

CANADA / JUDGMENT

Merritt v. Canada (Attorney General)

2020 BCSC 1887

COURT

Supreme Court of British Columbia

DECIDED

19 November 2020

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2020 BCSC 1887 Merritt v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Merritt v. Canada (Attorney General),

2020 BCSC 1887

Date: 20201119

Docket: S123809

Registry: Vancouver

Between:

Sherri Merritt

Plaintiff

And

Attorney General of Canada, The Minister of Justice of the

Province of British Columbia, Claude Wilcott,

Jennifer Hyland, John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

Counsel for the Plaintiff:

T.F. Beasley

G. Krueger

Counsel for the Defendants:

C. Landsiedel

K. Lakusta

A. Eyer

Place and Dates of Hearing:

Vancouver, B.C.

October 22-23 and

November 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 19, 2020

Nature of Application

- [1] The defendants, Attorney General of Canada, the Minister of Justice of the Province of British Columbia, Supt. Claude Wilcott, and Sgt. Jeniffer Hyland ("Crown Defendants"), apply to file under seal an affidavit sworn by Supt. Wilcott on October 19, 2020. The Crown defendants wish to use that affidavit in support of their extant application to strike an expert report the plaintiff intends to tender at trial. The report is authored by Mr. Les Rose, who between the summer of 1999 and May 15, 2015, was a lawyer working in the RCMP Legal Advisory Section. The Crown defendants' position is that Supt. Wilcott's affidavit must be filed under seal and not disclosed to the plaintiff because it contains information that is protected by solicitor-client privilege.

Background

- [2] A brief summary of the nature of the action and the facts alleged by the plaintiff, Ms. Sherri Merritt, is necessary for context.
- [3] Ms. Merritt was employed by the City of Coquitlam as a clerk and assigned to work as a support staff member for the Coquitlam detachment of the RCMP. Ms. Merritt seeks damages from the defendants in respect of alleged wrongful intentional and negligent conduct on the part of the specific Crown defendants, Supt. Claude Wilcott and Sgt. Hyland. Both are members of the RCMP and are stationed at the RCMP's Coquitlam detachment. At all material times, Supt. Wilcott was the Officer in Charge of the Coquitlam detachment. Ms. Merritt pursues the Minister of Justice of British Columbia and the Attorney General of Canada, claiming that they are liable for the torts committed by Supt. Wilcott and Sgt.

Hyland.

- [4] Ms. Merritt says that she was the target of an unlawful criminal investigation led by Supt. Willcott and Sgt. Hyland that ultimately resulted in the termination of her employment with the City of Coquitlam. She alleges that the events that led to her termination began on approximately September 19, 2011, when she attended at the Coquitlam Detachment just prior to going on medical leave for treatment of her cancer. Her purpose was to copy her work product, i.e., templates and an Excel spreadsheet, located on her USB drive on her office computer because someone had tampered with them the last time she was on leave. She deleted those documents from her computer once she copied them. Ms. Merritt says that she obtained prior approval to do what she did from Cpl. Dale Allchin, a member of the RCMP's "E" Division HQ Operational Policy and whom she says is a recognized privacy policy advisor. Ms. Merritt left on medical leave for treatment of cancer the next day.
- [5] It is important at this juncture to note that Ms. Merritt's version of events is contested by the Crown defendants. One of the factual disputes in this case is whether Ms. Merritt deleted files or data from the RCMP's network. She claims that she did not.
- [6] Sometime later, other members of the Detachment decided to initiate a criminal investigation into Ms. Merritt's conduct. According to Ms. Merritt, on October 19, 2011, Supt. Willcott and the City's RCMP administrator informed, in person, the RCMP's records staff, front counter staff, and its major crimes sections that Ms. Merritt was under a criminal investigation, and then followed up that advice with a confirming email to the Detachment's main reception, traffic counter staff, and the City's community policing department.
- [7] Ms. Merritt says she was not aware of the criminal investigation until advised by a City employee on October 21, 2011. On October 24, 2011, Sgt. Hyland informed her that she was the subject of a criminal investigation for mischief to data contrary to s. 430(5) of the Criminal Code.
- [8] According to Ms. Merritt, when Sgt. Hyland was told that Ms. Merritt was prepared to provide a statement to the RCMP, Sgt. Hyland responded, stating that there was nothing Ms. Merritt could say that would change Sgt. Hyland's mind and her decision to forward the file to Crown counsel for charge approval.
- [9] Ms. Merritt alleges that on approximately October 24, 2011, Cpl. Allchin and Mr. Rose discussed her matter, reviewed the mischief sections of the Criminal Code, and concluded there was no basis for a charge to be laid against Ms. Merritt. Further, she says that Cpl. Allchin and Mr. Rose agreed to inform the investigating officers, including Sgt. Hyland, of their assessment. Amongst Ms. Merritt's allegations against Supt. Willcott is her assertion that he acted out of malice towards her because she had, in the past, challenged certain aspects of his management of the Detachment.
- [10] Ms. Merritt's position is that Mr. Rose did not provide legal advice to Cpl. Allchin or to anyone else at the RCMP.

- [11] Crown counsel decided against proceeding with criminal charges against Ms. Merritt.
- [12] Ms. Merritt's employment with the City was terminated, which she says was a result of the misconduct of Supt. Wilcott and Sgt. Hyland, including their dissemination and broadcasting of inaccurate and misleading information to the City and others.
- [13] In her pleadings, Ms. Merritt alleges, inter alia, that the Crown defendants: (a) engaged in wilful and malicious conduct towards her and (b) acted and colluded in such a manner to be tortious in nature and to constitute interference with contractual relations. With respect to the conduct of Supt. Wilcott and Sgt. Hyland, Ms. Merritt alleges that they are liable for abuse of or misfeasance in public office and abuse of authority and intentional or negligent infliction of mental suffering.
- [14] Some of the particulars pleaded by Ms. Merritt describe alleged biased, malicious, improper, and deficient criminal and other investigations against her and the use of the criminal investigation as a means to remove Ms. Merritt from her position with the Coquitlam detachment and as a means to intimidate and threaten her livelihood.
- [15] The case has not proceeded with any dispatch for numerous reasons that are not relevant to the sealing application. The trial is now scheduled to proceed in June 2021.
- [16] Underlying the Crown defendants' application for a sealing order is their application to strike an expert report that Mr. Rose prepared for Ms. Merritt dated August 26, 2020 (it was served on the Crown defendants the following day). Amongst other things, his report ("Rose Report") speaks to investigation and charging procedures at the RCMP. In Ms. Merritt's previously filed trial brief, she said she intends to tender the Rose Report at trial in respect of "competent investigations for criminal charges and protocols for RCMP."
- [17] The Crown defendants seek to strike the Rose Report because they say he is in a conflict of interest. To further their assertion of conflict of interest, they filed an affidavit sworn by Supt. Wilcott on October 7, 2020 in which he deposed that he sought and received legal advice from Mr. Rose concerning the facts and matters in issue in this action. His affidavit does not disclose the nature or substance of the advice sought or received. In it, he deposed:
2. For a period of time, and at least during the entire period of my service as OIC of the Detachment, Mr. Les Rose was legal counsel for the RCMP and was a lawyer in the RCMP Legal Advisory Section.
 3. Mr. Rose held himself out and identified himself to RCMP members, including myself, as their lawyer.
 4. Any e-mail or written correspondence that I had with Mr. Rose included the "Solicitor-Client Privilege" designation, and I understood that our verbal conversations regarding legal advice were also designated solicitor-client privileged.

5. On or about September 29, 2011, I contacted Mr. Rose to obtain his legal advice regarding the Plaintiff's copying and deletion of files from RCMP computer drives at the Detachment (the "Security Incident"), which had been reported to me as the OIC.
6. During my telephone call with Mr. Rose, I discussed details of the Security incident and sought and received his legal advice regarding:
 - (a) a possible criminal investigation into the Security Incident; and
 - (b) a possible redeployment of the Plaintiff back to her employer, the City, due to the Security Incident.
- [18] Thus, quite apart from their position that Mr. Rose's prior relationship with the RCMP puts him in conflict, the Crown defendants argue that Mr. Rose is in conflict of interest because he provided legal advice to Supt. Wilcott concerning Ms. Merritt's conduct, and for that reason alone, the Rose Report should be struck.
- [19] Ms. Merritt obtained an affidavit from Mr. Rose in response. In it, Mr. Rose denied a solicitor-client relationship existed with Supt. Wilcott. According to Mr. Rose, his client throughout was the RCMP and further, that he did not provide legal advice to the RCMP concerning Ms. Merritt's case. According to Mr. Rose, at that material time, legal advice was provided to the RCMP by the RCMP's legal counsel, Kyle Friesen and further, that he, Mr. Rose, never discussed with Mr. Friesen any aspect of the investigation concerning Ms. Merritt.
- [20] Specifically, Mr. Rose deposed:
 6. At all material times, Corporal Allchin was a member of the RCMP's "E" Division HQ Operational Policy Unit and a recognized privacy policy dvisor ("Cpl. Allchin").
 7. At all material times, Kyle Friesen, RCMP legal counsel, was the sole provider of legal advice regarding the matter herein. I never discussed with Mr. Friesen any aspect of the matter.
 8. I have no recollection of a conversation with the Defendant Wilcott on September 29, 2011.
 9. I have no recollection whatsoever of any conversation with the Defendant Wilcott.
 10. The only instance during the material time period that I provided legal advice to the RCMP regarding issues resulting from the return of a municipal employee to a city was unrelated to this matter.
 11. The only time I provided substantive legal advice to the RCMP with respect to a municipal employee was with respect to a matter unrelated to the matter herein.
 12. During or around the Fall of 2011, Judith Mules, of DOJ, who had carriage of the file, emphatically advised me by phone not to provide any such legal advice to the RCMP regarding the matter herein. At that time, I confirmed to her that I had not and would not do so.

13. I do recall discussing with Cpl. Allchin, as a friend and colleague, that given the circumstances of the matter, he had an obligation to disclose to the management of the Coquitlam Detachment that Cpl. Allchin had a conversation with the Plaintiff in which he assured the Plaintiff that her actions protecting the integrity of her personal "correspondence macros" were reasonable and not problematic.
- [21] To further support their strike application, the Crown defendants seek to file under seal a second affidavit from Supt. Wilcott sworn October 19, 2020. As I understand it, they also intend to rely on that affidavit to challenge Mr. Rose's evidence that he did not provide legal advice to Supt. Wilcott.
- [22] In Supt. Wilcott's second affidavit, which I will refer to as "Wilcott Affidavit No. 2", Supt. Wilcott described in detail the legal advice he says he received from Mr. Rose on September 29, 2011. It also attaches his handwritten notes he says he made of his conversation with Mr. Rose.
- [23] The Crown defendants' position is that Wilcott Affidavit No. 2 must be sealed in order to protect solicitor-client privilege. They asked me to review the affidavit and to find from reading it, that Mr. Rose in fact gave legal advice to Supt. Wilcott, and based on that finding, the Rose Report should be struck.
- [24] Ms. Merritt agreed that I could review Wilcott Affidavit No. 2 in camera. She nonetheless opposes the application for a sealing order because she says that in tendering Wilcott Affidavit No. 2 for filing, the Crown defendants have expressly waived solicitor-client privilege, or alternatively, that waiver must be implied in the circumstances.

Test for Sealing Orders

- [25] The seminal case concerning sealing orders is the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. The test is set out at para. 53. A sealing order will be issued where:
- (a) the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in litigation where no reasonably alternative measures will not prevent the risk; and
 - (b) the salutary effects of a sealing order, including the rights of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.
- [26] In its subsequent decision in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras. 1-4, 30, the Court said that its approach in *Sierra Club* balances the need for confidentiality and the open court principle, the latter being fundamental to the justice system but one that is not absolute.

[27] One exception to the open court principle is solicitor-client privilege. It is of superordinate or overriding importance and fundamental value to the proper administration of justice. Solicitor-client privilege is regarded as the highest form of privilege recognized by the courts; it is integral to the proper functioning of our legal system. It does not matter that the lawyer who provides advice to a member of the RCMP works for another branch of the government, such as the Department of Justice: *Chemtrade Electrochem Inc. v. Stikeman Elliott LLP*, 2020 ABCA 322 at paras. 18-23; *Smith v. Jones*, [1991] 1 S.C.R. 455 at para. 46; *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 49-54, 67; *R. v. McClure*, 2001 SCC 14 at paras. 34-37; *R. v. Chan*, 2002 ABQB 287 at paras. 67-68; *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 at para. 22; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 15.

Positions of the Parties

- [28] The Crown defendants' position is that the disclosure of specific legal advice in Wilcott Affidavit No. 2 does not constitute an express or implied waiver. They argue that there was no intention to waive privilege and furthermore, in respect of implied waiver, Supt. Wilcott did not disclose the legal advice he says he received from Mr. Rose as a substantive element of the defence of any of the Crown defendants. Their submission is articulated in their notice of application, excerpted below:
20. The reference to Mr. Rose's legal advice in the (public) Wilcott Affidavit is not advanced for state of mind nor relied on to justify conduct nor put forth as part of any defence. It is, rather, referred to simply for the fact it was given, and only in relation to the admissibility of the Rose Report and, in particular, to the narrow argument that Mr. Rose must be disqualified as an expert. The mere reference to the fact of legal advice being given in the Wilcott Affidavit is insufficient to waive privilege over the content of the advice itself, as the above cases make clear. Further, as indicated above, the RCMP - not Supt. Wilcott - is the client and it is only the client who may waive privilege. The actions of the Crown Defendants in seeking to file the Confidential Affidavit under seal, refusing to disclose the Confidential Affidavit to opposing counsel, and continuing to insist on the protection of the privilege, are all consistent with the position that privilege has not been waived.

Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 at para 35

Wardrope v. British Columbia (Minister of Justice) (21 February 2019), Vancouver Registry S1611344 (BCSC) at para 24

Calandrini v. Canada (Attorney General), 2018 FC 52 at para 117, aff'd 2019 FCA 73

- [29] Ms. Merritt's position, which she acknowledges is advanced without knowing the contents of Wilcott Affidavit No. 2, is that Mr. Rose's evidence establishes that he did not provide legal advice to Supt. Wilcott and on that basis, there is no basis to seal Wilcott Affidavit No 2 because there is nothing privileged set out in that affidavit.

- [30] She also questions the reliability of Supt. Wilcott's evidence which she understands from the Crown defendants' oral submissions provides specific details of his recollection of advice he purportedly received over nine years ago. Ms. Merritt also questions the credibility of Supt. Wilcott's evidence, particularly if the evidence in the text of his affidavit expands upon the notes attached as an exhibit, which, I find, it does. Moreover, based solely on a review of those notes, I could not conclude nor could I find that Supt. Wilcott received legal advice from Mr. Rose.
- [31] Ms. Merritt says that if Mr. Rose in fact gave legal advice to Supt. Wilcott, then waiver is implied in the circumstances because the Crown defendants' use of Wilcott Affidavit No. 2 to strike the Rose Report transcends the conflict issue into substantive issues, such as Supt. Wilcott's state of mind and the credibility and reliability of his evidence overall (Ms. Merritt contends that both are very much in issue in this case). Ms. Merritt argues that Supt. Wilcott's evidence concerning legal advice he says he received from Mr. Rose and the actions that he took following it are closely intertwined with the merits of her claim as well as the defences advanced by the Crown defendants. She submits that disclosure is required in the interests of justice and to ensure trial fairness.
- [32] Ms. Merritt also submits that if the legal advice that Supt. Wilcott says he received suggests or indicates that the communication was meant to further the alleged unlawful conduct, then the crime-fraud exception to privilege, which includes tortious conduct, applies to defeat the privilege.

Analysis and Determination

- [33] I agree with the Crown defendants that in view of the overriding, or as they put it, "given the transcendent importance" attached to solicitor-client privilege, the salutary effect of a sealing order protecting the privilege "is of the highest value."
- [34] Consequently, if Supt. Wilcott's evidence that he received legal advice from Mr. Rose is correct, then absent an express waiver of the privilege or facts engaging the limited basis in which waiver can be implied, a sealing order is necessary to protect privilege. Both prongs of the Sierra Club test are also met: *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 44; *Pritchard* at para. 18; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paras. 16-18.

Whose Privilege is it?

- [35] Before I turn to consider whether privileged was waived, I must consider the threshold question of who possesses the privilege.

- [36] Mr. Rose's evidence is aligned with the position of the Crown defendants that the privilege belongs to the RCMP and not Supt. Wilcott, even though the RCMP is not an entity that exists in law. His view in this respect accords with the case law: see, Campbell at para. 49; Wardrope v. British Columbia (Minister of Justice), (21 February 2019) Vancouver S1611344, at paras. 23-25.
- [37] Nonetheless, here, all Crown defendants, including the Minister of Justice for British Columbia ("MOJ"), who the defendants say is the entity ultimately liable for the acts of members of the RCMP carried out during the course of their employment, jointly tender and rely on Wilcott Affidavit No. 2 in support of their application to strike the Rose Report. The MOJ, joined in by the other Crown defendants, has actively participated in the disclosure of privileged information belonging to the RCMP in Wilcott Affidavit No. 2 to be used, albeit in what they ask to be under seal, as a sword to strike the Rose Report. Thus, it is not open to the Crown defendants to say that privilege could not have been waived by Supt. Wilcott because it was not within his right or authority to waive the RCMP's privilege.

Waiver

- [38] Express waiver occurs where the party possessing the privilege knowingly or evinces an intention to waive it: British Columbia (Attorney General) v. Lee, 2017 BCCA 219 at paras. 53-55.
- [39] Privilege was not waived through Supt. Wilcott's first affidavit when he deposed that he received legal advice from Mr. Rose. An affiant's mere disclosure that he or she received legal advice does not constitute a waiver of privilege.
- [40] Nor was there an express waiver arising from Wilcott Affidavit No. 2. Although Supt. Wilcott and the other Crown defendants intentionally disclosed what they say were privileged communications, they did so under the condition that the disclosure is tendered under seal. Thus, the second part of the test for express waiver - evincing an intention to waive it - is not engaged.
- [41] Waiver may be implied or inferred from the conduct of the holder of the privilege. The circumstances in which waiver may be implied are narrow given that solicitor-client privilege is a fundamental and substantive rule of law. A cautious approach must be taken to determining if implied waiver has occurred, and found only where absolutely necessary. It does not involve a balancing of interests between litigants: Soprema Inc. v. Wolrige Mahon LLP, 2016 BCCA 471 at paras. 50-52.
- [42] Waiver will be implied where a party puts in issue its reliance or receipt of legal advice to justify its conduct or state of mind in order to advance its claim or defence. Implied waiver does not arise where a party discloses the mere fact it received legal advice or admits they relied on it. It occurs when the party chooses to use the legal advice as a substantive element of his claim or defence: HMB Holdings Limited v. Replay Resorts Inc., 2018 BCCA 263 at paras. 42-48; Soprema Holdings at paras. 49-51, 53; Creative Career Systems Inc. v. Ontario,

2012 ONSC 649 at paras. 24-35; Campbell; Land v. Kauffman, [1991] O.J. No. 1658 at 4.

[43] Implied waiver is also discussed in Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 5th ed. (Toronto: LexisNexis Canada, 2018) [Sopinka] at 14.157 - 14.159:

[14.157] Whether intended or not, waiver may occur when fairness requires it, for example, if a party has taken positions which would make it inconsistent to maintain the privilege

[14.158] The notion of fairness has also been invoked as a basis for waiver when the party directly raises in a pleading or proceeding the legal advice that he or she received, thereby putting that advice in issue

[14.159] Waiver does not occur because the party discloses that he or she received legal advice, nor does it occur because the party admits that he or she relied on the legal advice; it occurs because the party chooses to use the legal advice as a substantive element of his or her claim or defence.

[44] The point is made in this excerpt from the reasons in Simcoff v. Simcoff, 2009 MBCA 80 at para. 27, cited in Creative Career Systems at para. 29, that implied waiver occurs when a party puts legal advice in issue as a substantive element of its claim or defence: "Waiver does not occur because the party discloses that he or she received legal advice, nor does it occur because the party admits that he or she relied on the legal advice; it occurs because the party chooses to use the legal advice as a substantive element of his or her claim or defence." As Ms. Merritt correctly points out, where a party makes a live issue of the legal advice it received, the opposing party is entitled to "get to the bottom of it".

[45] An example of implied waiver is found in Campbell. There, the RCMP put in issue its good faith belief in the legality of its reverse sting operation, and asserted its reliance upon consultations with Department of Justice lawyers to buttress its position. The Crown sought to establish that the police had at all stages of their investigation acted in good faith and in the belief that their reverse sting operation was legal. In that respect, at the hearing of the defence application for a stay of proceedings, counsel for the Crown questioned one of the police officers at length about his understanding of the law and the circumstances that led him to seek legal advice. Crown counsel did not ask the officer to disclose the advice. In cross-examination, the officer was asked for much greater detail about the purpose in which he sought legal advice and the matters over which he sought advice: see, Campbell at 574-576.

[46] In argument on the stay application, the Crown asked the court to evaluate police conduct throughout the reverse sting operation, and maintained that none of it constituted an abuse of process. That the police officers sought and relied on legal advice formed part of the Crown's good faith defence. In his reasons, Mr. Justice Binnie said at 599 that while the advice "was not explicitly stated in so many words, the plain implication sought to be conveyed to the defendants [the appellants] and to the courts was that the RCMP accepted the legal advice they were given by the Department of Justice and acted in accordance with

it. The credibility of a highly experienced departmental lawyer was invoked to assist the RCMP position in the abuse of process proceedings."

[47] The Supreme Court of Canada held that the RCMP waived the right to shelter the contents of the advice it relied upon based on solicitor-client privilege.

[48] Binnie J. concluded at 600 that the only satisfactory way to resolve the issue of good faith is to order disclosure of the content of the legal advice. His reasons are explained at various parts of his reasons at 611-614, where he found that waiver occurred where the Crown put reliance on legal advice in issue as part of its good faith defence:

The record is clear that the RCMP put in issue Cpl. Reynolds' good faith belief in the legality of the reverse sting, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP factum in the Ontario Court of Appeal has already been quoted in para. 46. In my view, the RCMP waived the right to shelter behind solicitor-client privilege the contents of the advice thus exposed and relied upon. I characterize the RCMP rather than Cpl. Reynolds as the client in these circumstances because even though he was exercising the duties of his public office as a police officer. Cpl. Reynolds was seeking the legal advice in the course of his RCMP employment.

It is convenient to recall at this point that at the time of the original disclosure motions, the position of the appellants was clear, i.e., disclose the communications or forswear reliance upon them. Notwithstanding this caution, the RCMP and their legal counsel chose to rely upon the communications to support their argument of good faith reliance. In doing so, the privilege was waived.

In *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A.), the bank put a defaulting customer into receivership, and the customer sued both the bank and the receiver, who then launched third party proceedings at each other. The bank said it had relied on the receiver's advice in putting the customer into receivership. The receiver denied detrimental reliance on its advice, and wanted to know what other professional advice the bank had received at the relevant time. In particular, the receiver wanted to know what legal advice the bank had received from its own lawyers, MacKimmie Matthews. The bank claimed solicitor-client privilege over this correspondence. In rejecting the bank's claim of privilege, the court, per Hutcheon J.A., stated as follows, at p. 51:

The issue in this case is not the knowledge of the bank. The issue is whether the bank was induced to take certain steps in reliance upon the advice from the receiver on legal matters. To take one instance, the receiver, according to the bank, advised the bank that it was not necessary to allow Abacus [the plaintiff debtor] time for payment before the appointment of the receiver. A significant legal decision had been rendered some months earlier to the opposite of that advice. The extent to which the bank had been advised about that decision, not merely of its result, is important in the resolution of the issue whether the bank relied upon the advice of the receiver. [Emphasis added.]

It appears the court in *Rogers* found that any privilege with respect to correspondence with the bank's solicitors had been waived as necessarily inconsistent with its pleading of reliance, even though the bank itself had not referred to, much less relied upon, the existence of advice from its own solicitors.

The present case presents a stronger argument for waiver than *Rogers*. The Crown led evidence from Cpl. Reynolds about his knowledge of the law with respect to reverse sting operations - he testified that he had read the Superior Court decision in *Lore*, *supra*, and was of the view that the operation in question was legal. But Cpl. Reynolds also testified, in answer to the appellants' counsel, that he sought out the opinion of Mr. Leising of the Department of Justice to verify the correctness of his own understanding. The appellants' counsel recognized that this alone was not enough to waive the privilege. Cpl. Reynolds was simply responding to questions crafted by the appellants, as he was required to do. Appellants' counsel accepted that he had no right at that point to access the communications. His comment to the judge was simply that "I certainly don't want to hear the argument that 'Oh well, the police acted in good faith because they acted on legal advice'". The critical point is that the Court did hear that precise argument from the Crown at a later date. The RCMP and its legal advisers were explicit in their *factum* in the Court of Appeal, where it was argued that "regard must be had to the following considerations (f) The R.C.M.P. consulted with the Department of Justice with regard to any problems of illegality" (emphasis added). We understand that the same position was advanced to the trial judge. As *Rogers*, *supra*, shows, it is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communications of which it forms a part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. The clear implication sought to be conveyed to the court by the RCMP was that Mr. Leising's advice had assured the RCMP that the proposed reverse sting was legal.

[Underlining in original; emphasis in italics added]

[49] Another example of implied favour is found in *Land v. Kaufman*, at 4, privilege was found to be waived when the plaintiff's solicitor filed an affidavit which averted to communications made by the plaintiff to her in support of its evidence that it misunderstood the client's instructions:

In my view, it would cause injustice and unfairness to allow the solicitor for one side to plead that he or she misunderstood the client's instructions and then be permitted to hide behind solicitor/client privilege when the other side seeks to explore whether there is any merit to that claim of misunderstanding. Fairness to the defendants demands that the defendants be entitled to those answers particularly after discoveries have been conducted and the positions of the parties have been revealed by their pleadings and their evidence on discovery.

Disposition

- [50] As I have said, there is no basis to find an express waiver of privilege in this case.
- [51] Assuming that Supt. Wilcott received legal advice from Mr. Rose, as he says he did, is there a basis to find an implied waiver?
- [52] Similar to Campbell and Rogers, in the case at bar, the Crown defendants have, as part of their defence, put the state of mind and bona fides of Supt. Wilcott and Sgt. Hyland in issue in their response pleading. In Part 1, Division 1, response to statement of facts section of their response to Ms. Merritt's amended notice of civil claim, they allege they acted in good faith, without malice, with an honest wish to carry out the purposes of the Criminal Code:
66. The Defendants did not act with malice and had reasonable and probable grounds for instituting the investigation of the Plaintiff referred to in the Notice of Civil Claim in that the Plaintiff had improperly copied and deleted documents from the RCMP secure shared access drive.
68. Supt. Wilcott and Sgt. Hyland acted in good faith with an honest wish to carry out of the purposes of the Criminal Code and RCMP Act to achieve the best interests of Canada, the Province and the RCMP.
- [53] In the instant case, Wilcott Affidavit No. 2 was sworn and tendered for a discrete purpose, i.e., to demonstrate that Mr. Rose is in conflict on the basis that he gave legal advice to Supt. Wilcott concerning Ms. Merritt's case. The Crown defendants did not tender it to advance any of their pleaded defences.
- [54] Unlike Campbell and Rogers, the Crown defendants have not asserted in their response pleading that Supt. Wilcott and Sgt. Hyland relied on legal advice for their conduct or that it informed their state of mind. Further, although Supt. Wilcott's examination for discovery has not concluded, I am advised by counsel in oral submissions that Supt. Wilcott has not, thus far, testified that he relied on legal advice from Mr. Rose. Thus, he has only put the receipt of legal advice in issue to contend that Mr. Rose is in a conflict.
- [55] I agree with the Crown defendants' submission that the circumstances where implied waiver may be found do not currently exist. Supt. Wilcott has not interjected legal advice in order to advance the pleaded defences of any of the Crown defendants. The fact that Wilcott Affidavit No. 2 may bear on issues of the reliability and credibility of Supt. Wilcott's evidence or the evidence of others is not a basis at this time to establish an implied waiver of privilege. Further, it is not apparent to me on reading Wilcott Affidavit No. 2 that the crime-fraud exception to privilege is engaged.
- [56] I have thus concluded that at this juncture, Wilcott Affidavit No. 2 should be filed under seal, with liberty to Ms. Meritt to apply at any time for disclosure should circumstances change (such as those that existed in Campbell).

- [57] However, my decision must not be taken to mean that I reject Mr. Rose's evidence and accept Supt. Wilcott's evidence that he in fact received legal advice from Mr. Rose. I have ordered Wilcott Affidavit No. 2 to be filed under seal solely on the basis that its contents purport to disclose privileged legal advice that has not been waived. Whether Supt. Wilcott in fact received legal advice from Mr. Rose is not a finding I am able to make at this point given the conflicts in their evidence and after having engaged in a comparative analysis of the text portion of Supt. Wilcott's affidavit and his notes attached as an exhibit.
- [58] I will now hear from submissions concerning the impact of my decision to seal the affidavit on the Crown defendants' application to strike Mr. Rose's report.

[FURTHER SUBMISSIONS FROM COUNSEL]

- [59] The hearing of the Crown defendants' application to strike Ms. Rose's report is adjourned to December 14, 2020.

"Walker J."

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Prepared on 25 October 2026 · Esheria