SUPREME COURT OF YUKON

Citation: *Ross River Dena Council* v. *The Attorney General of Canada*, 2009 YKSC 70

Date: 20091105
S.C. No. 05-A0043
06-A0092
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh — Counsel for the Plaintiff
Maegan M. Hough — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Ross River Dena Council ("RRDC") for unredacted copies of certain federal Cabinet documents created in 1973, following the release of the Supreme Court of Canada's decision in *Calder* v. *Attorney General*, [1973] SCR 313, on January 31, 1973. That case recognized for the first time in the modern era that the interest claimed by aboriginal peoples in their ancestral lands constituted a legal interest that predated European settlement. The several Cabinet documents at issue

prefaced and related to the announcement by the federal Government of its comprehensive land claims policy on August 8, 1973.

[2] RRDC claims that the portions of the documents sought are not privileged (with one exception), or if they are, then that privilege has been waived. In the further alternative, RRDC argues that the portions of the documents sought are subject to the common interest exception to solicitor-client privilege.

[3] The Attorney General of Canada ("Canada"), takes the position that all of the portions of the documents sought are subject to solicitor-client privilege, that the privilege has not been waived, and that the common interest exception to solicitor-client privilege does not apply.

[4] Pursuant to Rule 25(15) of the *Rules of Court*, I have been provided with unredacted copies of all the subject Cabinet documents in order to determine the validity of the privilege claims.

LAW

Privilege, Onus and Waiver

[5] The party asserting solicitor-client privilege bears the onus of establishing the privilege on the balance of probabilities: Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, (Aurora: Canada Law Book, 2009) at 11.3-11.4.1. In order to establish solicitor-client privilege, the claimant must satisfy the court that there has been:

1. a communication between a lawyer and a client;
2. which entails the seeking or giving of legal advice;
3. which is intended to be confidential as between the lawyer and client.

See: *Canada* v. *Solosky*, [1980] 1 S.C.R. 821 at 837.

[6] Solicitor-client privilege is integral to the proper functioning of the Canadian justice system and is not to be lightly interfered with. As Fish J. said in *Blank* v. *Canada (Minister of Justice)* 2006 SCC 39, at para. 26:

> "... The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice."

[7] Although the privilege is not absolute, it will only give way in limited circumstances: *The Law of Privilege in Canada*, cited above, at 11-3.

[8] Any waiver of solicitor-client privilege must come from the client and not the lawyer: *Homalco Indian Band* v. *British Columbia*, 2003 BCSC 533, at para. 11. Once solicitor-client privilege has been established, a party seeking to show that the privilege has been waived bears the onus of doing so.

[9] Waiver of part of a communication will generally be deemed to be a waiver of the entire communication, if it is related to the same subject matter: *The Law of Privilege in Canada*, cited above, at 11.70.8. As Spence J. said in *Leadbeater* v. *Ontario* [2004] O.J. No. 1228, at para. 68:

> "Once the otherwise privileged document is disclosed the privilege that would apply to other communications between the solicitor and client as to the <u>same subject matter</u> is

> waived, ... Otherwise a party could engage in selective and self-serving disclosure in respect of a particular topic, disclosing only those privileged documents that support the position of the party and not disclosing those communications that do not." (my emphasis)

Similarly, in *Guelph (City)* v. *Super Blue Box Recycling Corp.*, [2004] O.J. No. 4468 (Ont. S.C.J.), at para. 91, the court held that if the holder of the privilege waives it, then the privilege is waived over the entire subject matter of which the disclosed communication is part.

[10] One of the leading authorities setting out the principles governing waiver of privilege is *S. & K. Processors Ltd*. v. *Campbell Ave. Herring Producers Ltd*. (1983), 45 B.C.L.R. 218 (S.C.) at paras. 6 and 10:

> "Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter* v. *Rogers*, [1982] 2 W.W.R. 189.
>
> …
>
> … As pointed out in *Wigmore on Evidence* (McNaughton Rev., 1961), vol. 8, pp. 635-36, relied on by Meredith J. in *Hunter* v. *Rogers supra*, double elements are predicated in every waiver--implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived…"

[11] To be clear, the “communication” referred to by McLachlin J. (as she then was) in *S. & K. Processors*, is one which is subject to solicitor-client privilege. Thus, where there has been disclosure of any material part of a privileged communication, a court may order the remainder of the document or documents be disclosed.

[12] In *K.F. Evans Ltd.* v. *Canada (Minister of Foreign Affairs)*, [1996] F.C.J. No. 30, Rothstein J. found that there had been waiver by the respondent Minister in the following circumstances (at para. 17):

1. there had been considerable disclosure of advice or information in the subject memoranda that could only have come from the solicitor;
2. it appeared that the Minister had disclosed certain portions of the legal advice considered innocuous and held back other information which he apparently considered damaging;
3. some of the information for which solicitor-client privilege was claimed constituted merely statements of existing law;
4. in one instance, two recommendations from a solicitor were made but only one was disclosed; and
5. some information deleted on the grounds of solicitor-client privilege was disclosed elsewhere in the material.

In those circumstances, Rothstein J. concluded, at paras. 23 and 24:

> “…The inconsistency of disclosing some solicitor-client advice and maintaining confidentiality over other advice both pertaining to the issues raised by the applicant causes me concern. In the circumstances of this case, to ensure that the Court and the applicant are not mislead, and in the interest

> of consistency, the respondent must be considered to have waived all rights to solicitor-client privilege.
>
> I am satisfied that there has been a waiver of privilege of some solicitor-client communication, and that in the circumstances of this case fairness and consistency must result in an entire waiver of the privilege. This is a case in which, as Wigmore says, the conduct of the respondent touches a certain point of disclosure at which fairness requires that privilege shall cease whether that is the intended result or not."

[13] Further, where waiver has been found to have occurred over a privileged document, it is open to a court to find that fairness and consistency require that communications on which the information in the waived document is based also be produced: *Trask* v. *Canada Life Assurance Co.*, 2002 BCSC 1741. Putting it another way, if the solicitor-client privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered: Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Toronto: LexisNexis Canada Inc., 2009) at 957.

Closely-related Information

[14] The parties generally agreed on the law set out above, however their positions began to diverge when addressing circumstances where there has been disclosure of "closely-related information", as distinct from privileged information. RRDC's counsel relied upon *Environmental Defence Canada* v. *Canada (Minister of Fisheries and Oceans)*, 2009 FC 131, on this issue. In that case, Madam Justice Layden-Stevenson, (as she then was) dealt with an appeal by the Minister of Fisheries and Oceans from an order of a prothonotary requiring the Minister to provide to the applicants an unredacted copy of a memorandum. The applicants were environmental groups that worked to

advance the conservation of species-at-risk in Canada. Layden-Stevenson J. held that the Minister failed to meet the burden of establishing the existence of solicitor-client privilege. She further held that any privilege that may have existed with respect to the redacted information was waived because of disclosure of “closely-related information”. At paras. 32 and 33, she stated:

> “It is not open to the Minister to assert that the content of the redacted portion contains legal advice and is therefore privileged and, at the same time, assert that the same information contained elsewhere in the Minister's record is not a disclosure of legal advice…
>
> In my view, given the Minister's disclosure, elsewhere in the record, of information closely-related to that in the redacted sentences, it would be unfair and inconsistent for the Minister to withhold the redacted portion of the Action Memorandum. Consequently, the prothonotary was quite right to conclude that any privilege that exists in the redacted sentences has been implicitly waived by the Minister.”

[15] Canada’s counsel stressed that, although the decision of Layden-Stevenson J. in *Environmental Defence* was upheld by the Federal Court of Appeal, 2009 FCA 136, it was on the limited grounds that the affidavit provided to support the assertion of privilege in that case was insufficient, and that the Court of Appeal expressly declined to address the issue of waiver in the decision below. Thus, says Canada’s counsel, the point about “closely-related information” was relegated to mere *obiter dicta*.

[16] Indeed, *Environmental Defence* was the only case which RRDC’s counsel was able to refer me to for the principle that disclosure of closely-related information, as opposed to privileged information, can result in waiver of solicitor-client privilege.

[17] In *R.* v. *Basi*, 2009 BCSC 777, E.A. Bennett J., allowed an application for disclosure, in part, where the content of the privileged legal memorandum was

"intricately connected to that which had already been released" and that withholding the memorandum would be "misleading". Therefore, Bennett J. concluded that fairness and consistency demanded that there was an implied waiver of privilege over the document (para. 28). However, the two documents at issue in *Basi* were clearly "legal opinions" which Bennett J. had previously concluded were subject to solicitor-client privilege.

[18] In my respectful view, a court should be wary of extending the limited circumstances in which solicitor-client privilege will give way by adding that the disclosure of closely-related information, although not strictly speaking information which is subject to solicitor-client privilege, justifies a finding that privilege has been waived. It seems to me that it would only be in rare circumstances where the disclosure by a party of certain information closely-related to that which it claims privilege over would cause the opposite party or the court to be misled, such that, in the interests of consistency and fairness, the privileged information should also be disclosed.

Common Interest Exception

[19] The divergence of the parties continued on the potential applicability of the common interest exception to solicitor-client privilege, in the event that I find that privilege attaches to the sought portions of the Cabinet documents. This exception most commonly originates in circumstances where two parties have jointly consulted one solicitor over a matter in which they share a common interest. In such circumstances, their confidential communications with the solicitor are privileged as against the outside world, but as between themselves, each is expected to share in and be privy to all communications passing between each of them and their solicitor. Should any subsequent dispute arise between the parties, neither can assert solicitor-client privilege

as against the other, and either may demand disclosure of communications in the other's possession.

[20] One of the leading cases in this area is *R.* v. *Dunbar* (1982), 68 C.C.C. (2d) 13, where the Ontario Court of Appeal stated, at para. 57:

> "…The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication: see 8 *Wigmore on Evidence*, (McNaughton Rev.), p. 603; *McCormick on Evidence,* 2nd ed., p. 189; *Phipson on Evidence,* 12th ed. (1976), p. 247; Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), p. 167."

[21] RRDC's counsel further relied upon the Supreme Court of Canada decision in *Pritchard* v. *Ontario (Human Rights Commission)*, 2004 SCC 31, as authority for the proposition that the common interest exception has recently been narrowly expanded to cover parties in a fiduciary relationship. At para. 24 of *Pritchard*, Major J., speaking for the Court stated:

> "The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here."

[22] RRDC's counsel submitted that the joint address by the Canadian Parliament to the Imperial Government on December 16 and 17, 1867 was given the force of statute by virtue of s. 146 of the *Constitution Act, 1867* and the *Rupert's Land and North-Western Territory Order of 1870* (the "*1870 Order*"). These combined, says counsel, created a relationship between the Government of Canada and the RRDC where Canada has assumed discretionary control over the specific territory claimed by the RRDC and the related aboriginal interests arising therefrom. RRDC submits that this relationship, in conjunction with the principle of the honour of the Crown, gives rise to a fiduciary duty by Canada towards the RRDC and its members: see *Guerin* v. *Canada*, [1984] 2 S.C.R. 335, at paras. 83-85, 87, 90, 98-103; *Haida Nation* v. *British Columbia*, 2004 SCC 73, at para. 18; and *Wewaykum Indian Band* v. *Canada*, 2002 SCC 79, at paras. 79-80.

[23] RRDC's counsel further argues that it is only necessary to establish this fiduciary relationship on a *prima facie* basis for the purposes of applying the common interest exception at this stage of the present actions, which have yet to proceed to examinations for discovery. In addition, counsel says that RRDC need only establish that this *prima facie* fiduciary duty relates to the specific interest arising from the asserted obligation on Canada's part from the undertaking set out in the *1870 Order*, which is to 'consider and settle' the Kaska's claims "to compensation for lands required for the purposes of settlement … in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the [aboriginal people]."

[24] Canada's counsel relied upon *Samson Indian Nation and Band* v. *Canada (C.A.)*, [1995] 2 F.C. 762 (F.C.A.), at para. 17, for the proposition that the common interest privilege arises only after two conditions have been met:

(a) the alleged trust-like or fiduciary relationship must be established on a *prima facie* basis (on this, counsel agreed with RRDC's submission); and

(b) the documents claimed must have been obtained or prepared in the course of the administration of the trust-like relationship, or in the course of the fiduciary carrying out their fiduciary duty.

[25] Further, Canada's counsel asserts that the fiduciary duty arising from the special or *sui generis* relationship between the Crown and First Nations "does not exist at large" and is not a source of "plenary Crown liability": *Weywaykum*, cited above, at para. 81. Thus, in the Crown-aboriginal context, the expanded application of the common interest exception to solicitor-client privilege should only apply when there is a fiduciary duty in relation to *specific* aboriginal interests. When multiple interests besides those of a First Nation are at play, then Canada submits that those competing interests must be weighed, and only if the First Nation's interest outweighs all others, does the common interest exception apply.

[26] Canada says that the Crown wears "many hats" and is responsible to the *whole* of the Canadian population. Thus, the Crown may continue to claim solicitor-client privilege over those documents that relate to multiple interests, or interests broader than those of the First Nation. In that regard, Canada's counsel points to the comments of Binnie J., speaking for the Supreme Court of Canada, in *Wewaykum*, cited above, at

para. 96:

> "When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.)…"

[27] Finally, relying upon *Samson* v. *Canada*, [1998] 2 F.C. 60 (F.C.A.), at para. 23, and *Homalco*, cited above, at para. 45, Canada's counsel says that any doubt in the process of weighing competing multiple interests must be resolved in favour of the protection of solicitor-client privilege.

[28] In the 1995 *Samson* decision, cited above, the Federal Court of Appeal was addressing an assertion of solicitor-client privilege by the Crown in the context of a specific surrender of reserve lands by three bands to the Crown in the 1940's. The Crown's control over the resources derived from the surrendered lands was at issue. The respondent First Nation argued that the trust relationship between the Crown and the Indians superseded the claim of privilege. The Court of Appeal had no difficulty concluding that there was a *prima facie* trust-style relationship between the First Nation and the Crown. However, beyond that, the Court had greater difficulty with the notion that the subject documents were obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out its duties. With respect to Crown "trusts", the Court said this at paras. 21 and 22:

> "…The Crown can be no ordinary "trustee". It wears many hats and represents many interests, some of which cannot but be conflicting. It acts not only on behalf or in the interest of the Indians, but it is also accountable to the whole Canadian population. It is engaged in many regards in

> continuous litigation. It has always to think in terms of present and future legal and constitutional negotiations, be they with the Indians or with the provincial governments, which negotiations, it might be argued, can be equated in these days and ages with continuous litigation. Legal advice may well not have been sought or obtained for the exclusive or dominant benefit of the Indians, let alone that of the three bands involved in these proceedings…
>
> There being many possible "clients" or "beneficiaries", there being many possible reasons for which the Crown sought legal advice, there being many possible effects in a wide variety of areas deriving from the legal advice sought, it is simply not possible at this stage to assume in a general way that all documents at issue, in whole and in part, are documents which were obtained or prepared by the Crown in the administration of the specific "trusts" alleged by the respondents and in the course of the Crown carrying out its duties as "trustee" for the respondents."

[29] To be clear, the RRDC is not alleging the existence of a *trust* here. Rather, it relies upon the asserted *fiduciary relationship* between the Crown and the RRDC (Kaska) arising from its claims to certain identifiable lands. It is in this respect that it persuades me to extend the application of the common interest exception to the portions of the Cabinet documents it seeks on this application.

ANALYSIS

[30] Solicitor-client privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege: *Canada* v. *Solosky*; *Samson* (1995), at para. 23; and *Homalco*, at para. 2; all cited above.

[31] I acknowledge that Canada, in preparing for the hearing of this application, changed its position with respect to which portions of the Cabinet documents it claims are subject to solicitor-client privilege. Indeed, that was due in large part to a meeting between counsel for the parties on August 12, 2009. At that meeting, RRDC's counsel

pointed out that the redacted portions of the “Memorandum to the Cabinet”, dated June 27, 1973, #667-73, and the “Memorandum for the Cabinet”, dated June 28, 1973, #671-73, were disclosed elsewhere in the “Cabinet Minutes” dated July 19,1973. Consequently, in a letter to RRDC’s counsel dated August 24, 2009, Canada’s counsel clarified, in effect, that she was no longer claiming solicitor-client privilege with respect to those portions of the Cabinet documents discussed at the meeting between counsel on August 12th.

[32] As a result, RRDC’s counsel argued that, since Canada has previously claimed that *all* the redacted portions were subject to solicitor-client privilege, the fact that Canada subsequently disclosed portions of the documents subject to that privilege amounts to a “waiver of privilege as to part of a communication”, in the sense discussed in *S. & K. Processors Ltd.*, cited above, which should result in a waiver as to the entire communication. While that argument is deceptively appealing, I have decided to reject it. A party should not be “penalized” for reconsidering its position and abandoning a claim of privilege previously asserted in error, with a view to simplifying the issues and shortening the hearing. RRDC’s argument in this regard suggests that Canada should forever be estopped from changing its legal position, once it has asserted a claim of solicitor-client privilege over a particular document. In my view, such an outcome would both discourage and delay the expeditious resolution of these types of disputes without any obvious justification.

[33] In the result, the partially redacted documents which remain at issue are limited to the following:

1. “Cabinet Minutes”, dated February 8, 1973, #C7-73;

2. “Indian and Inuit Claims Policy”, dated June 5, 1973, #570-73;

3. “Memorandum to the Cabinet”, dated June 8, 1973, #574-73;

4. [Joint] “Memorandum to the Cabinet”, dated June 27, 1973, #667-73; and

5. “Cabinet Minutes”, dated July 19, 1973, #32-73.

I will address each in turn.

1. “Cabinet Minutes”, dated February 8, 1973, #C7-73

[34] The unredacted copy of these minutes provided to me by Canada is five pages long in total.[1] The redacted portion is a single paragraph beginning at the bottom of the paginated page five and carrying on to the top of the paginated page six. As Canada’s counsel had previously indicated to RRDC’s counsel in her letter of September 4, 2009, the redacted portions contain a legal opinion of the then Minister of Justice, the Honourable Otto Lang, regarding the outcome of the *Calder* decision. There is no dispute that the Minister of Justice acts as the official legal advisor to Cabinet from time to time, pursuant to the *Department of Justice Act*, R.S.C. 1985, c.J-2, s. 4. Having reviewed the content of the redacted paragraph, I am satisfied that Canada has met its onus of establishing that the communication is subject to solicitor-client privilege. It is a communication between a lawyer (the Minister of Justice) and his client (Cabinet), which entailed the giving of legal advice and was intended to be confidential.

[35] The onus then shifts to RRDC to show that the privilege has been waived. RRDC’s first line of attack here is that there has been disclosure of a material part of the privileged communication elsewhere within the same Minutes, or in the other disclosed documents, and thus the entire redacted communication should be disclosed on the

[1] I note that, after the first two cover pages, the next previously paginated page is “5” and there is a blank space before the title “Claims of Native People”. However, I gathered from Canada’s counsel at the hearing that the unredacted copies of the documents provided to me for review under Rule 25(15) are in exactly the same state as they were when provided to Canada by the federal archivist at Library and Archives Canada.

basis of the principle in *S.& K. Processors Ltd.*, cited above. However, I am not satisfied that RRDC has met its onus in establishing, on the balance of probabilities, that this privileged information has already been disclosed elsewhere. Admittedly, there is a reference in the second paragraph of paginated page five to certain opinions expressed by the then Minister of Indian Affairs and Northern Development, the Honourable Jean Chrétien, about the significance of the *Calder* decision, which reads very much like a legal opinion. However, I accept Canada's submission that Minister Chrétien was not then speaking in his capacity as legal advisor to Cabinet, but rather as the Minister of Indian Affairs and Northern Development. In any event, I am not satisfied that there has been waiver by partial disclosure of otherwise privileged information.

[36] The second line of attack by RRDC's counsel is that there has been waiver by disclosure of closely-related information. I have already indicated above that this rationale for waiver of solicitor-client privilege should be applied sparingly and only in situations where the disclosure of information closely-related to the privileged information sought would mislead the opposite party or the court, such that consistency and fairness would require further disclosure of the privileged information. Having had the opportunity to review the content of the redacted privileged information, as well as the balance of the document, I am not satisfied that RRDC has met its onus in this regard.

[37] The final line of attack by RRDC in seeking disclosure of the redacted paragraph is its argument on the common interest exception to solicitor-client privilege.

[38] In my view, the context of the issues raised in the present actions is similar to the situation facing the Federal Court of Appeal in the 1995 *Samson* decision, cited above.

Given the special relationship between the Crown and the RRDC (Kaska), in the context of the principle of the honour of the Crown, like the Court in *Samson*, I have little difficulty finding that a fiduciary relationship can be established on a *prima facie* basis. However, I have a significant problem addressing whether the second condition in *Samson* has been met. More particularly, it is not possible at this stage of the litigation to find in a general way that the Cabinet Minutes of February 8, 1973 were created or obtained by the Crown in the context of carrying out its duties as a fiduciary in relation to the specific aboriginal interests asserted by the RRDC (Kaska). As I noted above at paras. 22 and 23, RRDC's counsel says these interests arise from the alleged undertaking in the *1870 Order.*

[39] Rather, I agree with the submissions of Canada's counsel that the Cabinet Minutes were apparently created in response to the *Calder* decision, which had the possibility of affecting non-treaty lands in various regions of the country, many First Nations and non-native Canadians, as well as the provinces and the northern territories. To paraphrase the Court of Appeal in *Samson*, the legal advice may well *not* have been sought or obtained for the exclusive or dominant benefit of the aboriginal people concerned, let alone that of the RRDC (Kaska) in these proceedings. There are many possible reasons for which the Crown likely sought the legal advice, as well as many possible effects in a wide variety of areas deriving from the advice sought. The Crown was wearing many hats in the service of the Canadian public as a whole and was not acting solely as fiduciary with respect to the RRDC's particular interests. It is thus simply not possible to assume that the sought portion of the document at issue was prepared or obtained by the Crown in carrying out any fiduciary duty it may have towards the

RRDC (Kaska) arising out of the *1870 Order*. Putting it another way, I conclude that there were very likely many competing interests at stake at the time the document was created, and that RRDC has not discharged its onus in persuading me that its interests outweigh the other interests (to use the language of Bennett J. in *Homalco*, cited above) to such an extent that no solicitor-client privilege may be claimed. In any event, any doubt in such a weighing process is to be resolved in favour of the preservation of the privilege.

2. "Indian and Inuit Claims Policy", dated June 5, 1973, #570-73

[40] The unredacted copy of this document is 33 pages in length, inclusive of a two page introductory summary and four appendices. The redacted portion is comprised of two paragraphs beginning at the bottom of paginated page three of the body of the Memorandum to Cabinet. As Canada's counsel stated in her letter to RRDC's counsel dated July 28, 2009, the redacted portions contain references to a legal opinion of the Minister of Justice on the *Calder* decision and several references to the legal conclusions in that opinion. Having reviewed the content of the redacted paragraphs, I am satisfied that Canada has met its onus of establishing that the communication is subject to solicitor-client privilege. Although the document as a whole was prepared by the Minister of Indian Affairs and Northern Development, the redacted paragraphs obviously refer to legal advice provided by the Minister of Justice. The principle that solicitor-client privilege may attach to advice or information provided by a lawyer which is incorporated into a document prepared by someone other than the lawyer was not in dispute on this application: see *K.F. Evans Ltd.,* cited above, at para. 10.

[41] Once again, the onus thus shifts to RRDC to show that the privilege has been waived, which it seeks to do by firstly arguing partial disclosure of the privileged information elsewhere within that document, or in the other Cabinet documents, and secondly, by arguing that there has been disclosure of closely-related information.

[42] I again acknowledge that Canada changed its initial position on the extent of the redacted portions of this document. It initially claimed that a single paragraph on the first page of the main Memorandum (after the two page Summary), was subject to solicitor-client privilege. However, after the meeting between counsel on August 12, 2009, in her letter to RRDC's counsel dated August 24, 2009, Canada's counsel resiled from that position. The now unredacted paragraph reads:

> "This paper should be read in conjunction with a companion paper prepared by the Minister of Justice which reviews the nature and extent of claims of Indians to lands outside reserves in the light of the *Calder* case and the legal implications that must be considered in framing a policy."

In my view, this does not amount to disclosure of privileged information. Nor has counsel for RRDC met its onus in persuading me that information subject to solicitor-client privilege has been disclosed elsewhere in the unredacted portions of the documents. Consequently, I am not satisfied that there has been waiver by partial disclosure of otherwise privileged information.

[43] With respect to the second line of argument, RRDC has failed to point to any particular passage or passages within the unredacted parts of the documents which might constitute information closely-related to the privileged information sought. Nor have I been able to find, on my review of the balance of the documents, any unredacted information closely-related to the privileged information sought which could mislead

RRDC or this Court, such that consistency and fairness would require further disclosure of the redacted privileged information.

[44] The final basis put forward by RRDC to justify disclosure of the privileged information is its argument on the common interest exception to solicitor-client privilege. However, for the reasons I stated in para. 39 above, I am unpersuaded that this particular document was created or obtained by the Crown principally for the purpose of carrying out any fiduciary duty it may have towards the RRDC arising out of the *1870 Order.* Once again, I find that there were likely competing interests at stake at the time the document was created and that RRDC has not discharged its onus in persuading me that its interests outweigh those other interests. Finally, any doubt in such a weighing process is to be resolved in favour of the preservation of solicitor-client privilege.

3. "Memorandum to the Cabinet", dated June 8, 1973, #574-73

[45] The unredacted copy of this memorandum is 18 pages long in total, including a three page Appendix (there being no assertion of privilege with respect to the latter). The majority of the document has been redacted, beginning with the second full paragraph on paginated page two and continuing to the end of the body of the memorandum.

[46] This is the exceptional document I alluded to in paragraph three of these reasons. RRDC concedes that, subject to its 'common-interest exception' argument, the legal opinion set out by the Minister of Justice in this memorandum would have been subject to solicitor-client privilege. However, RRDC continues to argue that the privilege has been waived by the voluntary disclosure:

(i) of the unredacted parts of that Memorandum;

(ii) of parts of the legal opinion set out in that Memorandum elsewhere in the Cabinet documents; and

(iii) of closely-related information elsewhere in the Cabinet documents.

[47] The portion of this document which has been disclosed is comprised of a total of four paragraphs. RRDC's counsel sought to characterize the content of these paragraphs as an "analysis" by the Minister of Justice of the *Calder* decision. In my view, the disclosed portions do not constitute an analysis at all, but rather a statement of the problem facing the Cabinet as a result of *Calder*, the objectives of Cabinet following *Calder*, and a summary of what the Justices of the Supreme Court of Canada concluded in *Calder*, led principally by Justices Judson and Hall. This summary reads much like a head note in a case report.[2] In short, I am not persuaded that the disclosed text can be said to constitute a portion of a privileged legal opinion. Therefore, RRDC's first waiver argument must fail.

[48] RRDC's second argument on this point is that there has been disclosure of parts of the legal opinion elsewhere in the Cabinet documents. In particular, counsel points to portions of the joint "Memorandum to the Cabinet", dated June 27, 1973, #667-73. Again, I acknowledge that Canada changed its position following the meeting between counsel on August 12, 2009, and subsequently disclosed portions of document #667-73 which it previously claimed were subject to solicitor-client privilege. The material portions of this document read as follows (the bold italicized text was previously, but is no longer, redacted):

[2] The actual text of the disclosed portion of the Memorandum is attached to these reasons as Schedule A, less the Appendix which is not in dispute.

(a) On page one, in the second paragraph:

> "On June 14, 1973, Cabinet considered two papers, ***Cab. Doc. No. 570-73 "Indian and Inuit Claims Policy" presented by the Minister of Indian Affairs and Northern Development, and Cab. Doc. No. 574-73 "Indian Title and Land Claims" presented by the Minister of Justice.*** Both papers accepted that the Indian title question is but a portion of the overall problem. The Indian Affairs paper, in particular, pointed out that the settlement of the legal claims affords an opportunity to contribute to a comprehensive settlement of Indian claims, including non-legal problems, and suggested steps that could be taken to deal with the claims on a comprehensive basis. ***The Justice paper dealt with the implications flowing from the legal position, and made recommendations regarding the immediate steps that should be taken in relation to claims regarding the "Indian title" to land in the light of the current legal situation.***
>
> The two papers, therefore, were complimentary, but emphasised different aspects of the problem…"

(b) On page two, in the third and fourth paragraphs:

> "This joint paper is, therefore, submitted in compliance with this direction. ***On examination of the previous papers,*** it was decided that the following matters required further clarification:
>
> …
>
> (a) <u>Immediate Public Posture and Time Sequence:</u>
> On the basis of conclusions reached in discussions between the two departments, the undersigned are of the opinion that the Government should immediately and publicly declare a policy ***of recognizing the Indian title where its surrender by the Indians has not yet taken place*** in the Territories, Northern Quebec and British Columbia, and accept the principle of compensating them for loss of traditional use and occupancy, but making clear its view that, while responsibility for compensation regarding lands in the Territories is that of the federal Government, responsibility for compensation regarding lands in a province is primarily that of the province."

(c) On page three, part way through the first paragraph, which begins on the previous page:

> "Following the announcement of the policy, the federal Government should consult with Quebec and British Columbia with a view to seeking their agreement both to join in the negotiations with the Indians and to join in providing an appropriate share of any compensation that is to be offered to the Indians as a result of the negotiations, warning these provinces that if they do not live up to their proper obligations, the federal Government ***will be obliged to assist the Indians formally in establishing their title.*** Alternatively, the federal Government might inform Quebec and British Columbia of its intentions before the announcement of the policy, inviting them to participate in the negotiations and warning them that if they do not agree to do so the federal Government will be obliged to enter into negotiations with the Indians directly ***and, if necessary, to assist them in the courts in asserting their title.*** If the agreement of the provinces to participate is not forthcoming, the Government should proceed with the negotiations with the Indians in those provinces, making it clear that no agreement can be finalized without the participation of the provinces…"

(d) On pages seven and eight:

> "3. <u>Joint Recommendations</u>
>
> We, therefore, jointly recommend that:
>
> (1) the Government should immediately and publicly declare a policy ***of recognizing the Indian title where its surrender by the Indians has not yet taken place in*** the Territories, northern Quebec and British Columbia, and accept the principle of compensating them for loss of traditional use and occupancy, but making clear its view that, while responsibility for compensation regarding lands in the Territories is that of the federal Government, responsibility for compensation regarding lands in a province, is primarily that of the province.
>
> (2) Following the announcement of the policy, it should consult with Quebec and British Columbia with a

> view to seeking their agreement both to join in the negotiations with the Indians and to join in providing an appropriate share of any compensation that is to be offered to the Indians as a result of the negotiations, warning these provinces that if they do not live up to their proper obligations, the federal Government ***will be obliged to assist the Indians formally in establishing their title*****.** Alternatively, the federal Government might inform Quebec and British Columbia of its intentions before the announcement of the policy; inviting them to participate in the negotiations and warning them that if they do not agree to do so the federal Government will be obliged to enter into negotiations with the Indians directly ***and, if necessary, to assist them in the courts in asserting their title*****.**
>
> …
>
> (8) ***The Government should indicate that claims with respect to Indian title in other regions of Canada, such as southern Quebec and the Atlantic Provinces, are of a different character and that the Government will be prepared to deal with these claims as and when they are made on the basis that it is up to the Indians concerned to establish them.***"

[49] Much of what appears above on pages seven and eight of document #667-73, also appears within a list of recommendations on page 15 of the Memorandum to Cabinet #574-73, currently under discussion. Indeed, three of the four recommendations in the list appear to be precursors to recommendations (1), (2) and (8) in document #667-73. In some sentences, the language has been tracked verbatim. Canada's counsel says that *all* of the redacted portion of Memorandum #574-73 is subject to solicitor-client privilege and contains "the legal analysis of the Minister of Justice of the legal implications of the *Calder* decision in aboriginal title across Canada as well as a description and weighing of the legal courses of action available to the

Crown."[3] Thus, in the joint Memorandum #667-73, there has been partial disclosure of privileged information in the recommendations on page 15 of the legal analysis. Furthermore, the balance of the redacted legal analysis in Memorandum #574-73 relates directly to those recommendations and deals with the same subject matter.

[50] RRDC's counsel also pointed to document #671-73 as another instance where parts of the Minister's legal opinion in Memorandum #574-73 have been disclosed elsewhere. Document #671-73 is yet a further example of where Canada changed its position from asserting that portions were subject to solicitor-client privilege, to withdrawing that assertion and subsequently providing disclosure. Those portions of the document which are material in this regard are set out as follows (the sentences previously, but no longer, redacted are in bold italics):

(a) On page one:

> "MEMORANDUM FOR THE CABINET:
>
> Indian and Inuit Title Claims
> Titres et Réclamations des Indiens et Inuit
>
> The Special Committee of Ministers on Indian Claims had for consideration three memoranda: the first from ***the Minister of Indian Affairs and Northern Development (Cab. Doc. 570/73, dated 5 June 1973); the second from the Minister of Justice (Cab. Doc. 574/73, dated June 8, 1973)****;* and the third jointly signed by the two above Ministers (Cab. Doc. 667/73, dated 27 June, 1973), requesting Cabinet approval for a policy on Indian and Inuit land claims.
>
> The Committee agreed that:
>
> (1) the Government should immediately and publicly declare a policy ***of recognizing the Indian title where its surrender by the Indians has not yet taken place*** in the Territories, northern Quebec and British Columbia, and accept the principle of compensating them for loss of traditional use and occupancy, but making clear its view that, while

[3] Canada's Outline, para. 21.

responsibility for compensation regarding lands in the Territories is that of the federal Government, responsibility for compensation regarding lands in a province is primarily that of the province;

(2) the federal Government will inform Quebec and British Columbia of its intentions before the announcement of the policy, inviting them to participate in the negotiations and advising them that if they do not agree to do so the federal Government will be obliged to enter into negotiations with the Indians directly ***and, if necessary, to assist them in the courts in asserting their title***;

(3) if the agreement of Quebec and British Columbia to participate in the negotiations is not forthcoming, the Government should proceed with the negotiations with the Indians in those provinces, making it clear that no agreement can be finalized without the participation of the provinces;

(4) any public announcement concerning ***Indian and Inuit title and claims*** in the above-mentioned regions will have to take account of the fact that in Quebec, the matter is presently "sub-judice"; and

(b) On page three:

(10) ***the Government should indicate that claims with respect to Indian title in other regions of Canada, such as southern Quebec and the Atlantic Provinces, are of a different character and that the Government will be prepared to deal with these claims as and when they are made on the basis that it is up to the Indians concerning to establish them;****…"*

[51] In my view, the above information eventually disclosed by Canada in document #671-73 does constitute partial disclosure of the Minister's legal opinion in Memorandum #574-73; specifically, items (1) and (10) above relate directly to recommendations (1) and (3) on p. 15 of the legal opinion.

[52] The final document which RRDC points to as containing parts of the Minister's legal opinion in Memorandum #574-73 are the "Cabinet Minutes" dated July 19, 1973,

#32-73. Once again, I find that there are parts of the Minutes which reflect the Minister's recommendations on p.15 of his opinion. In particular, I refer to items (1), (2), and(10) on pp. 7 and 8 of the Minutes, set out below:

> "(1) the government should immediately and publicly declare a policy of recognizing the Indian title where its surrender by the Indians has not yet taken place in the Territories, northern Quebec and British Columbia, and accept the principle of compensating them for loss of traditional use and occupancy, but making clear its view that, while responsibility for compensation regarding lands in the territories is that of the federal government, responsibility for compensating regarding lands in a province is primarily that of the province;
>
> (2) the federal government will inform Quebec and British Columbia of its intentions shortly before the announcement of the policy, inviting them to participate in negotiations and advising them that if they do not agree to do so the federal government will be obliged to enter into negotiations with the Indians directly and, if necessary, to assist them in the courts in asserting their title;
>
> …
>
> (10) the government should indicate that claims with respect to Indian title in other regions of Canada, such as southern Quebec and the Atlantic provinces, are of a different character and that the government will be prepared to deal with these claims as and when they are made on the basis that it is up to the Indians concerned to establish them;"

In my view, there is a direct relationship between these items and items (1), (2) and (3) on p. 15 of the Minister's legal opinion.

[53] It is significant here that RRDC has pled the history and circumstances of the comprehensive land claims policy announcement by the federal Government on August 8, 1973. It also pleads that the RRDC land claims, and those of the Kaska, were part of

the comprehensive land claims of the Yukon Indian people, which were the first claims accepted by Canada under the comprehensive land claims policy in 1973. Canada has generally admitted these factual allegations, but says that the claim of the Yukon Indian people was accepted for the limited purposes of negotiation of a comprehensive land claim agreement and that Canada did not recognize their claim as a claim of aboriginal title. RRDC has also pled that it relied upon the acceptance by Canada of its land claim, and has subsequently organized its legal, economic and social affairs, based upon that acceptance, including having borrowed substantial sums of money from Canada to prepare for, and participate in, the ensuing negotiations. Consequently, it seems that the comprehensive land claims policy may be a material point at the trial of these actions, although to what extent is presently unclear. Thus, the legal opinion which contributed to the formation of the policy could also be relevant, although precisely how RRDC may use it, if at all, is also presently unclear. Nevertheless, the legal advice in Memorandum #574-73 is sufficiently linked with this litigation that, having disclosed the substance of three of the four recommendations flowing from that advice, it would be inconsistent and unfair to RRDC to allow Canada to maintain that the advice itself remains under the cloak of solicitor-client privilege.

[54] In some respects, this case is analogous to *K. F. Evans Ltd.*, cited above, where Rothstein J. said at para. 18:

> "Perhaps in an effort to be cooperative, the respondent disclosed as much of the solicitor-client advice and information that he considered could be disclosed without damage or embarrassment. Be that as it may, inconsistency has resulted."

And earlier, quoting from *Wigmore*, at para. 15:

> "…There is always also the objective consideration that when [a privileged person's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final."

Therefore, in the interests of fairness and consistency, the entire redacted part of Memorandum #574-73 should be disclosed to RRDC.

[55] Given my conclusion that there has been waiver by partial disclosure of privileged information, it is unnecessary for me to address RRDC's alternative argument for disclosure, namely that there has been voluntarily disclosure of "closely-related information" elsewhere in the Cabinet documents.

[56] Lastly, while it is also unnecessary for me to deal with RRDC's argument based on the common interest exception to solicitor-client privilege, for the sake of completeness I will touch on it briefly. For the same reasons I gave at para. 39 above, I remain unsatisfied that the Minister's legal opinion was prepared or obtained by the Crown in carrying out any fiduciary duty it may have towards the RRDC arising out of the *1870 Order*. At the very least, I conclude that there were likely competing interests at stake at the time the document was created and that RRDC has not discharged its onus in persuading me that its interests outweigh the other interests to such an extent that no solicitor-client privilege may be claimed. In any event, any doubt in the weighing process is to be resolved in favour of preserving the solicitor-client privilege.

4. "Memorandum to the Cabinet", dated June 27, 1973, #667-73

[57] The unredacted copy of this document is 18 pages in its entirety. However, it is actually comprised of two separate, but virtually identical memoranda, each nine pages

in length, from the Ministers of Justice and Indian Affairs and Northern Development, respectively. As I noted above, Canada changed its position and decided to disclose portions of the document which it previously asserted to be subject to solicitor-client privilege. The only remaining portion of this document which is redacted is one four-line sentence at the beginning of the second complete paragraph on paginated page three in each of the separate memoranda. Having reviewed that sentence, which is identical in each memorandum, I am not satisfied that it meets the three criteria for establishing solicitor-client privilege as set out in *Solosky,* cited above.[4] In other words, I conclude that Canada has not met its onus of establishing privilege on the balance of probabilities. In my view, that information, or at least the essence of it, is contained elsewhere within the document and, consequently, I am unable to conclude that it was intended to be confidential as between the Minister of Justice and the Cabinet.[5] Indeed, the sentence begins as follows: "*As mentioned*, both the Indian Affairs and Justice papers recommend …" (my emphasis), indicating that what follows has been discussed earlier in the document.

[58] In the alternative, even if the redacted sentence could be said to contain privileged information, I am satisfied that, because that information has been disclosed elsewhere, the privilege has been waived and the redacted information should also be disclosed.

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[4] In order to establish solicitor-client privilege, the claimant must satisfy the court that there has been: (i) a communication between a lawyer and a client; (ii) which entails the seeking or giving of legal advice; (iii) which is intended to be confidential as between the lawyer and client.

[5] One might reasonably expect that *anything* discussed within Cabinet would be intended to remain confidential. Indeed, it appears Cabinet confidentiality was absolute prior to a Cabinet Directive in 1967 that Cabinet documents were made available in the Public Archives of Canada when they were 30 years old (Norman Marsh, *Public Access to Government-held Information*, Great Britain: Steven & Sons, 1987, at 131). This administrative process became a statutory one with the enactment of the *Access to Information Act* in 1980. Thus, in 1973, the members of Cabinet would have known that the content of their discussions would become public in 30 years time, subject to any assertions of solicitor-client privilege.

[59] In the further alternative, even if it could not be said that there has been disclosure of privileged information relating to the redacted sentence, this appears to be one of those rare situations where there has been sufficient disclosure of other closely-related information, or other information intricately connected with that contained within the redacted sentence, that the interests of consistency and fairness dictate that the redacted sentence should also be disclosed.

[60] Having said all that, it is probably unnecessary for me to decide on the disclosure of the redacted sentence on the basis of the common interest exception to solicitor-client privilege. However, had I been required to do so, I would have ruled that the exception does not apply in these circumstances either, for the same reasons I gave at para. 39, above.

5. "Cabinet Minutes", dated July 19, 1973, #32-73

[61] The unredacted copy of these Minutes, as provided to me by Canada, total seven pages in length. The redacted portion is a seven-line, one sentence paragraph, listed as item (2) at the top of page six of the paginated pages.[6] Having reviewed the context of the redacted paragraph, I am satisfied that Canada has met its onus of establishing that the communication is subject to solicitor-client privilege. It is obviously a communication between the Minister of Justice and his client, the Cabinet, which entailed the giving of legal advice intended to be confidential.

[62] Thus, the onus shifts to RRDC to show that the privilege has been waived. Here, it strikes me that portions of the unredacted Minutes, particularly those at the bottom of

[6] As with the Cabinet Minutes dated February 8, 1973, I note that, after the first two cover pages, the next previously paginated page is "5" and the last paginated page is "9". The last topic in the Minutes is entitled "Two Price Wheat", and it is apparent that the text continues on a following page or pages, which have not been provided. Nevertheless, I have assumed here, as above, that Canada's counsel has provided me with a copy of these Minutes in exactly the same state as they were provided to Canada by the federal archivist at Library and Archives Canada.

paginated page seven and the top of paginated page eight, specifically items (6) and (7), read together, can be said to relate very closely to the Minister's redacted legal advice. Those items read as follows:

> "(6) the following persons should provisionally be considered as eligible for benefits under a settlement:
>
> (a) all persons recognized as being Indians in the communities in which they live or have lived, so long as it can be established that they have Indian blood and so long as they live in the broad area under negotiations;
>
> (b) all persons coming within the definition "Indian" in the Indian Act, whether or not they are persons described in (a) above, so long as they live or have lived in the area under negotiation; and
>
> (c) all persons, whether or not they come under (a) or (b) above, so long as it can be established that they fall within a formula such as the quarter-blood basis and so long as they live in the broad area under negotiation;
>
> (7) these criteria of eligibility, although not strict at the present time, should be capable of adjustment in the early stages of each negotiation, and the Indians conducting the negotiations might be permitted to share the benefits with persons not represented so long as this did not increase the size of the settlement."

[63] Similarly, in joint Memorandum #667-73, item (5) on paginated page seven, set out below, contains language almost identical to that in items (6) and (7) of the subject Minutes:

> "(5) The following persons should provisionally be considered as eligible for benefits under a settlement:
>
> (a) all persons recognized as being Indians in the communities in which they live, so long as it can be established that they have Indian blood and so long as they live in the broad area under negotiation e.g., the Yukon;

> (b) all persons coming within the definition “Indian” in the Indian Act, whether or not they are persons described in (a) above, so long as they live in the area under negotiation; and
>
> (c) all persons, whether or not they come under (a) or (b) above, so long as it can be established that they fall within a formula such as the quarter-blood basis and so long as they live in the broad area under negotiation.
>
> However, some latitude should be given the Special Committee of Ministers on Indian claims to adjust these criteria in the early stages of negotiation, and the Indians conducting the negotiations might be permitted to share the benefits with persons not represented so long as this did not increase the size of the settlement.”

[64] In my view, the above items quoted amount to effective disclosure of much of the substance of the Minister’s legal advice in item (2) of the Cabinet Minutes. Even in the absence of an intention to waive privilege, this partial disclosure would, in the interests of fairness and consistency, dictate full disclosure, so as to ensure that the court and the applicant are not misled. As Rothstein J. said in *K.F. Evans Ltd*., cited above, at para. 24:

> “This is a case in which, as *Wigmore* says, the conduct of the respondent touches a certain point of disclosure at which fairness requires that privilege shall cease whether that is the intended result or not. “

[65] In the further alternative, even if the disclosed items I have identified above, do not constitute privileged information, I would be prepared to find that they are so closely related to, or intricately connected with, the Minister’s redacted opinion in item (2), that this is one of those rare instances where consistency and fairness dictate that the opinion should also be disclosed.

[66] Although it may be unnecessary to address the final argument advanced by RRDC, I would continue to decline to apply the common interest exception to solicitor-client privilege with respect to the redacted portion of this particular document, for the same reasons advanced above at para. 39.

CONCLUSION

[67] In summary, my conclusions are as follows with respect to each of the subject Cabinet documents:

1. "Cabinet Minutes", dated February 8, 1973, #C7-73

The redacted portion is subject to solicitor-client privilege and RRDC has failed to show that the privilege has been waived. The common interest exception to solicitor-client privilege does not apply to this document.

2. "Indian and Inuit Claims Policy", dated June 5, 1973, #570-73

The redacted paragraphs are subject to solicitor-client privilege and RRDC has failed to show that the privilege has been waived. The common interest exception to solicitor-client privilege does not apply to this document.

3. "Memorandum to the Cabinet", dated June 8, 1973, #574-73

The parties agree that the redacted portion of this document is subject to solicitor-client privilege. Three of the four recommendations by the Minister of Justice on page 15 of the document have been partially disclosed elsewhere in the other Cabinet documents, particularly those numbered 667-73, 671-73, and 574-73. Further, the redacted recommendations arise directly from the preceding legal analysis and the entire document is focussed on the same subject matter, namely the Government's response to the *Calder* decision. Thus, that partial

disclosure justifies an order that the entirety of the Minister's Memorandum #574-73 should also be disclosed. Although it may be unnecessary to decide the point, the common interest exception to solicitor-client privilege does not apply to this document.

4. "Memorandum to the Cabinet", dated June 27, 1973, #667-73

Canada has not met its onus in establishing that the redacted four line sentence is subject to solicitor-client privilege. Therefore, it ought to be disclosed. In the alternative, even if the sentence could be said to contain privileged information, because that information has been disclosed elsewhere, the privilege has been waived and the redacted information should also be disclosed. In the further alternative, even if it could not be said that there has been disclosure of privileged information relating to the redacted sentence, this is one of those rare instances where there has been sufficient disclosure of other information closely-related or intricately connected with that contained within the redacted sentence, that consistency and fairness dictate that the redacted sentence should also be disclosed. Having said that, the common interest exception to solicitor-client privilege would not apply to this document.

5. "Cabinet Minutes", dated July 19, 1973, #32-73

Canada has satisfied me that the redacted portion of this document is subject to solicitor-client privilege. However, RRDC has similarly met its onus in showing that the privilege has been waived. The substance of the Minister's legal advice has been disclosed elsewhere within the document, and also in document #667-73. Even in the absence of an intention to waive, a sufficient amount of the

content of the privileged information has been disclosed elsewhere to warrant full disclosure of the redacted information. In the further alternative, even if the identified disclosed information is not privileged, it is so closely related to the substance of the Minister's opinion that consistency and fairness dictate the latter should also be disclosed. Finally, although I do not have to decide the question, I would nevertheless decline to apply the common interest exception to solicitor-client privilege with respect to this document.

[68] As RRDC has been substantially successful on this application, I conclude that it should be awarded costs, but those costs will be in the cause.

[69] To avoid any uncertainty arising from this judgment, I direct that the disclosure I have ordered shall be made within 30 days from the date this judgment is filed, subject to an appeal, or an application for directions, by either party within that time.

Gower J.

Schedule A

CABINET DOCUMENT No. 574-73

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THIS DOCUMENT IS THE PROPERTY OF THE GOVERNMENT OF CANADA

FOR MINISTERS' EYES ONLY

June 8, 1973.

MEMORANDUM TO THE CABINET:

COPY NO. 57
NO. D'EXEMPLAIRE

Re: Indian Title and Land Claims
Réclamations des Indiens
aux titres de propriété

1. Problem

The recent case of *Calder v. Attorney General* has raised serious questions regarding the nature and extent of Indian claims to lands outside reservations.

2. Objectives

To consider the nature and extent of the claims of Indians to lands outside reserves in the light of the *Calder* case, and the legal implications that must be considered in framing a policy for dealing with these claims.

3. Factors

(a) The *Calder* case: In the *Calder* case, the Nishga Indians sought a declaration that they had a right recognizable at law to occupy and use some 1,000 square miles of land in British Columbia in the manner in which they had done so from time immemorial, a right existing either by virtue of such occupation (i.e., aboriginal title) or under the terms of the Royal Proclamation of 1763 (by which following the Conquest, vast tracts of land had been set aside for the use of the Indians). The claim was rejected (4 to 3) by the Supreme Court of Canada on the ground that there was no right to sue the province under British Columbia law, Justices Judson, Ritchie, Martland and Pigeon constituting the majority. Mr. Justice Pigeon confined his opinion to this technical point, so that on the substantive issue the court split 3 to 3. Mr. Justice Judson gave an opinion, in which Justices Ritchie and Martland concurred. Mr. Justice Hall, with whom Justices Spence and Laskin concurred, gave a conflicting opinion.

The Judson opinion concluded that the 1763 proclamation did not apply to British Columbia because the lands set aside for the Indians by the proclamation did not include lands in that province. If an aboriginal title ever existed there apart from the proclamation, it

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had been lawfully extinguished by a series of proclamations by the Governor and legislative action of the colony before Confederation. Moreover, this state of affairs had been recognized by the federal Parliament, in exercising its legislative authority over Indians, by statutes confirming federal-provincial agreements regarding Indian reserves in British Columbia. Consequently, the Indian title in British Columbia exists only in reservations expressly created by the province.

The Hall opinion accepted the view that possession of land by the Indians from time immemorial in the settled manner in which it had been occupied by the Nishga tribe is sufficient to establish an Indian aboriginal title. No document (such as the proclamation of 1763) was required to create it. When a country is conquered or settled, the pre-existing laws and rights thereunder continue until altered, and if occupancy by the Indians is established their right to do so is recognized by the courts. Moreover, he thought the proclamation applied to this territory, both because it "followed the flag" whenever England acquired new territories, and because the lands reserved by the proclamation included British Columbia. Once the aboriginal title is established, it cannot be extinguished except by surrender by the Indians, or by clear and specific legislation by competent legislative authority. Neither the colony or Province of British Columbia nor the federal Parliament had, in his view, done so. Indeed, the Governors of the colony before Confederation did not have power to extinguish the Indian title except on paying compensation.

(b)