

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**LTS INFRASTRUCTURE SERVICES LIMITED PARTNERSHIP**

**Plaintiff**

**- and -**

**ROHL ENTERPRISES LTD.**

**Defendant**

**- and -**

**TRAVELERS INSURANCE COMPANY OF CANADA**

**Defendant**

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**Transcript of the Reasons for Decision by the Honourable Justice  
S.H. Smallwood, sitting in Yellowknife, in the Northwest  
Territories, delivered orally on the 24th day of February, 2021.**

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**APPEARANCES:**

**K. Loo:**

**Counsel for the Plaintiff,  
appearing via videoconference**

**C. Skipper:**

**Counsel for the Plaintiff,  
appearing via videoconference**

C. Petrucci:

Counsel for Travelers Insurance,  
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B. Kaneski:

Counsel for Rohl Enterprises,  
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**RULINGS, REASONS**

Reasons for Decision

1

1           **REASONS**

2           THE COURT:           Okay. Dealing first with the application  
3                               regarding the solicitor/client privilege claim. So this is a  
4                               decision from a continuation of a hearing regarding the  
5                               claim of solicitor/client privilege over a number of  
6                               documents. I do not intend to fully review the history of  
7                               the previous applications or what has occurred so far  
8                               with respect to the documents.

9                               In a decision made on December 22nd, 2020,  
10                              with additional reasons provided on January 6th, 2021,  
11                              I had required LTS and Travelers to each provide to the  
12                              other a general description of the documents in  
13                              question, along with some additional information.  
14                              Following review of the information provided, a further  
15                              hearing was to be held on January 26th, 2021,  
16                              regarding any documents over which the solicitor/client  
17                              privilege claim remained in dispute.

18                             LTS and Travelers reached an agreement  
19                             regarding most of the documents. They agreed that  
20                             where either side has asserted a solicitor/client privilege  
21                             claim, neither side will challenge the privilege with two  
22                             exceptions: one, records that were sent by a third party  
23                             to the party claiming privilege; and two, either side is  
24                             entitled to claim that the privilege had been waived.

25                             The result is that 29 documents listed by  
26                             Travelers remain in dispute. The 29 documents are  
27                             challenged by LTS because of the involvement of

1 Michael Pellegrini of Vertex, who was either the recipient,  
2 author or copied on the correspondence in question.

3 Vertex provided investigative services to  
4 Travelers during the investigation of LTS's bond claim.  
5 Vertex provided Travelers with an investigative report in  
6 a letter dated December 1st, 2015, to Louis Carriere at  
7 Fasken's and which has been produced to LTS.

8 LTS argues that by pleading and producing the  
9 December 1st, 2015, letter that Travelers has waived  
10 any solicitor/client privilege that might have attached to  
11 that document. And therefore, any documents which  
12 are associated with Michael Pellegrini and Vertex in the  
13 course of the investigation are also producible.

14 Travelers' response is that LTS claimed in its  
15 Statement of Claim that Travelers failed to properly  
16 investigate the bond claim and in pleading the letter in  
17 its Statement of Defence, Travelers was responding to  
18 LTS's allegation and was not pleading solicitor/client  
19 advice.

20 Travelers' position is that it has not waived  
21 solicitor/client privilege over the documents by pleading  
22 the investigative steps that Travelers took.

23 The first question is whether solicitor/client  
24 privilege attaches to these documents, and second, if  
25 the documents are subject to solicitor/client privilege,  
26 whether Travelers has waived the privilege.

27 The law with respect to solicitor/client privilege

1 is well-known. Solicitor/client privilege requires that  
2 there be: one, a communication between solicitor and  
3 client; and two, which involves the seeking or giving of  
4 legal advice; and three, which is intended to be  
5 confidential. *Blank v. Canada (Minister of Justice)*,  
6 2006 SCC 39.

7 It is also settled that solicitor/client privilege can  
8 extend to communications between a client and a  
9 solicitor and a third party. However, not every  
10 communication by a third party with a lawyer is  
11 protected by solicitor/client privilege.

12 Where the third party serves as a channel or  
13 conduit of communication between the lawyer and  
14 client, communications with the third party by the client  
15 or solicitor will be protected by the privilege as long as  
16 the communications meet the criteria for solicitor/client  
17 privilege. *General Accident Assurance Company v.*  
18 *Chrusz*, [1999] OJ 3291 (CA) at paragraph 106.

19 The Ontario Court of Appeal in *Chrusz* took a  
20 functional approach in assessing whether solicitor/client  
21 privilege applied to communications with a third party.  
22 Even if a third party does not act as a channel of  
23 communication between the solicitor and client,  
24 privilege may still attach. If the third party's function is  
25 integral to the existence or operation of the  
26 solicitor/client relationship, then the privilege can cover  
27 any communications which are in furtherance of that

1 function and which meet the criteria for solicitor/client  
2 privilege. *Chrusz* at paragraph 120.

3 It was also stated in *Chrusz* at paragraph 111:

4  
5 The privilege also extends to communications  
6 and circumstances where the third party  
7 employs an expertise in assembling information  
8 provided by the client and explaining that  
9 information to the solicitor. In doing so, the  
10 third party makes the information relevant to  
11 the legal issues on which the solicitor's advice  
12 is sought.

13  
14 In this case, the 29 documents involve  
15 correspondence or attachments which were either sent  
16 to Mr. Pellegrini (approximately eight documents); copied  
17 to Mr. Pellegrini (approximately 17 documents); or from  
18 Mr. Pellegrini (approximately four documents). LTS's  
19 position is that privilege attached to the documents sent  
20 or copied to Mr. Pellegrini, but that it was waived and that  
21 documents sent by Mr. Pellegrini are not subject to  
22 privilege. Travelers' position is that all of the  
23 documents are subject to solicitor/client privilege.

24 There is no dispute that the correspondence  
25 that was sent to Mr. Pellegrini or copied to Mr. Pellegrini  
26 was the subject of solicitor/client privilege. With respect  
27 to the correspondence and attachments sent by Mr.

1                   Pellegri where he is the author of the correspondence, I  
2                   am satisfied that this communication falls within the  
3                   continuum of correspondence between solicitor and  
4                   client and that the communications sent by Mr. Pellegri  
5                   were integral to the operation of the solicitor/client  
6                   relationship.

7                   Mr. Pellegri and Vertex were retained by  
8                   Travelers to perform a preliminary investigation of the  
9                   alleged default of Rohl. LTS had claimed that Rohl was  
10                  in default of its obligations under the subcontract. In  
11                  conducting an investigation, Vertex provided a service  
12                  that extended beyond gathering information and  
13                  passing it along to the solicitor for the purposes of  
14                  providing advice to Travelers.

15                  The content of the December 1st, 2015, letter  
16                  or report written by Mr. Pellegri substantiates this. Mr.  
17                  Pellegri's conclusion following the preliminary  
18                  investigation was:

19  
20                  Based on our review of various project  
21                  documents, including the subcontract, quality  
22                  management plan, daily logs and remediation  
23                  plans prepared by LTS, Rohl conformed to the  
24                  contract requirements and the remediation  
25                  required by LTS is due to design issues and  
26                  goes beyond the scope which Rohl was  
27                  subcontracted to perform.

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Vertex was retained because Travelers and its solicitor required the expertise of Vertex to understand technical information regarding the claim of LTS. Mr. Pellegri and Vertex were retained to perform a function that was integral to the solicitor/client relationship and the ability of the solicitor to provide legal advice to Travelers on the issue.

The bigger question is whether Travelers has waived solicitor/client privilege by pleading the December 1st, 2015, letter in their Statement of Defence or by producing the letter to LTS as part of the discovery process. In the Statement of Defence, Travelers pleaded the investigation, claiming that it took reasonable steps to investigate and consider the bond call in a timely manner.

In support of this claim, Travelers cited the report of December 1st, 2015, and its conclusions regarding whether Rohl was in default of the subcontract. As part of the discovery process, Travelers produced the December 1st, 2015, report.

Solicitor/client privilege can be waived expressly or implicitly. Generally, waiver of solicitor/client privilege can be established where it is shown that the client: one, knows of the privilege; and two, voluntarily shows an intention to waive that privilege.





1 or defence. Therefore, where the state of mind in  
2 question is whether the party acted in good faith or in  
3 reliance upon the other party's representations  
4 compelled disclosure of solicitor/client communications  
5 requires two elements, namely: (1) that the presence of  
6 absence of legal advice is relevant and material to the  
7 existence or non-existence of a claim or defence; and  
8 (2) that the party who received the legal advice made  
9 receipt of it an issue in the case.

10  
11 Later in the text it was noted (at page 1028)  
12 that when the existence or adequacy of legal advice is  
13 not a basis for the claim or the defence, privilege is not  
14 waived by a simple reference to legal advice in a  
15 pleading or disclosed document.

16 While Travelers did plead the Vertex report in  
17 its Statement of Defence, it did so in response to LTS's  
18 allegation that it had failed to take reasonable and  
19 appropriate steps to investigate the bond claim. In  
20 pleading the Vertex report, it was in support of  
21 Travelers' claim that it had reasonably investigated the  
22 bond claim and Travelers did not specifically plead  
23 reliance on legal advice.

24 Travelers did not plead reliance on legal advice  
25 received or put its state of mind with respect to the legal  
26 advice it received as a result of the report into issue.  
27 Pleading reliance on the report does not necessarily

1 make the content of any legal advice received in  
2 conjunction with the preparation of the report relevant  
3 or admissible when Travelers has not plead reliance on  
4 the legal advice.

5 In this circumstance, pleading the Vertex report  
6 did not implicitly waive the solicitor/client privilege  
7 contained in the 29 documents. Similarly, producing  
8 the Vertex report as part of the discovery process does  
9 not result in a waiver of solicitor/client privilege over  
10 communications that were exchanged with Mr. Pellegrini.

11 As I have already concluded earlier that the  
12 solicitor/client privilege extended to communications  
13 with Mr. Pellegrini and that the involvement of Mr.  
14 Pellegrini was integral to the functioning of the  
15 solicitor/client relationship between Travelers and its  
16 solicitor, it follows that by sending, receiving or copying  
17 Mr. Pellegrini on correspondence that was privileged, the  
18 privilege was not waived.

19 This extends to the issue of Mr. Pellegrini and the  
20 solicitor, Mr. Carriere, attending meetings during the  
21 investigation. Their involvement in the investigation  
22 and any meetings with the investigative team do not  
23 change their role, nor does their attendance at  
24 meetings that did not involve solicitor/client  
25 communications which might be privileged. Disclosure  
26 of these documents which do not contain solicitor/client  
27 privileged information does not implicitly waive

1 solicitor/client privilege over documents that do contain  
2 privileged information.

3 I would also note that there are 29 documents  
4 in question, which is not a significant number, and  
5 Travelers has disclosed other documents regarding the  
6 investigation into the bond claim, so this is not a  
7 situation where Travelers has plead that the  
8 investigation was properly conducted and then refused  
9 to produce any documents with respect to the  
10 investigation.

11 Therefore, for these reasons, the 29 documents  
12 that are in issue which were sent to, received from, or  
13 copied to Mr. Pellegrini, I conclude that they are subject  
14 to Travelers' solicitor/client privilege claim and that in  
15 the circumstances, the privilege has not been waived.

16 Turning to the other Notices of Motion and  
17 argument heard on February 12th, 2021, there were  
18 two Notices of Motion. There was a Notice of Motion  
19 filed by Travelers and the issues raised by Travelers in  
20 its Notice of Motion, I understood from counsel, were to  
21 be further discussed by counsel and they may have  
22 been capable of resolution, so we will address those  
23 issues following this decision.

24 There was also a Notice of Motion filed by LTS  
25 where LTS sought further direction regarding my order  
26 of January 6th, 2021, on document production. On  
27 January 6th, 2021, I ordered that Travelers produce to

1 LTS a list of documents where attachments have not  
2 been produced or where it is not clear that the  
3 attachment has been produced by LTS. I also ordered  
4 that in response LTS would produce the attachments or  
5 provide an explanation for why the attachment could  
6 not be produced.

7 Travelers produced to LTS a list of 1,031  
8 documents. There are three categories of documents:  
9 those embedded in an email with an attachment; the  
10 Aconex documents; and those with a file with the  
11 attachment not attached. I do not think it is necessary  
12 for the purposes of this decision to describe further the  
13 categories.

14 With respect to the first category, the emails  
15 embedded in an email with an attachment, apparently  
16 LTS found 40 of the 49 documents elsewhere in the  
17 production and is attempting to find the remaining  
18 documents, so the first category is not really in issue.

19 For the next category, the Aconex documents,  
20 these documents appear to be documents which were  
21 harvested from the Aconex document management  
22 system. In this category, the Aconex system has been  
23 archived and data management for LTS has been  
24 moved to a newer system. LTS claims that the  
25 attachments in the Aconex system cannot be retrieved.

26 LTS attempted to locate 17 of the emails where  
27 the attachment was listed on the bottom of the email or

1 in the subject header of the email. The emails were  
2 located, but the attachments were not attached.

3 It is not clear why this occurred, but Alex  
4 Graham, Director, Technology Services, speculated  
5 about what might have happened and concluded that  
6 there was no way to confirm his theory with respect to  
7 what happened to the attachments because the system  
8 had been decommissioned for a few years and he was  
9 not aware of any way the attachments could be  
10 retrieved.

11 Travelers claims that this is not an explanation,  
12 but is a guess and does not explore other options like  
13 backup tapes or archives. Mr. Graham's comment that  
14 he is not aware of any way the attachments could be  
15 retrieved only answers the question of whether there is  
16 another way to access the attachments through the  
17 Aconex system, and it appears that is not possible, and  
18 I accept that explanation. But it does not answer the  
19 question about whether the attachments might be  
20 accessed through other means available to LTS, such  
21 as backup tapes or other archives.

22 LTS has only reviewed 17 of the Aconex  
23 emails. I am not clear exactly how many emails there  
24 are, but I am going to order that LTS will review every  
25 Aconex email and confirm whether the attachment is  
26 available and provide a report to Travelers regarding  
27 the results.

1 I am told that 13 of 13 Aconex documents that  
2 were searched by LTS were found elsewhere in the  
3 production. If the attachment is available elsewhere,  
4 including in archives or other systems available to LTS,  
5 LTS will either produce the document or provide the  
6 location or locations, to Travelers, in the production for  
7 each item.

8 The third issue is the file name issue. The  
9 majority of the documents fall under this category. For  
10 these documents, LTS reviewed 53 emails and found  
11 72 percent elsewhere in the production and claims that  
12 28 percent are truly missing. LTS suggests that  
13 Travelers can search the file name and find the missing  
14 attachments. So I presume that this means that 28  
15 percent of missing attachments will continue to be  
16 missing, despite LTS having made no effort to review  
17 the list and confirm that percentage or to identify which  
18 of the hundreds of documents might continue to be  
19 missing.

20 When I ordered Travelers to go through the  
21 production and identify missing attachments in LTS's  
22 documents production, which consisted of  
23 approximately 130,000 documents, I was aware that  
24 this was a significant undertaking that I was placing on  
25 Travelers. I did not expect that this would be a  
26 one-sided endeavour. Having received the list  
27 prepared by Travelers, I expected LTS to go through

1 the list and report back to Travelers on each item on  
2 the list, and not conduct a cursory inspection before  
3 claiming that the task was too onerous.

4 This litigation was initiated by LTS and LTS is  
5 the party with the document production of 130,000  
6 documents. Each party has obligations as part of the  
7 document production process. As I have previously  
8 stated, the document discovery process and litigation  
9 on this scale and involving electronic production is not  
10 expected to be 100 percent accurate, but that does not  
11 absolve a party of the responsibility to address  
12 deficiencies when those deficiencies are specifically  
13 identified and listed by the other party.

14 Therefore, LTS, I am going to order, will go  
15 through the entire list and for each item will either  
16 produce the document or will provide an explanation for  
17 why it is not available. Where the document is  
18 available elsewhere in the production, LTS will provide  
19 the location or locations where that document can be  
20 found and will report this to Travelers.

21 Travelers will have their costs on this  
22 application and the application regarding solicitor/client  
23 privilege.

24

25 **CERTIFICATE OF TRANSCRIPT**

26 Neesons, the undersigned, hereby certify that the foregoing  
27 pages are a complete and accurate transcript of the



1 proceedings transcribed from the audio recording to the best  
2 of our skill and ability. Judicial amendments have been  
3 applied to this transcript.

4

5 Dated at the City of Toronto, in the Province of Ontario, this  
6 1<sup>st</sup> day of March, 2021.

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10 Kim Neeson

11 Principal

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