Federal Court of Appeal  Cour d'appel fédérale

Date: 20140912

Dockets: A-350-12
A-351-12
A-358-12

Citation: 2014 FCA 201

CORAM: **PELLETIER J.A.**
DAWSON J.A.
STRATAS J.A.

Docket: A-350-12

BETWEEN:

THE CHIEF AND COUNCILLORS OF THE GRAND RAPIDS FIRST NATION, BEING CHIEF OVIDE WILLIAM MERCREDI, COUNCILLOR WILLIAM EUGENE FERLAND, COUNCILLOR KENNETH GEORGE COOK, COUNCILLOR RONALD JOSEPH BALLANTYNE, on their own behalf and on behalf of the GRAND RAPIDS FIRST NATION (also known as the MISIPAWISTIK CREE NATION and the GRAND RAPIDS CREE)

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket: A-351-12

AND BETWEEN:

THE CHIEF AND COUNCILLORS OF THE

OPASKWAYAK CREE NATION, BEING CHIEF NORMAN GLEN ROSS, COUNCILLOR BERNICE GENAILLE, COUNCILLOR KAREN INNES, COUNCILLOR OMAR CONSTANT, COUNCILLOR STAN HEAD, COUNCILLLOR CLARENCE CONSTANT, COUNCILLOR GARTH FLETT, COUNCILLOR DANNY YOUNG, COUNCILLOR JOHN PAUL MARTIN, COUNCILLOR EDMIN JEBB, COUNCILLOR KERRY BIGNESS, COUNCILLOR RON A. CONSTANT, COUNCILLOR GARY COOK on their own behalf and on behalf of the OPASKWAYAK CREE NATION

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket: A-358-12

AND 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)

Appellants

and

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Heard at Winnipeg, Manitoba, on January 16, 2014.

Judgment delivered at Ottawa, Ontario, on September 12, 2014.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The fundamental issues raised on these appeals are: i) whether the Federal Court erred in upholding the federal government's claim that certain documents are protected from disclosure on discovery on the ground that they are subject to litigation brief privilege; and, ii) whether the Federal Court erred in upholding the federal government's claim to solicitor-client privilege over documents that the government itself disclosed to the plaintiffs. For the reasons that follow, I have concluded that the Federal Court did err, so that the documents at issue should be disclosed as described later in these reasons.

I. Factual Background

[2] In order to understand the asserted claims to privilege, it is important to understand the underlying dispute between the parties.

[3] During the 1960s, Manitoba Hydro began construction of a hydro-electric dam on the Saskatchewan River, knowing the project would cause flooding to reserve lands held by the Opaskwayak, Chemawawin and Misipawistik Cree Nations. Related to that construction, the

Province of Manitoba wished to construct a transmission line and provincial highway through the Misipawistik Cree Nation's reserve lands.

[4] Given the negative effects of the dam project on the appellants' lands and lifestyle, Canada required Manitoba and Manitoba Hydro to enter compensation agreements with the affected First Nations.

[5] After the compensation agreements were finalized, the affected First Nations took the position that the agreements were insufficient to compensate for all the social, economic and cultural losses suffered through the Hydro project. The affected First Nations, including the appellants, sought and secured funding from Canada for research and related activities in an effort to negotiate more satisfactory compensation.

[6] Negotiations then took place over a number of years, sometimes involving the participation of Canada, but mostly involving Manitoba and Manitoba Hydro. Negotiations eventually broke down, and in May of 1980 the appellants filed a statement of claim against Manitoba and Manitoba Hydro. Canada was notified by a letter dated May 2, 1980 that Manitoba and Manitoba Hydro intended to file third party claims against it.

[7] Between 1980 and the early 1990s, a number of letters, position papers, and a legal opinion shared between the appellants and Canada reflected the appellants' position that Canada was liable for their losses; Canada denied responsibility. However, at one point the Minister of Indian Affairs and Northern Development (DIAND) stated 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 [appellants]."

[8] Throughout the process, lawyers with the Department of Justice provided legal opinions to Canada, and attended meetings with the First Nations and their counsel.

[9] Ultimately, after new compensation agreements were signed with Manitoba and Manitoba Hydro, the appellants filed statements of claim against Canada for its involvement in the Hydro project. Since their inception, the actions have proceeded slowly. This delay in part led Canada to file a motion for summary judgment on the basis of delay, and the application of limitation periods and the doctrine of *laches*.

[10] During this protracted litigation with Canada, the appellants came into possession of approximately 96 documents over which Canada claims privilege. Most of the documents were disclosed through the discovery process as items listed in Schedule I of Canada's various affidavits of documents.

[11] The majority of the documents at issue were created before litigation was commenced against Canada. Some of the documents contain legal opinions and communications between the Department of Justice and DIAND employees. Other documents reference legal opinions in briefing notes and confidential internal documents which discuss relevant events, negotiations, settlement proposals and Canada's potential liability.

[12] In response to Canada's advice that it was seeking summary judgment, the appellants filed motions to compel the production of additional documents from Canada. Essentially, the appellants sought disclosure of a number of documents that were never in their possession, but over which Canada claimed litigation brief privilege.

[13] Within a few days of receiving this motion, Canada requested that the appellants return any and all privileged documents in their possession. This request was refused. Canada then reviewed the documents produced under Schedule I of its various affidavits of documents and discovered it had disclosed a large number of the allegedly privileged documents in question. Canada maintained that this disclosure was inadvertent. Subsequently, Canada filed a motion seeking the return of some 96 allegedly privileged documents it had disclosed, together with 6 documents that were disclosed to the appellants through unknown means. This motion was heard at the same time as the appellants' motion to compel production of the additional documents.

II. Judicial History

[14] The motions for the return of the allegedly privileged documents and for the disclosure of additional documents were initially heard by a prothonotary on the basis of common evidence. For reasons cited as 2011 FC 1102, 398 F.T.R. 26, he dismissed the appellants' motions for additional production and allowed Canada's motion in part. More specifically, he ordered that all documents produced through the discovery process that were not subject to solicitor-client privilege (i.e. for which Canada claimed only litigation brief or settlement privilege) were no longer privileged on the basis that Canada had failed to show that the documents were inadvertently disclosed. Canada did not appeal this finding. The Prothonotary further found that

privilege had been established over the documents that were either disclosed through unknown means or that were never in the appellants' possession. All documents in the appellants' possession that were subject to solicitor-client privilege were to be returned to Canada, on the basis of the Prothonotary's finding that the appellants failed to establish that such privilege had been waived by Canada.

[15] The appellants appealed the Prothonotary's order to a judge of the Federal Court. For reasons cited as 2012 FC 927, 416 F.T.R. 50, the Judge dismissed the appeal, for reasons similar to those of the Prothonotary. The appellants each appeal from that decision.

III. The Issues

[16] While the parties raise a number of issues, in my view the issues to be decided are as follows:

1. What is the standard of appellate review to be applied to the Judge's decision?
2. What documents are properly at issue on these appeals?
3. Did the Judge err by finding that Canada had established that the undisclosed documents were subject to litigation brief privilege?
4. Did the Judge err by finding that Canada's disclosure of documents it now claims are privileged was inadvertent such that the privilege was not waived?
5. Did the Judge err by upholding Canada's claim to solicitor-client privilege in respect of four documents?

IV. Consideration of the Issues

2. *What is the standard of appellate review to be applied to the Judge's decision?*

[17] An appellate court may interfere with a decision of a motions judge when the motions judge had no basis on which to interfere with the decision of a prothonotary, or, in the event such grounds existed, if the decision of the motions judge was arrived at on a wrong basis or was plainly wrong (*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, at paragraph 18).

2. *What documents are properly at issue on these appeals?*

[18] In its appeal, the Chemawawin Cree Nation puts in issue Canada's claim to litigation brief privilege over four documents which the First Nation describes as: the Bloodworth Briefing Note, the First Marion Paper, the Second Marion Paper, and the Dick Bell Notes. Canada did not disclose these documents to the appellants. The Chemawawin Cree Nation obtained these documents through unknown means.

[19] The remaining appellants cast their arguments more broadly, seeking production of documents described in Appendices A and B to their memoranda of fact and law. Included in these appendices are the four documents put in issue by the Chemawawin Cree Nation.

[20] The Misipawistik and Opaskwayak Cree Nations challenge the litigation brief privilege asserted by Canada over approximately 119 documents described in Appendices A and B to their memoranda of fact and law.

[21] Appendix A itemizes 44 documents over which Canada claimed privilege in its affidavits of documents and which were not disclosed by Canada to the appellants. The Prothonotary and the Judge found that the 44 documents in Appendix A were subject to litigation brief privilege and found five of those documents also subject to solicitor-client or settlement privilege. The four documents put in issue by the Chemawawin Cree Nation are included in Appendix A.

[22] Appendix B itemizes 75 documents over which Canada asserts solicitor-client privilege in full or in part. These documents consist of: 64 documents that were previously listed in Schedule I to various of Canada's affidavits of documents and that were disclosed by Canada to the appellants; and 11 documents that were included in Schedule I of the Chemawawin Cree Nation's affidavit of documents.

[23] Canada argues, and the appellants conceded, that the only documents properly at issue in Appendix A are those documents which the Judge found to be subject to litigation brief privilege without also finding them to be privileged in their entirety on the ground of solicitor-client or settlement privilege. Given that the appellants do not challenge the findings of solicitor-client or settlement privilege with respect to the documents identified by Canada, I agree. This means the documents 16, 21, 26, 27 and 28 in Appendix A to the memoranda of fact and law of the Opaskwayak and Misipawistik Cree Nations are exempt from disclosure.

[24] Canada further argues that the only documents properly at issue in Appendix B are those documents which were produced through the discovery process to either the Opaskwayak or Misipawistik Cree Nations because the Chemawawin Cree Nation no longer argues in its appeal that Canada waived its claim to privilege over documents disclosed to it.

[25] Again, I agree. While these three lawsuits are related, they have not been consolidated and it was for the Chemawawin Cree Nation to argue any waiver of privilege in respect of documents disclosed only to it. Consequently, the following documents listed in Appendix B to the memoranda of fact and law of the Opaskwayak and Misipawistik Cree Nations are exempt from disclosure: A1, A5, A24, A27, A41, A42, A46, A49, A131, A146, A168, A171-A178, A47, A50/B12, A51, A52/B14, B15, A53, B16, A54/B17, A58/B20, A59/B21 and A60/B23 (based on the numbering from the Prothonotary's order).

3. *Did the Judge err by finding that Canada had established that the undisclosed documents were subject to litigation brief privilege?*

[26] The Judge began his analysis of the claim to litigation brief privilege by articulating the legal principles that were to govern his analysis of the claim. He noted that litigation brief privilege must be established by the party claiming the privilege on a document by document basis. He further noted that to establish litigation brief privilege two elements must be proven: first, that litigation was ongoing or reasonably contemplated at the time the document was created; and second, that the dominant purpose for creating the document was to prepare for that litigation (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319).

[27] This case was argued on the basis the usual test for litigation privilege applies to communications created by or within a party to threatened or pending litigation in circumstances where those communications are not covered by legal advice privilege since they were not prepared for the purpose of obtaining legal advice. I take no position on whether this characterization is correct in law.

[28] The resolution of this issue turns on whether the Judge erred in his application of the law as he stated it to the case as it was argued before him. In my view, the Judge did err. I reach this conclusion on the following basis.

[29] The Judge's analysis of the claim to litigation privilege is contained in paragraphs 151 and 152 of his reasons. There, he wrote:

> 151. […] 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 (Committee of) v. Sippola*, [1991] B.C.J. No. 3614 (C.A.)]. 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.

[30] As the Judge noted in paragraph 151 of his reasons, Canada adduced no evidence about the dominant purpose for the creation of any individual document over which litigation brief privilege was claimed. Mr. Bloodworth's evidence, quoted by the Judge at paragraph 151(c) was inadequate to establish that the dominant purpose for the creation of any document was to

receive legal advice or aid in the conduct of litigation. This is because Mr. Bloodworth's evidence related only to some of the documents and those documents were not identified. More importantly, an attempt to avoid litigation does not equate with receiving legal advice or aiding in the conduct of litigation.

[31] Similarly, Mr. Bloodworth's evidence on cross-examination, which the Judge referred to at paragraph 151(d), was insufficient to establish the dominant purpose for the creation of any particular document. This is because awareness of "a possibility of Canada having litigation with the First Nations" is distinct from the purpose for which a document was prepared. Additionally, the knowledge, experience and qualifications of a sender or recipient of a document does not establish the purpose for which the document was created. Finally, Mr. Bloodworth's familiarity with various types of privilege is irrelevant to the determination of the existence of the privilege. That was a question for the Court, not Mr. Bloodworth.

[32] The Judge then relied upon his review of the documents and found their dominant purpose "quite clear on their face." I agree that, in theory, it is possible for the content of a document to establish the purpose for which the document was created. Therefore, I have reviewed each of the non-disclosed documents over which Canada claims litigation brief privilege (found in the confidential part D.5 of the appeal book). With respect, based on my review, I am not satisfied that the contents of these documents establish that it is more likely than not that each document was prepared for the dominant purpose of seeking legal advice or aiding in the conduct of litigation.

[33] To conclude, the evidence before the Judge was insufficient to demonstrate on a document by document basis that each of the undisclosed documents was created for the purpose of seeking legal advice or aiding in the conduct of litigation.

[34] While this finding is sufficient to dispose of Canada's claim to litigation brief privilege over the non-disclosed documents, I am doubtful that the record supports the finding that litigation was reasonably contemplated when many of the documents at issue were created. The Judge's findings at paragraphs 151(a) and (b) of his reasons fall short of establishing this.

4. *Did the Judge err by finding that Canada's disclosure of documents it now claims are privileged was inadvertent such that the privilege was not waived?*

[35] The Opaskwayak and Misipawistik Cree Nations argue that the Judge erred in upholding the Prothonotary's conclusion that Canada's disclosure of privileged documents was inadvertent. They argue that there was substantial evidence that the disclosure was advertent and that the Judge ought to have drawn an adverse inference from Canada's failure to call evidence from anyone who had personal knowledge of the circumstances surrounding the disclosure. Instead, Canada's evidence was to the effect that it could not ascertain why so many privileged documents were disclosed and that there was no evidence of any voluntary decision to disclose privileged documents.

[36] The Judge was mindful of the evidence that supported the submission that Canada's disclosure of privileged material was deliberate. He summarized this evidence at paragraph 164 of his reasons as follows:

> 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.

[37] The Judge considered, at paragraph 171 of his reasons, the evidence that supported Canada's position that the disclosure was inadvertent. That evidence was adduced through the affidavit of André Bertrand.

[38] Mr. Bertrand was a case manager with the Litigation Management and Resolution Branch (LMRB) of DIAND who was assigned to this litigation in 2008. In order to prepare his affidavit, he spoke to colleagues who worked on the files and former case managers. He also reviewed various documents.

[39] Contained in his affidavit is useful evidence with respect to the timing of relevant events. In the actions brought by the Opaskwayak and Misipawistik Cree Nations:

- Canada's affidavits of documents were sworn on June 17, 2002 and served on the plaintiffs on July 18, 2002.
- Copies of Canada's Schedule I documents were provided to the plaintiffs on September 26, 2002. Contained in those documents were documents over which Canada now asserts solicitor-client privilege.
- Supplementary affidavits were sworn by Canada in February of 2005 and served in March of 2005.
- Copies of documents contained in Canada's supplementary Schedule I were provided to the plaintiffs in February of 2005.

[40] In the action commenced by the Chemawawin Cree Nation:

- Canada's affidavit of documents was sworn on October 21, 1998.
- Canada provided copies of its Schedule I documents on October 3, 2007.

[41] By May 13, 2004, Canada knew that the plaintiffs had one of the Marion Papers over which it claimed solicitor-client privilege. On December 22, 2008, counsel for the Chemawawin Cree Nation wrote to Canada asserting waiver over otherwise privileged documents and questioning the correctness of Canada's Schedule II.

[42] Notwithstanding, it was not until June 12, 2009, that Canada sought return of its privileged documents.

[43] Paragraphs 67 and 70 of Mr. Bertrand's affidavit contain the most salient evidence relied upon by the Judge with respect to the issue of the advertence or inadvertence of Canada's disclosure:

> 67. I have reviewed LMRB's records and spoken to former case managers on these files and have not been able to determine how so many of Canada's privileged or partly privileged documents found their way into Schedule I. Our records show that the Brass affidavit was reviewed for privilege by [Department of Justice], and this would have been standard practice for the Mercredi and Ross affidavits too. However, several privileged documents were produced when they should not have been. I am unable to tell whether the review was flawed, or whether a problem arose in implementing the results of the review, but I encountered nothing in my review of the files which suggests a deliberate or voluntary decision to release the documents.
>
> […]
>
> 70. An LMRB case manager swearing an affidavit of documents does not now, and did not then, have the necessary authority to waive privilege on behalf of the Crown. Nor can DOJ waive privilege without explicit instructions from the client department, which must first obtain the necessary approvals from the deputy minister's office, at a minimum, and perhaps also from the upper echelons of other government departments. No such decision has ever been made, nor has approval ever been sought, to waive Canada's privilege in this litigation.

[44] Missing from the affidavit is evidence of the sort one would expect to find in the case of inadvertent disclosure of privileged documents: namely, evidence of shock, efforts to find the cause of the error and demands for the immediate return of the documents.

[45] On the evidentiary record before him, the Judge concluded that all of the allegedly privilege documents "were inadvertently disclosed in a context where there was no intention to waive privilege" (reasons, paragraph 172).

[46] In my respectful view, the evidence did not support that finding of fact.

[47] At its highest, Mr. Bertrand's evidence was that he was unable to explain why the documents were disclosed and his after-the-fact review did not find direct evidence of an intention to waive the privilege. This falls short of establishing that the disclosure was inadvertent. There was no direct evidence that Canada did not intend to waive its claim to privilege.

[48] Having disclosed documents in Schedule I of its various affidavits as to documents, and having neglected to press for the prompt return of the documents, Canada was obliged to provide more cogent evidence that it did not intend to waive its claim to privilege.

[49] Rule 224(1)(*d*) of the *Federal Courts Rules* requires the deponent of an affidavit as to documents to be "an authorized representative of the Crown" where the Crown is a party to litigation. Rule 223(2)(*a*)(ii) requires a list of all documents for which a claim of privilege is asserted and Rule 223(2)(*b*) requires a statement of the grounds on which each claim of privilege is advanced. Rule 224(2) obliges the deponent to make reasonable inquiries relating to any matter in question in the action. In light of this regime, to allow Canada to maintain its claim to privilege on the record before us would significantly dilute the legal standard of care required of a deponent of an affidavit as to documents.

[50] It follows that Canada's claim to solicitor-client privilege has been waived in respect of all documents at issue that were disclosed to the appellants Opaskwayak and Misipawistik Cree

Nations. Because the Chemawawin Cree Nation did not argue that Canada had waived its privilege to solicitor-client documents provided to it, Canada is entitled to assert solicitor-client privilege in respect of documents provided only to that First Nation.

5. *Did the Judge err by upholding Canada's claim to solicitor-client privilege in respect of four documents?*

[51] The Chemawawin Cree Nation takes issue with the extent to which the three disputed documents in its possession have been redacted on grounds of solicitor-client privilege. Those documents are the Bloodworth Briefing Note and the First and Second Marion Papers. Those documents were not disclosed by Canada and were obtained by the Chemawawin Cree Nation through unknown means. The fourth document the Chemawawin Cree Nation puts in issue, the Dick Bell Notes, are not in its possession. These notes are found in Part D.5 of the appeal book, filed on a confidential basis. Canada claims solicitor-client privilege over one paragraph contained in that note.

[52] My conclusion that Canada has waived its right to claim privilege makes it unnecessary to consider the extent of the scope of the solicitor-client privilege claimed in the three documents in the appellants' possession. It is necessary to review the claim to solicitor-client privilege in the Dick Bell Notes. These notes are found at Tab 2 of part D.5 of the appeal book, filed on a confidential basis. Canada claims solicitor-client privilege over the last partial paragraph on page 13 and the first partial paragraph on page 14. This claim does not appear to have previously been adjudicated.

[53] The parties agree that the three elements of a claim to solicitor-client privilege are a communication between a solicitor and client which entails the seeking or giving of legal advice and which is intended to be confidential.

[54] In the paragraph at issue, counsel for Canada recounts matters based on his interpretation of certain events infused with legal appreciation. I conclude that the claim to solicitor-client privilege is validly asserted because all three elements of the claim are satisfied.

V. Conclusion

[55] For the above reasons, I would allow the appeals and set aside the order of the Federal Court. Pronouncing the judgment that the Federal Court should have made with respect to documents at issue in this appeal (as described above in more detail), I would disallow the claim to litigation brief privilege, excepting from disclosing those documents or portions thereof that are covered either by valid claims of solicitor-client or settlement privilege. Further, I would disallow the claim to solicitor-client privilege in respect of all documents at issue in this appeal that were provided by Canada to the Opaskwayak and Misipawistik Cree Nations. Finally, I would order that the Opaskwayak and Misipawistik Cree Nations together receive one set of the costs of this appeal and that the Chemawawin Cree Nation receive its costs of this appeal.

[56] A copy of these reasons shall be placed on each Court file.

"Eleanor R. Dawson"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-350-12
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CONCURRED IN BY:	PELLETIER J.A. STRATAS J.A.
DATED:	SEPTEMBER 12, 2014

APPEARANCES:

Harley Schachter Kaitlyn Lewis	FOR THE APPELLANTS
Cary Clark Jean-Daniel Boulet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Duboff Edwards Haight and Schachter LLP Winnipeg, Manitoba	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

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Cary Clark Jean-Daniel Boulet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Duboff Edwards Haight and Schachter LLP Winnipeg, Manitoba	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

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DOCKET:	A-358-12
STYLE OF CAUSE:	ALPHEUS BRASS ET AL. v. HMTQ
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JANUARY 16, 2014
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	PELLETIER J.A. STRATAS J.A.
DATED:	SEPTEMBER 12, 2014

APPEARANCES:

Mark Underhill	FOR THE APPELLANTS
Cary Clark Jean-Daniel Boulet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Underhill, Boies Parker Vancouver, British Columbia	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT