Federal Court  Cour fédérale

Date: 20120724

Docket: T-3134-91

Citation: 2012 FC 927

Ottawa, Ontario, July 24, 2012

PRESENT: The Honourable Mr. Justice Russell

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 AND ORDER

[1] This is an appeal of the decision of a Prothonotary Lafrenière, dated September 30, 2011, pursuant to Rule 51 of the *Federal Courts Rules*.

[2] The motion 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.

BACKGROUND

[3] The background and framework of the dispute between the parties are summarized by Prothonotary Lafrenière in his decision and, with a few minor adjustments, I can do no better than set out his account here for convenience.

The Decision

[4] 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 Canada's Affidavit of Documents. The balance of the documents are said to have been obtained by the Plaintiffs by other, unknown means.

[5] Canada sought an order for the return of all its privileged documents. The Plaintiffs 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.

[6] Both motions were heard together by Prothonotary Lafrenière on common evidence.

[7] The Prothonotary concluded that the Plaintiffs' motion should be dismissed, and that Canada's motion should be allowed in part. In summary, while Canada failed to properly establish litigation brief or settlement privilege for certain documents produced to the Plaintiffs, the Prothonotary ordered all documents subject to solicitor-client privilege returned to Canada.

[8] Since it appeared to the Prothonotary that documents were produced by Canada through inadvertence, he also found that there was no waiver of privilege, and certainly no implied waiver, requiring further production of privileged materials. Further, he held that the Plaintiffs could not rely on their "illegitimate possession" of privileged documents to justify further production.

[9] An order disposing of both motions, consistent with his reasons, was issued by the Prothonotary in each file.

Facts

[10] This case's history is long and is divided into two distinct periods. The first is the time period between 1960-1992 leading up to actual litigation, where the parties were both dealing with the fallout of the Manitoba Rapids Hydro Project (Hydro Project). The dispute in this appeal centers 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.

1960-1992

[11] The genesis of the dispute originated over half a century ago. While the basic facts are not contentious, how they should be interpreted is at the crux of the dispute over documents. 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).

[12] Canada required Manitoba and Manitoba Hydro to enter into compensation agreements with the affected bands for the use of the lands and the negative effects which flowed from that use.

These negotiations took place during the early 1960s. The agreements reached 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.

[13] 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.

[14] 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. The SFC's 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, Canada was no longer involved.

[15] 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.

[16] Around this time, the First Nations obtained legal counsel through Mr. John Wilson, who is the principal affiant for the Plaintiffs. In March 1982, Mr. Wilson authored a formal legal opinion received by both the First Nations and Canada. The parties disagree as to who actually retained him to do this. While indicating that he was retained to institute an action against Manitoba and Manitoba Hydro, Mr. Wilson states 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).

[17] 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 that "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.

[18] Around the time that 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.

[19] 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.

[20] In 1985, the SFC obtained new counsel, Mr. 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.

[21] 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.

[22] 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 had 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 showing Canada's liability, Canada would

investigate and negotiate a resolution. At this time, Canada 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.

[23] 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

[24] Nearly all the Plaintiffs' evidence relates to the pre-litigation period. As stated earlier, Mr. Wilson, the First Nations' counsel, was their principal affiant. The other witness for the Plaintiffs, Ms. Patricia Turner, was the president of the SFC and then Chief of the Misipawik First Nation during the 1980s. Her affidavit echoes 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.

[25] 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, the First Nations say there was no expectation of confidentiality. Mr. Wilson 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 was obtained from Canada. In effect, he says the legal opinion sought for the First Nations had to be shared with Canada.

[26] 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 its files to them and that lawyers met to share opinions. They point to the Minister's commitment that, if it was eventually established that Canada was legally liable, a resolution of Canada's responsibility would be effected through negotiation rather than litigation.

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

[28] 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.

[29] Finally, the Plaintiffs emphasize that they received funding from Canada and that this is evidence 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

[30] Canada's principal affiant for this period is Glenn A. Bloodworth, a former employee of DIAND. He occupied various positions within DIAND, 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.

[31] Canada submits that the facts show that 1979 to 1991 was a pre-litigation period when Canada 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 with Manitoba and Manitoba Hydro and to protect itself from liability. There was thus a dynamic tension: the First Nations continually advised Canada as to their position that Canada was liable for flooding damages and Canada refused to accept it. Canada says there was no agreement regarding the alleged liability.

[32] 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 legal opinion provided to Canada was on instruction of the First Nations.

[33] 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 that confidentiality and privilege would be waived, or that there would be no restrictions on 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, paragraph 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, which means the upper echelons of management within DIAND.

[34] In short, Canada's characterization of its relationship with the First Nations is very different from 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 Canada had programs to assist First Nations in dealing with those impacts and in securing compensation.

1992 – Present

[35] Litigation was commenced against Canada by Chemawawin in December 1991, followed by OCN and Grand Rapids in February 1992. Over 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 the present appeal before me, 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.

[36] A brief overview of the history of documentary discovery in the proceedings is required to place the appeal in context.

[37] In *Brass*, affidavits of documents were sworn in 1997 and 1998. *Ross* and *Mercredi*, which were represented 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.

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

[39] 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.

[40] 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.

[41] 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.

[42] 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.

[43] 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.

[44] 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 motions before the Prothonotary and the present appeal.

[45] 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 given 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 on the Plaintiffs on March 19, 2009.

[46] 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.

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

Discovery That Privileged Documents Were Included in Schedule I

[48] 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.

[49] 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.

[50] Canada filed motions before the Prothonotary 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

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

[52] Responding to a letter discussing an upcoming meeting, counsel for Canada wrote on May 13, 2004 expressing concern that Canada 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 Marion Paper never received approval from the Deputy or the Minister.

[53] 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 then counsel left on early maternity leave in July 2004, and the issue was not resolved.

[54] 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.

[55] The debate continued into 2008, after Mr. 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 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 the summary 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.

[56] 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.

[57] Mr. Underhill wrote to confirm that the legal opinions were "stand alone" and that he did not know how they, 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.

[58] Once the motion to produce documents was 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.

THE PROTHONOTARY'S CONCLUSIONS

[59] The Prothonotary found that the motions before him engaged two major questions:

a. Are the documents at issue privileged?

b. If they are, was there a waiver of privilege by Canada?

[60] For reasons given in his orders, the Prothonotary concluded that

a. Those documents which describe communications between a solicitor and its client, DIAND, whether or not they were communicated through staff, are subject to solicitor client privilege notwithstanding any disclosure to the Plaintiffs;

b. The documents that were disclosed to the Plaintiffs are no longer protected by litigation brief or settlement privilege;

c. Litigation and settlement privilege was validly asserted by Canada over the undisclosed documents, or parts thereof;

d. There was no waiver of solicitor client privilege, litigation brief privilege, or settlement privilege;

e. There was no implied waiver of solicitor client privilege, litigation brief privilege or settlement privilege;

f. No form of privilege had been vitiated in any other way, such as estoppel, fraud, equitable fraud, bad faith, breach of trust or fiduciary duty, or bad faith.

THE APPEAL

[61] Canada does not challenge the Prothonotary's findings that the disclosed documents are no longer protected by litigation brief or settlement privilege.

[62] The appeal by the Plaintiffs is that the Prothonotary was wrong in finding that the documentation in dispute attracted any kind of privilege or, even if it did, that privilege has not been waived or otherwise vitiated by the conduct of Canada.

[63] The grounds and arguments advanced by the Plaintiffs are many and complex. I propose to deal with each in turn but, first of all, it is necessary for me to decide the proper standard of review for this appeal.

STANDARD OF REVIEW

[64] Unsurprisingly, there is no agreement between the parties on this issue. Canada says that the effect of the Prothonotary's orders is not vital to the final issue in the case, so that the only question is whether the Prothonotary's decision is clearly wrong, in the sense that it is based upon a wrong principle or misapprehension of the facts. Because the decision is not clearly wrong in this sense, Canada says that the Prothonotary's exercise of his discretion should not be disturbed. Canada also says that even if I consider the matter *de novo* the result is the same.

[65] The Plaintiffs say that the orders are vital to the final issue and/or are clearly wrong and I should consider the matter *de novo*.

[66] The Plaintiffs' position is that the result of the privilege motions is vital to the final resolution of the issues in dispute. Those issues are both the limitations and laches issues, which the Plaintiffs face in the upcoming motion by Canada to strike their claim, as well as the issue of Canada's ultimate liability to the Plaintiffs for its conduct in relation to the Hydro Project and its fallout.

[67] Canada says that the test for vitality is a stringent one and the Court should not come too hastily to the conclusion that a question, however important, is vital to the final outcome. Relying upon *R.v Aqua-Gen Investments Ltd.*, [1993] 2 FC 425, 39 ACWS (3d) 59 at paragraphs 43 and 67, Canada says that the critical question is whether the decision of the Prothonotary will preclude the hearing of the case on its merits, and the emphasis has to be on the subject of the orders, and not their effect. See *Aqua-Gem* at paragraph 100. Canada points out that the subject of the orders is production of documents and not the merits of the claims.

[68] Canada emphasizes that the Plaintiffs' argument is essentially that, without Canada's privileged documents, all relevant information will not be in front of the Court when it is called upon to rule on the merits of their fiduciary claim or on Canada's intended motion for summary judgment. Canada says that, in *R v National Post*, 2010 SCC 16, [2010], 1 SCR 477 at paragraph 42, the Supreme Court of Canada clearly rejected this line of argument:

> At common law, privilege is classified as either relating to a class (e.g. solicitor and client privilege) or established on a case-by-case basis. … Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case.

[69] More specifically, Canada refers to the Plaintiffs' argument that the result of the privilege motions is vital to the final outcome of the case because information contained in the documents is allegedly relevant to their plea of equitable fraud and estoppel as a bar to limitations. However, Canada says that the Plaintiffs cannot, by their own pleadings, place Canada's privileged documents into issue. Moreover, the specific arguments Canada will make on limitations are not before this Court. The Plaintiffs' arguments about the vital nature of these 1980's document are, at best, premature.

[70] The leading case on equitable fraud in the limitations context is *Guerin v Canada*, [1984] 2 SCR 335, but there is no suggestion in that case that privilege was superceded in order to get all relevant information before the Court.

[71] In any event, Canada says it is not open to the Plaintiffs to argue that the contents of the documents in question make them vital to the final issue or outcome, since that improperly focuses on the subject of the documents rather than the subject of the motion.

[72] Moreover, the Plaintiffs should not be able to rely on privileged documents improperly retained in order to make that point.

[73] Lastly, Canada says that the Plaintiffs' argument calls for very specific determinations as to the relevance and weight of the documents in question, since privilege (especially solicitor client privilege) should not be over-ridden on anything less. Such determinations are beyond the purview of the Court in assessing whether the established threshold for review of a prothonotary's decision is met.

[74] Canada asserts that the questions raised in the motions before the Prothonotary were not vital to the final issue in the case. This has also been the finding in other cases concerning disputes over privileged information or access to documents, and should clearly be the finding in this case as well.

[75] In considering these arguments and authorities, I think I have to acknowledge that the denial of further discovery will rarely be vital to the final outcome of the case (see *Roman v Canada* (2005), 2005 CarswellNat 1103, 2005 FC 474), and that it will also be a rare case when it can be shown that the denial of further documents will be vital to the final outcome: see *Galerie au Chocolat Inc. v Orient Overseas Container Line Ltd.*, 2010 CarswellNat 678, 2010 FC 327. This suggests, however, that rare cases may arise where the denial of further document may be vital. So is this that rare case and, if it is, should the fact that the documents are excluded as a result of privilege make a difference?

[76] In addressing this issue, I take note of the guidance provided by my colleague, Justice Michael Phelan, in *Lac Seul Band of Indians v Canada* 2011 FC 351 at paragraph 23:

> There is some question in this Court as to what may be "vital" (see *Ridgeview Restaurant Ltd. v Canada (Attorney General)*, 2010 FC 506). A number of cases have held that generally unless the decision concludes some part or all of the case at this early stage, the decision is not vital. Other cases have seen the issue of "vital" as applying to questions that somehow go to the root of a case; jurisdiction would be an example. What may be "vital" depends on the circumstances of each case. Rigid categorization is not helpful.

[77] I do not think, to quote the Supreme Court of Canada in *National Post*, above, because "Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case" that this disposes of the "vital" issue. The fact that a finding of privilege might prevent the Court from ascertaining the full facts required to make a determination is not, in my view, dispositive of whether a particular finding of privilege is vital to the final issue. I am not here concerned with the necessary operation of class privilege, but with whether, on the facts of this case, a finding of privilege is vital to the final issue.

[78] What the Plaintiffs are saying, in effect, is that access to the documents in question, and their deployment in either defending the anticipated motion to strike or in establishing their case at trial in itself makes the documents vital to the case. It seems to me that this begs the question of whether the contents of the documents will assist the Plaintiffs in the way they claim. But I do not think that "vitality" in this context can be assessed on the basis of the relevance or weight that a particular document might have for assisting the Plaintiffs. In addition, of course, unless I review the full record and hear full argument on the anticipated strike motion at trial, I am not in a position to say what value any particular document might have for the Plaintiffs. For example, a solicitor's advice to his or her (defendant) client that liability may or may not exist, depending upon the other evidence available, may be vital for establishing that the client did not negotiate in good faith, but I do not think this can mean that, at the discovery stage, and on an appeal from a prothonotary, such as has come before me, that I can assess "vitality" on the basis of how significant a privileged document might be in assisting the Plaintiffs to make their case.

[79] I think the jurisprudence is clear that a discretionary order of a prothonotary should only be reviewed *de novo* on appeal if the questions raised in the motion are vital to the final issue in the

case, or the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[80] In the present case, Prothonotary Lafrenière was asked to decide whether particular documents should attract privilege. This is what he did decide. It seems to me that whether or not a particular document is privileged cannot, *per se*, be vital to the case. And whether or not a particular privileged document might turn out to be vital cannot be determined by this Court on appeal. This is why, I think, *Gallerie*, above, establishes that it will be a rare case when it can be shown that the denial of further discovery or further documents will be vital to the final outcome.

[81] In their presentations, the Plaintiffs have emphasized the need to examine documents on an individual basis when assessing privilege. On the issue of "vitality", it would seem that the Plaintiffs would have to show how each individual document is vital to the final outcome of their case. They have not done that. In the normal course, this would be impossible because the document remains privileged and need not be produced. The Plaintiffs have been able to mount some kind of argument for vitality in the present case because they have seen some privileged documents that were inadvertently disclosed to them. Even so, I do not think the Plaintiffs have established that "rare case" for any particular document or for any particular class of documents.

[82] Nor do I think the Plaintiffs have established that the Prothonotary's discretion was based upon a misapprehension of the facts. This dispute has a long history and there is competing affidavit evidence. The Plaintiffs say that the Prothonotary should have preferred their evidence and their

view of the facts. However, I can find nothing wrong with the Prothonotary's weighing of evidence or with his assessment of the material facts.

[83] The Plaintiffs also argue, in places at least, that the Prothonotary applied a "wrong principle" to the facts. There is some complexity with regard to these issues and, in a long judgment, it is not possible for the Prothonotary to refer to all "principles" which the Plaintiffs think he should have specifically mentioned. Without concluding that the Prothonotary was wrong in these instances, I have simply looked at the documents again, *de novo* and taking into account the Plaintiffs' concerns and criticisms together with my own view of the applicable law.

[84] In fact, even though I do not think that "vitality" is established, and even in those instances where I do not think a wrong principle was applied, or where there was no mistake as to facts, I have as an alternative examined the evidence and the documents in question, *de novo* to see if I would reach a different conclusion from the Prothonotary's. As my reasons show, even if examined on a *de novo* basis, I see no reason to change the Prothonotary's conclusions.

THE ISSUES

[85] I think the issues before me are as follows:

a. Are the documents at issue privileged?

b. If any of the documents at issue are privileged, has Canada waived privilege?

c. If the documents are privileged and there has been no waiver of privilege, has privilege been vitiated for any of the other reasons put forward by the Plaintiffs, i.e. estoppel, fraud, equitable fraud, bad faith, breach of trust or fiduciary duty?

Solicitor Client Privilege

[86] First of all, I agree with the Plaintiffs on the legal requirements for solicitor and client privilege and the required approach to assessing documents to determine whether they attract that privilege.

[87] The elements of a proper claim to solicitor client privilege are not in dispute. They require:

a. A communication between solicitor and client;

b. Which entails the seeking or giving of legal advice; and

c. Which is intended to be confidential by the parties.

[88] Secondly, I agree that the Court must consider each document individually and decide whether the claim to privilege is properly made out in respect of each document. The Court must not deal with all the documents as a class.

[89] I also agree with the Plaintiffs that no automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer.

[90] In this case, therefore, care should be taken not to automatically clothe documents, or part of documents, with privilege simply because they have found their way into a lawyer's files. An

assessment needs to be undertaken as to whether the elements of a proper claim to privilege have been made out.

[91] The Plaintiffs say that, contrary to the position taken by the Prothonotary, there is no "presumption" of solicitor and client privilege. In *Metcalfe v Metcalfe*, 2001 MBCA the Manitoba Court of Appeal reviewed the document in question and, based on the text of the document and the circumstances in which it was written, made a factual determination that it was intended to be confidential. What the Manitoba Court of Appeal observed, at paragraph 11 was that

> In the present case, the communications in issue are letters in which the appellant's former solicitor gave the appellant information and legal advice relating to the action which had been brought against him.

[92] Under these factual circumstances, dealing as it did with litigation that had already been brought, it was readily apparent in the *Metcalfe* case that there was an intention of confidentiality.

[93] In contrast, given the unique factual matrix of the present case, the Plaintiffs say that the same cannot automatically be said about the correspondence at issue, (including correspondence emanating from the Department of Justice) without critically examining all the facts.

[94] The Plaintiffs argue that a "presumption" as to intended confidentiality, would effectively reverse the well accepted law on onus of proof which this Court continues to accept. The correct articulation of the law is that the onus lies on the party claiming the privilege to demonstrate that the privilege exists.

[95] A party asserting a claim to solicitor client privilege must do more than make the bald assertion that a document is subject to solicitor client privilege. The party asserting such privilege must establish the facts upon which the privilege is claimed.

[96] In *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, Justice Major reiterated the indicia for determining claims of solicitor client privilege in circumstances when government in-house counsel are involved. At paragraph 20, he said that:

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

[97] With these principles in mind, the Plaintiffs argue that on the unique facts of this case, and properly weighing reliable evidence before the Court, neither Canada nor the First Nations had any expectation of confidentiality as between them, be it in respect of historical documents, file memos, legal counsel's opinions or summaries of those opinions, or the summaries of potential witnesses' evidence.

[98] In fact, the Plaintiffs say that the opposite is the case and that Canada expressly agreed to provide the Forebay Bands with unlimited access to all federal government files, and never publicly advised them that it was resiling from that representation.

[99] While the Plaintiffs say they recently learned that Canada did, in fact, withhold relevant information and legal opinions in the 1980s, this fact does not, the Plaintiffs argue, negate Canada's

express or implied "agreement" or "understanding" with the First Nations, or the "undertaking" or "representation" given that Canada was sharing all information in its files that could have a bearing on the subject of the negotiations to resolve the Forebay claims.

[100] After reviewing the documentation at issue, it seems to me that we are dealing with communications between solicitor and client which entail the seeking or giving of legal advice, and that the only real issue of contention is the confidentiality requirement for each document.

[101] The confidentiality requirement has to be assessed by looking at the disputed documentation in conjunction with the evidence provided by the witnesses put forward by both sides. The Plaintiffs concede that they cannot point to a document that specifically says that Canada agrees not to claim solicitor client privilege and agrees to share its legal opinions with the Plaintiffs, but they say that there are documents which, when properly interpreted, point to the same results, and their own witnesses (whose evidence they say should be preferred) testified that Canada committed to an unrestricted sharing of files, including legal opinions and confidential communications involving the seeking or giving of legal advice.

[102] I have now reviewed each document in question, as well as the affidavit evidence on both sides and the cross-examinations of each witness, and the evidence otherwise available to me as part of this appeal, and I have to conclude that solicitor client privilege is established in each case for the documents, or portions thereof, in dispute.

[103] The Plaintiffs make much in their submissions of what they call a "sui generis" relationship between them and Canada throughout the relevant period of time. What they mean by this is that Canada agreed not only to assist them in their dealings and negotiations with Manitoba and Manitoba Hydro, but that Canada also agreed to assess its own legal liability and to share that assessment with them and compensate them accordingly, without the need for any legal action, at least as far as the establishment of liability was concerned.

[104] It seems to me that at least part of the reason why the Plaintiffs call this relationship "sui generis" is because, if it did exist, it would be a most unusual position for Canada to adopt. It amounts to Canada saying that it will either accept the Plaintiff assessment of Canada's liability or seek advice from its own lawyers and then disclose that advice to the Plaintiffs. In other words, it would amount to an undertaking by Canada to assist the Plaintiffs in building their case against Canada and relieving the Plaintiffs of the burden of establishing a case for liability and of taking legal action to establish liability in the usual way. This situation is "sui generis" because the Plaintiffs have not pointed to a situation where Canada has taken such an approach in its dealings with anyone, including potential First Nations claimants, and it would be a most extraordinary situation if Canada did.

[105] Canada may well agree to assist First Nations claimants by providing financing and other assistance to those who are seeking compensation, and this occurred in the present case along with a commitment that Canada would also share information with the Plaintiffs that might help them to obtain settlements and/or compensation from Manitoba and Manitoba Hydro. The evidence before me suggests that both the Plaintiffs and Canada realized that, in dealing with Manitoba and

Manitoba Hydro, the issue of Canada's own liability would inevitably arise and there is strong evidence of a commitment from Canada that if "definite evidence" should arise from the Plaintiffs negotiations with Manitoba and Manitoba Hydro "proving a failure by Canada to meet its legal obligations, if any, Canada is prepared to examine and directly negotiate a resolution of these issues with the Bands."

[106] But this is saying no more than could be said by any potential defendant. All it means is that if the Plaintiffs were to discover evidence suggesting a liability by Canada, then Canada was "prepared to examine" it and "directly negotiate a resolution." Surely it does not have to be spelled out that if Canada does not accept the evidence as establishing liability, then negotiations are not likely to result in compensation, and surely it does not have to be said that in examining any such evidence Canada will be communicating with and taking legal advice from its own lawyers on whether the evidence gives rise to any liability; and surely it does not have to be said that, in seeking and taking such advice, Canada will be able to rely upon the same solicitor client privilege that is available to anyone else who faces a potential liability. In my mind, there is a world of difference between providing financial and informational support (and committing to negotiate in good faith if liability is establish) and agreeing to relinquish solicitor client privilege and the sacrosanct relationship that such privilege protects.

[107] This is why, I believe, the Plaintiffs cannot point to one piece of evidence which says that Canada will share legal opinions and other solicitor client privileged information with the Plaintiffs. It would have been such an extraordinary concession to make that it would have required clear language and formal authorization.

[108] In my view, there is no evidence on the record that Canada has ever admitted liability to the Plaintiffs arising out of the Hydro Project and its aftermath.

[109] The Plaintiffs rightly point out that each document has to be examined individually to see if it meets the criteria for solicitor client privilege. Having completed this exercise, I think it is noteworthy that not one of the documents in question contains any suggestion that it has been written with a view to sharing its contents with the Plaintiffs.

[110] It is the context of the whole record before me that makes Mr. Bloodworth's account of the relationship between Canada and the Plaintiffs the most convincing and, in this crucial aspect, I do not believe his evidence was brought into question during cross-examination.

[111] I think it is clear that the Plaintiffs had their own counsel at all material times and that Mr. Wilson's legal opinions were provided to Canada as a pre-requisite for financial and strategic support without any corresponding obligation on Canada's part to abandon solicitor client privilege and provide the legal advice it was receiving to the Plaintiffs. As Ms. Turner says, "you don't bite the hand that feeds you," and I see no evidence of anyone on the Plaintiffs side asking Canada for legal opinions on Canada's liability and/or making inquiries as to why they had not been provided. Canada's potential liability was recognized early on; the Plaintiffs themselves asserted it in various ways, and they had access to lawyers who could, and did, provide opinions to support such assertions. But Canada has clearly never accepted those assertions and Canada's liability remains to be established, which is what the underlying action is about. Presumably, if the Plaintiffs can

establish that liability, they can ask Canada to honour its commitment to bargain in good faith over compensation.

[112] I also think that the Plaintiffs' assertion that Canada was engaging in some kind of subterfuge is untenable, i.e. securing legal opinions about its own liability, but refusing to disclose those opinions and to bargain in good faith on the basis of whatever they said. In my view, Canada was simply doing what most potential defendants do: seeking legal advice on a confidential basis concerning an evolving situation in which both Manitoba and the Plaintiffs had raised the issue of Canada's potential liability for the Grand Rapids Project and its fallout.

[113] The Plaintiffs seem to think that there is something inherently wrong in Canada seeking to minimize its own potential liability and in seeking to "influence the negotiating process in a way that was in their best interests, and in a way that Federal officials perceived would help insulate Canada from the consequences of wrongful conduct which Federal officials came to understand and accept that it was responsible for." They also argue that the "federal government's advice to the bands conflicted with that of the lawyer retained by band," thus conceding, in my view, that the First Nations had their own lawyer who advised them at the material time and who, presumably, was at liberty to advise them on point. In my view, the fact of Canada's seeking to minimize its own exposure, if any, during the course of a long negotiating process is not in conflict with Canada's commitment to deal fairly with the Plaintiffs should Canada's liability be clearly established.

[114] Even if Canada had come to the conclusion that it faced a potential liability, it would obviously have been imprudent to make its legal communications on point available at a time when the Plaintiffs were negotiating with Manitoba and Manitoba Hydro. And if, as the Plaintiffs allege,

the "federal government's advice given to the bands was that the bands had no viable claim against the province of Manitoba, or Manitoba Hydro, and that the only viable option was negotiation, not litigation," the Plaintiffs had their own lawyers to help them assess the situation and the value of anything Canada might say on point. As the present law suit proves, settling matters with Manitoba and Manitoba Hydro does not prevent the Plaintiffs from pursuing Canada for whatever potential liability Canada may carry for the Hydro Project and its fallout. Of course, Canada wanted to minimize its liability, if any. Communicating with its own lawyers in the face of repeated assertions from Manitoba and the Plaintiffs that Canada had some liability, and declining to make advice received available to the Plaintiffs, is not a form of subterfuge or evidence of bad faith. It is normal, prudent conduct. This is why the Plaintiffs are seeking to establish that Canada undertook to share its privileged information with the Plaintiffs in a *sui generis* relationship that effectively abandoned solicitor client privilege. In my view, there is no specific undertaking to this effect on the record before me, and the whole record reviewed in context does not evince, even implicitly, any such intention or agreement by Canada to abandon its right – which our jurisprudence says is sacrosanct – to solicitor client privilege.

[115] The Plaintiffs also argue that privilege does not attach to documents in a party's possession, or communications between a party and its solicitor, as against persons sharing a "common" or "joint" interest in the subject matter of the document or communication.

[116] They say that the evidence supports that all documents dated from February 3, 1992, when the litigation was commenced, and over which privilege is claimed, were obtained by Canada or brought into existence in furtherance of a joint or common interest. They also say that documents

dated after February 3, 1992, which were nonetheless created for the purpose of furthering the joint interest, are also immune from a claim of privilege.

[117] I see no evidence that the Plaintiffs had a joint or common interest in any way that is relevant to the documents for which privilege is claimed. The Plaintiffs had their own legal counsel. I think it not unfair to say that the Plaintiffs and Canada were jointly interested in ensuring that Manitoba and Manitoba Hydro were held responsible to the maximum degree for any losses the Plaintiffs may have suffered as a result of the Hydro Project and its fallout. To this end, Canada provided financing, information and strategic support for some of the time, but was certainly not involved for the whole period in question. But this is a very different issue from Canada's own liability. The Plaintiffs and Canada had no common interest in establishing that Canada had incurred some kind of liability for the Hydro Project and its fallout. The Plaintiffs' interest was to ensure that Canada would assume responsibility for any losses suffered that were not compensated by Manitoba and Manitoba Hydro. Canada's interest was, as the Plaintiffs themselves point out, in minimizing any such exposure. The documents we are addressing in this motion are related to Canada's exposure. Canada did not communicate with its lawyers for the purpose of assisting the Plaintiffs in a common purpose to establish that Canada was liable in some way for the losses suffered by the Plaintiffs as a result of the Hydro Project. Canada is not in the business of joining with litigants to assist them in establishing Canada's liability by making available to them normally privileged information that arises from communications with its own legal advisers. This is why Mr. Bloodworth's description of the nature of the relationship between Canada and the Plaintiffs is the only one that makes any sense in the full context of the record.

[118] I think the Plaintiffs are aware of this because they go on to argue that the "joint interest exception to the existence of privilege applies because Canada, as 'trustee', was receiving legal opinions for the very purpose of assisting the bands to determine whether Canada was liable, and whether Canada should contribute financially to a negotiated settlement."

[119] The evidence establishes, in my view, that Canada's commitment was premised upon it being clearly established from definite evidence arising during negotiations with Manitoba and Manitoba Hydro that proved a failure by Canada to meet its legal obligations, if any. If this were to occur, then Canada was prepared to "examine" and "directly negotiate a resolution." This does not commit Canada to accepting any such evidence as establishing its liability – it has never done so – and, obviously, in examining any such evidence Canada would need to communicate with its lawyers in the usual way and with the advantage of the usual privilege that pertains to any such communication. Canada's liability and exposure depends upon many factors, including the existence of limitations and laches defenses, which I understand Canada intends to test in an anticipated motion to strike. I do not see in the evidence any kind of explicit or implicit commitment by Canada that, for instance, in examining any evidence that suggests it could be liable for some aspect of the losses suffered by the Plaintiffs as a result of the Hydro Project, Canada will not consider using any applicable limitations and laches defences when it "examines" any evidence of possible liability and before proceeding to a negotiated settlement.

[120] If the Plaintiffs feel that Canada has misled them in some way, then, presumably, they will argue that point in defending the motion to strike and/or in the eventual trial of this action. I certainly cannot say that Canada has misled the Plaintiffs on the evidence before me. The Plaintiffs

appear to be saying that they want the Court to abrogate privilege to assist them in proving that Canada has misled them. But I do not see in the authorities that privilege can be abrogated to assist one of the parties to make their case in a motion to strike and/or at trial. There would be no such thing as privilege if that were the case. The issue of what Canada might have said and done, and the full meaning of the same, is very much what this lawsuit is about. I am not hearing the motion to strike or the trial. I do not think the Plaintiffs can come before me with what they hope to establish, but which has yet to be established on a full record, and claim it as justification for abrogating privilege. If they say they cannot make their case unless privilege is abrogated then they are faced with the Supreme Court of Canada's ruling in *National Post*, above, that "Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case."

[121] But the Plaintiffs go further and say that, even in cases where there is no express "joint interest" negating a claim to privilege, there may be circumstances where, given the nature of the relationship between the parties, a finding of a common interest will be presumed, and no privilege may be claimed over a certain subject matter.

[122] Hence, the Plaintiffs point out that the Supreme Court of Canada has confirmed that the "common interest" exception has been expanded to cover those situations in which a fiduciary, or like, duty has been found to exist between the parties so as to create a common interest. They assert that this includes trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations, and certain types of contractual or agency relations.

[123] The Plaintiffs say that this type of "joint interest" is not one that requires any actual express intention on the part of the parties to pursue a common goal, but is an incident of the special fiduciary relationship where, in any given fact situation, the documents in question were created, or were collected, for the purpose of fulfilling a fiduciary obligation (where one exists).

[124] In *Samson Indian Band v Canada* (1995), 125 DLR (4^{th}) 294 (Fed. CA), the Federal Court of Appeal set out at page 302 a two-part test to be used to assess whether privilege may be abrogated where a trust-like relationship exists between the Crown and an Indian band, at page 302:

> 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. [Emphasis added]

[125] The Plaintiffs argue that, in later cases, the Federal Court of Appeal seems to have abandoned the requirement of the first part of the test dealing with the establishment of a fiduciary relationship and has, quite properly, focused on the idea that in order for the privilege to be abrogated, the documents in respect of which privilege is challenged must "concern the administration of, or discharge of, responsibilities of the Crown as trustee for the benefit of the respondent bands…"

[126] The Federal Court of Appeal went on to explain as follows in *Samson Indian Band v Canada*, [1998] 2 FC 60, at paragraph 25:

> [the trial judge] took the correct view of the respondents' joint interests when he ordered, on March 20, 1996, that the Crown

> produce any document in the nature of legal advice that concerns the administration of, or the discharge of, responsibilities of the Crown as trustee for the benefit of the Plaintiff Bands…"

[127] In the case at bar, the Plaintiffs say that the documents in question over which Canada claims privilege were created or were gathered by the Crown for the purpose of fulfilling a fiduciary obligation to the Forebay Bands – a duty that Canada recognized at the time.

[128] The allegation is that Canada was animated by the understanding, acceptance and belief that it was acting as "trustee" in assisting the First Nations to pursue compensation for the losses they had suffered.

[129] In conclusion, the Plaintiffs say that the documents over which Canada continues to claim privilege in this case, to use the words of the Court of Appeal in *Sampson*, above,

> concern the administration of, or the discharge of, responsibilities of the Crown as trustee for the benefit of the Plaintiffs Band…

[130] I do not think that the evidence before me shows that the documents in question were created or gathered by Canada for the purpose of filling a fiduciary or trust obligation, or that Canada was animated by the understanding and acceptance and belief that it was acting as "trustee" in assisting the Plaintiffs to pursue compensation for the losses suffered by the Plaintiffs. The limited assistance provided by Canada related to the Plaintiffs' claims against Manitoba and Manitoba Hydro. The documents over which privilege is claimed are concerned with Canada's efforts to understand its own legal obligations vis-à-vis the Plaintiffs. Canada did not create or gather this documentation as part of a fiduciary obligation. It created and/or gathered the documents to help it understand what possible obligations and liabilities (including as a possible fiduciary) it might have towards the Plaintiffs. This was not done to assist the Plaintiffs, or to further fiduciary

obligations; it was done in furtherance of Canada's own interests as a potential defendant in a lawsuit involving the Plaintiffs and their repeated assertions that Canada had a legal liability to compensate them for some proportion of the losses they claimed to have suffered as a result of the Hydro Project. In my view, no *ad hoc* or *per se* fiduciary obligation arose in relation to the documents at issue.

[131] Finally, on this theme, the Plaintiffs say that, independently of any other basis, "the honour of the Crown requires, given the *sui generis* relationship between Canada and the bands, disclosure of all relevant documents."

[132] This argument is based upon an assertion by the Plaintiffs that the evidence before the Court is that, until litigation was commenced in the 1990s, the energies of the First Nations and Canada were being expended on the common goal and interest they were pursuing: the recovery of full compensation for the Plaintiffs in a manner that did not involve suing Canada.

[133] In this case, the Plaintiffs argue that the honour of the Crown gives rise to a duty upon Canada, which includes an obligation to honour the spirit and intent of representations made in the 1980s to share all relevant information, whether or not privilege may otherwise be claimed, and whether or not there is any legal basis to compel Canada to do so.

[134] The Plaintiffs support this position with the reasoning of the Federal Court of Appeal in *Stoney Band v Canada* 2005 FCA 15:

> I conclude that, with respect to the honor of the Crown, the concrete practices required of the Crown so far identified by the Supreme Court of Canada in the aboriginal context are: acting appropriately as a fiduciary; interpreting treaties and documents generously;

> negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when Aboriginal rights are infringed. However, I do not suggest that this is an exhaustive list of the ways in which the honour of the Crown may be manifest.

[135] The Plaintiffs say that, on the facts of this case, Canada was taking part in a negotiation process, and not a litigation process. Additionally, successive ministers repeatedly assured the Plaintiffs that Canada would negotiate a settlement with them if evidence of liability came to light.

[136] I have already said that, in my view, the Plaintiffs and Canada were not involved in a common goal, at least as far as the documentation at issue in this motion is concerned. Canada provided some assistance to the Plaintiffs in their efforts to recover compensation from Manitoba and Manitoba Hydro, but it is clear that as far as Canada's own obligation to provide compensation was concerned, this was very much dependent upon Canada's assessment of its own liability. In addition, the "spirit and intent of representations in the 1980s" that Canada may have made are part of what this lawsuit is about and very much open to dispute. In my view, there is no clear intent and commitment by Canada to share privileged communications and information with the Plaintiffs, and Canada has never conceded that liability has been established. The Plaintiffs are seeking to abrogate privilege on the basis of grounds they have yet to establish.

[137] All in all, then, I think Canada has demonstrated in accordance with the governing jurisprudence that the documents or portions thereof at issue are protected by solicitor client privilege. I see no reason to change the Prothonotary's assessment of the documents at issue.

Litigation Brief Privilege

[138] Once again, I agree with the Plaintiffs as to what Canada must do in order to establish litigation brief privilege. Firstly, litigation brief privilege must be established by the party claiming the privilege on a document by document basis.

[139] Secondly, there is no uncertainty as to the essential elements of a proper claim of litigation brief privilege. The Supreme Court of Canada in *Bland v Canada (Minister of Justice)* 2006 SCC 39 has confirmed that the establishment of such privilege requires the party claiming the privilege to prove that:

a. Litigation was ongoing or reasonably contemplated at the time the document was created; and

b. The dominant purpose of creating the document was to prepare for that litigation.

In order to meet the first requirement, Canada must demonstrate that a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without litigation.

[140] The Plaintiffs say that Canada does not meet this test, given that both the First Nations and Canada took the position, throughout the 1980s, that issues between them would be resolved not by litigation, but through negotiation. They say Canada cannot repeatedly affirm its commitment to the negotiation of any issues which may arise between the parties and then assert that, in fact, it anticipated that litigation would be necessary to resolve any dispute.

[141] They also say that, throughout much of the 1980s, both Canada and the First Nations contemplated what can only be characterized as the "theoretical possibility" of litigation by the Plaintiffs against Canada, but no one was of the view that such litigation was a realistic possibility given that:

a. The First Nations did not want to litigate;

b. The First Nations were being funded by Canada to negotiate and not litigate;

c. The First Nations did not have the financial wherewithal to litigate without funding from Canada;

d. Among others, two separate ministers of Indian affairs expressly promised and represented that, if there was ever any evidence of liability, Canada would negotiate a resolution; and

e. The First Nations were not in possession of information sufficient for them to know that there was a cause of action against Canada until they obtained legal advice on the ramifications of the factual findings of the 1986 Hobbs report, which came at the earliest when Roger Tasse provided his legal analysis in or about 1988. Although Canada had the opinions of the Department of Justice in 1984 (Barbara Shields) and 1989 (Ian Gray), those opinions were not shared with the Plaintiffs at any time.

[142] Moreover, the Plaintiffs say that Canada has not led any evidence to establish the second requirement for this kind of privilege, i.e. that the specific documents over which privilege is claimed were created for the dominant purpose of litigation.

[143] The Plaintiffs say that, in order to establish "dominant purpose," the party asserting the privilege must present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it. They say that affidavit evidence from the person who created the document, or authorized its creation, is required in order to establish the dominant purpose of the document's creation. They also say that this must be done on a document by document basis, and not globally.

[144] The Plaintiffs caution that it is not sufficient for the author of a document to be aware that litigation was a possibility. First, as set out above, the litigation must be reasonably contemplated, as that is defined in the cases. But, more importantly, even where litigation is ongoing, it must be further demonstrated that the "dominant purpose" for the creation of the specific document was to prepare for the conduct of that litigation. As the Court stated in *Hamalainen (Committee of) v Sippola*, (1991) 62 BCLR (2d) 254,

> The fact that litigation is a reasonable prospect after a casualty, and the fact that that prospect is one of the predominant reasons for the creation of the reports is now not enough. Unless such purpose is, in respect of the particular document, the dominant purpose for creating the document, it is not privileged.

[145] In *Hamalainen*, the Court found that the affidavits relied on to establish privilege were insufficient because they were based on "a significant error of law, namely, the assumption that, because litigation seems likely, the reports must necessarily have been prepared for the principal purpose of assisting in the preparation for and the conduct of such litigation."

[146] The Plaintiffs principal point on this branch of privilege is that the "dominant purpose" of those instructing Mr. Henderson, viewed objectively, and with the knowledge and appreciation that Canada was acting on the basis that it believed it had obligations to the bands in the 1980s, was not contemplated litigation. The dominant purpose was to satisfy a process of mutual cooperation with the First Nations with a view of assisting them to secure compensation for the losses experienced following Canada's consent to the taking of reserve lands and the subsequent construction and operation of the Hydro Project, even if, as the Minister of Indian Affairs confirmed, the evidence pointed to Canada.

[147] The Plaintiffs say that, apart from Canada's failure to bring evidence of "dominant purpose," many of the documents over which litigation privilege has been claimed, on their face identify that they were not created for the dominant purpose of litigation, but for the purpose of assisting the First Nations to resolve their grievances, and for furthering ongoing negotiations.

[148] In the *Hamalainen*, case, upon which the Plaintiffs place heavy reliance, the British Columbia Court of Appeal pointed out at page 8 that at "what point, the dominant purpose becomes that of furthering the course of litigation will fall to be determined by the facts peculiar to each case."

[149] The Master's decision appealed from in *Hamalainen* had dealt with "affidavit material filed by the party claiming privilege which was deficient in a number of respects" [page 9]:

> As already noted it failed to draw any distinction between the purpose underlying the production of individual documents. The risk inherent in that approach was pointed out by Mr. Justice Esson in the Shaughnessy Golf case at p. 319 of the report:

> Privilege was claimed for a large number of documents. The grounds for it had to be established in respect of each one. By trying to extend to the whole list the considerations which confer privilege on most of the documents, the plaintiff has confused the issue and created the risk that, because it did not make in its evidence the distinctions that could have been made, it must be held not to have established privilege for any.
>
> Furthermore the affidavit material concentrated on the repetitious assertion by each deponent of his belief that litigation in the case was inevitable, from which fact the dominant purpose underlying the production of all documents was apparently assumed. As already pointed out that approach to the onus facing the deponent on this question represented a mistaken view of the law.

[150] Notwithstanding deficient affidavit material in *Hamalainen*, the Master still had to make a decision on the facts of the case as to dominant purpose of the documents in question and the BCCA confirmed his approach:

> In my view, this decision imports no more than a conclusion that in this case, on the basis of the material put before him, it was apparent to him that the dominant purpose underlying the production of investigative (adjusters') reports and witness statements after the date upon which liability was formally denied was probably for use in the litigation which had been in reasonable prospect since the accident of November 30th with respect to documents produced prior to that date, the defendant failed to meet the onus put upon him to establish that dominant purpose. I cannot say that the Master was wrong to approach the problem the way he did; in fact, I think he was right.

[151] In the present case, I am faced with similar difficulties. Given the long history of this dispute, it is hardly surprising that Canada did not produce individualized affidavits for each disputed document. In my view, however, that is not fatal, and I must make a decision based upon the evidence that is before me. In my view, that evidence shows the following:

a. The Plaintiffs had made it clear to Canada that they held Canada legally responsible and liable to compensate them for losses suffered as a result of the Hydro Project and/or that Canada would be third partied by Manitoba;

b. The Plaintiffs were in a position to know that they had a potential cause of action against Canada throughout the whole period. Mr. Wilson's opinion and other documents make this abundantly clear. They informed Canada of this;

c. Mr. Bloodworth's evidence is that from 1979 to 1992, he and other DIAND officials

> were under the impression that it was possible that the first nations might bring litigation against Canada at any time. Many of the documents in Canada's Schedule II were created by Canada with that thought in mind, and sometimes in an attempt to avoid the anticipated litigation;

d. Mr. Bloodworth expanded on the dominant purpose issue under cross-examination. He had examined a large number of individual documents and ticked them to show that "my review of the document the information was prepared (*sic*), the persons preparing the information had knowledge of the facts, were aware there was a possibility of Canada having litigation with the First Nations." These were documents from the pre-litigation period. After litigation was commenced, Mr. Bloodworth used his "understanding of the knowledge of the individual authorizing the document, the knowledge and experience and qualifications of the individual to whom the document was addressed and/or who was sending it" to identify which documents attracted litigation brief privilege. It also has to be borne in mind that in his affidavit, Mr. Bloodworth gave evidence that "Because of the positions that I occupied in the federal government, I was and am well-versed in the various types of privilege that can adhere to government documents." He was not challenged on this;

e. Significantly in this case, there are also the documents themselves that have been made available to the Court and which, in my view, make their dominant purpose quite clear on their face, as well as the fact that such purpose is bolstered by the obviously privileged and confidential status of the information they contain.

[152] In the end, the dominant purpose of the document "necessarily falls to be determined by the facts peculiar to each case," as the BCCA said in *Hamalainen*, above. Taking into account the facts peculiar to this case, and in particular the evidence referred to above, I think I have to conclude on a *de novo* consideration of this issue that, as regards the documents in question, litigation was in reasonable prospect when the document was produced and that the dominant purpose for which each document was produced probably was to seek legal advice or to aid in the conduct of such litigation.

[153] In my view, then, Canada has established litigation brief privilege over the documents, or portions of the documents, in question. I see no reason to change the Prothonotary's assessment of the documentation at issue on this branch of privilege.

Settlement Privilege

[154] As *Bauer Nike Hockey Inc. v Tour Hockey* 2003 FCT 451 (TD) makes clear, settlement privilege requires the party claiming a privilege to establish three things:

a. A litigious dispute must be in existence or within contemplation;

b. The communication must have been made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations failed; and

c. The purpose of the communication must be an attempt to effect a settlement.

[155] Once again, as with litigation privileges, Canada must show a clear indication in relation to each document that its purpose was to effect a settlement.

[156] The Plaintiffs say that there is an additional point to be made in respect of the claim to settlement privilege in this case. To the extent that any settlement privilege is established, what the Plaintiffs are seeking is a copy of settlement documents that by the very nature of the claim to privilege Canada argues were already voluntarily disclosed to them in the past, but which the Plaintiffs either did not get, or no longer have a copy of.

[157] The Plaintiffs say that the purpose of settlement privilege is not to prevent the opposing party from having the document, but is to prevent the trier of fact from being swayed by admissions or concessions that may have been made by the party making the settlement overtures. It may be that any admissions made by Canada in those communications or settlement proposals are not admissible at trial, but the Plaintiffs say this cannot preclude their disclosure to them at the discovery stage.

[158] The Plaintiffs say that they are only seeking a copy of settlement documents that have already been disclosed to them, but which they now do not have. However, the Plaintiffs do not indicate in this appeal what use they intend to make of such documents. They do not, for instance,

indicate or undertake that they will not place such documents before the trier of fact or that they agree with Canada that such documents are subject to settlement privilege. It seems to me that it would have been a very simple matter for the Plaintiffs to make it clear that all they wanted was a copy of a settlement document and would not dispute its privileged status. Obviously, then, the Plaintiffs do want a copy of a settlement document whose privileged status they do wish to dispute and which they intend to place before the trier of fact either in the motion to strike or at trial. Otherwise, there would be no problem.

[159] I have to keep in mind that I am considering an appeal from Prothonotary Lafrenière's decision where both sides disputed the privileged status of documentation, including the three documents which the Prothonotary thought were subject to settlement privilege.

[160] The Plaintiffs say that they should not be punished for poor record-keeping. But that is not the issue. If the Plaintiffs merely want copies to complete their deficient records, then they could acknowledge privilege.

[161] The Plaintiffs real argument is that "It may be that any admissions made by Canada in those communications or settlement proposals are not admissible at trial, but that cannot preclude their discovery to the Plaintiffs at the discovery stage." The Plaintiffs cite *Middelkamp v Fraser Valley Real Estate Board* (1992), 96 DLR (4^{th}) 227 (BCCA) as authority for this position. But it seems to me that *Middelkamp* supports Canada's position by holding that "this privilege protects documents and communications created for such purposes [i.e. for the settlement of disputes] <u>both from production to other parties to the negotiations and to strangers</u>, and extends as well to admissibility,

and whether or not a settlement is reached." (para 19) [Emphasis added] Justice Locke, at paragraph 84, also emphasized that, in his view "the guiding principle and one promising the greatest good for the greatest number of disputants is to shield these documents from production." [Emphasis added].

[162] In the present case, we are dealing with production.

[163] Applying the criteria in *Bauer*, above, to the documents at issue in this case, I believe that Canada has established its case for settlement privilege, and I see no reason to change the Prothonotary's assessment of the documents at issue.

WAIVER

Express

[164] The arguments put forward by the Plaintiffs for express waiver in this case are that the evidence added the following factors to the admissions conceded by Canada's witnesses, and amounted to the following:

a. Canada listed a large volume of documents in three separate original affidavits of documents produced between 1998 and 2002 as non-privileged;

b. Following the listing, Canada disclosed those documents to the Plaintiffs on numerous occasions over more than a decade;

c. Those disclosures only took place after legal counsel had vetted the documents for the express purpose of considering whether to claim privilege over them;

d. Canada's voluntary disclosure continued with its supplementary lists of documents produced in 2004;

e. Yet another allegedly "privileged" document was produced in answer to discovery undertakings, following an examination for discovery in 2005 in the Opaskwayak case;

f. At least three different legal counsel (including current litigation counsel), and three different case managers, participated in the production of all of these documents;

g. Canada did not ask for the return of any documents over which it now asserts privilege until 2009.

[165] The Plaintiffs say that, in keeping with the principle enunciated in the *Metcalfe* and *Reese* cases, and the law of agency, lawyers and case managers, acting in the ordinary course of their duties, are agents who have the authority (actual, apparent, implied, necessary, or ostensible) to waive privilege.

[166] Craig Henderson was lead counsel for Canada on the Hydro Project files from 1982 to 2003. Mr. Henderson was responsible for preparing or directing the preparation of legal opinions relating to the SFC issues, and met with opposing counsel on several occasions to discuss those legal opinions and to strategize on the coordinated approach of Canada and of the First Nations.

[167] It was Mr. Henderson who signed the Certificate of Solicitor with respect to Canada's original Affidavit of Documents in each of these three legal proceedings. The Plaintiffs say that Mr.

Henderson made a determination that privilege would not be asserted over numerous documents to which Canada now asserts that privilege was intended to apply.

[168] The Plaintiffs point out that Canada has adduced no evidence from Mr. Henderson whatsoever, nor has it suggested that he was not available to testify. They say that there is no evidence from anyone having any personal knowledge that his decision, or the decision of other lawyers or case managers to disclose the documents in question, was beyond their authority, was mistaken, or was in any way "inadvertent."

[169] The Plaintiffs say that Canada's only evidence on the subject of advertence is from Mr. Bertrand, who has only been involved in these files since 2008. He simply deposed that he could not ascertain why so many documents over which Canada now claims privilege were disclosed.

[170] In these circumstances and in the absence of evidence to the contrary, the Plaintiffs argue that the proper conclusion is that Mr. Henderson properly adverted to all relevant factors and made a conscious and informed decision to produce the documents over which Canada now claims privilege.

[171] In reviewing the evidence related to express waiver, I believe the following are important factors for me to consider:

a. Mr. Bertrand reviewed department records and spoke with former case managers;

b. Mr. Bertrand was unable to determine how documents for which privilege is now claimed came to be included in Schedule 1, but it is reasonable to conclude, as he did, that this was done in error because his review turned up nothing to suggest a

deliberate or voluntary decision on what would have been an extremely unusual concession to make i.e. to waive privilege;

c. Mr. Bertrand's evidence spoke to the seriousness of waving privilege and a government process that had to be followed before waiver could occur. Based upon his review of the files, he could find no evidence that any necessary approval had ever been sought to waive privilege, and no evidence that any decision had been made to waive privilege;

d. As far as the law of agency and ostensible authorities is concerned, there is no evidence that anyone – legal counsel, case manager or whoever – agreed to waive privilege or that the disclosures were anything more than inadvertence.

[172] Considering this issue *de novo* and going over the evidence myself, I reach similar conclusions to those reached by the Prothonotary, although it is my view that all of the relevant documents, whether part of the disclosure made by the Plaintiffs or otherwise in the possession of the Plaintiffs, were inadvertently disclosed in a context where there was no intention to waive privilege. I see no evidence, for instance, that the Plaintiffs acquired privileged documents in some clandestine or underhand way.

[173] As the Prothonotary pointed out, the inadvertent production of documents does not, *per se*, amount to waiver, and a determination must be made on a case-by-case basis as part of which the competing interests of the parties must be made.

[174] I acknowledge and accept the competing factors identified by the Prothonotary that come into play when considering a case such as this:

a. The manner in which the documents were released;

b. Whether there was a prompt attempt to retrieve the documents after the disclosure was discovered;

c. The timing of the discovery of the disclosure;

d. The timing of the application to recover the documents;

e. The number and nature of the third parties who have become aware of the documents;

f. Whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party; and

g. 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* 920010 103 ACWS (3d) 931 at para 14).

[175] I further agree with the Prothonotary and accept as part of my *de novo* review that in this case disclosure occurred in the context of slow-moving litigation where discovery and production took place years after the claims and initial affidavits of documents were filed. Once inadvertent disclosure was discovered, Canada's response did not suggest waiver. As the Prothonotary points out, the time between production and discovery of the mistake was on the longer side, but this is because of the quantity of documents involved and the age and speed of the claim.

[176] The Prothonotary regarded the unfairness issue as of particular significance for the facts of this case and I have to say that this is also my view:

> **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] A.J. No. 159 at para 36 (CA) (QL), aff'd [2002] 3 S.C.R. 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, [2001] O.J. No. 1777 (QL), the Court distinguished the case before it from *Tilley v. Hails* (1993) 12 OR (3d) 306, [1993] O.J. 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.

[177] Having reviewed the evidence before me and conducted my own *de novo* assessment of the situation, I find that, essentially, I reach the same conclusions as the Prothonotary on the issue of voluntary waiver. It did not occur in this case.

Implied Waiver

[178] The Plaintiffs argue further that, where an otherwise privileged document is disclosed, any privilege that might apply to other documents with the same subject matter, is deemed to be waived. Once privilege has been waived, a party cannot be selective in the scope of waiver. With respect to part of a specific document all communications about that subject matter identified in that same document lose their privilege.

[179] In *Begetikong Anishnabe v Canada (Minister of Indian Affairs and Northern Development)*, [1997] FCJ No 1434, the Federal Court explained the circumstances when partial disclosure of privileged documents will require full disclosure of other documents over which privilege is sought to be maintained. At paragraphs 10 and 11, Justice Dubé explained as follows:

> In the Evans decision, Rothstein J. of this Court considered the following factors as being relevant to the determination as to whether partial disclosure required full disclosure:
>
> > (a) There had already been considerable disclosure of legal opinion;
> >
> > (b) It appeared that the respondent had disclosed portions of the legal advice that he considers innocuous or perhaps beneficial and had kept other information confidential which he apparently considers damaging;

> (c) Some of the information for which privilege was claimed were merely statements of existing law;
>
> (d) In one case, two recommendations are made, but only one is disclosed;
>
> (e) Some information deleted on the grounds of privilege is disclosed elsewhere in the material.

The learned judge concluded that these factors showed inconsistency. He said as follows, at p. 7:

> ... The inconsistency of disclosing some solicitor-client advice and maintaining confidentiality over other advice both pertaining to the issues raised by the applicant causes me concern. In the circumstances of this case, to ensure that the Court and the applicant are not mislead, and in the interest of consistency, the respondent must be considered to have waived all rights to solicitor-client privilege.

[180] The Plaintiffs say that, on the facts of this case, the very same factors that were cited as critical by then Justice Rothstein of the Federal Court in the *Evans* case are present here.

[181] The Plaintiffs point out that the implied waiver rule not only applies in respect of documents that are disclosed, but also in respect of privileged information that is disclosed. Thus, where there has been disclosure elsewhere in the record (as opposed to elsewhere in a document or redacted document) of information closely-related to that in the document or part of documents over which privilege is claimed, it would be unfair and inconsistent for the claim to privilege to be sustained in respect of the document, which would leave only a partial explanation of the true state of affairs.

[182] The Plaintiffs argue that in this case, there is ample evidence of Canada disclosing some legal opinions touching on its liability. Fairness should not allow them to disclose only some parts of the legal opinions and maintain privilege over other parts of it.

[183] The Plaintiffs' criticism of the Prothonotary's approach to this issue is also worth bearing in mind for purposes of my own *de novo* evaluation.

[184] They say that there are three distinct types of implied (or court ordered) waiver that the Plaintiffs put forward in this motion:

a. Implied waiver over the redacted parts of documents that are closely related to the un-redacted portions of the same documents such that fairness requires them to be disclosed;

b. Implied waiver of completely separate documents (or portions thereof) which are so closely related to other documents that were voluntarily disclosed such that fairness requires those additional documents to be disclosed;

c. Implied waiver of completely separate documents (or portions thereof) which are so closely related to documents that the court orders disclosed as part of this motion process, such that fairness requires those additional documents to be disclosed.

[185] In addition, each of the above implied waivers might involve documents already in the Plaintiffs' possession that were themselves either:

d. Documents (or parts thereof) that Canada voluntarily disclosed to the discovery process, and which Canada never did and does not claim privilege over;

e. Documents (or parts thereof) that Canada disclosed in the discovery process as not being privileged, but with respect to which Canada now claims privilege;

f. Documents (or parts thereof) that Canada never disclosed in the discovery process, but which came into the Plaintiffs' possession, other than through the court discovery process, and which Canada claims privilege over.

[186] The Plaintiffs say that the Prothonotary failed to deal at all with items (a) and (c), above, and only dealt with item (b). I should not make the same mistake on this appeal.

[187] Further, the Plaintiffs say that the Prothonotary improperly confined his analysis of implied waiver of otherwise privileged documents to the class of documents in (e) and (f), but neglected to consider the situation of documents in (d).

[188] The Plaintiffs' point is that the implied waiver analysis was improperly confined by the Prothonotary to:

a. Documents that he ruled had been "inadvertently" disclosed by Canada in the discovery process; or

b. Documents which had come into the Plaintiffs' possession outside of court discovery process, which he felt had been obtained in an improper fashion.

[189] The Plaintiffs complain that once the Prothonotary concluded that no part of those documents were voluntarily disclosed by Canada, his inquiry ended in respect of those documents. I

think the Prothonotary went much further than this but, for purposes of my own evaluation, I have the Plaintiffs' concerns in mind.

[190] Having completed my own *de novo* review of the evidence, and bearing in mind the range of review outlined by the Plaintiffs, I once again reach the same conclusions reached by the Prothonotary on the issue of implied waiver, and I can do no better than reproduce those portions of his reasons which highlight the important factors at play in this case, and adopt them for purposes of my own reasons and conclusions:

> 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 SCR 254, 55 DLR (3d) 224; *Schauenburg Industries Ltd. v. Borowski* (1979), 25 OR (2d) 737, 101 DLR (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] OJ No 862 (Gen. Div.). The surreptitious delivery of confidential material cannot be sanctioned: *Ontario (Attorney General) v. Gowling & Henderson* (1984), 47 OR (2d) 449, 12 DLR (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, [1983] 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 WWR 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. <u>In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the</u>

> 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 OR (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".

[191] My own conclusion is that the Plaintiffs have not established a case for implied waiver on the facts of this case.

Other Grounds

[192] The Plaintiffs have advanced a number of grounds for their position that, even if privilege exists in the present case, and express or implied waiver have not been established, privilege should nevertheless be vitiated for a number of reasons.

Estoppel

[193] In my view, the evidence does not show that Canada made the kind of representation that could support an estoppel.

[194] The Plaintiffs say that, on numerous occasions, Canada represented that Canada would share its legal advice with them.

[195] My review of the record suggests that Canada provided financial and strategic assistance to the Plaintiffs, including information, in their dispute with Manitoba and Manitoba Hydro at certain times. However, for reasons already given, I do not believe that Canada ever represented to the Plaintiffs that, when it came to considering Canada's own potential liability for the Hydro Project and its fallout, Canada would share its privilege communications and advice on that issue with the Plaintiffs.

[196] It is my view that the essential elements for an estoppel argument have not been made out in this case, and there is no reason to deviate from the Prothonotary's conclusions on this issue.

Equitable Fraud

[197] The Plaintiffs argue further that privilege in this case is vitiated by equitable fraud.

[198] As the Plaintiffs point out, equitable fraud was defined by the Supreme Court of Canada in *Guerin v R.*, [1984] 2 SCR 335 (SCC). In that case, Justice Dickson explained that it was

> … conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other.

[199] Justice Dickson went on to explain as follows, in the same paragraph (115):

> I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in

> concealing the terms of the lease from the Band, in my view, their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band.

[200] Thus, it is clear that it is not the wrongfulness of the conduct that is relevant, but the degree of unconscionability in the context of the relationship between the parties that governs.

[201] The Plaintiffs say that Canada's conduct in this case amounts to equitable fraud. It is conduct which, having regard to the special relationship between the two parties concerned, was unconscionable for Canada to engage in.

[202] My review of the evidence leads me to the conclusion that there are no grounds for equitable fraud in this case and there is no reason to deviate from the Prothonotary's conclusions on point.

[203] The "special relationship" and "unconscionability" arguments have already been addressed. The Court does not accept that Canada went as far in its promises of assistance as the Plaintiffs allege, or that there were trust and/or fiduciary considerations when it came to information generated in a privileged context and which dealt with Canada's own potential liability. The evidence is also clear that Canada never accepted liability. Hence the present lawsuit. The history of these proceedings shows that the Plaintiffs and Canada have spent years discussing whether Canada has some liability to the Plaintiffs for the Hydro Project and its fallout. The Plaintiffs do not like the result of those discussions and now wish to say that Canada has not fulfilled commitments given years ago that litigation would not be necessary. However, the nature and scope of any such commitments is very much in dispute between the parties. There is no evidence of equitable fraud before me that would allow me, at this point in the dispute, to find that Canada has behaved

unconscionably towards the Plaintiffs in a way that requires the vitiation of the privileges that normally prevail in a lawsuit.

Essential Justice

[204] The Plaintiffs argue that, finally, if there are no other grounds on which privilege can be set aside, it remains the law that where it is required in the interest of justice, privilege may be set aside. In *Blank v Canada* 2006 SCC 39, the Supreme Court of Canada stated at paragraph 44:

> The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

[205] Similarly, in *Pax Management Ltd., et al. v CIBC* (1987) 14 BCLR (2d) 257, at page 7, the British Columbia Court of Appeal held that solicitor client privilege may be set aside when a document contains information which could reasonably be anticipated to throw light on the question of whether or not the client has committed a fraudulent act:

> The denial of privilege in such circumstances is not based on waiver by the client, express or implied, but simply on the policy basis that the benefits of maintaining the privilege are outweighed by the benefits to be derived, in cases where fraud is a genuine issue, from full disclosure of all circumstances relevant to resolving that issue including those circumstances contained in documents which are usually protected from disclosure by reason of the solicitor/client privilege.

[206] The Plaintiffs say that the Court has the discretion, where it determines that a claim of fraud is honestly advanced and has sufficient credence, to disallow the privilege so that all relevant material is before the Court.

[207] Hence, the Plaintiffs urge that it would be just and appropriate to compel Canada to disclose documents over which privilege may otherwise be claimed in order that its conduct be exposed and not hidden from the trier of fact.

[208] On the record before me, I do not regard the Plaintiffs as having established that privilege should be set aside "in the interests of justice" and I see no reason to deviate from the Prothonotary's conclusions on point. The Plaintiffs have not established that fraud or unconscionable conduct on the part of Canada require that the usual privileges that arise in a lawsuit, and that are equally available to the Plaintiffs, should be set aside as far as Canada is concerned.

[209] The Supreme Court of Canada has recently said in *National Post*, above, that "Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case." This is a consequence that is equally applicable to the Plaintiffs when they claim privilege. The Plaintiffs' essential case before me is that a "*sui generis*" relationship arose between them and Canada over the Hydro Project that renders Canada's defence of this lawsuit illegitimate and unconscionable. In my view, however, the evidence put forward by the Plaintiffs before the Protnonotary and before me in this appeal does not establish their view of what Canada's obligations are in the circumstances. They themselves know that Canada has never clearly accepted liability, or agreed to waive privilege. This is why the Plaintiffs have had to produce an inordinate amount of material and argument to try and convince the Court that, notwithstanding the lack of evidence on these central issues, the Court should nevertheless consider and find other ways

to give them what they want at this point in the process. In my view, however, the Plaintiffs cannot rely upon what they have yet to prove, on these crucial points, to justify waiver of the normal privileges available to both sides in a lawsuit. The Plaintiffs have to posit a "*sui generis*" situation because they know they cannot bring this case within the established peramiters where privilege has been deemed to be waived.

[210] I cannot find evidence of estoppel, equitable fraud, or bad faith in the record before me. All of these arguments come back to what Canada undertook in terms of assisting the Plaintiffs, and what undertakings were given regarding the privileged communications, advice and information that is embodied in the documentation that is the subject of this appeal. As indicated, I simply cannot find that Canada agreed that the usual privileges would not apply and that the Plaintiffs would be provided with documents and information that usually attract privilege in a situation where Canada's own potential liability is put at issue.

[211] I am not adjudicating the merits of this claim and I do not have a full record before me that would allow me to assess what "the interests of justice" means in the context of this case. All I can do is assess the Plaintiffs' complaints against the record available for this appeal, and the governing jurisprudence on privilege.

CONCLUSION

[212] In general, I see no grounds for interfering with the Prothonotary's exercise of discretion. As an alternative, I have also conducted a *de novo* review on this appeal and have reached the same

conclusions as Prothonotary Lafrenière, even though my approach and reasoning have been different from his in some respects.

ORDER

THIS COURT ORDERS that:

a. For reasons given, the appeals in T-3134-91, T-299-92 and T-300-92 are dismissed. A copy of these Reasons for Order and Order will be placed in each file.

b. The parties are at liberty to address the Court on the issue of costs and should do so, initially at least, in writing.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-3134-91
STYLE OF CAUSE:	ALPHEUS BRASS et al.
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	- and -
	THE GOVERNMENT OF MANITOBA
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	February 6-8, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	July 24, 2012

APPEARANCES:

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Harley I. Schachter	**PLAINTIFFS (T-299-92 and T-300-92)**
Cary Clark Marlaine Anderson-Lindsay Jean Daniel Boulet	**DEFENDANT**

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