
CANADA / JUDGMENT

Iser v. Canada (Attorney General)

2017 BCSC 1215

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Supreme Court of British Columbia

DECIDED

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2017 BCSC 1215 Iser v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Iser v. Canada (Attorney General),

2017 BCSC 1215

Date: 20170714

Docket: S140297

Registry: Vancouver

Between:

Christopher Henry Iser,

by His Committee Jessica Nicole Iser

Plaintiff

And

The Attorney General of Canada,

Vince LeBlanc, Scott Verwold and

John Does #1-8

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

B.E. Webster-Evans

T. Grace

Counsel for the Defendants:

B. Sokhansanj

M. McEachern

S. Vigneau

C. De Los Reyes

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 20 & 21, 2017

Place and Date of Judgment:

Vancouver, B.C.

July 14, 2017

- [1] The defendants have applied for various orders that, in combination, would have the plaintiff return or destroy various privileged documents as well as any work product that relied on or referred to such privileged documents.

Background

- [2] The plaintiff, Mr. Iser, was seriously injured in an assault that occurred on August 14, 2012 while he was in federal custody. In reasons that I issued on September 1, 2016, and that are indexed at 2016 BCSC 1627, (the "Earlier Decision") I said:
- [4] On February 13, 2013, Mr. Iser's mother and sister, Mrs. Jacqueline Iser and Ms. Jessica Iser respectively, were appointed the plaintiff's co-committees.
- [5] On January 15, 2014, the plaintiff filed a notice of civil claim. That pleading was amended on June 16, 2016. The amended notice of civil claim alleges that Mr. Iser was, at all material times, a federal inmate housed at Matsqui Institution ("Matsqui"), and that the defendants were responsible for the placement, monitoring, safety, and care of inmates, including Mr. Iser, at that institution.
- [6] Mr. Iser and his co-accused had been arrested by members of the Gang Task Force on October 27, 2010. The plaintiff was convicted of four firearms-related offences on March 9, 2012, and he was sentenced to five and-a-half years' imprisonment on April 26, 2012. Mr. Iser was originally housed at a Regional Reception and Assessment Center and he was transferred to Matsqui on August 13, 2012. Within a day of being transferred to Matsqui, he

was severely beaten by other inmates while he was in the day yard and he suffered various serious injuries.

- [7] It is central to the theory of the plaintiff's case that Mr. Iser was a gang member and that Matsqui was, at the time, an institution populated and controlled by members or associates of rival gangs.
- [9] The amended notice of civil claim alleges, and it appeared to be common ground, that Mr. Iser suffered a severe brain injury when he was assaulted, that he is now in a wheelchair, and that his speech is severely impaired. It is anticipated that the claim being advanced on behalf of Mr. Iser will be significant.
- [3] I have been charged with the case management of this action. A dominant, indeed overwhelming, issue during the interlocutory and pre-trial management of this action has pertained to the Confidential Informer Privilege (CIP) and/or Public Interest Privilege (PIP) that the defendants assert exists in relation to numerous "documents", in the broadest sense of that word, that the defendants have produced. I say that this issue has overwhelmed these proceedings because it has interfered with the orderly progress of the matter.
- [4] I consider it important to address and memorialize some parts of the interlocutory history of the action. This is partly because that history explains aspects of my conclusions on this application and partly because the full nature of that history underlies my concerns with the manner in which these issues of privilege have been addressed. Simply put there has to be a significant change in how further document production and future applications are conducted.
- [5] Let me make clear on the outset that:
- i) I do not, in any way, question the superordinate importance of CIP. Similar, but somewhat lesser, concerns are attached to PIP;
 - ii) I accept that mistakes and misjudgments, with the best of intentions, will occur during the conduct of major litigation; and
 - iii) I am satisfied that the mistakes, in practice and in judgment, that have been made in this action have been inadvertent.
- [6] Having said that, this is the sixth discrete application in this court that raises privilege issues. I have overseen further pre-trial conferences where privilege issues were raised or orders relating to claims of privilege were discussed that I need not address further.
- [7] The following matters are relevant:
- i) On March 17, 2016, following a four-day hearing, Master Baker ruled on various claims of CIP and PIP (the "Baker Decision");

- ii) The defendants appealed the Baker Decision. They sought and obtained a stay from Punnett J.: see *Iser v. Canada (Attorney General)* (April 7, 2016), Vancouver S140297 (BCSC), (the "Punnett Decision");
- iii) Sharma J. heard the appeal of the Baker Decisions. On May 6, 2016, following a three day hearing, Sharma J. issued a preliminary ruling: see *Iser v. Canada (Attorney General)* (May 6, 2016), Vancouver S140297 (BCSC), (the "Sharma J. Preliminary Ruling");
- iv) On May 13, 2016, Sharma J. issued oral reasons that reversed the Baker Decision. Those reasons are indexed at 2016 BCSC 985 (the "First Sharma J. Decision");
- v) On August 5, 2016, Groberman J.A. heard an application for leave to appeal the First Sharma J. Decision;
- vi) On September 1, 2016, following a four day hearing and further written submissions, I issued the Earlier Decision. The Earlier Decision addressed various matters including several applications that related to claims of CIP and PIP;
- vii) The plaintiff applied to re-open the First Sharma J. Decision. The narrow ground for that application was that the affidavit that had been before Master Baker was different from the affidavit that was relied on by the defendants in the ensuing appeal before Sharma J. Following a two day hearing the plaintiff's application was dismissed in reasons for judgment that are dated December 12, 2016 and that are indexed at 2016 BCSC 2325 (the "Second Sharma J. Decision");
- viii) The defendants have now brought this application. The hearing of the application occupied two full days and dealt only with further questions of privilege and the consequences of such privilege. On this application the defendants identified four separate categories of material to which different considerations would apply. At least one of those categories engaged, I was told, five further subcategories of material; and
- ix) I have been advised that the defendants intend to bring a further application under s. 37 of the Canada Evidence Act, R.S.C., 1985, c. C-5 and address further questions of privilege.
- [8] In total these various applications have thus far occupied the better part of 18 days. I am advised that both of Justice Sharma's decisions and the Earlier Decision have been appealed and that that appeal will be heard in September of this year.
- [9] Some aspects of these various applications were inevitable and were the consequence of litigation that is hard fought. Other aspects were, however, avoidable. There are two broad concerns that I wish to identify.
- [10] First, I consider that the defendants have repeatedly advanced claims of privilege and sought forms of relief that are simply too broad. This is apparent in multiple ways. A few examples will suffice.

- i) The four day application that was heard before Master Baker took place in two two-day segments. Between those segments nearly a month went by and Master Baker asked counsel for the defendants to "winnow" their privilege claims. That was, in fact, done. The defendants reviewed the privilege claims they had made and narrowed the number of documents in issue.
- ii) In the Punnett J. Reasons, Punnett J. said:
- [5] Part of the reason we are here and this is not denied by the defendants, is that the manner in which disclosure has unfolded has been unfortunate and for reasons unclear to me has been what I could describe as overly vigorous with the result that it is acknowledged that certain refused disclosures and reductions should not have occurred and will be remedied.
- iii) In anticipation of the appeal from Master Baker's order, the defendants again reviewed their production and once again disclosed further materials over which privilege had previously been claimed. They also redacted some additional information on the basis of privilege.
- iv) In the Sharma J. Preliminary Ruling, Sharma J. said:
- [33] I understood the plaintiff's position is fueled by the frustration and concern she has, not only about the pace, but the methodology of disclosure. With regard to at least one incident that concern in justified. It is my understanding that the defendants instructed their representative and an examination for discovery not to answer questions about documents already listed on the basis that they were irrelevant. They say the documents had been listed in error. I do not know enough about those documents or those circumstances but there is no doubt that that incident alone justifies the plaintiff exercising a certain degree of skepticism, not only on the claims of privilege, but on the scope of disclosure thus far. The fact that the defendants are bound to assert certain privileges unique to government does not relieve them of any obligations under the Rules of Court.
- v) The transcript emanating from the hearing before Groberman J.A., on August 5, 2016, indicates that counsel for the defendants conceded that during the "re-vetting" of documents the defendants determined that certain earlier redactions were unnecessary.
- vi) Similarly, in the most recent hearing before me, the defendants had once again "re-vetted" their documents with the result that some documents that had previously been redacted were now being disclosed.
- vii) Before me, on an earlier occasion, counsel for the defendants appeared with a draft order in circumstances where it was patent, with the briefest of inquiries, that the order was too sweeping in its terms. The draft order was withdrawn.
- [11] The second broad category of concern that I have is the frequency and breadth of the errors that have occurred in the disclosure of the defendants. There is almost no means by which to capture this in a succinct manner. The following examples are intended to be illustrative of these difficulties.

- i) One category of change arises from the process of "re-vetting" that the defendants have engaged in on an ongoing basis. This simply means that the defendants have continued to review documents that have already been listed and/or produced and in that ongoing process have come to different decisions or conclusions at different times.

The consequences of this process is that some documents, over which privilege was initially claimed, were subsequently disclosed. Other documents, however, were determined to have been disclosed in error and efforts were then made to retrieve such documents. The present application pertains to some such circumstances. The frequency with which such changes in position have occurred cannot be identified with precision. They appear, however, to have occurred on literally dozens of occasions, and sometimes, on multiple occasions in relation to an individual document.

- ii) On several occasions inappropriate and/or inadvertent disclosures have been made on the record and in open court. This then necessitated the need to seal portions of the recordings generated during the hearing and secure orders that now regulate the conduct of counsel for the plaintiff in terms of what had been disclosed or of what they had heard.

- iii) It is clear both that the sealed affidavit the defendants relied on before Master Baker was not the same affidavit that they subsequently relied on in the appeal that was heard by Sharma J. and that this fact was not disclosed to either the plaintiff or to Sharma J. It was this consideration that led to the application to re-open and to the Second Sharma J. Decision. In that decision Sharma J. concluded that the conduct of the defendants and their counsel had not been intended to mislead and as such was not blameworthy. She also said:

- [8] However, I also find the plaintiff's position that it was unclear that the affidavit before me was not the same one proffered to the Master to be reasonable. It is important to remember that plaintiff's counsel has never seen either the affidavit, or the redactions of the documents attached to both. I add that it was not clear to me in issuing my reasons that the affidavits were different. This was a genuine misunderstanding. I place no fault on either party or their counsel for the misunderstanding.

- iv) In the application that gave rise to the Earlier Decision the defendants filed an affidavit in support of a particular claim for privilege. I identified an error or deficiency in that affidavit that necessitated the calling of a witness to give oral evidence and to address that deficiency.

- v) In the hearing that gave rise to the Earlier Decision one of the central issues was whether the defendants' disclosure of a video undermined the claims of CIP or PIP that were being made; see Earlier Decision at paras. 114, 117, 119, 120, and 124-126. In the most recent application before me the defendants now assert that the disclosure of the video, in a particular format, was made in error. I will return to this issue later in these reasons.

- [12] I repeat that I appreciate that some errors or some mistakes or some changes in position, with better information, are inevitable. What has occurred in this case is something quite different.

- [13] Furthermore, I do not consider that it is open to the defendants to argue that the importance of CIP or PIP somehow justifies their ongoing changes of position. Respectfully, in some senses, the converse is true. I accept that what is ultimately important is that the positions being advanced by counsel are accurate and principled. Nevertheless the very importance and significance of CIP should mean that extraordinary care is taken when first undertaking document production and when deciding what is properly privileged and what is not. The fact that aspects of these applications are brought *ex parte* and *in camera* demands still further care and precision. In such applications the court, of necessity, is relying on what it is being told by only one of the parties.
- [14] The consequences of the defendants ongoing changes in position and the errors they have made are numerous and varied; see for example Earlier Decision at paras. 143-144. Based on the defendants most recent List of Documents less than 1,000 documents have been produced though I am told that some of those documents are lengthy. More than 20 days will have been spent on the narrow question of what is properly privileged and what is not. These applications have required that transcripts from many, if not all, hearings be generated, they have given rise to significant volumes of correspondence and they have consumed considerable judicial resources.
- [15] They have also caused plaintiff's counsel, who work in small firms, difficulty. One aspect of the application before me seeks, as I have said, the return of materials that have been erroneously produced. A subset of that relief seeks to have plaintiff's counsel now deliver up all of their work product, and the work product of their experts, that refers to or relies on documents that were earlier produced but for which privilege is now claimed. The complexities and time-consuming nature of that exercise are self-evident.
- [16] This trial has also now been adjourned twice. While document disclosure issues and these applications are not the only reason for such delays they have been a significant contributing factor.
- [17] Furthermore, and importantly, the defendants' conduct has and will inevitably give rise to a loss of confidence. The sworn assertion that something should be regarded as covered by CIP and/or PIP and a subsequent change in that position or conclusion cannot occur very often without some justifiable concern arising. Before me counsel for the plaintiff have argued that it appears that the defendants have waived privilege over documents in circumstances where the previously privileged content of a document assists the defendants. I have no basis to conclude that this is so. Nevertheless the specter of such concerns is avoidable with appropriate care.
- [18] With this backdrop and these comments I turn to the specific applications before me. The defendants identified sixty-three documents that contained redaction errors and that were sent to plaintiff's counsel. Some of these documents have several versions. These documents, as I have said, fall into four categories.

Category 1

- [19] There are thirty one documents with respect to which erroneously redacted versions were sent to plaintiff's counsel prior to May 4, 2016 and properly redacted versions were provided to plaintiff's counsel on May 4, 2016. The properly redacted versions, including the specific claims of informer or public interest privilege in respect of each such redaction, were reviewed and upheld by Sharma J. in the First Sharma J. Decision. These documents have been identified with precision in correspondence between the parties and are part of the application record.
- [20] With respect to this category of materials, the defendants seek an order for the return or destruction of all of the versions of each of these documents that were provided to plaintiff's counsel prior to May 3, 2016. As I understand it, some of the documents had several or different versions with increasing or decreasing numbers of redactions on them. To be clear the defendants seek the return of all hard copy and electronic versions of all of these documents as well as any copies of these materials. They also seek any work product created by plaintiff's counsel that refers to or incorporates these materials. Still further they seek to have the plaintiff's experts, who were earlier provided with these materials, surrender these documents as well as any work product that relies on or refers to any such materials.
- [21] The relevant legal principles are clear. In *British Columbia (Attorney General) v. Lee*, 2016 BCSC 707, the respondent requested disclosure of information from the Information Access Office of the government of British Columbia pursuant to the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165. The petitioner sent several hundred pages to the respondent including 19 pages of what the petitioner asserted was inadvertently disclosed but was, in fact, privileged. The Attorney General petitioned the court for, inter alia, an order enjoining the respondents from retaining, disseminating, or making any current or future use of privileged documents and an order requiring the return or destruction of any or all documents and copies. Hinkson C.J.S.C. ordered the return or destruction of those pages that he held were properly privileged.
- [22] In *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219, Mr. Justice Hunter varied Mr. Justice Hinkson's order to require the return or destruction of all 19 pages, stating:
- [62] In my opinion, the 19 pages inadvertently disclosed through the access process are subject to solicitor-client privilege. I agree with the chambers judge that the privilege has not been waived.
- [63] I would allow the appeal and vary the order made by the chambers judge to apply to all of the 19 pages. All of these pages must be returned or destroyed and the order of the chambers judge that the respondents must refrain from making any further use of the privileged documents is extended to include all of the 19 pages.
- [23] In *Chan v. Dynasty Executive Suites Ltd.*, [2006] O.J. No. 2877 (S.C.J.), leave to appeal ref'd, 2006 CarswellOnt 8136 (Ont. Gen. Div.), the court said:

74 The case law on this point is clear. Once a lawyer has been advised that privileged documents were produced inadvertently, the lawyer must promptly return the material uncopied and, if possible, unread. If there is any issue as to whether privilege is properly asserted, the obligation of the receiving counsel is to seal the documents, and any notes made in respect of the documents, and seek further direction from the court: *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, [2000] O.J. No. 2420 at para. 11 (S.C.J.); *Nova Growth Corp.*, *supra*, at para.29; *Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) (1993) Ltd.* (2001), 293 A.R. 366 at para. 7 (C.A.); *Williams v. Stephenson*, [2005] B.C.J. No. 1949 at para. 75 (S.C.).

75 In *Nova Growth Corp.*, *supra*, Justice Farley was unequivocal regarding the responsibility of counsel in this regard, citing with approval, at para. 29, the decision of Justice Nordheimer in *Aviaco International Leasing*, *supra*, at para. 11:

Once plaintiffs' counsel realized that the letters had been sent to them by mistake, something that ought to have been obvious to them as soon as they saw the letters, they were under a positive duty to advise both counsel of the mistake. Then they should have returned the letters without keeping any copies of them or, if they reasonably thought there was an issue as to whether they were entitled to retain the letters, then they ought to have taken immediate steps to seek a ruling from the court on that issue.

[24] In this case it does not appear the plaintiff's counsel would have been aware, from the nature or contents of the documents, that privileged materials had been "inadvertently" disclosed to them. Nevertheless they were thereafter apprised of this, in writing, by the defendants. The plaintiff's position with respect to the return of these materials has not been consistent over time. Before me counsel for the plaintiff agreed to the return of all versions of all documents within this first category of documents.

[25] The return of work product that incorporates such material is, however, more complicated. The documents over which the defendants claim privilege have been inputted into plaintiff counsel's document management systems and into different forms of work product. Extracting such material from these systems, and from the work product of the plaintiff's experts, is necessarily complicated and time-consuming. It is also work that, because of its importance and the need for care, will have to be undertaken by counsel rather than by, for example, a paralegal.

[26] At the hearing before me the question of whether the defendants would pay the reasonable costs of this work was raised. In correspondence to the court, subsequent to the hearing, counsel for the defendants have confirmed that the defendants consent to both: "(i) an order that the defendants pay the costs of the application; and (ii) an order that the defendants pay the reasonable costs incurred by plaintiff's counsel to locate, compile, and seal all copies of the document versions in question, including copies provided to the plaintiff's experts".

- [27] One last issue arises. The defendants originally sought an order that plaintiff counsel's work product and that of their experts be destroyed. The validity of the privilege being claimed over the documents that underlies this work product is, however, being appealed. If successful on that appeal, the plaintiff would have to re-create this same work product.
- [28] Counsel for the defendant subsequently argued that this work product should be delivered to them, in sealed form, and that they would hold that material pending the appeal.
- [29] Aspects of the work product that the defendants seek to recover are, based on the two decisions of Sharma J., privileged. That work product itself, however, is material that the plaintiff could normally claim privilege over.
- [30] In this case plaintiff's counsel have had and held the material in issue for more than a year. They have undertaken to separate and seal any work product that either relies on or that references the privileged documents in question. The appeal of this matter is now approximately three months away. In such circumstances I consider that these precautions are adequate and appropriate. Accordingly, as it relates to this first category of 31 documents, I order:
- a) that all versions of these 31 documents, including all copies of such documents, in both hardcopy and electronic form, be returned to the defendants;
 - b) all work product that plaintiff's counsel or their experts have generated, that refers to or relies on these 31 documents, is to be compiled and sealed in a secure location pending the appeal of each of the First and the Second Sharma J. Decisions. If those decisions are upheld this work product is to be destroyed. If the decisions are upheld in part it may be necessary for counsel to reappear and seek clarification on how best to proceed; and
 - c) the defendants are to pay plaintiff's counsel their reasonable costs in undertaking the activities required in the two previous sub-paragraphs.

Category 2

- [31] There are 21 documents (23 document versions) with respect to which the only error is that the inmates' "FPS numbers" were not redacted in the copies that were sent to plaintiff's counsel. These inmate "FPS numbers" are analogous to social insurance numbers. Counsel for the plaintiff agree that these numbers should have been redacted.
- [32] The defendants now seek either an order for return or destruction of these documents or, in the alternative, an order that the plaintiff's counsel maintain the "FPS numbers" in confidence. The precise documents that are in issue have again been identified in correspondence between the parties and are part of the application record.

- [33] Having plaintiff's counsel maintain this information in confidence is a simpler and less onerous form of order and, accordingly, I order the plaintiff's counsel take such steps as are necessary to ensure that the "FPS numbers" on these documents are properly protected and that they are maintained in confidence.

Category 3

- [34] The sole "document" in question is a video that was produced to the plaintiff early in this litigation. The defendants now seek return of the video arguing that they did not appreciate, when it was disclosed, that its contents were readily discernible to a viewer.
- [35] That video was central to aspects of the ruling I made in the Earlier Decision. Indeed the rulings that I made, that certain otherwise privileged information be produced to the plaintiff, was premised on the understanding that the contents of the video were clear and easily discerned. In the Earlier Decision I said:
- [114] It is also relevant that the defendants have disclosed a video that shows the faces of all of the individuals in the yard on the day the plaintiff was assaulted. I was advised by the defendants' deponent that with this video, and with the assistance of a prison guard, she was able to identify all of the individuals on the video.
- [117] I was not provided with any of the application materials that were before Sharma J. and that underlie the Privilege Reasons. I was, however, told that some 30 to 40 documents that were part of the application before Sharma J. contain the names of individuals who were in the yard that day. These names were redacted and Sharma J. clearly considered that those redactions were appropriate. I was also told that Sharma J. had not been told that a video, which revealed the faces of all of the individuals who were in the yard when Mr. Iser was assaulted, existed and that that video had been disclosed to the plaintiff without any redactions or other limitation on its contents.
- [119] To the extent those reasons relied on PI privilege, the existence and production of the video shifts the ground for that claim of privilege. Simply put, the video, a document that is not sealed or protected in any way, already goes some way to disclosing the information the plaintiffs seek. That fact would be relevant to any discretion a court might exercise in relation to the disclosure of some information that might otherwise be contained in or on some documents.
- [124] Finally, I consider that the disclosure of the video fundamentally alters the claim for CI privilege over the names of the inmates who were in the yard when the plaintiff was assaulted. The issue is no longer who was present at that time. The issue is now a matter of simply attaching a name to a photo or, more specifically, a series of names to the images on a video.

- [36] The order that I made, based on these understandings and these conclusions, have now been appealed. These issues are to be heard together with the various appeals from the First and Second Sharma J. Decisions.
- [37] The defendants now say that they believed, at all times, that the version of the video that was delivered to the plaintiff was formatted differently from the video that they held and that they used for their own purposes.
- [38] Following the receipt of the Earlier Decision the defendants wrote to counsel for the plaintiff and said:

In addition to the documents to which we have previously referred, we also ask that your office kindly return to use the video footage referred to in the hearing before Justice Voith (Defendants' document #CAN1-000624, "WW Yard Entry C086"). We are advised by our client the Correctional Service Canada ("CSC") that it had been their understanding that the version of the video that was disclosed to you had been converted to a new format (Windows media) such that the faces were not clear. We note that at the hearing before Justice Voith, Ms. Grace stated that the video footage is "blurry" and that "we don't know who any of the people are." However, following Justice Voith's September 1, 2016 reasons, CSC revisited the quality of the video and has confirmed that the video should be redacted to obscure the inmates' faces so as to protect their identities.

Accordingly, notwithstanding Ms. Grace's comments, we ask that you kindly return the video to us to ensure that the identity of the individuals in the video is not disclosed. The point is an important one because the identity of some of the individuals in the video is subject to both informer privilege and public interest immunity. To be clear; There is a risk to the individuals' safety should their identities become known. We will provide you with a redacted copy of the video, if technologically feasible, as soon as possible.

- [39] Some of these same points are reiterated and developed in an affidavit of Ms. England dated April 6, 2017 and in a further sealed affidavit. In particular, Ms. England has deposed that the "video footage is much clearer than I understood it to be".
- [40] Several difficulties arise with the position now being advanced by the defendants. First, I do not accept, as the defendants now assert in their oral and written submissions, that they understood or believed throughout that the video was "blurry" because of comments made by plaintiff's counsel. Instead, that submission appears to be opportunistic. The exchanges between counsel for the defendants and myself, when this issue was argued, and there were several such exchanges, were premised on the video being clear to a viewer. The very reason that I pressed the issue more than I normally would was because I could not understand why, on a principled basis, the video had been disclosed in the first instance and why, having produced the video, the defendants were now taking the position that they were privileged. I was told that the defendants had made a measured decision to disclose the video.
- [41] I further observe that the video has always been contained on Part 1, or the non-privileged portion, of the various Lists of Documents that the defendants have produced. If the video was being delivered to the plaintiff in a format where its contents were obscured, and clear

versions of the video existed, the video should have been placed on the privileged portion of the defendant's List of Documents. The defendants delivered their 23rd List of Documents on April 10, 2017, or just prior to this application being heard, and the video is still contained on Part 1 of that List.

- [42] Next, the fact that Ms. England had a particular understanding of the contents of the video is not the end of the issue. Ms. England, in her affidavit, has stated that it has been her "practice to provide non-CSC parties with the video footage" in a format that would not be discernible. The obligation to review documents and to make decisions about both relevance and privilege rests, however, with counsel and not with their clients. Accordingly it is counsel's "practice" and not the defendants' "practice" that is important.
- [43] In *Boxer v. Reesor* (1983), 43 B.C.L.R. 352 (S.C.), Chief Justice McEachern, as he then was, quoted the following passage from G. Peter Fraser & John W. Horn, *The Conduct of Civil Litigation in British Columbia*, 1st ed., vol. 1 (Markham, Ont: LexisNexis Canada Inc., 1978) at 276-277:

Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area.

- [44] In this case, as I have said, it is quite clear that the application that gave rise to the Earlier Decision was argued on the basis that the contents of the video that had been produced to the plaintiff were clear to a viewer of that video. My questions to counsel were posed and premised on that basis. Had counsel believed that the video was "blurry" or that the images and faces on the video could not be made out by a viewer no issue would have existed and the application would have taken a different course.
- [45] Accordingly, it is not enough for Ms. England to now assert her beliefs or her "practice". At least part of the question is who placed the video on the non-privileged portion of the defendants' List of Documents and what was counsel's understanding when that was done? Had counsel ever reviewed that video when the List was generated? If these decisions were not made by counsel, but were instead made by employees of the defendants then very different issues of concern arise. I raise these matters both because of the basis upon which the issue was originally argued before me and because it did not appear that counsel for the defendants, who addressed the significance of the video, or other counsel for the defendants who were present that day, had any appreciation or any belief that the version of the video that was provided to the plaintiff was to have been formatted in a way that prevented a viewer from being able to make out its contents.
- [46] Still further issues arise. The Earlier Decision has, as I have said, been appealed. The finding that the defendants now seek, that being that the contents of the video that was sent to counsel for the plaintiff was believed, from the outset, to be indiscernible, and that it is accordingly privileged, has the effect of undermining that appeal. The underlying premise

of my determination, on several issues of privilege, would now be grounded on a different factual footing. The fact that this may not be the intended object of the defendants does not matter.

- [47] In a related vein, I do not know if an order from the Earlier Decision was ever entered. It is not clear whether the defendants should be bringing an application to introduce fresh evidence or, indeed, whether such an application would be available to them. When I raised these various matters with counsel it did not appear that they had been considered.
- [48] What is clear to me is that the defendants cannot proceed on this application as though the Earlier Decision does not exist or as though they never made, expressly or impliedly, the various submissions that they did.
- [49] It will be necessary for the defendants to consider these issues and to consider how best to proceed. For the time being I am adjourning this aspect of the application. As a result of the issues that have been raised by the defendants; however, I am directing that counsel for the plaintiff place the video in a secure location, that they make no further use of the video and that they not disclose the contents of the video to any third party including to their experts.

Category 4

- [50] Category 4 consists of 13 documents with respect to which erroneously redacted versions were sent to plaintiff's counsel at various times up to June 2016. These 13 documents, however, fall into several discrete categories.
- [51] Some of these documents were reviewed by Sharma J. and the various claims of privilege that were raised in relation to them were properly described in the evidence before her but the accompanying gray scale or red-lined document contained an error in the gray scaling or red-lining.
- [52] To the extent documents were initially over-redacted (i.e. information was erroneously redacted over which no privilege was claimed) the defendants have since provided plaintiff's counsel with properly or correctly redacted versions. In the case of under-redacted versions of documents (i.e. a claim of privilege was advanced but the document was not properly redacted) the defendants have applied for the return of these documents.
- [53] Other documents, for example, were apparently reviewed by Sharma J. but did not properly reflect the sealing order made by Punnett J. on April 28, 2016.
- [54] I do not consider that I need to address each of these documents separately with reference to the specific category within which they fall. I have reviewed the various portions of the various sealed affidavits that pertain to each of the specific redaction errors at issue. Based on that review I am satisfied that each of the following documents was "under-redacted" and that each such document, and all copies of them, should be returned to counsel for the defendants: 000126, 000699, 000644, 000573, 000669, 000704, 000705, 000738, 000032, 000033, and 000652.

- [55] The defendants also claim PIP over two documents -- 000142 and 000735. These claims for privilege have not yet been considered in any of the earlier hearings or earlier decisions that I have referred to. Both Sharma J. and I have, in earlier decisions addressed the legal basis for a claim of PIP; see for example Earlier Decision at paras. 62-64 and 68. I have, in arriving at my decision, considered these various legal principles but do not consider that it is necessary to repeat them.
- [56] I have also considered and reviewed the specific portions of the sealed affidavit of Ms. England dated April 6, 2017 that address these two documents. Still further I believe that I can, without giving rise to any concern, indicate that the issue in both documents is the failure to redact an inmate's name and the view that that failure may place the inmate in danger.
- [57] Document 000142 (on page 6) highlights the breadth of the privilege claims being made by the defendants. The specific claims at issue are based not on the inmate being "a rat" but rather on the fact that the inmate had an association with another inmate, whose name has also been redacted, and that that association "may not be well known and could put [both individuals] at risk". The communications between these two individuals also occurred five years ago.
- [58] In the Earlier Decision, at paras. 84-95, I expressed some concern over the breadth of the privilege claim being advanced by the defendants. I identified that virtually all substantive communications between inmates and prison officials were considered privileged because such inmates might/would be viewed as "rats" and that their safety might/would be jeopardized.
- [59] The claim for PIP over document 00142, which is based on the historical association of two inmates, is a further expansion of such claims. It appears that the disclosures of an association between individuals can also give rise to safety concerns. It is relevant that the affidavits before me do not suggest that there is anything unique about the particular association at issue in this particular redaction. Instead, an earlier sealed affidavit filed by Ms. England which is referred to in her sealed affidavit of April 6, 2017, indicates that the disclosure of any gang affiliation can put an individual at risk. This is apparently a generic concern at play for all "affiliations" in all penal institutions.
- [60] The practical result of this further rationale for PIP in a prison setting, particularly in the present circumstances where the plaintiff alleges he was attacked because of a gang affiliation, is apparent. The significant limitations on what would otherwise be disclosed are equally apparent.
- [61] As this matter will soon be heard by the Court of Appeal some guidance on whether it is possible to reconcile or accommodate both the privilege the defendants seek and the disclosure the plaintiff requires may be forthcoming.

- [62] I make one further observation. The sealed affidavit of Ms. England sworn on April 6, 2017, referred to and relied on an earlier sealed affidavit she swore on May 3, 2016. I reviewed that earlier affidavit to address the specific document issues before me. It is not clear to me why much of the information in paragraphs 1-36 and 51-56 of the May 3, 2016 affidavit was sealed. Most of that information could, with some deletions and with careful drafting, have been disclosed to counsel for the plaintiff. The May 3, 2016 affidavit reveals several further broad grounds on which PIP is asserted. I accept that some of this information may have been provided directly to counsel for the plaintiff, at earlier applications and in a non-sealed format, without my being aware of that fact.
- [63] Ultimately, however, I consider that the evidence of Ms. England, who is a Security Intelligence Officer, and who has deposed that disclosure of the name of this inmate may put him "at risk", virtually dictates my conclusions and the exercise of my discretion. Accordingly, I consider that the further redaction to document 000142 should be made and that earlier versions of the unredacted document should be returned.
- [64] Aspects of the information at issue on document 000735 are more straight forward. The defendants have failed to redact, in several places, the name of an inmate. They also wish to redact an identifying tattoo, as well as the names of the individuals who were with this inmate when Mr. Iser was attacked. I am satisfied that these various redactions are, based on Ms. England's affidavit, necessary and appropriate. Ms. England's affidavit also attached and referred to defendant's document 000699, which is somewhat related to document 000735, and to various additional redactions that should be made to document 000699. The materials and charts provided to me by counsel for the defendants did not, however, identify document 000699 as being at issue. In addition I was told several times that there were only two further documents that had not yet been viewed or considered by the court. Accordingly I have not addressed the contents of document 000699.
- [65] As the defendants have agreed to pay the plaintiff's costs of this application I need not address that issue.

"Voith J."

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