotiations proving a failure by Canada to fulfill its legal obligations, the Federal Government will negotiate a reasonable and just redress with the Forebay Bands". The Minister indicates, however, that he does not believe Canada has an obligation to participate in any ultimate compensation settlement since Canada was not a party to the Hydro project.

[16] Around the time Mr. Wilson's legal opinion was shared, Canada created the Manitoba Northern Flood Agreement Office (later called Manitoba Resource Developments Impact Office) (MRDIO), whose mandate included support to First Nations implementing compensation agreements with third parties.

[17] Three of the First Nations chose to incorporate the SFC on April 6, 1984. Although OCN did not join the incorporation, it remained involved as a member band.

[18] In 1985, the SFC obtained new counsel, Morris Kaufman, and other professionals to advise them, including E.E.Hobbs and Associates (E.E. Hobbs). The principal of E.E. Hobbs was a former DIAND employee.

[19] On May 30, 1985, the SFC asked Canada to "stop the running of time" so that the statute of limitations would not apply to the time then being spent in negotiations. DIAND's Deputy Minister

wrote that Justice Canada had advised that the government could not contractually waive such provisions. However, this should not preclude continuing negotiation: Bloodworth Affidavit, Exhibit N.

[20] Further studies, correspondence and position papers were pursued and exchanged. The theme continued – the First Nations produced reports from consultants and lawyers which said Canada was liable in this matter and failed in its fiduciary duty. The government denied liability, but stated it was committed to supporting the negotiation process. Again, the Minister reiterated that if definite evidence were to arise as Canada's liability, they would investigate and negotiate a resolution. At this time, the government was also producing internal documents – both from lawyers and lay employees – on this issue. Throughout the process, lawyers from the Department of Justice had been providing legal opinions to Canada, their client, having received requests from a range of officials in DIAND. They were also present during meetings with the First Nations and their counsel. The most notable figure was Mr. Craig Henderson, lead counsel from 1980 – 2003, although he was assisted by others, including Ms. Barbara Shields (from 1984-1986). Mr. Ian Gray, with DIAND Legal Services, Ottawa, also provided opinions in the late 1980s and early 1990s.

[21] Eventually, talks with Manitoba and Manitoba Hydro resumed, and new agreements were signed with the Chemawawin, OCN and Grand Rapids in 1990 and 1991. Canada was not directly involved in negotiations at this point. Statements of Claim were filed against Canada shortly thereafter: Chemawawin on December 18, 1991, and OCN and Grand Rapids on February 5, 1992.

Plaintiffs' Interpretation of the Events leading to Litigation

[22] Nearly all the Plaintiffs' evidence relates to the pre-litigation period. As stated earlier, Mr. Wilson, the First Nations' counsel, was the principal affiant. The other witness, Patricia Turner, was the president of the SFC and then Chief of the Misipawik First Nation during the 1980s. Her affidavit adds very little to the account, generally echoing Mr. Wilson's beliefs as to the common interest of the parties and the consequences of Canada's failure to disclose to the First Nations the information promised.

[23] The First Nations and their two deponents characterize this period as one of cooperation between the parties. Mr. Wilson repeatedly states that his understanding was that Canada would share with them all relevant information; in other words, there was no expectation of confidentiality. He suggests that he himself was retained by Canada, which would explain why Canada received a copy of his opinion in 1982. He also notes that all the funding for his retainer and fees were obtained from Canada. In effect, the legal opinion sought for the First Nations had to be shared with Canada.

[24] The Plaintiffs interpret this sharing of factual and legal information to be evidence of the development of a joint strategy, that Canada was a full partner in their negotiations. The Plaintiffs assert that Canada had opened all their files to them. Lawyers met to share opinions. They point to the Minister's commitment that, were it eventually to be established that Canada was legally liable, a resolution of Canada's responsibility would be effected through negotiation rather than litigation.

[25] Oddly, the Plaintiffs' deponents also allege that throughout the time of cooperation, Canada was keeping legal opinions and other relevant facts from them. Their evidence stems from the privileged documents which are at the centre of this motion. The Plaintiffs stress that Canada knew, and complained, about the inadequacy of the deal shortly after its completion without notifying the First Nations. Specifically, they felt that the letters of intent were vague and band counsel was not adequately informed.

[26] The Plaintiffs also believe that the documents they now possess show that during this period Canada was in possession of opinions and briefing notes which indicated it was aware of a fiduciary duty to the First Nations. Despite this, Canada told them that it was not liable – information the First Nations claim they relied on to their detriment.

[27] Finally, the Plaintiffs emphasize that they received funding from Canada as evidence that there was no contemplated litigation. In the words of Patricia Turner, they were not apt to "bite the hand that feeds them".

Canada's Interpretation of the Events leading to Litigation

[28] Canada's principal affiant for this period is Glenn A. Bloodworth, a former employee of DIAND. He occupied various positions in the department, including the positions of Director of what became MRDIO in 1982, and the Director of the Indian Environmental Protection Branch from 1986-1992. Significantly, all of his positions involved flooding issues in Manitoba.

[29] Canada submits that the facts show that 1979 to 1991 was a pre-litigation period when the government acted with the belief that litigation was impending. Canada's motive during this time was two-fold: to help the First Nations come to an adequate agreement and to protect itself from liability. There was thus a dynamic tension: the First Nations continually advised Canada as to their position that the government was liable for flooding damages and Canada refused to accept it. There was no agreement regarding alleged liability.

[30] Mr. Bloodworth states that in order to justify the continued funding pursuant to the Contribution Agreement, the First Nations had to show that they had a legitimate complaint. They provided DIAND with a plan regarding research, investigation and representation, and were required to provide an up-to-date legal opinion. Mr. Wilson was the designated representative of the First Nations. The single legal opinion provided to Canada was on instruction of the First Nations.

[31] Canada also points out that the funding provided for negotiations did not extend to negotiations. This was something the First Nations would have to access through DIAND's head office.

[32] There is a fundamental rift between the parties on the openness of Canada's files. Canada disputes that any promises were made to share all information, including legal opinions. Mr. Bloodworth asserts that there was no expectation of confidentiality or that there would be no restrictions in the sharing of information. As an example, he states that in 1985, when E.E. Hobbs and Associates sought access to DIAND's archives, this access was limited and steps were taken to ensure that legal opinions and confidential information were not made available: Bloodworth

Affidavit, para. 46. He further notes that no Department of Justice files were made available to the Plaintiffs and that a former deputy minister informed the SFC that such opinions were for DIAND's own information. Mr. Bloodworth maintains that privileged documents cannot be released without the consent of the client – the upper echelons of management within DIAND.

[33] In short, the government characterizes its relationship with the First Nations in a much different manner than do the Plaintiffs. Canada denies that there was any explicit fiduciary duty in relation to this issue. Any obligations were simply related to the fact that reserve lands had been negatively impacted and the government had programs to assist First Nations in dealing with those impacts and in securing compensation.

B. 1992 – Present

[34] Litigation was commenced against Canada by Chemawawin in December 1991, followed by OCN and Grand Rapids in February 1992. Almost twenty years have passed and the parties are still at the discovery stage. A number of procedural events have transpired, including the threat of dismissal for delay. In fact, the proceedings were dismissed in December 1998, but reinstated by the Court of Appeal in March 2000. Relevant to this motion, however, are the events surrounding the production of documents. Almost all the evidence as to the events of this post-litigation period are found in the affidavit of Mr. André Bertrand, case manager with the DIAND Litigation Management and Resolution Branch (LMRB) who has been assigned to these files since April 2008.

[35] A brief overview of the history of documentary discovery in the proceedings is required to place the parties' motions in context.

[36] In *Brass*, affidavits of documents were sworn in 1997 and 1998. *Ross* and *Mercredi*, which were handled by different counsel, had a slower start. Discovery of documents did not begin until 2000. The Plaintiffs' affidavits of documents in *Mercredi* and *Ross* were served on Canada on December 7, 2001. Copies of documents were included in the Plaintiffs' Schedule I throughout the summer and fall of 2002. Affidavits of documents for these two matters were served by Canada on the Plaintiffs on July 18, 2002, and copies of documents from Schedule I were provided on September 26, 2002. Examinations for discovery were only conducted in *Ross*, running from 2002 to 2005.

[37] In 2004, Mr. Schachter took over as counsel of record in both *Ross* and *Mercredi*.

[38] In January 2005, the Plaintiffs served unsworn Amended Affidavits of Documents for both matters. Canada swore supplementary affidavits in both matters on February 24 and 25, 2005, and served the Plaintiffs on March 30, 2005. Copies of documents in Schedule 1 were provided electronically and in hard copy.

[39] Meanwhile, in *Brass*, actual production of documents did not occur until June, 2004, when Canada received the "Chemawawin Document Record". At that time, counsel for the Plaintiffs advised that over 300 of the documents had gone missing, at least two of which appeared to contain

privileged material belonging to Canada. Another document, not included in counsel's letter, also appeared privileged. This is discussed in greater detail immediately below.

[40] From 2004 to 2006, no active steps were taken in *Ross and Mercredi* while settlement discussions were being pursued. In *Brass*, a stay of proceedings was in effect from 2000 to 2006 for similar reasons. On September 22, 2006, Canada advised that it saw no further basis to discuss settlement.

[41] In March 2007, Mark Underhill assumed conduct of the *Brass* file from previous counsel, Jack London, and advised Canada that his clients wanted to proceed expeditiously.

[42] In May 2007, the Plaintiffs all agreed to waive the implied undertakings rule so that relevant documents disclosed by Canada in one case could be shared with all. That same month, the Plaintiffs in *Brass* asked for production of Schedule I documents from Canada for the first time. Same was provided electronically in October 2007 and in hard copy in November 2007.

[43] An Amended Statement of Claim was filed in *Mercredi* on November 21, 2007 (which Canada contested), and in *Ross* on November 18, 2008 (which Canada did not contest). On December 3, 2008, Canada advised that it planned to file a motion for summary judgment based on latches and the expiration of the limitation period. This was the catalyst for the present motions.

[44] During a case management conference on December 16, 2008, it was determined that Canada's motion for summary judgment could not be heard until an updated list of privileged

documents was provided by Canada and the Plaintiffs were provided an opportunity to raise any objection. Canada reviewed its privileged documents in Schedule II and moved some to Schedule I (unprivileged) with redactions, serving the unsworn affidavits to the Plaintiffs on March 19, 2009.

[45] On June 3, 2009, the Plaintiffs in both *Mercredi* and *Ross* filed a notice of motion to compel documents. The Plaintiffs in *Brass* did the same on August 6, 2009.

[46] On September 24, 2009, Canada filed an amended Affidavit of Documents to make clear all the documents over which they claimed privilege.

Discovery That Privileged Documents Were Included in Schedule I

[47] Upon service of the Plaintiffs' motions, Canada went on to review the documents in Schedule I and discovered that some of the documents contained therein were covered by privilege, yet had been produced. All but six were included in their original Affidavit of Documents, sworn in 2002. Having already made a phone call, counsel for Canada wrote to counsel for *Mercredi* and *Ross* on July 17, 2009, requesting their return. The Plaintiffs refused, denying that any privilege was attached and alleging that, to the extent there was, it had been waived.

[48] On conducting a similar privilege review in relation to the *Brass* files, Canada confirmed that those Plaintiffs were also in possession of several privileged documents inadvertently included on their Schedule I list. Counsel wrote asking for their return on July 29, 2009.

[49] Canada filed the present motions seeking a declaration that the documents in question were privileged and requiring their return in respect of all the files.

Documents Not Disclosed Yet in the Plaintiffs' Possession

[50] In addition to the above documents, there were some documents belonging to Canada which the Plaintiffs obtained despite the fact that they had not been produced on discovery. The first indication of this appears to be when production was requested in *Brass* in 2004.

[51] Responding to a letter discussing an upcoming meeting, counsel for Canada wrote on May 13, 2004 expressing concern that they had not received the documents in Schedule I. Counsel also noted that the Plaintiffs had referenced a document authored by Caroline Marion dated July 25, 1991, and entitled "Proposed Departmental Position – Grand Rapids Forebay" (Marion Paper), which was included in the Plaintiffs' Schedule of Documents, but not in any of the affidavits from Canada. Mr. Bloodworth asserts in his affidavit that this had been authored by a regional employee in response to settlement proposals which had been submitted by the Chemawawin and Masakahiken at the time. He also notes that to his knowledge the position never received approval from the Deputy or the Minister.

[52] Counsel for Canada asked for a copy of the document, concerned that it might be privileged. In a phone conversation on May 18, 2004, Mr. London, counsel at the time, told her he did not know how it was obtained. Canada's counsel left on early maternity leave in July 2004, and the issue was not resolved.

[53] At the end of 2006, the Marion Paper came up again at a meeting, where counsel representing all of the Plaintiffs were present. Again, Mr. London denied knowing how it was obtained.

[54] The debate continued into 2008, after Mark Underhill had assumed conduct of the *Brass* file. It came to Canada's attention that the Plaintiffs in *Brass* had another privileged document when Mr. Underhill wrote to advise that he believed many of the documents in Schedule I were not privileged: Bertrand Affidavit, Exhibit Q. Further, Mr. Underhill indicated that privilege had been waived over a number of documents that would otherwise be protected. He referred to a summary of legal opinions which described legal opinions by various Justice and First Nations lawyers and maintained that Canada had waived privilege by making the substance of these opinions known. He went on to reason that, notwithstanding that document, the substance of these opinions had also been disclosed in other documents produced during discovery and, therefore, the full opinion had to be produced in either case. Finally, Mr. Underhill noted that he was in possession of two opinions not in Schedule II of Canada's Affidavit of Documents, suggesting it was incomplete. One opinion was that of Ian Gray, a government lawyer.

[55] Canada responded immediately, requesting clarification as to the documents described and how they came to be in the possession of the Plaintiffs. Counsel reminded the Plaintiffs that privilege was claimed over the Marion Paper in the other two matters and that Jack London had already been asked how he came to have it.

[56] Mr. Underhill wrote to confirm that the legal opinions were "stand alone" and that he did not know how it, or the other documents, had come into the Plaintiffs' possession. He also later confirmed that the summary document had no production number and provided it, with advice to his client redacted, to counsel for Canada.

[57] Once the motion to produce documents were filed in June of 2009, the Plaintiffs attached the entire Marion Paper and the summary of legal opinions to their motion records. Canada again wrote each party, noting that they had never seen those documents together at any time. Again, clarification was sought as to how the documents had been obtained. No answer was forthcoming.

II. Documentary Evidence in this Case

A. Generally

[58] The volume of documents in these proceedings is substantial information. According to Mr. Bertrand, over 6,000 documents have been collected in the database. This process is coordinated by LMRB that retains researchers to help counsel preparing documents for litigation. Mr. Bertrand discusses in his affidavit the logistical difficulties in doing this. He cannot determine how it was that privileged documents came to the Plaintiffs – whether there was a flawed review or problem in implementing it. Mr. Bertrand is adamant that disclosure of the privileged documents was not voluntary and that an LMRB case manager swearing an affidavit of documents would not have the authority to waive privilege in any event. Even a Justice Lawyer would need approval from the upper echelons of DIAND.

B. Documents at Issue in the Motions

[59] There are two principal sets of documents at issue in this motion. The first consists of documents which are already in the possession of the Plaintiffs. There are approximately 96 which Canada asserts are privileged, or partly so, for a variety of reasons and which they seek to be returned. As discussed above, most were included in Schedule I and produced by Canada, allegedly through inadvertence. The others were obtained by means which remain undisclosed by the Plaintiffs.

[60] The second set of documents is not yet in the Plaintiffs' possession. The Plaintiffs, on the basis of documents already produced, and now claimed as privileged, seek further documents from Canada which they allege were wrongly kept from them during the alleged cooperation period.

[61] In both cases, some of the documents consist of legal opinions and communications between Justice Canada and DIAND officials. There are also references to such opinions in briefings authored by DIAND employees and confidential internal documents which discuss the relevant events, negotiations and settlement proposals and Canada's potential liability..

[62] Most of the documents were created before the commencement of litigation.

III. Issues

[63] This motion engages two major questions:

1) Are the documents at issue privileged?

2) If they are, was there a waiver of privilege by Canada?

IV. Analysis

A. Are the Documents Privileged?

[64] Canada claims that all of the documents inadvertently produced and requested by the Plaintiffs are protected by solicitor-client privilege, litigation privilege and/or settlement privilege. Each assertion of privilege must be assessed separately.

Solicitor-Client Privilege

[65] This privilege applies to any communication so long as it: (i) is a communication between solicitor and client; (ii) entails seeking or giving legal advice; and (iii) is intended to be confidential by the parties (*Solosky v Canada* (1979) [1980] 1 SCR 821 (SCC) at 837).

[66] Solicitor-client privilege is "sacrosanct". It is trite law at this point that the privilege has gone beyond a mere rule of evidence to become a substantive rule. The extent and rationale of this rule was discussed by the Federal Court of Appeal in *Stevens v Canada (Prime Minister)* [1998] 4 FC 89 FCJ No 794 (QL) (CA), citing to the leading decisions in *Solosky* and *Descôteaux et al v Mierzwinski* [1982] 1 SCR 860. Speaking for the Court, Justice Linden stated:

> 19 While the privilege has traditionally been regarded as a rule of evidence, it has evolved over the years and, in *Solosky v. The Queen*, the Supreme Court established that it had become a substantive right ... Dickson, J. (as he then was) stated:

Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits.

20 …. In Descôteaux et al. v. Mierzwinski Lamer J. (as he then was) commented on the rationale in Solosky. In Lamer J.'s opinion the Court was not applying a rule of evidence, as there was no litigation or proceeding before a court in that case, but rather the Court was appealing to the doctrine of confidentiality, which was akin to the privilege in litigation. He went on to set out the substantive rule of confidentiality:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

21 Lamer J. outlined a very liberal approach to the scope of the privilege by extending it to include all communications made "within the framework of the solicitor-client relationship." The protection is very strong, as long as the person claiming the

> privilege is within that framework. If it is merely a claim for confidentiality, the protection, though broader, is not absolute, and it must be determined with a different set of criteria.

[67] The above indicates the fundamental importance of this right of confidentiality to the legal system and the relationship between a client and solicitor. Justice Linden went on to confirm that the force of this rule applies as much to the government as it does to a private party:

> 22 A second preliminary matter that must be considered in resolving the problem before us is that the identity of the client is irrelevant to the scope or content of the privilege. Whether the client is an individual, a corporation, or a government body there is no distinction in the degree of protection offered by the rule. In the case of a corporation or government the precise identity of the client may be more problematic, which may give rise to difficulties in determining whether or not the privilege has been waived. Also, it may be difficult to determine whether the privilege has been lost in some cases, where it is unclear who may claim the privilege and who may waive it within a corporate or a government context. However, these difficulties do not affect the substance of the right. Furthermore, I can find no support for the proposition that a government is granted less protection by the law of solicitor-client privilege than would any other client. A government, being a public body, may have a greater incentive to waive the privilege, but the privilege is still its to waive.
> (emphasis added)

[68] This important principle was confirmed in the context of a case involving First Nations in *Samson Indian Nation and Band v Canada* [1995] 2 FC 762 (CA) at paras 9-10:

> The principles relating to solicitor and client privilege... apply regardless of whether the solicitor is in private practice or is a salaried or government solicitor...
>
> ... Contrary to the contention of the respondent Samson Band, solicitor-client privilege, therefore, is not to be interfered with except to the extent absolutely necessary, and any conflict should be resolved in favour of protecting confidentiality.

[69] This privilege attaches to documents as soon as a solicitor-client relationship begins; there is no need for pending litigation. It belongs to the client, not the lawyer: *Smith v Jones* [1999] 1 SCR at para 46.

[70] The Plaintiffs put much emphasis on the confidentiality requirement in privilege. They attempt to argue that there was no express agreement as to confidentiality and the conduct of Canada demonstrated they did not have it. This argument is flawed for several reasons.

[71] First of all, there is a presumption that this type of communication is meant to be confidential. In *Metcalfe v Metcalfe*, 2001 MBCA 35, 198 DLR (4th) 318 (CA), the Manitoba Court of Appeal overturned a motions judge's determination that letters were not protected by privilege as they did not appear to be confidential or pass the test in *Slavutych v Baker et al* [1976] 1 SCR 254. In *Slavutych* the Supreme Court accepted Wigmore's four conditions necessary to the establishment of privilege, which included that the communications must originate in confidence. Helper J.A. outlined the reason for the judge's error:

> 11 In the present case... [t]hese letters are clearly written in the lawyer's professional capacity and clearly offer legal advice relation to the action. The motions judge erred in his conclusion that the communications in question did not come within the *Slavutych* test for confidentiality as certainly solicitor-client privilege attached to them in the circumstances in which they were written.
>
> 12 In Sopinka, S.N. Lederman & A.W. Bryant, the Law of Evidence in Canada, 2d ed. (Toronto: Butterworths, 1999), the authors wrote at p.728, para. 14.42:
> It has long been established that prima facie all four of Wigmore's prerequisites are met in solicitor and client communication.

[72] See also *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860, where Lamer J. (as he then was) stated for the court at pp.870-71:

> It is not necessary to demonstrate the existence of a person's right to have communications with his lawyer kept confidential. Its existence has been affirmed numerous times and was recently reconfirmed by this Court in *Solosky*...

[73] Just as any other solicitor-client relationship, the communications between government lawyers and their client departments are meant to be confidential. On the basis of the evidence of Mr. Bloodworth and Mr. Bertrand, which was not shaken in cross-examination, I am satisfied that documents containing solicitor-client communication, both before and after the litigation was commenced, were intended to be kept confidential, and more importantly, that no decision was ever made, nor was any approval sought, to waive Canada's solicitor-client privilege in these proceedings. I conclude that any disclosure of such information to the Plaintiffs, whether it be through inadvertence or negligence, was not authorized.

[74] The Plaintiffs' own argument that the government withheld evidence from them support Canada's position that it did not share the substance of its legal opinions. There is also no evidence of unrestricted access to such documents being provided the Plaintiffs. In fact, policies were in place to restrict access to privileged documents, and I am satisfied that they were complied with in this case.

[75] Finally, I note that the Plaintiffs cannot have access to legal opinions simply because they were expressed by the client in their own communications to superiors. There is clearly no

involvement of a third party in this situation which might abrogate the privilege. This was unequivocally confirmed by Justice Tremblay-Lamer in *Elomari v Canadian Space Agency* 2006 FC 863:

> 35 With regard to documents containing communications that did not take place between solicitor and client, but rather between public servants of the client department, the Court specified that where communications contain a description or discussion of legal advice sought or to be sought or of legal advice obtained, such communications are also privileged*: Blank v. Canada (Minister of Environment)* 2001 FCA 374, [2001] F.C.J. No. 1844 (C.A.)(QL).

[76] To summarize, those documents which describe communications between a solicitor and its client, DIAND, whether or not they were communicated through staff, are subject to privilege. This is very strong protection which has not been displaced by the Plaintiffs, notwithstanding their disclosure.

Litigation Brief and Settlement Privilege

[77] Litigation brief privilege is of a different breed than solicitor-client privilege. First and foremost, it is not a substantive rule but one simply of evidence. It does not command the same sacred status in our legal system and so must not be as tenaciously protected. The Supreme Court's decisive statement on the fundamental differences between the two is found in *Blank v Canada,* 2006 2 SCR 319. Speaking for the majority, Justice Fish rejected the argument that litigation privilege is really a branch of solicitor-client privilege and thus should enjoy near equal protection:

> 26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege… The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 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.

28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is

> more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> ("Claiming Privilege in the Discovery Process", in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65)
>
> (emphasis added)

[78] Thus, to be protected communications must be made in relation to the litigation at hand. The Court went on to adopt the dominant purpose test rather than simply the substantial purpose test in order to evaluate whether communication was made for such a purpose. This may be slightly more restrictive, favouring disclosure. Unlike solicitor-client privilege, these types of documents do not attract near absolute protection.

[79] The furtherance of settlement privilege requires three things: (a) the litigious dispute must be in existence or within contemplation; (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed, and; (c) the purpose of the communication must be to attempt to effect a settlement (*Bauer Nike Hockey Inc v Tour Hockey* 2003 FCT 451 (TD)). The above analysis on litigation brief privilege is applicable here: to the extent that any of the documents at issue can be protected by privilege, there must be clear indication that the document's purpose was to effect a settlement.

[80] As discussed later in these reasons, I accept that the review of documents by LMRB staff, and presumably by Department of Justice lawyers, was flawed, and that certain privileged documents were inadvertently disclosed to the Plaintiffs. However, it is not enough on a motion to compel the return of specific documents to simply make general assertions that the documents or portions of documents are confidential and privileged. The fact that the documents were released placed the onus on Canada to explain in detail the nature of the document, the context in which it was created, and how confidentiality was maintained. I am unable to ascertain the exact purpose for the creation of disclosed documents in relation to the current litigation and to determine whether each document was intended to be treated confidentially, and had in fact been treated confidentially. More importantly, there is no evidence before the Court from anyone involved in reviewing the documents for privilege before they were released to the Plaintiffs. It is therefore unclear whether a conscious decision was made at the time to release the documents notwithstanding any litigation brief and settlement privilege, or whether the documents were simply disclosed in error. The burden was on Canada to establish with the best evidence that a mistake was made. It has failed to do so. In the circumstances, I conclude that the documents that were disclosed to the Plaintiffs are no longer protected by litigation brief or settlement privilege.

[81] I view the undisclosed documents over which privilege is asserted differently. There is a stringent and specific test to establish litigation brief or settlement privilege with respect to documents. However, I am not prepared to give form priority over substance, at the expense of the very purposes of the privilege for the following reasons.

[82] First, the documents over which privilege is claimed by Canada were produced to the Court for inspection. Second, Canada has maintained confidentiality over the documents and asserted privilege. Third, on their face, the documents clearly contain privileged information. In the circumstances, I am satisfied that privilege is validly asserted by Canada over the undisclosed documents, or parts thereof.

B. Was Privilege Waived?

Inadvertent Production and Waiver

[83] The inadvertent production of documents does not, per se, amount to waiver. More is required. For instance, there must be knowledge and inaction on the part of the person claiming the privilege or evidence of an implied waiver: see *Chapelstone Developments v Canada* 2004 NBCA 96 at para 55. The determination of waiver is made on a case-by-case basis with regard to the particular circumstances of the case. It requires a balancing of competing interests, disclosure and confidentiality.

[84] Jurisprudence has provided several factors which are to guide a court's discretion in determining whether privilege has been waived:

1) the manner in which the documents were released;

2) whether there was a prompt attempt to retrieve the documents after the disclosure was discovered;

3) the timing of the discovery of the disclosure;

4) the timing of the application to recover the documents;

5) the number and nature of the third parties who have become aware of the documents;

6) whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party; and

7) the impact on the fairness, both actual and perceived, of the processes of the Court.

(see *Airst v Airst* (1998) 37 OR (3d) 654 at pp 659-660; *United States of America v Levy* (2001) 103 ACWS (3d) 931 at para 14).

[85] In this motion, most of the documents were released by Canada to the Plaintiffs, although some were acquired by other means. Obviously, privilege that can be established in relation to those documents not produced on discovery, but obtained otherwise, should be maintained.

[86] The documents that were inadvertently released require more detailed consideration with reference to the above factors. Their release occurred in the context of slow moving litigation where discovery and production took place years after the claims and even initial Affidavits of Documents were filed. That there were so many documents created over such a long period of time also favours Canada. Once inadvertent production was discovered, reaction was quick. The time between production and discovery of the mistake was on the longer side, but I again point to the sheer magnitude of documentary evidence and the age and speed of this claim. The explanation for the timing of discovery is also reasonable; Canada was responding to the Plaintiffs' request that they re-examine their schedules of documents.

[87] Most significant is the final two factors listed above: both speak to fairness. The existence of prejudice is an important factor. In this case, Canada bears the prejudice while there is little to the Plaintiffs. This is highlighted by the nature of the communications at issue. Prejudice is more easily made out where the privilege at issue is solicitor-client. This is illustrated by a plethora of case law which speaks to the importance of this privilege and the difficulty in inadvertently waiving it. The weight of the law is clearly on the side of no waiver of solicitor-client privilege where it has been inadvertent (see, for instance, *Chapelstone Developments v Canada, supra,* at para 51; *Royal Bank of Canada v Lee and Fishman* (1992),127 AR 236 (CA) at 240; *Lavallee, Rackel and Heintz v Canada (Attorney General)* [2000] AJ No 159 at para 36 (CA) (QL), aff'd [2002] 3 SCR 209 *Stevens v Canada, supra,* at para 50 (FCA) (QL); and *Metcalfe*, supra at para 14).

[88] Waiver of solicitor-client privilege has also been set apart from waiver of other types of privilege. In *Bennett Mechanical Installations Ltd v Toronto (Metropolitan)* [2001] OTC 345 OJ No 1777 (QL), the Court distinguished the case before it from *Tilley v Hails* [1993] 12 OR (3d) 306 OJ No 333 where no waiver of solicitor-client privilege was found. In *Bennett Mechanical* litigation privilege had been claimed:

> …It is important to note that in *Tilley v. Hails* the document was communication between a solicitor and client for the purpose of seeking legal advice and was therefore the subject of solicitor and client privilege which as Chapnik J. points out, has historically been considered to be fundamental to the administration of justice. However as Carthy J.A. notes in Chrusz supra at page 331, ... "there is nothing "sacrosanct" about [litigation privilege]. It is not rooted as is the solicitor client privilege in the necessity of confidentiality in a relationship."
> At para. 26

[89] Notwithstanding the fact the document in question was not found to be confidential, the Court would have found privilege waived at any rate, focusing on the relevance of the document and the length of time it had been available. Cases which consider solicitor-client privilege, however, bring the discussion back to the overriding need to uphold the relationship at issue. Thus, where there is no clear intention to waive, courts tend to uphold solicitor-client privilege:

> 21 The privilege accorded to communications between solicitor and client has historically been considered to be fundamental to the due administration of justice. I can find no clear or conscious intention on the part of the applicant to waive privilege or to consent to the production of the document.
>
> 22 Where documents have been disclosed without the consent of the client, the court will intervene to order the inspecting party to return all copies of the privileged documents and restrain the use of information contained in or derived therefrom…
> *Tilley v Hails, supra.*

[90] As this passage makes clear and as in *Metcalfe, supra,* the client must authorize waiver:

> 13 The privilege arising out of the solicitor-client relationship belongs to the client, not the solicitor ... . Thus, it is only the client or the client's agent or successor who can waive the solicitor-client privilege... . It has been said that waiver of privilege will only occur where the holder of the privilege knows of the existence of the privilege and demonstrates a clear intention of waiving the privilege ... .
>
> 14 Thus, where there is an inadvertent disclosure of a document covered by solicitor-client privilege, and it is clear that there is no intention of waiver, the case law has generally upheld the privilege over the document itself ...
> *Metcalfe, supra.*

[91] Here, the Plaintiffs have not shown any express intention of Canada – specifically the client DIAND – to waive privilege generally, or at all, over the documents. Canada's witnesses were

unwavering in their testimony that policies prevented the Department of Justice lawyers, and certainly non-lawyer case managers, from waiving privilege over a document. To the extent they did, it would be without the client's permission. Further, there is no evidence that anyone at all consciously agreed to waive privilege.

[92] Finally, the conduct of the Plaintiffs is also relevant. While they assert that they do not believe many of the documents to be privileged, one letter in particular, that from Mr. Underhill to Canada' counsel, indicates otherwise. These documents were, on their face, subject to solicitor-client privilege and the Plaintiffs failed to act appropriately.

Implied Waiver

[93] The Plaintiffs point to the effect of Canada having disclosed parts of the documents and indeed some legal opinions. Their legal argument is that the effect of disclosing privileged material in part is to render all of it subject to scrutiny. There is no such thing as partial protection.

[94] However, the Plaintiffs cannot rely on their possession of privileged documents to compel the order of further privileged documents. For the reasons above, Canada has established that certain documents are privileged, some of which have inexplicably fallen into the hands of the Plaintiffs. It is neither just nor appropriate to compel Canada to produce further documents due to the actions of the Plaintiffs. Numerous courts have confirmed this logical conclusion:

> 14 It is an established principle of law that a person who has obtained confidential information is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication: *Slavutych v. Barker*, [1976] 1 S.C.R.

> 254, 55 D.L.R. (3d) 224; *Schauenburg Industries Ltd. v. Borowski* (1979), 25 O.R. (2d) 737, 101 D.L.R. (3d) 701 (H.C.J.).
>
> 15 Furthermore, where such communications are disclosed either inadvertently or through improper conduct by a party, that party's solicitors are not entitled to make use of the documents in the litigation: *Guiness Peat Properties Ltd. v. Fitzroy Robinson Partnership*, [1987] 2 All E.R. 716, [1987] 1 W.L.R. 1027 (C.A.); *Bernardo v. Deathe*, [1991] O.J. No. 862 (Gen. Div.). The surreptitious delivery of confidential material cannot be sanctioned: *Ontario (Attorney General) v. Gowling & Henderson* (1984), 47 O.R. (2d) 449, 12 D.L.R. (4th) 623 (H.C.J.). *Tilley v. Hails, supra* (emphasis added).

[95] Even where privileged documents were inadvertently produced by Canada, this general principle holds. There is a very narrow exception for "implied waiver". The facts of this case, however, do not give rise to such a waiver for the reasons that follow.

[96] Implied waiver requires "voluntary action" on the part of the producing party so that "fairness and consistency" compel further production. This is essential as it protects the rationale behind the rule and fairness to the parties. It is meant to prevent the production of some evidence which would be helpful to one's case while refusing to disclose the unsavory bits. In essence, it is a rule against "cherry-picking". Implied waiver may also occur where one introduces evidence that they relied on legal advice. McLaughlin, J. (as she then was) gave useful discussion of the issue in *S & K Processors Ltd v Campbell Ave Herring Producers Ltd* [1983] 4 WWR 762 BCJ No 1499 (QL):

> **6** Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so

> require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189.
> **…**
> **10** As pointed out in Wigmore on Evidence (McNaughton Rev., 1961), vol. 8, pp. 635-36, relied on by Meredith J. in Hunter v. Rogers supra, double elements are predicated in every waiver--implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. In *Hunter v. Rogers*, supra, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.
>
> **11** In the case of production of an expert's report under the Evidence Act, s. 11, it can be contended that the pre-trial production of the report and the attendant loss of privilege at that stage is involuntary, being compelled by statute. Being involuntary, it cannot constitute waiver…
> (emphasis added)

[97] Although this case concerned a statutory requirement to disclose and produce certain documents, subsequent cases have made similar findings in instances of inadvertently released materials. For instance, in *Metcalfe, supra*, the Court referred to *S & K Processors*, finding that even though a party raised his belief that the proceeding was in abeyance at one point, this had no relevance to the proceedings at hand. There was no indication he had the intention of raising an issue that would lead to waiver of privilege by implication. The Court put emphasis on relevant texts' discussion of waiver, especially as it relates to the double elements of principled intention and

fairness and consistency, concluding, "There is nothing in the selective disclosure of the subject letters which results in misleading information being placed before the court" (at para. 41).

[98] This approach was also evident in *Stevens v Canada, supra,* where the Court stated at paragraph 51:

> With respect to the release of portions of the records, a similar view has been adopted in British Columbia. In *Lowry v. Can. Mountain Holidays Ltd*. Finch J emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance. I believe that this approach is appropriate in this case…

[99] It is already established that the waiver here was involuntary. There is no attempt to put misleading information before the Court. Further, Canada is not relying on its legal state of mind in this action. It does not defend its actions with reference to reliance on legal opinions. To the extent that the relevance of legal opinions is introduced at all, it is by the Plaintiffs. Both principled intention, fairness and consistency require a finding that privilege has not been lost due to "implied waiver".

Conclusions on Waiver

[100] The onus is on the Plaintiffs, as the parties alleging waiver, to show that it has been waived (*Hannis v Tompkins* [2001] OTC 1000 43 ETR (2d) 208; *Simpson v Gevais* [1996] BCJ No 173 (Master, BCSC); *Canadian Imperial Bank of Commerce v Bonnell* [1997] PEIJ No. 108 (QL)). They have not met their burden.

[101] Solicitor-client privilege is of such importance to the legal system that inadvertent production will seldom result in waiver. This fact, and consideration of the relevant factors in the case at hand, indicates that there is no waiver of the documents subject to this privilege. Further, there is no basis on these facts for "implied waiver" due to inadvertent production of some documents.

[102] In light of this, the Plaintiffs must do what they should have in the first place: all copies of documents inadvertently produced and subject to solicitor-client privilege should be returned and any copies destroyed. This is consistent with the weight of the jurisprudence and the high value placed on maintaining the confidentiality of solicitor-client communications. As discussed, documents alleged to be subject to other claims of privilege have not been shown to be such and so need not be returned.

[103] As the Plaintiffs cannot rely on their possession of privileged documents to compel further production, their motion is dismissed. This does not foreclose a later challenge of Canada's claim to privilege over new documents to be listed in its affidavit of documents which are not the subject of the within motions, or over documents which have hereby been declared to be privileged, on the basis that the challenged document is related to a document or series of documents which are the subject of the within motions.

Furtherance of "Joint or Common Interest" or Trust Relationship

[104] The Plaintiffs contend that documents created after litigation was commenced should also be disclosed due to the fact that they were created for a joint or common purpose. This applies equally to those documents which may otherwise be subject to solicitor-client privilege. The thrust of the argument is that as Canada committed to providing support to the First Nations in their fight against Manitoba and Manitoba Hydro, including financial support, they were united in purpose.

[105] The Plaintiffs' argument is based on a faulty premise. Joint interest arises where parties share a solicitor or, notwithstanding that they have different solicitors, they have a common interest in the subject matter of the communication at the time it was made: see *Ziegler Estate v Green Acres* 2008 ABQB 552 at para 32. This may arise where parties are looking for the same ultimate outcome (as was the case as to the context of the advice in *Zeigler).* Often, it is related to a trust situation where the management of property or monies directly impacts a third party: see *Re Ballard Estate* (1994) 20 OR (3d) 350 (Gen Div) at pp 351-352.

[106] Despite Mr. Wilson's belief that he was retained by the federal government, he clearly was not. The fact that his legal opinion was communicated to DIAND officials does not make him their lawyer. Regardless, the solicitors who were acting on behalf of Canada were representing the federal government's interest, and not the First Nations. They did not negotiate on behalf of the Plaintiffs, nor did they represent them in any other way. The first potential for joint interest – joint retainer – does not arise on the facts of this case.

[107] Further, Mr. Wilson's involvement in the case does not imply that there was any sort of legal team of which he and Justice lawyers were a part, suggesting a joint interest. It is the uncontested evidence of Mr. Bloodworth that their lawyers acted in Canada's interests and that their interests were two-fold: to help the First Nations, but to also protect themselves. It was clearly a quasi-adversarial context, evident by the statements of the First Nations themselves at the time which revealed they believed Canada to be liable. Canada's consistent disagreement as to this fundamental point indicates that the interests, especially as relates to this litigation, were not aligned.

[108] Related to this argument is the First Nations' contention that they had a joint interest in the contents of the communications given their trust relationship with the government and its fiduciary duty to them. However, this argument must also be rejected. As Canada argues, there needs to be cognizable aboriginal interest. Indication of a trust would be discretionary control of the land by Canada. Here, however, Canada did not have discretionary control over the land. There is no indication that these documents were prepared in the administration of a trust or as a trustee. This was canvassed in *Samson Indian Band*, *supra*:

> 17 In order for the trust principle to apply at the discovery stage of an action for breach of duty in the administration of a trust, two conditions, in our view, must be fulfilled: the alleged trust relationship must be established on a prima facie basis, and the documents allegedly belonging to the beneficiaries must be documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee. We have here little concern with respect to the first condition. Our concern is, rather, with the second one.
> 18 We are prepared, because of the very special relationship between the Crown and the Indians and because the Crown is to be held to "a high standard of honourable dealing with respect to the

aboriginal peoples of Canada as suggested by *Guerin v. The Queen*", to accept that whatever may be the precise nature of the relationship between the Crown and the Indians, it would prima facie qualify as a trust-type relationship for the purposes of the application of the trust principle at the discovery stage.

19 That being said, however, it does not necessarily flow that the rules and practices developed with respect to private trusts apply automatically to Crown "trusts" such as those alleged in the present proceedings.

20 The basis of the trust principle, as appears from Mr. Justice Lederman's reasons in *Re Ballard Estate*, is the assumption, in cases of private trusts, that legal advice sought by the trustee belongs to the beneficiaries "because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust".

21 That assumption cannot be applied to Crown "trusts". The Crown can be no ordinary "trustee". It wears many hats and represents many interests, some of which cannot but be conflicting. It acts not only on behalf or in the interest of the Indians, but it is also accountable to the whole Canadian population. It is engaged in many regards in continuous litigation. It has always to think in terms of present and future legal and constitutional negotiations, be they with the Indians or with the provincial governments, which negotiations, it might be argued, can be equated in these days and ages with continuous litigation. Legal advice may well not have been sought or obtained for the exclusive or dominant benefit of the Indians, let alone that of the three bands involved in these proceedings. Legal advice may well relate to policy decisions in a wide variety of areas which have nothing or little to do with the administration of the "trusts". It is doubtful that payment of the legal opinions given to the Crown is made out of the "private" funds of the "trusts" it administers...

22 There being many possible "clients" or "beneficiaries", there being many possible reasons for which the Crown sought legal advice, there being many possible effects in a wide variety of areas deriving from the legal advice sought, it is simply not possible at this stage to assume in a general way that all documents at issue, in whole and in part, are documents which were obtained or prepared by the Crown in the administration of the specific

> "trusts" alleged by the respondents and in the course of the Crown carrying out its duties as "trustee" for the respondents.
> (emphasis added)

[109] The Crown wears many hats and acts for all Canadians. It is trite to say that its interests are not always one and the same with First Nations. The Court of Appeal more recently commented on the inappropriateness of importing fiduciary duty into litigation in *Stoney Band v Canada* 2005 FCA 15:

> 22 In litigation, the Crown does not exercise discretionary control over its Aboriginal adversary. It is therefore difficult to identify a fiduciary duty owed by the Crown to its adversary in the conduct of litigation. It is true that an aspect of the claim against the Crown by the Stoney Band is based on an allegation of breach of fiduciary duty with respect to the surrender and disposition of reserve land. But even if such a fiduciary duty existed, that duty does not connote a trust relationship between the Crown and the Stoney Band in the conduct of litigation.
>
> 23 As indicated in *Haida* at paragraph 18 and in *Wewaykum* at paragraph 81, the term "fiduciary duty" does not create a universal trust relationship encompassing all aspects of the relationship between the Crown and the Stoney Band. Any fiduciary duty imposed on the Crown does not exist at large but only in relation to specific Indian interests.
>
> 24 Focusing specifically on litigation practices, I find it impossible to conceive of how the conduct of one party to the litigation could be circumscribed by a fiduciary duty to the other. Litigation proceeds under well-defined court rules applicable to all parties. These rules define the procedural obligations of the parties. It seems to me that to impose an additional fiduciary obligation on one party would unfairly compromise that party in advancing or defending its position. That is simply an untenable proposition in the adversarial context of litigation. Even where a fiduciary relationship is conceded, the fiduciary must be entitled to rely on all defences available to it in the course of litigation.
> (emphasis added)

[110] Finally, as is evident from the discussion above, the evidence simply does not indicate that the First Nations and Canada were in the open, cooperative, "interests fully united" type of relationship alleged. The inevitable conclusion is that Mr. Wilson was the First Nations' counsel and representing their interests. Whether or not his opinion was shared is irrelevant – it does not subtract from the fact that the government's lawyers did not share theirs with him.

[111] The Plaintiffs argue that the fact that Canada withheld information does not negate their implied agreement. The point is, however, that whatever the agreement was regarding the sharing of certain information – whether research or files – it is clear that there was never any intention to share Canada's legal opinions or privileged documents.

[112] On the facts of this case, Canada is justified in calling the relationship quasi-adversarial. The First Nations' stated goal in a 1982 position paper was to have the two governments put in place the machinery to indemnify these Indian Bands for their losses. Despite an understanding that if clear evidence of Canada's liability was produced, there would be negotiation. Canada never admitted to finding such evidence. The Plaintiffs are trying to have it both ways – arguing that Canada's actions indicated it was a "full partner" while at the same time alleging Canada's actions were contrary to Aboriginal interests.

[113] The above points also speak to the First Nations' invocations of equitable fraud and the honour of the crown in order to prevent Canada from claiming privilege over documents. Such allegations are disingenuous since the Plaintiffs were contemplating litigation against Canada almost from the start.

Additional Arguments Advanced by the Plaintiffs

[114] The Plaintiffs have made a number of additional arguments in support of their motion to compel production of Canada's privileged documents. I view these as "everything but the kitchen sink" arguments, obviously advanced in the hope that somehow, notwithstanding the lack of any evidence to support them, that something might resonate with the Court.

[115] First, they submit that Canada should be estopped from claiming privilege because of an alleged representation that Canada would be sharing information with them, including legal opinions. Since I have concluded that no such representation was made, the essential elements for the application of estoppel has not been made out.

[116] Second, the Plaintiffs allege that Canada acted in bad faith in secretly withholding critical information which allegedly supports the existence of Canada's liability to the First Nations. There is no evidence establishing that Canada has ever accepted liability. In fact, Canada has consistently denied any liability. Accordingly, the allegation of bad faith is unfounded.

[117] Third, to vitiate any claim to privilege, the Plaintiffs rely on equitable fraud or breaches of trust or fiduciary duty by Canada in not making full disclosure of all relevant facts. An allegation of fraud is a serious matter, and clear and convincing evidence of unlawful conduct must be established. Moreover, there is nothing unlawful, or even improper, about a party relying on solicitor-client privilege as a basis for retaining information or documents.

Removal of Plaintiffs' Counsel

[118] Finally, Canada has requested in its notice of motion an order removing the Plaintiffs' solicitors as counsel of record for refusing to return clearly privileged documents and sharing them with their clients. Counsel for Canada did not pursue the relief with much vigour at the hearing of the motions.

[119] Removal of counsel is an extraordinary remedy, to be approached with great caution and rarely invoked. As was stated by the Alberta Court of Appeal in *Michel v Lafrentz*, [1992] AJ No. 1067: "Disqualification of counsel, and his removal from the record in ongoing proceedings, civil or criminal, is a step that should not be undertaken where there is a clear, responsible alternative and where such an order is not mandated by fundamental fairness and the public interest in the due administration of justice..".

[120] On the facts of this case, I am not satisfied that removal of counsel is warranted.

"Roger R. Lafrenière"
Case Management Judge

Toronto, Ontario
September 30, 2011

FEDERAL COURT

SOLICITORS OF RECORD

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