CV 07028

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES A. O'NEIL

Plaintiff

- and -

MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., ROGER WALLACE WARREN, PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVID TURNER, LLOYD GOULD, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS LOCAL 4, HARRY SEETON, CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, ROSS SLEZAK, THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, BASIL E. HARGROVE, THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA LOCAL 2304, LISA EVOY, AS ADMINISTRATOR OF THE ESTATE OF THE LATE JAMES MILTON EVOY, DECEASED, DALE JONNSTON, ROBERT KOSTA, HAROLD DAVID, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, WAYNE CAMPBELL, SYLVAIN AMYOTTE, GORDON ALBERT KENDALL, EDMUND SAVAGE, JOE RANGER, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER AND TERRY LEGGE

Defendants

- and -

ROYAL OAK MINES INC., HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CANADA, THE MINISTER OF LABOUR, CANADA, THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA. THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE and PINKERTON'S OF CANADA LIMITED

Third Parties

REASONS FOR JUDGMENT

[1] This application requires consideration of the issue of solicitor-client privilege in the context of examinations for discovery. As such, it involves what have been termed as two antithetical principles, as per Doherty J.A. in *General Accident Assur. Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), at 341:

> These issues bring to the forefront two antithetical principles, both of which are accepted as fundamental to the civil litigation process. One principle, the right to full and timely discovery of the opposing party's case, rests on the premise that full access to all the facts on both sides of a lawsuit facilitates the early and just resolution of that suit. The other principle, the right of a party to maintain the confidentiality of client-solicitor communications, and sometimes communications involving third parties, rests on the equally fundamental tenet that the confidentiality of those communications is essential to the maintenance of a just and effective justice system.

[2] This application arises from the examination for discovery of Lloyd Gould, one of the defendants in this action. The action itself arises from an explosion at the Giant Mine in Yellowknife in September, 1992, during a lengthy and volatile strike at the mine. Nine miners who were working underground at the time were killed. A companion action (CV 05408) has been commenced on behalf of the dependants of the nine deceased. These two actions are proceeding in tandem and there are many issues in common and many steps have been taken in common. The plaintiff here is claiming damages for psychological injuries and post-traumatic stress as a result of being on the scene at the time of the explosion.

[3] One of the defendants named in both actions, Roger Warren, was convicted of second-degree murder for setting the explosion. The parties have, however, brought claims against numerous organizations and individuals on the basis of negligence and breach of a duty of care. Among those defendants is the Government of the Northwest Territories. Mr. Gould, at the pertinent times, was employed by the government as a mine inspector and for some part of that as acting chief mine inspector. The allegations pleaded against the government and its employees and agents are essentially that they entered the field of regulating mine safety and mine operations; that they adopted certain policies and operational procedures consistent with their legislative authority; that they owed a duty of care to implement such policies and take such steps as were rationally and reasonably necessary to maintain safe working conditions at the Giant Mine; and that they failed in that duty by failing to order a cessation of work (especially in light of a pattern of prior acts of vandalism, sabotage and acts and threats of violence). The specific allegations against Gould are that he was employed by or on behalf of the government to carry out inspections to ensure that the policies and procedures of the government were properly implemented and enforced. It is further alleged generally that he failed to take all steps reasonably necessary to ensure safety at the Giant Mine, and for such failure the government is vicariously liable.

[4] In response, the defendant government, on behalf of itself and its agents and employees also named as defendants, has included in its Statement of Defence the following plea:

> 6. The actions of these Defendants and each of them, were reasonable and were undertaken prudently and in good faith having regard to the circumstances and to the Defendants' jurisdiction, authority and the resources available to them.

[5] The examination for discovery of Mr. Gould revealed that, on May 27, 1992, Mr. Gould, along with two other safety officials of the government, advised the deputy minister of the Department of Safety and Public Services that it would be advisable to close down operations at the Giant Mine and to remove all persons from the site. They supplied a list of specific facts as justification for this recommendation. They considered that it would be appropriate for the Minister of Safety and Public Services to request the chief mine inspector to order the mine to cease operations in accordance with various provisions of the territorial *Mining Safety Act*. On May 28, 1992, Gould wrote to the Minister directly advising him that, in his opinion, the mine site was not secure and that the health and safety of the workers on site were endangered. He proposed shutting down the mine and provided a draft order for the Minister's consideration. These documents have been produced by the government (although I ruled that the draft order itself was not producible on the basis of public interest immunity: see *Fullowka et al* v. *Royal Oak Mines Inc.*, [2000] N.W.T.J. No. 72). On May 28, as well, the Minister sent a letter to Mr. Gould stating simply that he, that is the Minister, has "every confidence" that Mr. Gould, as chief mining inspector (albeit in an acting capacity), "will exercise those powers entrusted to you as you see fit".

[6] The discovery evidence further revealed that Mr. Gould did not issue an order to close the mine. In explaining why no such order was issued, Mr. Gould said that he had not done so on the basis of legal advice. That advice came from two lawyers employed by the government, a Mr. Gilmour (who at the time was the assistant deputy minister of the territorial Department of Justice) and a Ms. Perry (a Department of Justice staff counsel). In the related proceedings (CV 05408), the designated representative of the government testified that the deputy minister of Mr. Gould's department had also received legal advice on the issue. [It should be noted that counsel for the plaintiffs on the companion case participated on this hearing and this ruling will apply with respect to the same issue in the context of that case since a similar motion was filed in that proceeding.]

[7] During the course of his examination Mr. Gould, on the advice of counsel, refused to answer a number of questions as to communications between himself and Mr. Gilmour or Ms. Perry on the basis of solicitor-client privilege. In some cases, the objections were

taken as to questions concerning what he was told by Gilmour or Perry; in other cases the objections related to questions about whether Gould sought advice from Gilmour or Perry and about what.

[8] The plaintiff submitted on this application that the objections are not valid since any right to claim privilege has been waived, both by the position taken by Gould and the government in their Statement of Defence and by the position taken by Gould in his testimony at his examination for discovery. With respect to the pleading, it was argued that, by pleading that he acted reasonably, prudently and in good faith having regard, *inter alia*, to his jurisdiction and authority, Gould has put in issue his understanding and state of mind as to the extent of his jurisdiction and authority as the chief mine inspector. With respect to the positions taken by him on discovery, it was submitted that it would be fundamentally unfair to allow Gould, and by extension the government, to rely on a defence that Gould acted reasonably, prudently, and in good faith having regard to his jurisdiction and authority, based on legal advice that he received, and then to refuse to disclose that legal advice. It was submitted that the defendants' position is that they based the performance of their duties on the legal advice they received. Thus any privilege over that advice has been impliedly waived.

[9] In *Descôteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860, the Supreme Court of Canada said that where legal advice of any kind is sought from a professional legal adviser in his or her capacity as such, the communications relating to that purpose are permanently protected from disclosure unless the client expressly or impliedly waives the protection. This privilege is not merely a rule of evidence but a substantive rule which can be invoked in any circumstance, in or out of court, where solicitor and client communications may be at risk of disclosure. The right to communicate in confidence with one's legal adviser is a fundamental civil and legal right that should be interfered with only to the extent absolutely necessary to do so. And, it makes no difference whether the legal adviser is an external one, such as a solicitor in private practice, or someone employed by the client, such as in-house salaried counsel, provided that in the latter context the communications with the employee were for the purpose of legal advice as opposed to some other corporate purpose. See also *Solosky* v. *Canada*, [1980] 1 S.C.R. 821; *Smith* v. *Jones* (1999), 22 C.R. (5th) 203 (S.C.C.); and *Alfred Crompton Amusement Machines Ltd.* v. *Customs & Excise Commissioners (No. 2)*, [1972] 2 All E.R. 353 (C.A.).

[10] The well-known text by Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (2nd ed., 1999), notes (at 758-759) that the law recognizes that privilege may be impliedly waived by the client even where there is no intention to do so. Generally speaking, privilege may be waived where the client relies in part upon privileged

communications to either assert a claim or base a defence. When a party places its state of mind in issue and has received legal advice to help form that state of mind, then privilege will be deemed to have been waived with respect to such legal advice. This issue could be raised by the pleadings or by the evidence (such as answers given on examinations for discovery). Something more than merely alleging good faith is required, however, but there is a large body of case law supporting the proposition that, where a party makes his or her intent and knowledge of the law relevant, then it would be unfair to preclude the opposing party from discovering information relating to that issue by relying on the privilege. In effect, reference to the legal advice to support a legal position works as an estoppel preventing reliance on the privilege to shield the advice from disclosure.

[11] A final general point to note about solicitor-client privilege is that the analysis of privilege claims is by nature fact-specific. Such claims must be assessed in the context of the specific circumstances of the case and, indeed, the nature of the case. This was a point also made in the *Chrusz* case (*supra*) at 348:

> The adjudication of claims to client-solicitor privilege must be fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made. A claim to client-solicitor privilege in the context of litigation is in fact a claim that an exception should be made to the most basic rule of evidence which dictates that all relevant evidence is admissible. It is incumbent on the party asserting the privilege to establish an evidentiary basis for it.

The *Chrusz* case was one dealing with disclosure of documents but these comments are equally appropriate to claims of privilege over testimonial evidence.

[1] A recent example of waiver by implication, and one strongly relied on by the plaintiff in this case, is the Supreme Court of Canada judgment in *Campbell & Shirose* v. *The Queen* (1999), 171 D.L.R. (4th) 193. That case arose from a criminal prosecution in which the accused were charged as the result of a “reverse-sting” operation by the police. Certain of the police activities, however, were themselves illegal. The accused therefore sought a stay of proceedings arguing that the prosecution was an abuse of process. Since not all illegal activity by the police will constitute an abuse of process requiring a stay of proceedings, an evaluation of the precise circumstances leading to the illegal police conduct became important. The Crown sought to mitigate the seriousness of the illegality by arguing good faith on the part of the police, a good faith that was premised on the fact that the police had consulted with a Crown Attorney about the legality of the operation before undertaking it. Evidence was led by the Crown from one of the police officers as to his knowledge of the law to support his view that the operation was legal and that he had sought the opinion of a Crown Attorney to verify his opinion.

On hearing this evidence, defence counsel sought disclosure of the legal opinion but it was denied on the basis of solicitor-client privilege (the police as "client" and Crown counsel as "solicitor"). Ultimately, however, the Supreme Court held that disclosure must be made since the police, by virtue of the position taken at trial, had waived privilege.

[12] The Court accepted that the Crown may assert good faith on the part of the police officers and indeed the Crown had set out to establish that the police had acted in good faith in the belief that the "reverse-sting" operation was legal. But when the police and Crown chose to rely on legal opinions to support their argument of good faith, those opinions became relevant and probative of the issue. Since the Crown asserted good faith, it was open to the defence to refute it. Therefore, since the legal advice the police received had become a live issue, the defence were "entitled to get to the bottom of it" (at para.73).

[13] In *Shirose* the waiver turned on the doctrine that a party cannot at once rely on the fact of a communication in attempting to secure a legal advantage, and then shield the substance of that communication from disclosure. This doctrine is premised on the need to prevent a party from unfairly misleading another, or the court, as to the nature of the advice received. It would have been unacceptable to permit the Crown to rely on legal advice to resist the abuse of process argument while hiding behind the privilege to prevent the actual content of that advice from being properly considered.

[14] The Supreme Court, in *Shirose*, referred with apparent approval to one of the best-known cases on this topic, *Rogers* v. *Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A.). Indeed, the Court held that the facts in *Shirose* presented a stronger argument for waiver than *Rogers* (see para. 70).

[15] In *Rogers*, the bank had put a defaulting customer into receivership and the customer then sued both the bank and the receiver, who then promptly launched third party indemnity proceedings against each other. The bank alleged that it had relied on the receiver's advice in putting the customer into receivership. The receiver denied that the bank had acted in reliance on its advice and claimed that the bank took advice from its own solicitors. The receiver sought disclosure of communications between the bank and its solicitors. The bank claimed privilege. The court set aside the claim of privilege on the basis that, by claiming it had relied on the advice of the receiver, it had put its "corporate" state of mind in issue, in the sense of whether it acted in reliance on the receiver's advice or it had information from other sources. The Supreme Court quoted (at para. 69) the following from the judgment of Hutcheon J.A. in *Rogers*:

> The issue in this case is not the knowledge of the bank. *The issue is whether the bank was induced to take certain steps in reliance upon the advice from the receiver on legal matters*. To take one instance, the receiver, according to the bank, advised the bank that it was not necessary to allow Abacus [the plaintiff debtor] time for payment before the appointment of the receiver. A significant legal decision had been rendered some months earlier to the opposite of that advice. *The extent to which the bank had been advised about that decision, not merely of its result, is important* in the resolution of the issue whether the bank relied upon the advice of the receiver. [Emphasis added.]

[16] The Supreme Court also quoted an extract from the judgment of the United States District Court for the District of Columbia in *United States* v. *Exxon Corp.*, 94 F.R.D. 246 (1981), which had been adopted by the court in *Rogers*:

> Most courts considering the matter have concluded that a party waives the protection of the attorney-client privilege when he voluntarily injects into the suit the question of his state of mind. For example, in *Anderson v. Nixon*, 444 F.Supp. 1195, 1200 (D.D.C. 1978), Judge Gesell stated that as a general principle "a client waives his attorney-client privilege when he brings suit or raises an affirmative defense that makes his intent and knowledge of the law relevant."
>
> . . . . .
>
> Thus, the only way to assess the validity of Exxon's affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon's interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives.

[17] The Supreme Court, in *Shirose*, concluded its analysis of the *Rogers* case by stating as follows (at para. 69):

> It appears the court in *Rogers* found that any privilege with respect to correspondence with the bank's solicitors had been waived as necessarily inconsistent with its pleading of reliance, even though the bank itself had not referred to, much less relied upon, the existence of advice from its own solicitors.

This suggests to me that it is not necessary to either refer to legal advice in the pleadings nor to reveal any part of that advice for a finding that privilege had been waived. It is sufficient if the party makes such advice pertinent to its legal position.

[18] The defendants (and here I refer not just to Mr. Gould but also to the government) have asserted that the content of the legal advice they received is not discoverable since they are not relying on the content per se as justification for their actions. Here the defendants have disclosed the fact that legal advice was provided and that Gould acted on that advice in not going ahead with his intention of closing the mine. Thus disclosure of the actual content of the advice is unnecessary. They have made, it was argued, disclosure of the "bottom line advice" received (in reference to the requirement imposed by the Supreme Court in *Shirose* at para. 74).

[19] The defendants also reminded me that this is not the first time that an issue of solicitor-client privilege has arisen in the six years that this over-all litigation has been in case management. In *Fullowka* v. *Royal Oak Mines*, [1998] N.W.T.R. 217, I ruled on an issue raised by the pleadings filed on behalf of the defendant Margaret Witte (also a defendant in this case) in the companion case to this one. As with the government defendants, Ms. Witte alleged in her defence that she acted "honestly and in good faith within the scope of her authority". On discovery she admitted that she had received legal advice during the course of the strike. The plaintiffs applied for disclosure of the names of the lawyers consulted and the topics of the consultations. I ordered disclosure of this information but not the contents of the actual advice. In doing so, I held that there had been an implied waiver by the defendant by having put in issue her state of mind (at 231):

> The question of what was the defendant's state of mind, however, has been put in issue. The claim alleges that this defendant took various decisions that directly and indirectly contributed to the volatile situation and atmosphere that led to Warren's criminal act. In her defence Witte pleads that she acted in good faith, with due regard for all applicable rules and regulations, and that she took all reasonable care in the circumstances. Her Reply to the Notice to Admit acknowledges as fact that she obtained advice from and gave instructions to legal counsel on matters pertinent to the strike. It seems to me that the question of whether or not Witte sought and received legal advice on these points is relevant to her defence of acting in good faith, in due compliance of the law, and with all reasonable care. Therefore the fact of seeking and obtaining legal advice is relevant. That, however, does not necessarily make the content of the legal advice relevant or admissible.

[20] There are, in my opinion, a number of important distinctions between the present case and the situation involving Ms. Witte. First, as I also noted in that judgment (right after the quoted portion above), the plaintiffs in that case were not seeking disclosure of the contents of the advice. Second, there is a difference in the position of Ms. Witte and that of the government (and its agents and employees) in terms of the jurisdiction issue, an issue that inherently requires a consideration of legal questions. The crux of the claim against the government, it seems to me, is that it had a public duty to act in a certain way

in these circumstances because of its statutory mandate to regulate mining operations. Ms. Witte had no such statutory role to play.

[21] Further, the government, and in particular in this case Mr. Gould, became aware of certain facts surrounding the strike and the ongoing mining operations; Mr. Gould and others formed the opinion that the mine should be ordered to cease operations; yet neither Mr. Gould nor his superiors acted on that opinion. When asked why, Mr. Gould and the government replied that they did not on the basis of legal advice. That answer by itself does not tell us that the legal advice was to the effect that the government had no jurisdiction to order that the mine be shut down. It may have been to that effect or it may have raised other issues. Yet the government and Mr. Gould have pleaded that they acted reasonably and in good faith having regard to their jurisdiction and authority. It seems to me therefore that the content of the advice, at least the "bottom line" and extent of it, need be disclosed so as to determine what considerations went into the decision not to order a shut down of the mine. This is relevant to the question of reasonableness and good faith. Reliance on legal advice was an issue raised by Gould and the government to justify their actions.

[22] In my opinion, these defendants have impliedly waived privilege by the position taken in their pleadings and the responses given on discovery. Disclosure of the advice received is required so as to assess the claim to good faith in acting within jurisdictional limits and to confirm or otherwise the extent to which legal advice itself prompted the actions taken or not taken. This is not an inquiry into the correctness of the legal advice given but on the reasonableness of the responses to that advice. Therefore disclosure must be made of at least a summary of the advice given relative to the decision to not issue an order shutting down the mine.

[23] The questions that were objected to fall into two categories. They relate either to (a) whether Gould sought legal advice and on what topics; or (b) what did Gilmour or Perry tell him. I therefore direct that both categories of inquiry be answered. With respect to what Gould was told, this can be done in a summary manner but specific as to the "bottom-line" advice. At this stage the area of inquiry is to be limited to the points raised at the discovery, which, as I understand them, are all centred around the decision to not issue the shut-down order in May, 1992. This is not a general direction allowing inquiries as to legal advice on anything related to the strike or the explosion. This order applies as well to the same lines of inquiry directed to the government's representative in the companion case (CV 05408).

[24] An order will issue directing Mr. Gould to reattend for examination and to answer questions in accordance with my directions herein. If counsel agree, such re-examination

could be conducted by way of written interrogatories. There were a number of other discovery objections canvassed at the hearing of this application, all of which to my recollection were disposed of at the hearing. If further directions are required, however, counsel may contact me.

[25] Costs of this application will be in the cause.

J.Z. Vertes
J.S.C.

Counsel for the Plaintiff: J.E. Redmond, Q.C.

Counsel for the Defendants (Government of the N.W.T. & Gould): P.J. Mousseau

Counsel for the Plaintiffs In Action No. CV 05408: J.P. Warner, Q.C.

O'Neil v. Witte, et al, 2001 NWTSC 75

Date: [Date (2001 11 07)]
Docket: CV 07028

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Third Parties

Heard at Yellowknife, NT, on September 24, 2001

Reasons filed: November 7, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Plaintiff: J.E. Redmond, Q.C.
Counsel for the Defendants
(Government of the N.W.T. & Gould): P.J. Mousseau
Counsel for the Plaintiffs
In Action No. CV 05408: J.P. Warner, Q.C.

07028

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