

CANADA / JUDGMENT

0782484 B.C. Ltd. v. E-Pro Enterprises Inc.

2017 BCSC 2245

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 2245 0782484 B.C. Ltd. v. E-Pro Enterprises Inc.,

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0782484 B.C. Ltd. v. E-Pro Enterprises Inc.,

2017 BCSC 2245

Date: 20171207

Docket: S113857

Registry: Victoria

Between:

0782484 B.C. Ltd. and South Island Aggregates Ltd.

Plaintiffs

And

E-Pro Enterprises Inc., Kevin Adrian Bromley carrying on business as E-Pro Enterprises,
Quantum Murray LP, 0848052 B.C. Ltd., H. Volk Transport and 0880056 B.C. Ltd.

Defendants

And

E-Pro Enterprises Inc., Kevin Adrian Bromley carrying on business as E-Pro Enterprises and
0848052 B.C. Ltd.

Third Parties

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiffs:

J.M. Hutchison, Q.C.

Counsel for the Defendant and Third Party, 0848052 B.C. Ltd., :

R. Lesperance

Kevin Adrian Bromley on his own behalf and for E-Pro Enterprises Inc.:

Not Present

Counsel for the Defendant, H. Volk Transport Limited:

Not Present

Counsel for the Defendant and Third Party, Quantum Murray LP:

(Participated by Telephone)

J.D. Wong

Counsel for the Defendant, 0880056 B.C. Ltd.:

Not Present

Place and Date of Hearing:

Victoria, B.C.

November 6, 2017

Place and Date of Judgment:

Victoria, B.C.

December 7, 2017

- [1] The defendant, 0848052 B.C. Ltd. ("0848"), and five proposed defendants, Great Pacific Mortgage and Investments Ltd., Accredited Mortgage Ltd., Rory Howard Campbell, Jeffrey Alexander Moses and Walter Rodney Neufeld (collectively the "Proposed Defendants") seek various forms of relief. I have referred to 0848 and the Proposed Defendants collectively as the "Applicants". The primary focus of the Applicants relates to the disclosure of portions of the files of the solicitors for the plaintiffs on the basis that the plaintiffs have voluntarily or impliedly waived privilege over those files.
- [2] 0848 also seeks disclosure of various other categories of documents. The Notice of Application that was filed also sought the cross-examination of Mr. Michael Kelly, a principal of the plaintiffs, on various affidavits that he has filed. That relief has been consented to subject to counsel agreeing on a date for Mr. Kelly's cross-examination.

Background Facts

- [3] Different sets of facts relate to different aspects of the various applications that were advanced. The following general background facts are, however, relevant.
- [4] The claim by South Island Aggregates Ltd. ("SIA") against the defendants is based on allegations that contaminated soil was moved by the defendants from a property in View Royal to SIA's property on Stebbings Road in Shawnigan Lake, British Columbia (the "SIA Property").
- [5] Key to this case are the alleged actions against the defendant Kevin Bromley. Mr. Bromley was, at the time, a professional engineer. He is also the principal of the defendant, E-Pro Enterprises Ltd. ("E-Pro").
- [6] 0848 retained E-Pro to remediate a property that 0848 owned at 140 Hallowell Road, View Royal, British Columbia (the "Hallowell Property"). E-Pro was, at the time, the owner of a property at 1012 Yates Street, Victoria, British Columbia ("E-Pro Property").
- [7] Based on the allegations made in the Notice of Civil Claim and the Third Party Notice of the defendant Quantum Murray LP ("Quantum"), Mr. Bromley took contaminated soil from the E-Pro Property and moved it to the Hallowell Property.
- [8] It is also alleged that Mr. Bromley took contaminated soil from the properties of two other E-Pro clients and deposited them on the Hallowell Property.
- [9] After allegedly moving contaminated soil from these various properties to the Hallowell Property, it is further alleged that on or about October 29, 2010 and until on or about November 5, 2010, Mr. Bromley arranged for Quantum, H. Volk Transport Limited ("Volk") and Don Mann Excavating Ltd. to transport that soil from the Hallowell Property to the SIA Property.
- [10] SIA's position is that while it agreed to receive soil from Quantum and E-Pro, it was not aware that the soil was allegedly contaminated.
- [11] On September 19, 2011, SIA commenced this action. In its Notice of Civil Claim, SIA advances claims against all defendants under the Environmental Management Act, S.B.C. 2003, c. 53. Under that legislation, a party who incurs costs to remediate a contaminated site may recover its reasonably incurred costs from a class of persons called "responsible persons" (see section 45).
- [12] SIA further claims against Quantum, Mr. Bromley, E-Pro and Volk in negligence and against Quantum, Mr. Bromley and E-Pro for breach of contract.

- [13] I have said that this action arises out of activities that took place in 2010 and that this action was commenced in 2011. The action was initially scheduled to go to trial in September, 2016. 0848 made further document disclosure just prior to the trial with the result that the trial was adjourned. On September 15, 2017 the plaintiffs brought an application to add the Proposed Defendants to this action (the "Joinder Application"). On October 2, 2017 Master Dick adjourned the Joinder Application so that this application could be heard first.

Issue 1: Waiver of Privilege

- [14] One of the issues in the rescheduled Joinder Application will be whether or not the relevant limitation periods have expired in relation to the claims that the plaintiffs now seek to advance against the Proposed Defendants. This issue is relevant because one consideration, when deciding whether to add a party to an existing action, is whether it is "just and convenient to do so": Rule 6-2(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Whether it is "just and convenient" to add a party to an action, in turn, is contingent on various factors including, for example, delay and, more importantly in this case, the expiration of a limitation period: *Med Finance Co. S.A. v. Bank of Montréal (B.C.C.A.)* (1993), 79 B.C.L.R. (2d) 222 (C.A.); *Owners, Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611.
- [15] Before me there was some issue about whether the former Limitation Act, R.S.B.C. 1996, c. 266, and s. 6 or the postponement provisions of that legislation was relevant. Though the plaintiffs do not, in their proposed pleading, plead postponement, the Applicants assert that it is s. 6 of the former Limitation Act that will provide the conceptual framework through which limitation issues will necessarily be addressed.
- [16] The respondents/plaintiffs, conversely, argue that s. 6(1) of the current Limitation Act, S.B.C. 2012, c. 13 governs, that whether the running of time was "postponed" is not relevant and that the question under the new legislation is when "the claim is discovered".
- [17] It is both unnecessary and inappropriate for me to resolve this issue. It is unnecessary because I do not consider that for present purposes the issue of which Limitation Act pertains is relevant. In either case the issue on the Joinder Application will be when the plaintiffs learned of or discovered facts that caused them to believe or understand that there was a basis to add the Proposed Defendants to the action.
- [18] That issue can be further distilled. During the application before me counsel for the Applicants took me to various documents that were part of 0848's early disclosure and argued that the facts and information that were revealed in that early disclosure now mirror the issues that are relied on by the plaintiffs to join the Proposed Defendants and in their proposed pleading. The issue of whether there was sufficient information and facts in 0848's early disclosure to provide the plaintiffs with the factual and legal knowledge necessary to add the Proposed Defendants to the action will be for the Joinder Application. In addition, that issue, at least in part, grounds the application to cross-examine Mr. Kelly.

- [19] The plaintiffs, however, will apparently seek to argue that it was only the additional document disclosure of 0848, made just prior to the originally scheduled trial date, that provided them with the factual knowledge necessary to make further investigations, to amend their pleadings and to bring the Joinder Application.
- [20] In that context the plaintiffs, and their counsel, have filed various affidavits and made various submissions that advance this assertion.
- [21] Importantly for present purposes the Applicants argue that as a result of these affidavits and submissions the plaintiffs have put their state of mind in issue and have voluntarily or impliedly waived the privilege associated with various communications with their counsel. Specifically, Mr. Kelly, in his affidavit dated May 9, 2017 has discussed why the plaintiffs chose not to take additional steps earlier in the litigation and why they chose to do so after 0848's additional disclosure. He has deposed:
6. At all times material to the commencement of the proceedings, the plaintiffs understood that the defendants 0848052 B.C. Ltd. was the owner of the property at 140 Hallowell Road and had engaged and instructed the said Kevin Adrian Bromley and his company to manage the removal of the contaminated soils from that property.
 9. After consultation with counsel, the plaintiffs determined that it was not necessary to examine the defendant Kevin Adrian Bromley for discovery or to examine a representative of the defendant 0848052 B.C. Ltd.
 11. On Friday, 9 September 2016, I together with other witnesses for the plaintiffs were in the office of counsel for the plaintiffs, in preparation for the intended commencement of the trial. At approximately 3 o'clock in the afternoon, counsel advised us that during a break in our preparations, he had check his office e-mail and discovered an e-mail message from counsel for the 0848052 B.C. Ltd had been sent that afternoon to him, and it had disclosed a significant number of documents not previously listed or produced by that defendant, amounting to more than 840 pages.
 12. After a preliminary look at the documents, counsel advised me and the other principal of the plaintiffs that it appeared that there was evidence of the involvement of other parties not previously identified in the engagement of the said Kevin Adrian Bromley and his company and in the management of the contaminated soil materials.
 14. Having advice from counsel during the weekend as to the nature of the evidence apparently found in the surprise disclosure, plaintiffs instructed counsel to seek an adjournment of the trial and, and if granted, to pursue determination of the appropriateness of seeking to add additional parties to the proceeding as defendants.
 16. Following the adjournment of the trial, after review of the documents in the surprise disclosure of 9 September 2016, counsel advised me and the other principal of the plaintiffs that it appeared there was significant evidence contained in the documents then newly disclosed that the defendants Kevin Adrian Bromley and his company had been engaged and

directed with respect to the contaminated soil materials by Great Pacific Mortgage & Investments Ltd. and/or by persons connected either as directors, officers or agents of it and that if confirmed by further investigation, they ought to be joined as defendants in this proceeding.

17. Counsel also advised me and the other principal of the plaintiffs that the surprise disclosure did not contain what appeared to be a complete record of communications, particularly e-mail correspondence, between the defendant Kevin Adrian Bromley and Great Pacific Mortgage & Investments Ltd.
 18. In order to further investigate, an appointment was taken out to examine the defendant Kevin Adrian Bromley for himself and on behalf of his company, which was scheduled for 25 November 2016.
- [22] In addition, at the application to adjourn the trial, counsel for the plaintiffs took the position that an adjournment was necessary to determine if additional parties needed to be added to the action. The defendants asserted that the limitation periods had expired to which counsel for the plaintiffs said:

"Great Pacific may have been there, but it appeared, until this documentation had - my first review after Friday afternoon, Great Pacific had a lending involvement but not particularly being involved in a capacity that would make it a defendant. There's lots of time that people, lay people particularly, think you can sue anyone under the sun. As counsel you have to decide whether there is a case to be advanced or not, whether there is credible evidence that may be accepted by a court, and a basis upon which you can frame a proper legal argument. It would have been quite improper for me to just simply, because somebody said Great Pacific was in some way connected, to have joined them as a party.

My client did consider all of that, and I can say got advice with respect to what was necessary for properly claiming against a property." (Underlining added.)

The Legal Framework

[23] The parties agree on portions of the relevant legal framework and disagree on other aspects of that framework. The parties agree on the importance and protection that is afforded solicitor-client communications.

[24] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, Fish J., for the Court, said:

24 Thus, the Court explained in *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860, and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; and *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31. In an oft-quoted passage, Major J., speaking for

the Court, stated in McClure that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).

[25] Fish J. also explained the policy objectives that inform solicitor-client privilege and said:

26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[26] Several other aspects of the relevant legal framework are also straightforward:

- a) The information being sought must be relevant to the action. Here the plaintiff accepts, for present purposes, that the information or documents that the Applicants seek is relevant.
- b) The onus to establish or prove the existence of solicitor-client privilege rests with the party alleging the existence of the privilege: see *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.) at para. 21.
- c) A solicitor-client relationship is established as soon as the prospective client has his or her first dealings with the lawyer to obtain legal advice: see *Descôteaux et al. v. Mierzewski*, [1982] 1 S.C.R. 860 at pp.876-877. In this case the relationship between the plaintiffs and their legal advisors was of long standing and there is no dispute that advice the plaintiffs received would normally be protected by solicitor-client privilege.

[27] The parties disagree, however, on a) the ongoing importance and relevance of *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499 and b) the legal significance of *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 both on *S. & K. Processors* and more generally.

[28] In *S. & K. Processors* McLachlin J., as she then was, said:

6 Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189.

10 Notwithstanding the fact that the Evidence Act, s. 11, does not require production of the documents in question, can it be said that in the interests of fairness and consistency the doctrine of waiver requires their disclosure? As pointed out in *Wigmore on Evidence* (McNaughton Rev., 1961), vol. 8, pp. 635-36, relied on by Meredith J. in *Hunter v. Rogers* supra, double elements are predicated in every waiver--implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. In *Hunter v. Rogers*, supra, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[29] The plaintiffs argue that *Soprema* has changed the analytical framework relevant to an implied waiver of the privilege that is attached to solicitor-client communications and that it has diminished or removed the emphasis and role of both fairness and consistency when addressing issues of implied waiver. I do not consider that this is so for several reasons.

[30] *Soprema* was an unusual and fact dependent case. The plaintiff had sued the defendant in negligent misrepresentation. The plaintiff had never pleaded or otherwise referred to legal advice it had received. Nevertheless, a constituent element of the tort of negligent misrepresentation is reliance. Accordingly, and necessarily, the plaintiff's state of mind was put in issue albeit not as a result of any pleading, or statement, or act on the part of the plaintiff or its counsel. The defendant argued that fairness, or trial fairness, required that the plaintiff produce various documents over which privilege, on the basis of solicitor-client communications, had been claimed. Harris J.A. set out the issues before the court in the "Introduction" to the judgment:

[2] The issue arises in a negligent misrepresentation case. To succeed, the plaintiff must prove that it relied in fact and relied reasonably on an alleged misrepresentation. Accordingly, its "state of mind" is in issue. It appears the plaintiff received legal advice about the transaction, but it does not rely on that advice to demonstrate that it reasonably relied on the misrepresentation. It has not, in this sense, voluntarily made its understanding of its legal position a material issue in the litigation. Nonetheless, the legal advice it received may be relevant to its "state of mind" because it bears on the question whether the reliance was reasonable. In this judgment I will refer to a party voluntarily putting its legal understanding in issue to reflect this distinction.

[3] The judge concluded that the test for waiver is not limited to circumstances where a party has voluntarily put its understanding of its legal position in issue. He concluded that a party may impliedly waive privilege if it put its "state of mind" in issue in a manner establishing a clear nexus between its state of mind and the privileged communications. Where the

privileged communications may be "highly relevant" to the state of mind, fairness and consistency may require waiver if upholding the privilege would confer an "unfair litigation advantage" on the party claiming the privilege. The decision whether privilege has been waived involves the court in a "gatekeeper" function, assessing the specific facts to balance the interest in maintaining privilege against fairness and consistency in litigation.

[Emphasis in original.]

- [31] Harris J.A. emphasized that it was "important that the action sounds in negligent misrepresentation" (para. 17). He identified that the question before the court had not been "authoritatively settled" in British Columbia (para. 21). He emphasized in his review of the relevant authorities that to "understand properly the scope of the legal principle one must examine statements of principle in light of the facts giving rise to them" (para. 27).
- [32] Harris J.A. concluded:
- [49] In my view, the authorities in this province do not clearly preclude the approach taken by the judge, although on balance I think the weight of authority supports the proposition that a party must voluntarily inject into the litigation legal advice it received or its understanding of the law before waiver can be implied.
- [33] Harris J.A. emphasized that his conclusion was supported by *R. v. McClure*, 2001 SCC 14 where the Court, at para. 35, emphasized "the solicitor client privilege must be as close to absolute as possible and does not involve a balancing of interests on a case-by-case basis" and by *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 where the Court, at paras. 20- 21, emphasized that communications should be disclosed only where absolutely necessary. Finally, he again emphasized, at para. 52, that these various points were "reinforced when one recalls the nature of the cause of action". This was because the test that had been used by the chambers judge called "into question whether solicitor client privilege would ever be protected in a case involving reasonable reliance" (at para. 52).
- [34] I have addressed *Soprema* at some length because it is important to recognize what *Soprema* did and what it did not do. *Soprema* did clarify and address a specific issue in respect of which the authorities in British Columbia had been unclear. That issue was the test for implied waiver in cases where the cause of action advanced, as opposed to any conduct on the part of a plaintiff, brings into play the plaintiff's "state of mind" and its reasonable reliance on a representation made to it. It is in this light that the court's comments, at para. 49, must be understood.
- [35] *Soprema* did not, however, change the law of solicitor-client privilege, or waiver, or implied waiver more broadly. It did not change the ongoing importance of either fairness or consistency in the analysis of questions of implied waiver.
- [36] In *Descôteaux*, the Court confirmed that solicitor-client privilege "which protects the fundamental civil and legal rights of a citizen to communicate in confidence with their lawyers will not be lightly abrogated" (at p.875). The statement that solicitor-client privilege

had been elevated to a substantive or "fundamental civil and legal right" was repeated in each of *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 57, *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 54, citing from para. 69 of *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536 and *McClure* at para. 24. Thus, these legal principles have been firmly entrenched for approximately forty five years.

- [37] The proposition that solicitor-client privilege should be interfered with only to the extent "absolutely necessary" was also established in *Descôteaux*, at p.875, and has been confirmed in, for example *Goodis* at para. 20 and 21 and in *Blank* at para. 24. Thus, this proposition has also been firmly established for some forty five years.
- [38] Solicitor-client privilege "is not absolute". It will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis: *R. v. McClure*, 2001 SCC 14 at paras. 34-35; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 36; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 18. Again, these propositions have been well established for about two decades.
- [39] Furthermore, and importantly, the Court in *Soprema* did not detract from the ongoing validity and status of *S. & K. Processors*. Similarly it did not obviate the need to consider both fairness and consistency when addressing an implied waiver of privilege. Indeed, *Harris J.A.* expressly addressed *S. & K. Processors* and said:
- [30] Modern discussion of the circumstances in which waiver will be implied and the relevant test to apply begins with *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499, 45 B.C.L.R. 218 (S.C.). In that case, *McLachlin J.*, as she then was, articulated the principle that waiver may be implied where fairness and consistency so require. The examples she gives to demonstrate when fairness and consistency require a finding of implied waiver are twofold. First, a party may waive privilege over part of a communication. Having done so, fairness and consistency require a finding the privilege has been waived over the entire communication. The second category of cases involved circumstances where a party relies on legal advice it received as an element of its claim or defence. Having raised legal advice, for example to justify or explain its conduct, a party cannot in fairness then be permitted to assert privilege to prevent an opposing party from exploring the validity of the claim. *S. & K.* does not explore the possibility that privilege may also be impliedly waived where advice or knowledge may be relevant to state of mind but that party has not explicitly put in issue reliance on legal advice or knowledge of the law to explain or justify its conduct. I do not think the case can be interpreted as authority for the proposition that waiver is implied in such circumstances.
- [40] The foregoing passage further confirms the narrow and specific issue that *Soprema* addressed. I would observe that *S. & K. Processors* has been referred to and relied on in hundreds of decisions. It is consistently referred to in various authoritative texts: see for example *Sopinka, Lederman and Bryant, The Law of Evidence in Canada*, 3rd ed., Lexis

Nexis at p. 961. It has also been consistently referred to by the British Columbia Court of Appeal: see *McCarty v. Chen*, (1994) 92 BCLR (2d) (C.A.) at para. 2; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2004 BCCA 512 at para. 12 [re-aff'd on other issues in 2005 BCCA 111]; *Mayer v. Mayer*, 2012 BCCA 77 at para. 181; *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 53.

Analysis and Application of Principles

- [41] Aspects of this portion of the application were simplified by the concessions made by counsel for the plaintiffs during the course of his submissions. Specifically, counsel accepted that paragraphs 12, 14 and 16 of Mr. Cook's May 9 affidavit had impliedly waived the privilege that would otherwise have attached to the communications between counsel and the plaintiffs. That waiver, however, it was argued, only attached to the communications with counsel that took place in or about September 2016, when 0848 delivered its additional documents, or thereafter. It did not, it was argued, extend to communications, about whether to add the Proposed Defendants, between counsel and the plaintiffs in the 2010 or 2011 timeframe - though it is clear that there were such communications.
- [42] I do not agree with this submission or position. It is clear, as I have said, that the plaintiffs' state of mind, with respect to the limitation issue, is relevant and will be a central aspect of the Joinder Application. This is not contested. In this case the plaintiffs have "voluntarily" put their understanding of their legal position in issue: *Soprema* at para. 2. They have asserted that it was as a result of "advice from counsel" that the plaintiff learned of "evidence that other parties not previously identified " might be proper defendants (at para. 12 of Mr. Kelly's Affidavit). It was as a result of "advice from counsel" that the plaintiffs instructed counsel to consider "the appropriateness of seeking to add new parties" (at para. 14 of Mr. Kelly's Affidavit).
- [43] Thereafter, following a review of the defendant's additional document disclosure and on the basis of "counsel's advice", Mr. Kelly and the other principals of the plaintiffs learned that "there was significant evidence contained in the documents then newly disclosed " that supported the addition of the Proposed Defendants (at para. 16 of Mr. Kelly's Affidavit).
- [44] Each of these statements posits or states that it was only as a result of the defendants' additional document disclosure, in September 2016, and the subsequent advice of counsel, that an awareness of potential causes of action against the Proposed Defendants emerged. Inherent in these assertions is the proposition that the plaintiffs lacked any such earlier information or advice. I do not consider that it is open for the defendants to waive the privilege over an aspect of the legal advice they received, in relation to a specific issue, while continuing to assert privilege over other legal advice, albeit provided earlier, in relation to that same issue.

- [45] In saying this I am aware that a waiver of privilege in relation to a specific issue will not give rise to a general waiver of all legal advice: *Brown v. Clark Wilson LLP*, 2014 BCCA 185 at paras. 31 and 32.
- [46] In *Do Process LP v. Infokey Software Inc.*, 2015 BCCA 52 the parties were involved in copyright litigation. The parties had entered into an agreement dealing with the ownership of software. The defendants pleaded that they had signed the agreement under duress and without legal advice. There was evidence that one of the defendants had said that he had earlier received legal advice on the same subject matter as the agreement. The plaintiffs applied for production of documents relating to the legal advice arguing that privilege had been waived. The chambers judge found that there had been no waiver and concluded that the defendant had, at most, put in issue whether they had legal advice in relation to the agreement but that they had not put in issue the nature of the advice they had received.
- [47] The plaintiffs appealed this finding. The appeal was allowed. The Court of Appeal concluded that the chambers judge had erred in failing to consider whether fairness and consistency in the litigation required that waiver be implied. Because the pleading referred to both duress and lack of legal advice, it put the defendants' state of mind into issue in such a way that fairness required disclosure. The chambers judge erred in concluding that there could be no deemed waiver unless the advice was received in relation to the agreement itself, given that the subject matter of the previous advice was an important term of the agreement.
- [48] Newbury J.A., for the Court, said:
- [27] It seems to me that in applying the legal description, or "test", enunciated by Hubbard, the chambers judge took an overly narrow view of the law respecting waiver - or again as Mr. Griffin contended, asked herself the wrong question. I say this for two reasons. First and most importantly, the Court did not consider whether the defendants' position was inconsistent with the maintenance of the privilege, or to put it another way, whether fairness and consistency in the litigation required that waiver be implied. Because the chambers judge concluded that legal advice received three years before the execution of the 2007 agreement was effectively irrelevant to implied waiver, i.e., that the defendants had not put in issue the nature of the advice Mr. Lounine "received or did not receive", she did not reach this stage of the analysis. But with respect, the defendants had, by pleading duress, put their state of mind in issue. In my view, this plea, together with the allegation of 'no legal advice', lead to the conclusion that if advice was received, fairness in the litigation requires that it be disclosed.
- [28] This is not to suggest that a person's general knowledge or understanding of a legal principle, obtained as the result of legal advice received in a different context, will necessarily or even usually be sufficient to result in deemed waiver. The advice must obviously be highly relevant to the litigation for the tests of "fairness and consistency" to overcome the important principle of solicitor-client confidentiality. In this instance, however, it appears the advice (assuming advice was obtained) related exactly to the central

issue, or one of the central issues, of the case - Mr. Lounine's state of mind when he signed and returned the letter agreement in December, 2007.

- [29] Second, the chambers judge assumed that for waiver to be found, the advice in question must have been given regarding the December 2007 agreement specifically, rather than regarding a subject dealt with in the agreement - the ownership of copyright and other rights in the Pro-Suite software. In my view this is not a distinction of principle. As the defendants seem to concede, advice regarding ownership of the Pro-Suite software - albeit received a few years earlier - would obviously be relevant to the state of Mr. Lounine's mind, including possible duress, when he signed the agreement. He himself had referred to it two weeks earlier in discussions with the plaintiffs. Whatever opinion he had received would affect the strength of his plea of duress (and may be relevant to the argument of 'no consideration' which counsel also intends to assert at trial.) If he had advice that he or Infokey did not hold copyright in the software, for example, the court might infer Mr. Lounine thought that he was conceding very little in signing the letter agreement or thought that he did not need further advice. As the defendants themselves stated in their factum:

There is a difference between saying, "I acted on my solicitor's (good or bad) advice in doing X," to answer, for example, a plea of bad faith and saying "I had no legal advice" as an adjunct to a plea of duress. In the former situation the advice may have been "don't do X" and unless the advice could be confirmed it would be unfair to the other party - hence a waiver of privilege must go to allow the challenge. In the latter case, if a plea of duress were advanced and it turned out the party had the benefit of legal advice about the very situation at hand, it would without doubt seriously undermine or defeat entirely the plea of duress, the essence of which is the inability to properly act in one's own interest.

[Emphasis in original.]

- [49] Similar considerations apply in this case. The advice the plaintiffs received at earlier points in time, about possibly adding the Proposed Defendants to the action, is directly relevant to their state of mind both in relation to their knowledge and awareness of potential causes of action against the Proposed Defendants and in relation to the advice that they received in or after September, 2016.
- [50] The conclusions I have expressed are strengthened by the submissions that were made by counsel for the plaintiffs at the application for the adjournment of the original trial date. In those statements, which are referred to at para. 22 of these Reasons for Judgment, counsel expressly referred to the legal advice that he had provided to the plaintiffs, at an earlier stage in the litigation, about whether or not the proposed defendants, or perhaps some of them, should be added to the action.
- [51] Those statements may constitute evidence, albeit not in affidavit form. Even if the statements are simply regarded as submissions to the court, such submissions can reveal legal advice and ground a waiver of the privilege attached to legal advice: Blank at para. 22.

- [52] Yet another factor is relevant. In paragraphs 9, 17 and 18 of Mr. Kelly's May 9 affidavit he explains why Mr. Bromley was not examined for discovery earlier in the action and why that examination for discovery only took place after the trial was adjourned. Thereafter, at paragraphs 20-49 of his Affidavit, Mr. Kelly refers at considerable length to some of the evidence given by Mr. Bromley at his examination for discovery and to documents that were disclosed by Mr. Bromley at or after his discovery. All of this evidence is included in support of the plaintiffs' Joinder Application.
- [53] The question, again relevant on the Joinder Application, is why Mr. Bromley was not examined at an earlier time. Had he been examined at an earlier time the plaintiffs, at least arguably, would have been in possession of the information and facts that they now rely on in the Joinder Application.
- [54] The answer that is proffered by the plaintiffs is that a) based on "consultation with counsel" the plaintiffs had initially "determined that it was not necessary to conduct an examination for discovery of Mr. Bromley" (para. 9 of Mr. Kelly's Affidavit) and b) based on the "advice of counsel" after the further document disclosure of the defendants in September 2016 an appointment to discover Mr. Bromley was taken out (paras. 17 and 18 of Mr. Kelly's Affidavit).
- [55] I understood counsel for the plaintiffs to agree that privilege had been waived over the legal advice that was given to the plaintiffs, after September 16, about conducting a discovery of Mr. Bromley but not over the earlier advice or "consultation" to forgo that discovery. If I misunderstood counsel I would determine that the plaintiffs waived the privilege that was otherwise attached to the advice that they had received, after September 16, to conduct the discovery of Mr. Bromley. Specifically, the plaintiffs' state of mind was an issue, it is clear that the plaintiffs' received legal advice about whether to conduct an examination for discovery of Mr. Bromley and the plaintiffs rely on the legal advice they received to justify their conduct: Soprema at para. 53. In such circumstances neither consistency nor fairness will allow them to maintain privilege over their communications with counsel.
- [56] I would apply the same analysis to the earlier advice or "consultation" with counsel in relation to that same issue. First, by waiving privilege over the advice given after September 2016, about whether to conduct an examination for discovery of Mr. Bromley, the plaintiffs have waived privilege over earlier legal advice in relation to that same issue. Consistency and fairness, in the circumstances of this case, require this. It would be wrong and unfair for the plaintiffs to seek to explain their late discovery of Mr. Bromley with reference to the legal advice they received and to seek to insulate earlier advice they received about the same matter.
- [57] Second, and on an independent basis, I consider that the plaintiffs waived privilege, in paragraph 9 of Mr. Kelly's Affidavit, over their early communications with counsel about undertaking an examination for discovery of Mr. Bromley. I do not consider that the word "consultation" changes anything. A "consultation" between a lawyer and a lay person about

whether to conduct an examination for discovery of a person must necessarily be in the nature of legal advice. Furthermore, a client's "determination" or decision following the receipt of legal advice or a legal "consultation" is intended to communicate that the client considered or relied on the advice it received. Why would the plaintiffs otherwise refer to their "consultation" with counsel? It was open to them to simply say they decided not to examine Mr. Bromley for discovery. They chose not to do so

- [58] Accordingly, I direct that the plaintiffs disclose all materials or communication or advice from the files of their solicitors that relate to a) the initial identification and selection of defendants in this action, b) the joinder or potential joinder of additional parties to the action and c) the examinations for discovery of either Mr. Bromley or his company E-Pro.

Issue 2: Disclosure of the documents and files of Cox Taylor and Mr. Alexander

- [59] As part of this action, the plaintiffs are claiming for their legal costs incurred in other actions including proceedings before the Environmental Appeal Board, judicial reviews of that decision, related appeals and potentially other actions. Mr. John Alexander of Cox Taylor had or has conduct of these various matters. The plaintiffs have advised all parties that they intend to call Mr. Alexander as a witness at trial in this action.
- [60] Pursuant to a Case Plan Order in this action, dated July 7, 2015, the plaintiffs were required to "list and produce all documents requested to date including: the files of the plaintiffs' counsel, John Alexander, so far as it pertains to the plaintiffs' claim for damages in respect of extra costs incurred at an Environmental Appeal Board Hearing" by August 31, 2015.
- [61] On August 14, 2015 counsel for the plaintiffs wrote all parties and advised that Mr. Alexander's file "is extremely large, occupying nine shelves in his office and is in its size inappropriate for copying. Mr. Alexander has agreed that counsel who wish to review his file may, by appointment, attend at his office and review the file".
- [62] On August 31, 2015 Mr. Alexander wrote a letter to counsel for the plaintiffs in this action setting out the evidence that he intends to give at trial. The plaintiffs have made some modest disclosure of Mr. Alexander's files. They have not, however, for example, disclosed his time records. The primary basis on which this aspect of the 0848's application is opposed is that Mr. Alexander was not served and that he should be a party to the application.
- [63] This matter should be straightforward. The plaintiffs intend to seek to recover the costs of various legal proceedings. It is their obligation, under Rule 7-1, to list and disclose all documents that are material to this aspect of their claim. Furthermore, the documents held at Cox Taylor are documents that belong to the plaintiffs. Certainly they are documents in the plaintiffs' "control". There is no suggestion otherwise in the material before me nor did counsel for the plaintiffs suggest otherwise. To the extent that Mr. Alexander has any interest in these documents he had waived that interest by making them available for inspection to the defendants.

- [64] At the same time, disclosure under the Case Plan Order or under Rule 7-1 does not necessarily require disclosure and production of nine shelves of material.
- [65] There is both a practical and a principled solution to this specific aspect of the application. The Cox Taylor files are available for inspection by the defendants. At a pragmatic level it is open to the defendants to inspect those files, identify what documents they consider material/relevant and request that those documents be listed and produced. This would be efficient. It would obviate ongoing discussion and debate between the parties about whether what had been produced by the plaintiffs was adequate or not.
- [66] Conversely it is open to the defendants, on a purely principled basis, to insist, both on the basis of the Case Plan Order and Rule 7-1, that the plaintiffs make proper disclosure of the documents in their possession or control that relate to this aspect of their claim. If that disclosure is inadequate, Rule 7-1(11) and the relevant authorities provide ample guidance on how to proceed.
- [67] The form of order presently sought by 0848 is overly broad. This is a relatively straightforward matter in respect of which an order already exists though the Case Plan Order, on its face, only extends to an Environmental Appeal Board Hearing and not to other actions. Counsel for both parties are experienced and knowledgeable. I would direct that counsel for the plaintiffs, in the absence of any other agreement, deliver a further list of documents, within 30 days, that complies with the Case Plan Order and the plaintiffs' disclosure obligations under the Rules.

Issue 3: Production of the Active Earth Documents

[68] 0848 seeks an order that:

- i) the plaintiffs deliver all documents in their possession in relation to their relationship with Active Earth Engineering Ltd., and any of its principals, including any documents that relate to the joint operation of a contaminated soil facility; and
- ii) all communications, including e-mails between the principles of the plaintiffs, and their counsel, and the principals of Active Earth, that relate to either the joint operation of a contaminated site or to the identification of potential defendants in the within action.

[69] Mr. David Mitchell, a professional engineer and principal of Active Earth has prepared an expert report on behalf of the plaintiffs in this action. Mr. Pye is a director of Active Earth.

[70] In *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act)*, 2017 BCSC 107 Mr. Justice Sewell commented on the relationship between Active Earth and the plaintiffs and said, inter alia:

[135] I have no difficulty in finding that Active Earth had an ownership interest of some sort in the Facility. The objective evidence can lead to no other rational conclusion.

- [140] These numbered companies entered into an agreement with CHH and SIA on February 14, 2013 (the "February 2013 Agreement")
- [141] The recitals to the February 2013 Agreement set out the ownership structure of the Facility:
- [143] there is ample evidence in the record to show that the principals of Active Earth and the principals of CHH considered that they were parties to a joint venture or partnership for the construction, permitting and operation of the Facility.
- [144] It is clear that at the very least the parties were in the position of jointly pursuing the business opportunity represented by the Facility and that Active Earth was providing its engineering services as part of that pursuit.
- [173] In fact, the engineering work of Active Earth, including its work product as Qualified Professional, was not being done on a fee for service basis, but as Active Earth's equity contribution to the joint venture that it was agreed would be the entity operating the Facility and earning income from it.
- [175] I am satisfied that the Board was misled about the true nature of the relationship between Active Earth and CHH and the fact that Active Earth's principals were partners in the proposed Facility
- [183] I need not review the extensive cross-examination of Mr. Pye, Mr. Block and Mr. Kelly. I think it sufficient to say that all three acknowledged that the underlying arrangement called for Active Earth or some entity representing its principals to perform the engineering work required for the Facility in exchange for a 50% interest in the business operating the Facility.
- [184] CHH's lack of candour in these proceedings reinforces my view that the interests of justice require that the Decision be set aside and the matter remitted to the Board for reconsideration in light of the fresh evidence.
- [71] The plaintiffs argue that Justice Sewell was mistaken in his conclusions and that there is additional relevant information that he did not have access to. Be that as it may, the documents being sought by the defendants are material and the reasons for judgment of Sewell J., at a minimum, provide a sufficient basis to ground this aspect of the application. I also note that the defendants only seek documents "in the possession" of the plaintiffs that relate to their relationship with Active Earth. If Mr. Mitchell is to provide expert evidence on behalf of the plaintiffs then the defendants are entitled to know what commercial or other relationships exist between the plaintiffs and Active Earth. That information will be directly relevant to whether Mr. Mitchell is in a position to provide helpful and unbiased expert evidence to the court.

[72] There is a second reason that these materials are relevant. Some of the documents that were provided to me suggest that the principals of Active Earth were providing information to the plaintiffs, in 2010 and 2011, about the roles and interrelationships of the defendants and the Proposed Defendants. These documents are relevant to the limitation issues and to the Joinder Application that I have discussed. I am satisfied that they too should be produced.

[73] I am satisfied that the forms of order being sought by the defendants, in relation to this aspect of the application are appropriate. I consider that 30 days is a reasonable timeframe within which these documents can be assembled and listed.

[74] Finally, I consider that the Applicants should have their costs of these various applications.

"Voith J."

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