Federal Court  Cour fédérale

Date: 20110923

Docket: T-1254-92

Citation: 2011 FC 1091

Vancouver, British Columbia, September 23, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

CHIEF JOHN ERMINESKIN, LAWRENCE WILDCAT, GORDON LEE, ART LITTLECHILD, MAURICE WOLFE, CURTIS ERMINESKIN, GERRY ERMINESKIN, EARL ERMINESKIN, RICK WOLFE, KEN CUTARM, BRIAN LEE, LESTER FRAYNN, THE ELECTED CHIEF AND COUNCILLORS OF THE ERMINESKIN INDIAN BAND AND NATION SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE OTHER MEMBERS OF THE ERMINESKIN INDIAN BAND AND NATION

Plaintiffs (Respondents)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, AND THE MINISTER OF FINANCE

Defendants (Applicants)

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion by the Crown Defendant (the Crown) made pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (Rules), for an order allowing the appeal and setting aside the Order of Prothonotary Lafrenière (Order) dated May 17, 2011, in which he found that the Crown

has waived solicitor-client privilege through the filing of an affidavit in support of a motion for leave to amend its statement of defence.

[2] For the reasons that follow, the appeal shall be dismissed.

Brief Statement of Factual Background

[3] Action T-1254-92 has been split into phases. The first two phases of the action were tried before Mr. Justice Max Teitelbaum between 2000 and 2004. On December 22, 2004, during the closing arguments of the trial of the two first phases, the respondent (Ermineskin) submitted that the Crown's pleadings of a limitation defence were inadequate. The Crown brought a motion to amend its pleadings to include express reference to certain limitations provisions (the 2004 amendment application). Ermineskin opposed the 2004 amendment application on the basis that the Crown offered no explanation for the delay in raising these limitations defences.

[4] On January 20 and 21, 2005, the 2004 amendment application was heard by Mr. Justice Teitelbaum, who was critical of the Crown's delay in requesting leave to amend and its failure to adduce affidavit evidence to explain the delay. While he permitted the amendments to refer specifically to sections of the *Alberta Limitation of Actions*, RSA 1980, c L-15 (*Alberta Limitation of Actions*), the amendments in relation to the *Federal Court Act*, RSC 1985, c F-7 (*Federal Court Act*) and the *Ontario Limitations Act*, RSO 1980, c 240 (*Ontario Limitations Act*) were denied. He further stated that he was not determining the issue of whether the Crown's pleadings, as they existed without the amendments, were sufficient to make all of its limitations arguments.

[5] By judgment dated November 30, 2005, Mr. Justice Teitelbaum dismissed the claims in the first two phases of the proceedings. Subsequent appeals were dismissed by the Federal Court of Appeal and by the Supreme Court of Canada. The proceedings were reactivated in June 2010 once all appeals were exhausted. The remaining phases required further document production and discoveries, which are set to continue until the end of 2011. No trial dates are set for these phases.

[6] On December 23, 2010, the Crown delivered a notice of motion seeking an order allowing it to amend its statement of defence to include an express reference to various sections of the *Alberta Limitation of Actions*, the *Federal Courts Act*, and the *Ontario Limitations Act*, (the 2010 amendment application).

[7] In support of the 2010 amendment application, the Crown's Motion Record includes an affidavit sworn by Ms. Lynda Sturney (the affidavit), a team leader in the Calgary office of the Litigation Management and Resolution Branch of the Department of Indian and Northern Affairs, which provides the contextual background leading to the Crown's decision to seek leave to amend its statement of defence in December 2004. Particularly, paragraph 12 reads as follows:

> I am advised by my counsel that the Crown believed that its existing pleadings were adequate and it was entitled to rely upon s. 39(2) of the *FCA* and the other specific sections of the Alberta and Ontario limitations legislation. However, out of an abundance of caution, on December 22, 2004, the Crown brought a motion to amend its Statement of Defence in order to refer specifically to certain legislative provisions relating to its six-year limitation defence.

[8] During cross-examination, Ms. Sturney acknowledged that she had no involvement in this litigation from 2000 to 2007 and, more specifically, that she was not assigned to argue the case during the time of the amendment application referred to in her affidavit. Ms. Sturney objected to

a number of questions relating to paragraph 12 of her affidavit on the basis that the information was not relevant and was privileged. In reference to her statement in paragraph 12 of her affidavit that she was "advised by my counsel that the Crown believed their existing pleadings were adequate", Ms. Sturney confirmed that counsel who advised her of that belief consisted of lawyers with Macleod Dixon LLP, who acted as counsel to the Crown as the agents of the Department of Justice.

[9] On April 19, 2011, Ermineskin brought a motion requesting, *inter alia*, a declaration that the Crown had waived solicitor-client privilege by tendering paragraph 12 of the affidavit as evidence in support of the Crown's 2010 amendment application.

[10] Prothonotary Lafrenière issued the Order on May 17, 2011.

Impugned Decision

[11] In the Order, Prothonotary Lafrenière stated that although solicitor-client privilege is fundamental to our justice system in Canada and must be jealously protected, it may be waived expressly or implicitly in situations where one of the parties makes the communications with counsel an issue in the proceeding.

[12] The Prothonotary's key finding of fact was that the hearsay statements in paragraph 12 of the affidavit are intended to rationalize the Crown's delay in amending its statement of defence. Based on this finding, the Prothonotary adopted and made them his, paragraphs 58 and 59 of Ermineskin's written submissions which read as follows:

> Based on these principles, by tendering the affidavit of Ms. Sturney the Crown has waived solicitor-client privilege. Paragraph 12 clearly puts into issue the fact of the Crown having received legal advice, as well as the content of that advice, in regards to both the adequacy of the limitation defence portion of the pleadings and the reason for pursuing an amendment of its pleadings in 2005. Through this affidavit, the Crown seeks to rely on its "belief" in the adequacy of its pleadings, a belief that necessarily arises from the legal advice received from the Crown's legal counsel, to explain its extraordinary delay in seeking to amend its Statement of Defence.
>
> Despite this reliance, the Crown has objected to the disclosure of the communications that would indicate the context of the legal advice received by the Crown in respect to the assessment of its pleadings, when that advice was received, as well as what, if anything occurred to cause the Crown to change its assessment that its pleadings were adequate. By these objections, the Crown seeks to waive privilege only insofar as it is beneficial to its position, without revealing information. This approach is incompatible with the principles of fairness and inconsistency.

[13] The Prothonotary concluded that the Crown waived solicitor-client privilege in relation to communications between the Crown and its legal advisors which bear upon paragraph 12 the affidavit and the Crown's belief when it brought its 2004 amendment application with respect to whether its existing pleadings were adequate. He ordered Ms. Sturney to produce all documents in her power, possession or control in relation to communications over which privilege had been waived and finally, ordered Ms. Sturney to re-attend for the purpose of cross examination on her affidavit sworn December 22, 2010.

Issues

[14] The issues here are:

a. What is the proper standard of review to be applied in this appeal?

b. Was the order waiving solicitor-client privilege vital to the final issue in the case?

c. Was the Prothonotary's decision to waive the solicitor-client privilege clearly wrong as being based upon a misapprehension of the facts or upon a wrong principle of law?

Relevant Legislation

[15] The guiding principles of appeals of prothonotaries' orders are found at Rule 51:

51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**51. (1)** L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.
(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.	**(2)** L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.

a. What is the proper standard of review to be applied in this appeal?

Crown's Arguments

[16] The Crown submits that the Order is reviewable *de novo* as a nondiscretionary matter, and relies on paragraph 11 of *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, [2009] FCJ No 182 [*Environmental Defence Canada*], where the Court proceeded based on the parties' agreement that the "determination as to whether the redacted passage is subject to solicitor- client privilege is hardly a discretionary matter".

[17] Nevertheless, if discretionary, the Crown contends that the Order meets the test for a *de novo* review of a discretionary decision of a prothonotary as it is based upon either a wrong principle or a misapprehension of facts (*Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (Fed CA) at para 95).

Ermineskin's Arguments

[18] Ermineskin's position is that the Order is discretionary, as solicitor-client privilege can be waived expressly or by implication. Even if this is not a discretion that should be exercised lightly, or without proper apprehension of legal principles affording protection for privileged communications, it is nonetheless a discretionary matter. It argues that the Crown failed to provide case law which demonstrates that the Order is "non discretionary" and erroneously relied on *Environmental Defence Canada*. Ermineskin further cites *Universal Sales Ltd v Edinburgh Assurance Co*, [2009] FCJ No 195 [*Universal Sales, Ltd*], where Mr. Justice Russell dismissed the submission that a prothonotary's decision as to whether privilege had been waived should be reviewed on a correctness standard rather than on the "clearly wrong" standard and held that he was required to follow the later standard set forth in *Merck & Co v Apotex Inc*, [2003] FCJ No 1925 [*Merck* 2003]. The respondents conclude that a *de novo* review can only be justified if the Crown can demonstrate that the Order was "clearly wrong" in a sense that the exercise of discretion by the Prothonotary was based either upon a misapprehension of the facts or upon a wrong principle, including an error of law.

Analysis

[19] The Court is of the view that the Crown failed to provide a clear explanation as to why the Order waiving solicitor-client privilege is non-discretionary. The Supreme Court of Canada

canvassed the solicitor-client privilege in *R v McClure*, [2001] SCJ No 13, 2001 SCC 14 at para 34 [*McClure*], and articulated that "[d]espite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances." Therefore, it is left to the discretion of the Prothonotary to decide whether solicitor-client privilege falls within such circumstances and thus, is a discretionary matter.

[20] The standard of review of decisions of a prothonotary is set forth in *Merck* 2003 at para 19. A discretionary order of prothonotaries ought not to be disturbed on appeal to a judge of this Court unless: (a) the question raised in the motion is vital to the final issue of the case, or (b) the order is clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehensions of the facts. The appeal is to be heard by this Court *de novo* if either prong of the test is met.

[21] The Federal Court of Appeal recently discussed the standard of review in *Bristol-Myers Squibb Co v Apotex Inc*, [2011] FCJ No 147, and articulated that the ordinary standard of review should apply to appeals from decisions of prothonotaries.

[22] As a result, the Court shall not intervene unless the parties can show that the question raised is vital to the final issue of the case or that the Prothonotary was clearly wrong or based his decision on a wrong principle or on a misapprehension of the facts.

b. Was the Order waiving solicitor-client privilege vital to the final issue in the case?

Crown's Arguments

[23] The Crown in its oral submissions agrees that the Order is not vital to the final issue.

Ermineskin's Arguments

[24] The question of whether a party has waived solicitor-client privilege, according to Ermineskin, is "not vital to the final issue of the case" (*Merck & Co v Apotex Inc*, 2008 FC 1121 at para 10 [*Merck* 2008]; *Universal Sales, Ltd* at para 17). The respondents submit that while the ultimate determination of whether to allow the Crown to amend its pleadings may or may not be "vital", the determination of which documents Ermineskin may access in concluding a cross examination of Ms. Sturney is clearly not "vital".

Analysis

[25] The Court agrees with the parties that an order waiving the solicitor-client privilege is not vital to the final issue of a case. An order of this nature stands in contrast to an order striking a cause of action. The Court notes that in *Merck* 2008, Mr. Justice O'Keefe also concluded that an order waiving privilege did not raise a question of vital importance to the final issue of the case.

[26] Therefore, the only way this appeal can succeed is if this Court finds that the Prothonotary was clearly wrong in the exercise of his discretion or clearly misapprehended the facts.

c. Was the Prothonotary's decision to waive the solicitor-client privilege clearly wrong as being based upon a misapprehension of the facts or upon a wrong principle of law?

Crown's Arguments

[27] The Crown argues that the Prothonotary misapprehended the facts in accepting Ermineskin's submissions that paragraph 12 of the affidavit "was intended to rationalize" the Crown's delay in seeking to amend its statement of defence. The Crown underscores that paragraph 12 of the affidavit provides only background information to describe the context of the 2004 amendment application, and it has no intention of relying on it to explain its delay in seeking to amend its statement of defence.

[28] The Crown submits that its belief in 2004 regarding the adequacy of its existing pleadings is irrelevant. The fundamental premise of its position on the 2010 amendment application is that it is entitled to the amendments because it will serve to determine the real question in controversy and because there is no serious prejudice to the respondents (*Canderel Ltd v Canada* (CA), [1994] 1 FC 3 at para 10 [*Canderel*]; *Dené Tha' First Nation v Canada (Attorney General)*, [2008] FCJ No 847 at paras 8, 13, 15 [*Dené Tha'*]).

[29] The Crown contends that the Prothonotary's waiver of solicitor-client privilege constitutes an error of law. It argues that the Court will not lightly penetrate the shield of solicitor-client privilege relying upon a unilateral assertion of an issue by an adverse party (*Talisman Energy Inc v Petro-Canada Inc*, [2000] AJ No 274 at para 34 [*Talisman*]; *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, [1992] 5 WWR 531 at para 22 [*Ed Miller Sales*). The Crown submits that the Prothonotary based his finding on the issue of delay, which has unilaterally been raised by Ermineskin, and will only become a relevant consideration for the Court to the extent that the delay

results in prejudice of a kind that cannot be compensated by costs (*Canderel* at para 10; *Dené Tha'* at paras 8, 13, 15.)

[30] The Crown further states that solicitor-client privilege will only be waived where the client makes a positive assertion which puts his or her state of mind "in issue", for instance, where one party seeks to rely on legal advice it has received in order to justify a course of conduct (*Stuart Olson Construction Inc v Sawbridge Plaza Corp*, [1995] AJ No 953 at para 24; *Fraser v Houston*, [2002] BCJ No 2204 at paras 22-24 [*Fraser*]; *Talisman* at paras 27, 33, 35).

[31] Moreover, the Crown urges that where legal advice is referred to for context and is not relied upon by a party, solicitor-client privilege has not been waived. It is of the view that an affidavit containing an express reference to receiving the advice of legal counsel does not constitute a waiver of solicitor-client privilege. The Alberta Court of Queen's Bench found at paragraph 23 of *Talisman*, that a direct reference to legal advice in a pleading or evidence to the fact legal advice was obtained does not necessarily constitute a waiver of solicitor-client privilege.

[32] Finally, the Crown contends that Ermineskin's reliance on *Cheung v 518402 BC Ltd*, [1999] BCJ No 2415, was misplaced, arguing that in the present case the affidavit does not attest to the substance of any communications exchanged between the Crown and its counsel. More fundamentally, the Crown rejects the argument that it provided paragraph 12 for the purpose of relying on evidence of communications between the Crown and its counsel, and then subsequently retracted its reliance. As such, it submits that it is not relying and has not previously relied on evidence relating to the adequacy of its pleadings as the basis for its 2010 amendment application.

Ermineskin's Arguments

[33] Ermineskin's position is that, on the basis of the record and applicable legal authority, it was open to the Prothonotary to find that paragraph 12 was intended to rationalize the Crown's delay in seeking to amend its pleadings. While the Crown has asserted that it does not have the intention of relying on paragraph 12 to explain its delay in seeking to amend its pleadings, the fact remains that it chose to tender the affidavit. Eventually, the Prothonotary will hear and decide upon the 2010 amendment application and he should be granted deference in ordering further document production and cross-examination on affidavits. As such, an explanation for the Crown's delay in seeking to amend its statement of defence may be relevant to the determination of whether an amendment should be permitted (*Merck & Co Inc v Apotex Inc*, [2004] 2 FCR 459 at paras 29-34 [*Merck* 2004]; *Canderel* at paras 12-13). Ermineskin submits that it is in theses circumstances that the Prothonotary made a finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay.

[34] Ermineskin contends that fairness and consistency require full disclosure of otherwise privileged communications to allow them to fully exercise its rights of cross-examination in light of the Crown's reliance on the state of its legal advice up to 2004 (*Genecor International, Inc v Canada (Commissioner of Patents)*, [2007] FCJ No 385 at para 26. As such, Ermineskin relies on *Castlemore Marketing Inc v Intercontinental Trade and Finance Corp*, [1996] FCJ No. 201 at para 1, where it was held that an affiant is required to answer questions on "any matter relevant to the determination of the issue in respect of which the affidavit was filed."

[35] Moreover, Ermineskin is of the view that the Crown did not identify a specific error of law, but rather allege that the Prothonotary was "clearly wrong" in determining that solicitor-client

privilege could be waived in the absence of a positive assertion that would put the Crown's state of mind "in issue." However, they submit that the Crown voluntarily injected its state of mind into this application by adducing the affidavit into evidence.

[36] Ermineskin adds that a party may be taken to have waived its right to solicitor-client privilege in relation to certain communication normally afforded that privilege where that party either expressly or impliedly waives such privilege. They rely on the British Columbia Supreme Court decision *Fraser*, for their argument. In that case, the Court held at paragraph 22:

> 1. Solicitor-client privilege should be interfered with only to the extent necessary to achieve a just result: *Descoteaux v Mierzwinski*, [1982] 1 SCR 860.
>
> 2. Waiver of solicitor-client privilege may occur in the absence of an intention to waive, where fairness and consistency so require. 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: *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, [1983] BCJ 1499.
>
> 3. A party will waive the protection of solicitor-client privilege when it voluntarily injects into the proceeding the question of its state of mind, and, in doing so, uses as a reason for its conduct the legal advice that it has received: *Morrison* (*supra*).
>
> 4. To displace solicitor-client privilege there must be an affirmative allegation which puts the party's state of mind in issue: *Pax Management Ltd v CIBC* (1987), 14 BCLR (2d) 257 (BCCA).

[37] Ermineskin further relies on Madam Justice McLachlin's (as she then was) characterization of the waiver of solicitor-client privilege in *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, [1983] BCJ No1499 [*S & K*], stating that "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."

[38] They contend that *Merck* 2004, at paras 16 and 45, makes clear that the Crown cannot "pick and choose" what evidence it will waive privilege over. Instead, "privilege is lost over any communication that has a relevant and material connection to the issue brought forward" (*Iozzo v Weir*, [2004] AJ No 395 at para 26. In hearing the 2010 amendment application, the Prothonotary is entitled to consider all evidence before the Court, including the Crown's statement that it believed its "existing pleadings were adequate", which may be held to explain its delay.

[39] Finally, Ermineskin underscores that the Crown's reliance on *Talisman* is misplaced, arguing that it is not binding on the Federal Court and that, in any event, it stands for the proposition that in exercising its discretion to order discovery of privileged documents, the Court must determine whether the legal advice offered by the waiving party is relevant to such a degree that privilege is waived over the entirety of the communications. Ermineskin argues that the Crown's delay in seeking to amend its pleadings is relevant to the application before the Court and thus, the evidence relating to the Crown's assertion, through the affidavit, that this delay was based on its belief in the adequacy of its pleadings up until 2004, is also relevant.

Analysis

[40] The main issue before the Court is whether Prothonotary Lafrenière's Order regarding the waiver of solicitor-client privilege was clearly wrong as being based upon a misapprehension of facts or upon a wrong principle of law.

Finding of Facts

[41] The Court cannot find that the Prothonotary misapprehended the facts, based on Ermineskin's submissions that paragraphed 12 of the affidavit "intended to rationalize" the Crown's delay in seeking to amend its statement of defence. The Court reiterates that the Crown delivered a notice of motion on December 23, 2010, seeking an order allowing amendments to its statement of defence to include an express reference to various statutes. The affidavit was submitted in the Crown's Motion Record in support of its 2010 application amendment.

[42] The Court is of the view that, on the basis of the record and the parties' submissions, the Prothonotary did not err in finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay in seeking to amend its statement of defence in 2004. The Court accepts Ermineskin's position that there is an explicit reference to legal advice to be found in paragraph 12 of the affidavit and, to a lesser extent, in Ms. Sturney's cross-examination. Accordingly, the Court is unable to agree with the Crown that paragraph 12 of the affidavit solely provides only background information to describe the context of the 2004 amendment application.

[43] Moreover, the Crown's submissions that paragraph 12 of the affidavit is irrelevant to its 2010 amendment application is without foundation. The affidavit was submitted in the Crown's Motion Record in support of the 2010 amendment application. The Prothonotary will hear the 2010 amendment application and, as such, the explanation for the Crown's delay in seeking to amend its statement of defence is a relevant factor to the determination of whether an amendment should be permitted or not. The Federal Court of Appeal in *Merck* 2004, cited *Continental Bank Leasing Corp v Canada*, [1993] 1 CTC 2306 (TCC) with respect to the factors that the Court must consider to

permit or deny amendments of pleadings, including "[…] the timeliness of the motion to amend or withdraw […]".

[44] In such circumstances, the Court must agree that the Prothonotary did not misapprehend the facts in finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay in seeking to amend its statement of defence.

Waiver of Solicitor-client Privilege

[45] The basic principles underlying the concept of solicitor-client privilege are not in dispute. It is common knowledge that the Supreme Court has repeatedly said that it recognized solicitor-client privilege as fundamental to the Canadian legal system (*McClure*). As stated in a recent decision by the Federal Court of Appeal, the protection of the confidentiality of legal advice communicated by lawyers to their clients is of fundamental importance to the administration of justice. Incursions must be kept to an absolute minimum (*Canada (Attorney General) v Quadrini*, [2011] FCJ No 475 at para 29).

[46] In paragraph 26 of *Environmental Defence Canada*, the Federal Court stated that a waiver of solicitor-client privilege is established when it is demonstrated that the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive it (*KF Evans Ltd v Canada (Minister of Foreign Affairs)*, [1996] FCJ No 30 at para 16). There may also be waiver by implication. The concept of implied waiver is addressed in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis Canada Inc, 2009) at 959:

As to what constitutes waiver by implication, Wigmore said:

> Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final [emphasis added].

[47] As recently confirmed by this Court in *Mahjoub (Re)*, [2011] FCJ No 1125 at para 10, the jurisprudence supports the following propositions relating to implied waiver of the privilege:

> (a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, [1983] BCJ 1499, *S & K*;
>
> (b) 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. (*S & K*);
>
> (c) in 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. (*S & K*) [My emphasis];
>
> (d) the privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *Bank Leu Ag v Gaming Lottery Corp*, [1999] OJ 3949 (Lexis); (1999), 43 CPC (4th) 73 (Ont SC) at paragraph 5;
>
> (e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (*S & K* at paragraph 10).

[48] In *Apotex Inc v Canada (Minister of Health)*, [2004] 2 FCR 137, Mr. Justice Lemieux concluded that fairness to a party is a guiding principle when determining whether solicitor-client privilege is deemed to have been waived. Balancing that element of fairness against the values underlying the privilege depends on the circumstances.

[49] Guided by these principles, the Court must turn to the circumstances in this matter. In the Court's view, paragraph 12 of the affidavit is about injecting in the process the Crown's legal advice as an element to explain its delay in seeking amendments to its statement of defence. Following Sopinka, Lederman & Bryant's unequivocal statement that "[t]here is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not," the Crown cannot be allowed, after disclosing relying on legal advice to determine the adequacy of its pleadings, to withhold communications between the Crown and its legal advisors which bear upon paragraph 12 of the affidavit.

[50] The Crown's position is that the affidavit refers only to the fact of receiving legal advice and not the content of that advice, based on *Talisman* and *Ed Miller Sales*. The Court cannot agree that this is the situation in the present case. *Talisman* further holds, at para 27, that waiver is triggered by demonstrating reliance on legal advice for the resolution of an issue, not by the mere reference to having received it. As such, paragraph 12 of the affidavit asserts that the Crown relied on legal advice in regards to the adequacy of the limitation defence portion of the pleadings and the reason for pursuing an amendment of its pleadings. Accordingly, based on the sound principle in *S & K*,

as the Crown relied on legal advice as an element of its claim, the privilege which would otherwise attach to that advice is lost.

[51] It is not open to the Crown to assert that there was no implied waiver because its pleadings do not rely on the legal advice contained in the affidavit. The Court rejects that argument, as it was also dismissed by this Court in paragraph 32 of *Environmental Defence Canada,* and held that "reliance is not, in or itself, determinative of the issue of implied waiver." Therefore, there is nothing clearly wrong about Prothonotary Lafrenière's conclusion that "based on these principles, by tendering the affidavit of Ms. Sturney the Crown has waived solicitor-client privilege."

[52] In closing, the Court must note that, as held by Prothonotary Lafrenière, the communication at issue in paragraph 12 of the affidavit relates to the applicants' belief in 2004 and not to any subsequent communication or legal advice. As such, there was only partial waiver by the Crown, limited to the considerations back in 2004.

[53] In answering the second question, the Court agrees with the parties that Prothonotary Lafrenière's Order fails to raise an issue vital to the final outcome of the case. Answering the third question, the Court also finds that the Prothonotary did not commit any error in the exercise of his discretion or base his discretion on any misapprehension of facts.

[54] The parties agreed that no costs should be awarded.

JUDGMENT

THIS COURT ORDERS that:

1. The appeal be dismissed.

2. No costs are awarded.

"Michel Beaudry"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1254-92
STYLE OF CAUSE:	CHIEF JOHN ERMINESKIN et al. v. HMQ et al.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 21, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	BEAUDRY J.
DATED:	September 23, 2011

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