

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Ross River Dena Council v.
Canada (Attorney General)***
2009 YKCA 8

Date: 20090529
Docket: CA08-YU627

Between:

Ross River Dena Council

Respondent
(Plaintiff)

And

The Attorney General of Canada

Appellant
(Defendant)

- and -

Between:

Ross River Dena Council

Respondent
(Plaintiff)

And

**The Attorney General of Canada
on behalf of and as representative for
Her Majesty the Queen in Right of Canada**

Appellant
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Smith

Oral Reasons for Judgment

Suzanne Duncan

Counsel for the Appellant

Stephen Walsh

Counsel for the Respondent

Place and Date:

Whitehorse, Yukon Territory
May 29, 2009

[1] **DONALD J.A.:** This is an appeal from the order of Mr. Justice Gower pronounced 23 January 2009 in the following terms:

1. Subject to the Court's decision on the defendant's application for a stay of execution of this Order, pending appeal, the defendant shall produce to counsel for the plaintiff the historical and anthropological report dated June 17th, 1982 which is referred to in paragraph 1 of the Reasons for Judgment dated January 23rd, 2009 by 5:00 p.m. on March 19th, 2009.

The decision is indexed as 2009 YKSC 04.

[2] Disclosure was resisted on grounds of relevancy and privilege. The appellant alleges the judge erred: (1) in finding the report relevant to the action; (2) in using the wrong test on determining whether the report was protected by solicitor-client privilege; (3) in interpreting settlement privilege too narrowly and therefore inapplicable to the report; (4) in finding that communications prepared for the purposes of comprehensive land claims are not protected by settlement privilege; (5) in finding, in the alternative, that if the report is subject to privilege, the appellant waived privilege in its pleadings.

[3] We are not persuaded that the judge erred as alleged in points (1) to (4) above. We prefer not to express any opinion on the alternative finding of waiver. The pleadings which formed the basis for the finding of waiver have now been amended and the issue of waiver has become moot.

[4] With particular reference to point (4), we are all of the view that the judge did not make the blanket pronouncement attributed to him in the appellant's description


of the alleged error. The ratio of the decision is, of course, conditioned by the circumstances of this case in relation to a single document.

[5] For these reasons and for the reasons of the judge, with which we are in substantial agreement, we would dismiss the appeal.

[6] FRANKEL J.A.: I agree.

[7] D. SMITH J.A.: I agree.

[8] DONALD J.A.: The appeal is dismissed. Thank you, counsel.


The Honourable Mr. Justice Donald