SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v Canada (Attorney General)* 2015 YKSC 52

Date: 20151116
S.C. No. 06-A0092
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA
On behalf of and as the representative for
Her Majesty the Queen in right of Canada

Defendant

Before Mr. Justice L.F. Gower

Appearances:

Stephen Walsh — Counsel for the plaintiff
Suzanne Duncan and Geneviève Chabot — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a pre-trial application by the plaintiff, Ross River Dena Council ("RRDC"), for two forms of relief:

1) an order to compel production of the memorandum to file from Ronald Burnett, dated April 14, 1993, regarding the ratification of the Umbrella Final Agreement ("UFA") by the Council of Yukon Indians ("CYI") (as it was then called); and

2) an order allowing RRDC to conduct an oral examination of Ms. Shari Borgford on affidavits she swore on behalf of the defendant, the Attorney General of Canada ("Canada"), in response to RRDC's interrogatories.

[2] Canada objects to the production of the Burnett memo on the basis of solicitor-client privilege. However, it agrees to the examination of Ms. Borgford, but only on terms, which I will come to below.

LAW and ANALYSIS

Production of the Burnett memo

[3] Despite arguments to the contrary in his initial written outline, RRDC's counsel fairly conceded at the hearing of this application that the Burnett memo meets the three criteria for establishing that it is subject to solicitor-client privilege, namely:

1) it is a communication between solicitor and client;

2) it entails the seeking or giving of legal advice; and

3) it was intended to be confidential.

See *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, at para. 15.

[4] However, it was not until his reply outline on this application that RRDC's counsel raised the argument that the honour of the Crown must trump solicitor-client privilege, where the two doctrines are clearly pitted against each other. He says this is because the honour of the Crown is a constitutional principle, whereas solicitor-client privilege is a common law doctrine, and thus the latter must yield to the former. Counsel candidly acknowledged that he is unaware of any authorities in support of this argument.

[5] RRDC's counsel also made the following submission in his reply outline:

> … [Canada] would have this Court accept the novel proposition that, on the facts of the case at hand, the law of

> privilege in Canada permits the Crown to hide behind the doctrine of solicitor client privilege so as to prevent disclosure of evidence of dishonourable conduct on the part of Crown officials (including, lamentably, several of the Crown's lawyers) with respect to the alleged ratification of the UFA…

[6] Canada's position is that solicitor-client privilege is a fundamental cornerstone of our system of justice, which is subject to only a few clearly prescribed exceptions, not including the honour of the Crown. These are set out in *The Law of Privilege in Canada*, Vol. 2, authored by R.W. Hubbard, S. Magotiaux, and S.M. Duncan[1] (2015: Thomson Reuters Canada Limited), at p. 11-39:

> Courts have repeatedly stated that communications subject to solicitor-client privilege should only yield in the most clearly defined circumstances. Although the privilege is not absolute, it must be treated as close to absolute as possible, to ensure public confidence and to retain relevance.
>
> In *Smith v. Jones*, [1999] the Supreme Court noted that the decision to exclude evidence because it was protected by solicitor-client privilege is a policy decision. However, the court went on to note that other societal values must prevail in some circumstances. These circumstances formed the exceptions to solicitor-client privilege. They are not foreclosed and may be expanded in the future.
>
> The current exceptions to the exclusion of evidence through solicitor-client privilege are:
>
> - where the information subject to privilege may prevent an accused person from defending him or herself fully, that is, where the innocence of the accused is at stake;
> - where the communications between solicitor and client are criminal communications;
> - where the safety of members of the public is at risk and a breach of solicitor-client privilege may prevent harm. (my emphasis)

[1] One of Canada's counsel in this matter.

[7] The phrase “as close to absolute as possible” comes from the Supreme Court of Canada decision in *R. v. McClure*, 2001 SCC 14. At paras. 31 and 32 of that case, Major J., speaking for the Court, began his discussion of the rationale of solicitor-client privilege by noting that it “commands a unique status within ” and is “fundamentally important” to our judicial system. He then went on to discuss the scope of the privilege:

> 34 Despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances. *Jones*, *supra*, examined whether the privilege should be displaced in the interest of protecting the safety of the public …
> …
>
> 35 However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[8] Major J. continued with this theme in concluding:

> 61 The difficulties described in successfully overcoming solicitor-client privilege illustrate the importance and solemnity attached to it. As described earlier, it is a cornerstone of our judicial system and any impediment to open candid and confidential discussion between lawyers and their clients will be rare and reluctantly imposed. (my emphasis)

[9] In 2004, Major J. again spoke for the Supreme Court in *Pritchard,* cited above*,* stating that the scope of the privilege is “broad and all-encompassing” and that it should only be set aside in the most unusual circumstances:

> 16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. …
>
> 17 As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.
>
> The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction [the innocence at stake exception].
>
> 18 In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare… (my emphasis)

[10] Major J. then went on to discuss the applicability of solicitor-client privilege in the context of government lawyers giving advice to government client departments:

> 19 Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 49. In *Campbell*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege. (my emphasis)

[11] As I noted above, RRDC's counsel fairly concedes on this application that the Burnett memo meets the three criteria for establishing that it is subject, at least initially, to solicitor-client privilege.

[12] Once a document is determined to be subject to solicitor-client privilege, it is presumptively inadmissible: *Charkaoui (Re),* 2009 FC 546, at para. 46.

[13] In *Bre-X Minerals Ltd. (Trustee of) v. Verchere*, 2001 ABCA 255, the trustee in bankruptcy for Bre-X, the bankrupt, appealed an order refusing to declare that the trustee had the authority to waive solicitor-client privilege on behalf of Bre-X. The first issue on the appeal was whether the trustee had the right to obtain documents protected by solicitor-client privilege and/or the power to waive that privilege for the bankrupt. The second issue was whether this was an occasion justifying an exception to the privilege. Conrad J.A., speaking for the majority of the Alberta Court of Appeal, concluded that solicitor-client privilege is the privilege of the bankrupt and "must be zealously protected" (para. 3). Further, while the privilege is not absolute, the trustee had failed to demonstrate any basis for a court sanctioned exception. In concluding on this point, Conrad J.A. stated:

> 49 … [W]hat interests will override solicitor-client privilege? In short, very, very few interests are more important than those protected by this privilege. The almost absolute nature of solicitor-client privilege was reiterated in the recent case of *R. v. McClure* (2001), 195 D.L.R. (4th) 513 (S.C.C.). …
> …
>
> 51 In my view, the Supreme Court's recent decision in *McClure* narrows the exceptions to solicitor-client privilege significantly, particularly given that court's criticism of case-by-case assessment of requests to set aside privilege. The Trustee, however, argues that exceptions may arise on a case-by-case basis where a principled basis for waiver

> exists. Even if principled exceptions were permissible on a case-by-case basis, the Trustee has not demonstrated that the facts of this case merit any exception…
>
> 52 In short, no overriding rationale for disclosure exists in the within action. There is simply no pressing objective that, in principle, surpasses in importance the interests protected by solicitor-client privilege, and thus no principled exception is justified. … (my emphasis)

[14] In *Stoney Band v. Canada*, [2005] 2 C.N.L.R. 371, the plaintiff First Nations band commenced an action in 1988 alleging improprieties in the transfer of its reserve lands. However, the band advised the Federal Court that it did not intend to pursue the action, as it was proceeding through a specific land claims process. In 2003, the Court initiated a status review of the action. This eventually led to a chambers judge reviewing the matter and holding that the conduct of the Crown (failing to uphold the honour of the Crown) was a relevant consideration on the status review. The Federal Court of Appeal allowed the appeal from that decision holding that the honour of the Crown does not apply to litigation conduct of the Crown. Rothstein J.A., as he then was, wrote for the Court. Similar to the situation in the case at bar, he observed that the chambers judge cited no supporting authorities when he applied the principle of the honour of the Crown to the litigation conduct of the Crown (para.19). In concluding on this point, Rothstein J.A. stated:

> 21 <u>The circumstances in which the honour of the Crown principle has so far been applied by the Supreme Court of Canada have not included its application to ordinary litigation conduct of the Crown</u>. I have considerable difficulty with the arguments made by the Stoney Band for its application of this principle to such conduct.
>
> 22 <u>In litigation, the Crown does not exercise discretionary control over its Aboriginal adversary</u>. It is therefore difficult to identify a fiduciary duty owed by the Crown to its adversary

> in the conduct of litigation. It is true that an aspect of the claim against the Crown by the Stoney Band is based on an allegation of breach of fiduciary duty with respect to the surrender and disposition of reserve land. But even if such a fiduciary duty existed, that duty does not connote a trust relationship between the Crown and the Stoney Band in the conduct of litigation.
>
> …
>
> 24 Focussing specifically on litigation practices, I find it impossible to conceive of how the conduct of one party to the litigation could be circumscribed by a fiduciary duty to the other. Litigation proceeds under well-defined court rules applicable to all parties. These rules define the procedural obligations of the parties. It seems to me that to impose an additional fiduciary obligation on one party would unfairly compromise that party in advancing or defending its position. That is simply an untenable proposition in the adversarial context of litigation. Even where a fiduciary relationship is conceded, the fiduciary must be entitled to rely on all defences available to it in the course of litigation.
>
> 25 The suggestion by the Band that the invoking of procedural defences by the Crown is inconsistent with the honour of the Crown appears to me to be contrary to existing Supreme Court of Canada jurisprudence. … (my emphasis)

The band's application for leave to appeal to the Supreme Court of Canada was dismissed.

[15] RRDC's counsel attempted to distinguish *Stoney Band* because: (1) unlike the case at bar, the honour of the Crown in *Stoney Band*, was not squarely pitted against solicitor-client privilege; and (2) the factual context in the case at bar is unique, i.e. there was an agreement between the parties that any settlement agreement, including the UFA, which was not properly ratified, would be null and void.

[16] I reject the first argument. If ordinary "procedural defences" are available to the Crown in litigation with an Aboriginal adversary, then surely such a fundamentally

important doctrine to our judicial system as solicitor-client privilege must also be available to the Crown. As for the second argument, I regret to say that I simply did not understand it.

[17] In my view, *Stoney Band*, is on all fours with the case at bar and is sufficient justification for dismissing RRDC's application for production of the Burnett memo. To hold otherwise, as RRDC urges, would result in the "untenable" situation alluded to in *Stoney Band*, i.e. whenever the Crown is involved in litigation with a First Nation, it would be prevented from relying on solicitor-client privilege to protect confidential information exchanged between government lawyers and client departments for the purpose of providing legal advice.

[18] I also disagree with the submission of RRDC's counsel that Canada is asking this Court to accept the novel proposition that the law of privilege in Canada permits the Crown to hide behind the doctrine of solicitor-client privilege in order to prevent the disclosure of evidence of dishonourable conduct on the part of the Crown with respect to the alleged ratification of the UFA. First, it is RRDC which is putting forward the novel proposition that the honour of the Crown will always trump solicitor-client privilege whenever the two doctrines are pitted one against the other. Second, the submission is unfounded, inappropriate and speculative. It is difficult to understand how RRDC's counsel can suggest that the content of the Burnett memo is likely to provide evidence of dishonourable conduct when he has never seen the document.

[19] Lastly, the submission by RRDC's counsel that a constitutional principle such as the honour of the Crown must always trump a common law doctrine such as solicitor-client privilege is belied by the manner in which the Supreme Court of Canada dealt with

this issue in *McClure*, cited above. In *McClure*, the clash was between solicitor-client privilege and the constitutional principle that a person accused of a criminal offence is entitled to make full answer and defence. McClure was a teacher charged with sexual offences against a number of former students. J.C. learned of this and brought a civil action against McClure alleging other incidents of sexual touching by him. McClure sought production of J.C.'s civil litigation file to determine the nature of the allegations and to explore whether he had a motive to fabricate or exaggerate the incidents of abuse. The trial judge ordered production of J.C.'s file and granted McClure access to it. That order was stayed pending appeal and was ultimately set aside by the Supreme Court of Canada, holding that the "innocence at stake" exception to solicitor-client privilege was not made out by the accused. In coming to that conclusion, Major J. made several comments about the balancing of full answer and defence and solicitor-client privilege, and confirmed that the constitutional principle does not always outweigh the privilege:

> 38 While solicitor-client privilege is almost absolute, the question here is whether the privilege should be set aside to permit the accused his right to full answer and defence by permitting him access to a complainant's civil litigation file. It is agreed that the file in this case qualifies for solicitor-client privilege. The solicitor-client privilege and the accused's *Charter* right to full answer and defence are both protected by law. Which prevails when they clash?
>
> …
>
> 40 Rules and privileges will yield to the *Charter* guarantee of a fair trial where they stand in the way of an innocent person establishing his or her innocence…. Our system will not tolerate conviction of the innocent. However, an accused's right to make full answer and defence in our system, while broad, is understandably not perfect. Section 7 of the *Charter* entitles an accused to a fair hearing but not

> always to the most favourable procedures that could possibly be imagined (see *R. v. Lyons*, [1987] 2 S.C.R. 309, per La Forest J., at p. 362).
>
> 41 Solicitor-client privilege and the right to make full answer and defence are principles of fundamental justice. The right of an accused to full answer and defence is personal to him or her and engages the right to life, liberty, security of the person and the right of the innocent not to be convicted. Solicitor-client privilege while also personal is broader and is important to the administration of justice as a whole. It exists whether or not there is the immediacy of a trial or of a client seeking advice.
>
> 42 The importance of both of these rights means that neither can always prevail. In some limited circumstances, the solicitor-client privilege may yield to allow an accused to make full answer and defence….(my emphasis)

Cross-examination of Ms. Borgford

[20] Rule 29(7) of the *Rules of Court* provides:

> Where a person to whom interrogatories have been directed answers any of them insufficiently, the court may require the person to make a further answer either by affidavit or on oral examination. (my emphasis)

[21] I am informed by RRDC's counsel that Ms. Borgford has sworn three affidavits in this action: the first on February 28, 2011; the second on August 29, 2011; and the third on September 27, 2013. I understand that Ms. Borgford was, at the time she swore the affidavits, the Acting Regional Director General of the Department of Indian Affairs and Northern Development Canada. On November 17, 2010, RRDC's counsel wrote to Canada's counsel, enclosing interrogatories which he expected would be answered by Ms. Borgford. He suggested in that letter that counsel may want to inform Ms. Borgford that if her answers to RRDC's questions were "insufficient", then he would almost certainly seek leave under Rule 29(7) to conduct an oral examination of her. The

answers to the interrogatories were provided in the three affidavits noted immediately above.

[22] As I understand it, in the summer of 2015, counsel exchanged correspondence and emails regarding the intention of RRDC's counsel to cross-examine Ms. Borgford on her affidavits. In particular, he indicated that he wanted to ask questions about her answers surrounding the issue of the UFA ratification. Canada did not expressly oppose this cross-examination, but wanted RRDC's counsel to identify the particular paragraphs he was concerned about. RRDC's counsel declined to provide that information.

[23] In his reply outline, and at the hearing of this application, RRDC's counsel confirmed that the "insufficiency" of Ms. Borgford's answers has to do with her failure to indicate whether she was answering on the basis of personal knowledge or information and belief and, if the latter, the source of that information and belief. I accept this as a legitimate reason for allowing the oral examination.

[24] RRDC's counsel also indicated at the hearing that he may wish to ask Ms. Borgford questions about perceived inconsistencies between Ms. Borgford's answers regarding meetings on June 7, 1989 and October 25, 1991, and whether UFA ratification was discussed and/or agreed to at either or both of those meetings. RRDC's counsel pointed to a perceived inconsistency between Ms. Borgford's answers in this regard and the affidavit of another of Canada's employees, Joe Leask, sworn on November 12, 2008, in Federal Court action T-1749-99, which is presently stayed.

[25] Canada's counsel at the hearing indicated that Canada had no particular opposition to the oral examination, but once again wanted to know in advance the areas in which Ms. Borgford would be questioned about. Counsel's concern here is that the

interrogatories covered a very broad range of topics and it would be helpful to know the areas of questioning in advance in order to better prepare Ms. Borgford for the examination.

[26] I accept that Canada's counsel has a reasonable concern here. However, no case authorities were provided in support of the proposition that RRDC's counsel has an obligation to give advance notice of the areas of questioning he intends to pursue. Further, it may be unfair to restrict RRDC's counsel in advance from only pursuing particular areas of questioning. As often happens in cross-examination, one answer can lead to a previously unthought-of question, and so on. Further, there is nothing to prevent Canada's counsel from objecting to particular questions on the affidavits, if they think the questions have already been sufficiently answered, are irrelevant or otherwise improper, much as they might do in an ordinary examination for discovery.

[27] Canada's counsel also objected to the intention of RRDC's counsel to cross-examine Ms. Borgford on the Joe Leask affidavit, on the basis that it ought to be subject to the "implied undertaking" common-law rule recognized by this Court in *Charlie v. Yukon (Chief Corner)*, 2010 YKSC 39, at paras. 22 to 24, and also codified in Rule 26 of our *Rules of Court*. The rule generally is that both documentary and oral information obtained on in the pre-trial discovery process in one proceeding is subject to an implied undertaking that it will be not used for in other proceeding or for any other purpose. I dismiss Canada's objection for two reasons. First, if Rule 26 applies at all, then sub-rule 26(6) creates an exception where the purpose of using evidence obtained in one proceeding, or information from such evidence, is to impeach the testimony of a witness in another proceeding. As I said earlier, RRDC's counsel suggests there is an

inconsistency between the affidavits of Ms. Borgford and Mr. Leask, which could lead to Ms. Borgford's impeachment. Second, if only the common law rule applies, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the witness being examined is virtually nonexistent: McLachlin & Taylor, British Columbia Practice (3d Ed), Vol. 1, p. 7-4.4. It is conceded by Canada that the parties and the issues in both actions are similar, if not identical.

[28] Accordingly, I grant leave to RRDC to conduct an oral examination on Ms. Borgford on the answers she gave to the interrogatories in her affidavits.

CONCLUSION

[29] The application to compel production of the Burnett memo is dismissed. The application for an order allowing RRDC to conduct an oral examination of Ms. Borgford in respect of the affidavits she has sworn in this action is allowed. As the parties shared mixed success on this application, I direct that each shall bear their own costs.

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GOWER J.