

FILE NO.: SCT-5004-11
CITATION: 2013 SCTC 04
DATE: 20130626

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

KAHKEWISTAHAW FIRST NATION

Claimant

Stephen M. Pillipow and Adam Touet, for
the Claimant

– and –

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA

As represented by the Minister of Indian
Affairs and Northern Development

Respondent

Lauri Miller and Donna Harris, for the
Respondent

HEARD: June 3, 2013

REASONS FOR DECISION

Honourable Johanne Mainville

[1] The Claimant submits an Application for an order requiring the Respondent to provide fifteen documents. They are listed in Schedule A of this decision. The Respondent challenges the Application on the grounds that the documents are subject to solicitor-client privilege.

[2] Pursuant to Rule 59(2) of the *Specific Claims Tribunal Rules of Practice and Procedure* (“SCT Rules”), counsels to the parties agreed that I may inspect the documents in order to decide this Application. The Respondent provided the Tribunal with a copy of documents identified as no. 1, 2, 3, 5, 7, 8, 9, 12, 13 and 14. The Respondent notified the Tribunal that its researcher was unable to locate documents no. 4, 6, 10, 11 and 15. In its written argument, the Respondent indicates that the researcher continues attempts to locate these documents, advising that possible explanations include: the documents were misfiled at Library and Archives of Canada (“LAC”), or, the documents have not been re-filed since the Access to Information and Privacy extraction, which was made in response to the Claimant’s researchers request for documents.

[3] Following this information, the Claimant notified the Tribunal that it was withdrawing its request in relation to documents no. 4, 6, 9, 10 and 15. A few days before the hearing, the Claimant made a correction and indicated that it was withdrawing its Application in regard to documents no. 4, 6, 9, 11 and 15, but not with respect to document no. 10. It should be noted again that document no. 10 was not located by the Respondent’s researcher

I. CONTEXT AND BACKGROUND

[4] In its Declaration of Claim, the Claimant alleges that the Respondent wrongfully expended the Claimant’s moneys deposited into the Capital and Revenue Accounts maintained by Canada for the Claimant.

[5] To prepare for the hearing of this claim, the Claimant commissioned research to be conducted by Joan Holmes & Associates Inc. into the management and administration of trust fund moneys, including the legislation, policies and practices concerning the trust fund moneys held by the Respondent.

[6] As part of its research, Joan Holmes & Associates Inc. reviewed files at LAC relating to the management and administration of trust fund moneys. In an affidavit sworn on April 5, 2013, and filed on behalf of the Claimant, Joan Holmes declares:

7. During our review, we digitally photographed certain documents for our records in accordance with LAC's policy allowing digital photographs. However, upon a subsequent review of these documents, we discovered that some of the documents we photographed might have been those identified by LAC as having been removed from the file. We therefore returned the file to LAC staff and asked them to conduct a second review of the file to confirm that all the documents provided to us were supposed to be on the file. After several days, LAC staff informed us that some of the documents we had been permitted to view should have been removed from the file; this included some documents we had photographed. (..)
8. Given that some of the documents we digitally photographed were supposed to have been removed from the file, we did not print these photographs nor did we disclose or provide our digital copies of the photographs to the Claimant, or to their counsel. Instead, we provided the Claimant and their counsel with only the information included by LAC on their notes in the file (i.e. date, correspondents and/or title, and the reason the document was removed from the file).

[7] Alena Dufault is the Chief, Archival and Operational Records Unit, LAC Access to Information, Privacy and Personnel Records Division. In her affidavit sworn on April 19, 2013, and filed on behalf of the Respondent, she explains the objectives of LAC as well as the applicable procedures to requests for information for restricted information. She also declares that “[i]f the envelope containing the removed documents was provided to Joan Holmes and Associates Inc. the inclusion of the envelope in the interim file was inadvertent and unintentional.”

II. ANALYSIS

[8] The onus is on the party asserting the solicitor-client privilege to establish entitlement: *Ross River Dena Council v. Canada (AG)*, 2009 YKSC 4, [2009] 2 C.N.L.R. 334, at para. 15, [Ross River], aff'd 2009 YKCA 8, [2009] 3 C.N.L.R. 361.

[9] The concept of privileged communication between a solicitor and a client has long been recognized as fundamental for the administration of justice: *Solosky v. The Queen* [1980] 1 S.C.R. 821, at para. 21. In discussing the solicitor-client privilege in that case Dickson J., on behalf of the Court, stated the following:

23. Wigmore on Evidence, McNaughton revision (1961), vol. 8, para. 2292, p. 554, framed the modern principle of privilege for solicitor-client communications, as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

24. There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach: *O'Shea v. Woods*, ([1891] P. 286) at 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. (...).

[10] Dickson J. outlined the required criteria to establish solicitor-privilege at para. 28:

28. (...) privilege can be claimed only document by document, with each document being required to meet the criteria for the privilege: (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

See also: *Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319, at para. 24 Fish J.; *Smith v. Jones* [1999] 1 R.C.S. 455, at para. 46, Cory J. and at para. 5, Mayor J.; *R. v. Campbell* [1999] 1 R.C.S. 565 at p. 601; *Geffen v. Goodman Estate* [1991] 2 S.C.R. 353, at pp. 382-383.

[11] These following principles were set out by the Federal Court in *Minister of National Revenue v. Reddy*, [2006] F.C. 277, at para.12, [2006] 3 CTC 17:

12. There is a distinction between a lawyer's duty of confidentiality and solicitor-client privilege. Communications may be confidential without being protected by solicitor-client privilege. In order for solicitor-client privilege to apply, four conditions must be established:

(a) there must be a communication, whether oral or written;

(b) the communication must be of a confidential character;

(c) the communication must be between a client or his agent and a legal advisor;
and

(d) the communication must be directly related to the seeking, formulating or giving of legal advice.

[12] Grotsky J. of the Saskatchewan Court of Queen's Bench in *Lac La Ronge Indian Band v. Canada*, [1996] S.J. No. 555, [1996] 10 W.W. R. 625, noted at para. 13 that communications with "in house" government lawyers may be covered by the privilege:

13. The communications must be between a qualified and practising solicitor acting in a professional capacity, and his or her client. In the government context the client is, in the broadest sense, the executive branch of the government, and the salaried legal advisors of the Crown are regarded by the law as in every respect in the same position as those who practise on their own account. See: *Weiler v. Canada (Dept. of Justice)*, [1991] 3 F.C. 617 (F.C.T.D.), at pp. 623-624 and *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs & Excise* (No. 2), *supra*, per Lord Denning M.R. at p. 129, affirmed at [1974] A.C. 405 [H.L.].

[13] In *Pritchard v. Ontario (H.R.C.)* [2004] 1 S.C.R. 809, Major J., citing *R. v. Campbell*, *supra*, wrote that:

19. Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency.

[14] Relying on *R. v. Campbell*, *supra*, the Respondent submits that legal opinions prepared by Department of Justice lawyers in response to requests for legal advice are protected by solicitor-client privilege. It adds that although the Crown is the "ultimate" client of the Department of Justice, due to practical realities, the client may often be an individual of a department or an agency.

[15] In *R. v. Campbell*, at para. 49, Binnie J. held as follows:

The solicitor-client privilege is based on the functional needs of the administration of justice. (...)

Cpl. Reynolds' consultation with Mr. Leising of the Department of Justice falls squarely within this functional definition, and the fact that Mr. Leising works for an "in-house" government legal service does not affect the creation or character of the privilege.

[16] Furthermore, referring to *Descôteau et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 the Respondent submits that it is not necessary that the communication be made to a legal adviser in order to attract solicitor-client privilege. It can be made to a clerk, administrative personnel, paralegal or another agent, so long as it is made in the context of obtaining legal advice.

[17] In *Descôteau v. Mierzwinski*, Lamer J., as he then was, stated the following at p. 877:

The items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently. It has long been recognized that even if the lawyer does not agree

to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged (*Minter c. Priest* [1930] A.C. 558; *Philson on Evidence*, 12th.ed., 1976, p. 244, No. 589; 8 Wigmore, *Evidence* (McNaughton rev. 1961), p.587, para. 2304).

[Emphasis added]

[18] The Claimant also relies on *R. v. Campbell, supra*, and submits that, although legal opinions from government lawyers may, in certain circumstances, attract solicitor-client privilege, not all opinions provided by government lawyers can be considered “legal opinions” that attract the privilege. In this matter, Binnie J. wrote the following at para. 50:

50. It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. (...).

[19] In this case, the subject documents consist of memoranda and letters between the Department of Justice of Canada and other federal government departments.

[20] I have carefully reviewed each document. Clearly, all include communications from a solicitor or Deputy Minister or acting Deputy Minister of Justice to different client departments, notably the department of Mines and Resources and the Treasury Board. The purpose of the communications was to give or obtain legal advice.

[21] I conclude that the communications in issue, i.e. documents no. 1, 2, 3, 5, 7, 8, 9, 12, 13 and 14, are protected by solicitor-client privilege.

[22] The Claimant maintains its Application regarding document no. 11. As mentioned previously, the Respondent was not able to locate this document and I therefore did not obtain a copy for review. The Claimant did not submit any arguments with regard to this specific situation, nor did it make any particular requests. In light of the absence of arguments and taking into consideration that the Claimant withdrew its Application with respect to the other documents that the Respondent was not able to locate, the Application with respect to document no. 11 is dismissed, but without prejudice to the Claimant seeking its disclosure at a later date

should the document eventually be located.

[23] Finally, there is no evidence that the privilege has been waived by the Respondent. The evidence before me shows that the government never had the intention to waive the privilege. In this case, LAC disclosed some documents unintentionally to Joan Holmes & Associates Inc. In *Celenase Canada v. Murray Demolition*, [2006] 2 S.C.R. 189, Binnie J. wrote the following at para. 34:

34. Whether through advertence or inadvertence the problem is that solicitor-client information has wound up in the wrong hands. Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors. (...).

[24] At the end of the oral hearing, the Respondent made a verbal request that the Tribunal order Joan Holmes & Associates Inc. to return to LAC all of the documents that they may still have in its possession. The Respondent did not submit any authority to the Tribunal in support of its request.

[25] Joan Holmes declared at para. 8 of her affidavit:

8. Given that some of the documents we digitally photographed were supposed to have been removed from the file, we did not print these photographs nor did we disclose or provide our digital copies of the photographs to the Claimant, or to their counsel. (...).

Counsel for the Claimant confirmed to the Tribunal that they never saw the documents.

[26] In light of the above, should the Respondent wish to obtain an order addressed to Joan Holmes & Associates Inc., it must then file an appropriate application supported by a full record, including authorities, in order to allow the Claimant and Joan Holmes & Associates Inc. to submit a proper response. Consequently, I shall make no order regarding Joan Holmes & Associates Inc. pursuant to this decision.

[27] Consequently, the Application of the Claimant is dismissed.

JOHANNE MAINVILLE

Honourable Johanne Mainville
Specific Claims Tribunal Canada

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

Date: 20130626

File No.: SCT-5004-11

OTTAWA, ONTARIO June 26, 2013

PRESENT: Honourable Johanne Mainville

BETWEEN:

KAHKEWISTAHAW FIRST NATION

Claimant

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development**

Respondent

COUNSEL SHEET

TO: Counsel for the Claimant KAHKEWISTAHAW FIRST NATION
As represented by Stephen M. Pillipow and Adam Touet
Woloshyn & Company

AND TO: Counsel for the Respondent
As represented by Lauri Miller and Donna Harris
Department of Justice

SCHEDULE A

1. Memorandum from Director to Deputy Minister, dated September 25, 1943;
2. Correspondence from Solicitor to Deputy Minister, dated November 25, 1947;
3. Correspondence from Deputy Minister Department of Justice to Deputy Minister Mines and Resources, dated August 28, 1946;
4. Correspondence from Solicitor to Hoey, dated 1946;
5. Correspondence from Deputy Minister Department of Justice to Treasury Board, dated December 11, 1944;
6. Correspondence from Deputy Minister Department of Justice to Indian Affairs, dated August 19, 1946;
7. Correspondence from Deputy Minister Department of Justice to Treasury, dated April 15, 1946;
8. Correspondence from Deputy Minister Department of Justice, dated March 23, 1938;
9. Correspondence from Deputy Minister Department of Justice, dated August 17, 1946;
10. Correspondence from Director, dated July 28, 1945;
11. Correspondence from Director to Allan, dated July 27, 1945;
12. Correspondence from Deputy Minister Department of Justice to Treasury, dated April 18, 1945;

13. Correspondence from Deputy Minister Department of Justice to Treasury, dated December 11, 1944;
14. Correspondence from Deputy Minister Department of Justice to D. J. Allan, dated November 14, 1944; and
15. Correspondence from Assistant Deputy Minister Department of Justice to Secretary of Mines and Resources, dated November 2, 1944.