

CANADA / JUDGMENT

Long v. Red Branch Investments Limited

2022 BCCA 293

COURT

British Columbia Court of Appeal

DECIDED

29 August 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCCA 293 Long v. Red Branch Investments Limited

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Long v. Red Branch Investments Limited,

2022 BCCA 293

Date: 20220829

Docket: CA47349

Between:

David P. Long

Appellant

(Defendant)

And

Red Branch Investments Limited and Gerald Wright

Respondents

(Plaintiffs)

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated February 23, 2021 (Red Branch Investments Limited v. Long, 2021 BCSC 283,

Vancouver Docket S187807).

Counsel for the Appellant:

H.C.R. Clark, Q.C.

Counsel for the Respondents:

J.P. Sullivan

A.R. Way

Place and Date of Hearing:

Vancouver, British Columbia

May 30, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 29, 2022

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Marchand

Summary:

Appeal from an order dismissing the appellant's application for production of a solicitor's file. Held: Appeal dismissed. The appellant and the respondents have a lengthy litigation history. Previously, the appellant had successfully obtained judgment against the respondents in relation to a royalty to a potash property. Years later, the respondents sought to reopen that case on the basis that it was obtained by fraud. The respondents say they learned of the fraud only when the appellant's solicitor's file was produced to assess special costs. The appellant then brought the instant application, seeking production of the respondents' solicitor's file on the bases that solicitor-client privilege had been impliedly waived or that litigation privilege had expired. With respect to the solicitor-client privilege, the scope of the order sought was overly broad and, in any event, the respondents had not voluntarily injected the legal advice they received into the litigation. With respect to the litigation privilege, it endured because of the close relationship

between the current and former actions.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

- [1] In this action, the respondents seek to overturn a judgment that the appellant, Mr. Long, obtained against them in previous litigation. They allege that the judgment was obtained on the basis of fraud and perjury.
- [2] Mr. Long seeks production of the file of the respondents' solicitor pertaining to that previous litigation. His applications for (1) a declaration that the respondents had waived solicitor-client privilege over communications and records in that file, and (2) an order for the listing and production of the documents in that file, were dismissed by Justice G.C. Weatherill in reasons for judgment indexed at 2021 BCSC 283. I will henceforth refer to the respondents collectively as "Red Branch".
- [3] In his appeal from that judgment, Mr. Long asserts, first, that in its pleadings in the current action, Red Branch impliedly waived privilege by putting in issue its state of mind in relation to legal advice it received in the previous litigation. This raises the principles discussed by this Court in *Soprema Inc v Wolrige Mahon LLP*, 2016 BCCA 471, and *HMB Holdings Limited v Replay Resorts Inc*, 2018 BCCA 263, leave to appeal to SCC refused, 38306 (14 March 2019).
- [4] Mr. Long asserts, second, that this current action is sufficiently distinct from the previous litigation so no litigation privilege continues in relation to the solicitor's file relating to that previous litigation.
- [5] The privilege issues Mr. Long raises are questions of law, for which the standard of review is correctness: *Soprema* at para 16.

2. BACKGROUND

- [6] In that previous litigation, Mr. Long successfully sued Red Branch in a royalty claim tried before Justice Wong (the "royalty action"), and was awarded special costs: *Long v Red Branch Investments Limited*, 2015 BCSC 2192. Credibility was a major issue in that action, which Justice Wong resolved in Mr. Long's favour. This was based at least in part on the corroborating evidence of one of Mr. Long's primary witnesses, John Darch, whom Justice Wong characterized at para 50 as a neutral and unbiased witness with no financial interest in the outcome.
- [7] Red Branch's appeal from that judgment was unsuccessful: *Long v Red Branch Investments Limited*, 2017 BCCA 256. What happened next led to the present litigation, which I will call the "fraud action".

- [8] In September 2017, in support of the assessment of the special costs awarded to Mr. Long, and at the request of counsel for Red Branch, Mr. Long's then-counsel produced what was purportedly a copy of that counsel's entire electronic file (the "Long solicitor's file") concerning the royalty action.
- [9] In the fraud action, Red Branch alleges that the Long solicitor's file revealed for the first time that Mr. Darch was anything but neutral and unbiased, and that, contrary to the sworn evidence of both Mr. Long and Mr. Darch at the trial of the royalty action, Mr. Darch, among other things, provided detailed and specific advice and strategy to Mr. Long, actively assisted him with the preparation of his case, and financially contributed to the legal expenses.
- [10] Red Branch sought to reopen the appeal on the basis of this evidence, but this Court dismissed its application: *Long v Red Branch Investments Limited*, 2018 BCCA 115. This Court commented at para 58:

While this Court has jurisdiction to re-open an appeal, hear fresh evidence in support of an allegation that a judgment was improperly obtained, and set aside a judgment on those grounds, we would be loath to do so in a case where the falsity of the impugned evidence is in issue. We say that because there is no doubt that the trial court retains jurisdiction to hear and determine a challenge to an entered judgment founded upon an allegation of fraud or perjury, and because courts of first instance are in a privileged position with respect to the determination of such factual disputes.

- [11] That is the genesis of the fraud action.

3. DISCUSSION

3.1 Was solicitor-client privilege impliedly waived?

3.1.1 Overview

- [12] In its notice of civil claim in this action, Red Branch pleaded the following in relation to the Long solicitor's file that was produced for the assessment of special costs in the royalty action:
32. The Solicitors' File included a number of documents, correspondence and other materials that demonstrate the following, inter alia:
- (a) Long and Darch discussed the Royalty Action in detail, including litigation strategy, orally and by way of correspondence over the period of at least January 2012 to February 2013;
 - (b) Darch provided detailed and specific litigation advice and strategy to Long (and his counsel) with respect to the Royalty Action including, but not limited to, advice on how to effectively question Wright during his examination for discovery, advice on the pleadings and advice and strategy on how Long ought to be conducting the litigation to ensure his success;

- (c) Darch actively assisted Long with the preparation of his case in the Royalty Action including by, but not limited to, independently obtaining documents and other evidence that he believed would assist Long in succeeding in the Royalty Action against Wright and Red Branch;
- (d) Darch was a trusted and close friend to Long, a business partner and someone Long considered to be a confidant;
- (e) Darch volunteered to act as a witness in the Royalty Action and to testify against Wright and Red Branch;
- (f) Darch made several payments directly, and indirectly through his company Western Investments Ltd., toward Long's legal accounts during the course of the Royalty Action (collectively, the "New Evidence").

33. The New Evidence was not discoverable by the Plaintiffs, through reasonable due diligence or otherwise, prior to the pronouncement of the Order for Judgment in the Royalty Action.

[Emphasis added.]

[13] In his response to civil claim, Mr. Long pleaded, among other things, that what Red Branch described as "New Evidence" could have been discovered by Red Branch through cross-examination in the course of the royalty action trial.

[14] Mr. Long takes the position that Red Branch's plea of due diligence in para 33 of its notice of civil claim clearly puts in issue what advice it obtained from its solicitors about Mr. Darch's evidence. This is because it raises the question of what Red Branch could have learned about Mr. Darch's evidence through due diligence, and there is no step that involves counsel more than the marshaling of evidence and the interviewing of witnesses. Here, Mr. Long points out that no one on behalf of Red Branch even interviewed Mr. Darch before trial.

[15] On this basis, Mr. Long applied before Justice Weatherill for (among other things):

a declaration that [Red Branch had] waived solicitor-client privilege over any communications or records of communications between [Red Branch and its] counsel in the Royalty Action up to November 27, 2015 [the date of Justice Wong's judgment in the royalty action].

[16] As I shall explain, I conclude that Mr. Long's position as to implied waiver of privilege is not sustainable, and I would dismiss his appeal in this regard. I will deal with two bases for this conclusion. The first is the scope of the relief Mr. Long sought before Justice Weatherill. The second is the application of the test this Court enunciated in *Soprema*.

3.1.2 Scope

- [17] In his notice of application, Mr. Long sought production of all communications between Red Branch and its solicitors pertaining to the royalty action. That scope was far too wide. On no rational understanding of the law could the basis upon which Mr. Long relies support a finding that solicitor-client privilege had been waived over the entire litigation file.
- [18] As the Supreme Court of Canada affirmed in *Goodis v Ontario (Minister of Correctional Services)*, 2006 SCC 31 at paras 20 - 21, communications protected by solicitor-client privilege should be disclosed only where "absolutely necessary", applying "as restrictive a test as may be formulated short of an absolute prohibition in every case" (see also *R v McClure*, 2001 SCC 14 at para 35). At best, following Mr. Long's argument to its logical conclusion, the waiver would extend no further than to communications or records of communications concerning whether and what steps should be taken in relation to evidence expected from or given by Mr. Darch.
- [19] Front and centre in this appeal is this Court's decision in *Soprema*, which I discuss further below. That case provides a useful example of appropriate scope. *Soprema* claimed against the defendant accounting firm, *Wolrige*, for negligent misrepresentation. Since it therefore had to prove that it reasonably relied on an alleged misrepresentation, it necessarily put its "state of mind" in issue. *Wolrige* applied for the production of a particular set of documents pertaining to other advice *Soprema* received that *Soprema* maintained was protected by solicitor-client privilege. It did not apply for the entire solicitor's file. *Wolrige's* position was that given *Soprema's* plea of reliance, *Wolrige* was entitled to know what advice *Soprema* had received from and through its solicitors in relation to the subject matter of the representations made by *Wolrige* that were the subject of the claim.
- [20] What was ordered, through application of a "surgical approach" (2016 BCSC 813 at para 125), was production of a subset of the documents requested that limited the documents to be produced by date range and subject matter.
- [21] Ultimately, this Court overruled that decision, noting that the precise question on appeal had not previously been authoritatively settled in British Columbia. That question was whether it is a necessary condition of implied waiver that a party voluntarily put in issue its understanding of its legal position or relies on the fact that it has or has not received legal advice as an element of its claim (at paras 15, 21). After a thorough review of the law, this Court settled that question in the affirmative, and concluded that the wrong test had been applied. It followed that there had been no implied waiver.
- [22] But the point is this: on any view of the law, the order requested by Mr. Long in this case was impermissibly broad and the asserted waiver impossible to justify. It included no limitation of any kind, whether of date, subject matter, sender or recipient. This appeal should be dismissed on that ground alone. Counsel seeking the production of documents covered by solicitor-client privilege on the basis of implied waiver should be careful to refine the class of documents sought in accordance with the basis on which it is alleged that an implied waiver arises.

[23] Before us, counsel for Mr. Long (who was not counsel in the proceedings below) submitted that this Court could narrow the scope as necessary, or send the matter back for the application to be recast. I would not think it right to accede to that request, because that relief was not sought in the factum and counsel for Red Branch had no notice of it. But it is unnecessary to decide the point as, in my opinion, the appeal should be dismissed on the following ground in any event.

3.1.3 The Soprema test

- [24] In my view, the test enunciated by this court in Soprema, and reiterated in HMB Holdings, is a complete answer to the appellant's position, and I do not propose to review yet again the body of law leading up to, and thoroughly canvassed in, those decisions.
- [25] In Soprema, this Court made it clear, as did the Supreme Court of Canada in McClure, that solicitor-client privilege will only yield in certain "clearly defined circumstances", and does not involve "a balancing of interests on a case-by-case basis" (McClure at para 35; Soprema at para 51). That is what led this Court to refer to the desirability of a test that rests on a "bright line" capable of identifying those circumstances.
- [26] Accordingly, to give rise to an implied waiver, it is not enough that the party asserting privilege (1) has put its "state of mind" in issue, as the plaintiff had done in Soprema by pleading negligent misrepresentation, or that it (2) had obtained legal advice about the transaction in question, as the plaintiff had done in Soprema about the share purchase out of which the claim arose. There is a necessary third element: the party (3) "must voluntarily inject into the litigation legal advice it received or its understanding of the law before waiver can be implied": Soprema at para 49 (emphasis added). See also Mickelson v Borden Ladner Gervais LLP, 2017 BCSC 1584 at para 18, discussing Soprema's three requirements, a description with which I agree.
- [27] This Court applied those principles in HMB Holdings, observing that the necessary element of voluntary injection may arise from pleadings, evidence or argument asserted by the party claiming privilege:
- [47] In the absence of either pleadings, evidence or argument asserting reliance on legal advice, the Chambers judge's invocation of fairness and consistency are insufficient to ground waiver.
- [28] Here, that third element is entirely missing. Red Branch's pleading indicates that it discovered new evidence in the form of the solicitor's file from Mr. Long's counsel only after it was produced. It maintains that it could not have discovered that evidence earlier "through reasonable due diligence or otherwise". Given that the reference is to Mr. Long's solicitor's file, it is not easy to understand how this raises the second element of legal advice given to Red Branch, but assuming that it does, nowhere does Red Branch plead that in carrying out due diligence, it relied on legal advice or on its understanding of the law. Nor has it given evidence or made any argument to that effect.

[29] Mr. Long sought to distinguish Soprema on the ground that the action there sounded in negligent misrepresentation, a factor that this Court described at para 17 as "important to recall". But the relevance of that aspect was limited to the first two elements, as this Court explained at para 18:

It follows that the claim of negligent misrepresentation necessarily puts an issue of plaintiff's "state of mind" both in respect of whether there was reliance in fact and, if so, whether that reliance was reasonable. It may often be that a party has received legal advice before entering the transaction, either about the transaction generally or, more specifically, about what it subsequently claims is the misrepresentation.

[30] As we have seen, the Court went on to explain that the first two elements were insufficient, on their own, to give rise to an implied waiver. The point of the case was that the third element must be satisfied also.

[31] Mr. Long went on to argue that the plea of due diligence in this case ties into the advice of counsel because no step involves counsel more than the marshaling of evidence, and given Red Branch's allegation of fraud, what it knew and ought to have known about Mr. Darch's evidence before the trial will be a crucial issue. This, says Mr. Long, cannot be fairly ascertained without access to Red Branch's solicitor's file.

[32] This is very much like the fairness argument in Soprema that this Court rejected: given Soprema's allegation of reasonable reliance on Wolrige Mahon's representations, what it knew or ought to have known about the true state of affairs through other advice is a crucial issue that cannot be fairly defended without access to the advice Soprema received. This Court explained why that was not sufficient at para 53:

Where legal advice may have influenced a party's "state of mind" on a material issue, it is inevitable that upholding the privilege will confer a litigation advantage on the party claiming it because the other would be denied access to relevant information about the opposing party's state of mind. One might think that this is an inevitable result of recognizing and upholding claims of solicitor-client privilege because part of the point of privilege is to protect from disclosure communications which are otherwise material and relevant. But it does not follow from this that that litigation advantage is "unfair". I do not think one can properly describe a litigation advantage "unfair" when it results from the recognition and protection of a fundamentally important principle in the legal system. Furthermore, protecting privilege in these circumstances does not raise an issue of inconsistency because the party asserting the privilege is not relying on the advice it received to justify its conduct at the same time as it shields that advice from disclosure.

[33] Mr. Long also sought to limit the application of Soprema by reference to two subsequent decisions.

- [34] The first was the judgment of Justice Voith, then of the Supreme Court of British Columbia, in 0782484 BC Ltd v E-Pro Enterprises Inc, 2017 BCSC 2245. In Mr. Long's submission, E-Pro Enterprises supports the proposition that solicitor-client privilege is impliedly waived not just where a party puts its understanding of its legal position in issue, but also where it puts its state of mind in issue in a manner establishing a clear nexus between its state of mind and the privileged communications. Mr. Long argues that in this case, that latter test has been met.
- [35] The difficulty is that the latter proposition was essentially the basis of the judgment that this Court overturned in Soprema. Moreover, in E-Pro Enterprises, the evidence put before the judge by the parties claiming privilege asserted reliance on legal advice, thereby satisfying the third element of the Soprema test as explained in HMB Holdings at para 47, quoted above (see the evidence reviewed in E-Pro Enterprises at paras 21 and 22). It follows that even if Mr. Long's characterization is correct concerning the manner in which Red Branch has put its state of mind in issue, which I do not decide, it does not shield him from the Soprema test.
- [36] The second was this Court's decision in Araya v Nevsun Resources Ltd, 2019 BCCA 205, leave to appeal to SCC refused, 38794 (9 January 2020). In Araya, this Court upheld a declaration that the plaintiffs had impliedly waived solicitor-client privilege over communications and documents relating to their claims up to and including the date of their first meeting with Canadian counsel. This was because the plaintiffs had pleaded postponement of the running of the limitation period until they obtained legal advice in Canada. They had already conceded a waiver of privilege over advice received up to the point of their meeting with Canadian counsel, and this Court held that by their postponement plea, the plaintiffs "have in fact injected into the litigation the legal advice they received and their understanding of the law governing their claims" (at para 25). Again, the third element of the test in Soprema was satisfied.
- [37] In this case, the chambers judge concluded that Mr. Long had failed to meet that test. I agree. Mr. Long has established no basis in law for distinguishing his case, and I would not accede to this ground of appeal.

3.2 Has litigation privilege expired?

- [38] Mr. Long submits that the current litigation, being a claim sounding in fraud, is a different action from the royalty action. Accordingly, he maintains, the litigation privilege that protected documents assembled and created by Red Branch's solicitors for that litigation no longer protects those documents from production in this litigation to the extent they are relevant.
- [39] The chambers judge rejected this argument:

- [37] Although the Royal Action itself has ended, the litigation that gave rise to it remains pending or may reasonably be apprehended. It is manifestly clear that the claim in this action arises from the same juridical source as the Royalty Action. It involves the same parties and arises from the same cause of action or juridical source. Much if not all of the evidence in the action that may well be launched if this action succeeds will be the same. In such circumstances, the underlying purpose of litigation privilege, namely the protection essential to the proper operation of the adversarial process, continues: *Blank v. Canada* (Minister of Justice), 2006 SCC 39 at paras. 38-39, 41.
- [38] I am not persuaded that litigation privilege has ended in respect of Red Branch/Wright's counsel's files on the Royalty Action. Indeed, as this Court stated in a previous determination in this action, "the relationship between the two proceedings could not be closer": *Red Branch Investments Limited v. Long*, 2020 BCSC 1924 at para. 18.
- [39] Indeed, in my view, this action is so closely related to the Royalty Action that the continuation of the litigation privilege attaching to the files of Red Branch/Wright's counsel's files in respect of the Royal Action is warranted.
- [40] This is entirely consistent with the judgment of the Supreme Court of Canada in *Blank v. Canada* (Minister of Justice), 2006 SCC 39, where Justice Fish, for the majority, explained:
- [38] As mentioned earlier, however, the privilege may retain its purpose -- and, therefore, its effect -- where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining litigation more broadly than the particular proceeding which gave rise to the claim" (para 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
- [39] At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.
- [41] In these circumstances, the judge considered that this case was one in which the duration of the litigation privilege was justified by its underlying purpose, namely the "protection essential to the proper operation of the adversarial process" (*Blank* at para 41). In my view, the judge was correct in coming to this conclusion. Mr. Long has demonstrated no error, and I would not accede to this ground of appeal.

4. DISPOSITION

- [42] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Marchand"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/22/02/2022BCCA0293.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/long-v-red-branch-investments-limited-2022>

Prepared on 28 October 2026 · Esheria