SUPREME COURT OF YUKON

Citation: *Ross River Dena Council* v. *The Attorney General of Canada*, 2009 YKSC 04

Date: 20090123
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 Walsh — Counsel for the Plaintiff
Suzanne Duncan — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Ross River Dena Council ("RRDC") for an order pursuant to Rule 25(14) of the *Rules of Court* requiring the Attorney General of Canada ("Canada") to produce an historical and anthropological Report, dated June 17, 1982, ("the Report") which reviewed the submission of the Kaska Dena Council ("KDC") for recognition of their comprehensive land claim in northern British Columbia. Pursuant to Rule 25(15), counsel for the parties have agreed that I may inspect the Report in order to decide this application. RRDC also seeks costs in any event of the cause.

ISSUES

[2] The issues on this application are as follows:

1. Canada submits that, since the Report reviewed KDC's claim in British Columbia, it can have no relevance to the within actions, which are solely concerned with RRDC's claims with respect to lands in the Yukon.
2. Canada submits that, as the parties' are still in the early stages of this litigation and that discoveries have not yet commenced, it would be premature for the Court to order production of the Report, since the facts which RRDC seeks to establish through the Report may become available by other means and through other documents.
3. Is the Report subject to solicitor-client privilege?
4. Alternatively, is the Report subject to settlement privilege?
5. If the Report is subject to either form of privilege, or both, has the privilege been waived?

ANALYSIS

Relevance

[3] RRDC has pled in its Statement of Claim in the '05 action the following:

> "2. The plaintiff and its members are part of the Kaska tribe of Indians.
>
> 3. The Kaska tribe of Indians, also known to the defendant Crown and its servants or agents as 'the Kaska' or 'the Kaska nation', is one of the aboriginal peoples of Canada, and is hereinafter referred to as 'the Kaska'
>
> …

> 4. The Kaska's traditional territory includes what is now the south-eastern part of the Yukon, and also includes adjacent lands in the Northwest Territories and British Columbia as shown on the map attached hereto as Schedule "A"."

[4] In its Statement of Defence in that action, at para. 4, Canada has pled that it:

> "has no knowledge of the facts alleged at paras. 2, 3, [and] 4… of the Statement of Claim; does not admit them to be true; and puts the plaintiff to the strict proof thereof."

[5] In its Statement of Claim in the '06 action, RRDC has made similar pleadings:

> "4. The plaintiff and its members are part of the Kaska tribe of Indians.
>
> …
>
> 6. The Kaska tribe of Indians also known to the defendant Crown and her servants and agents as 'the Kaska' or 'the Kaska nation', is one of the aboriginal peoples of Canada, and is hereinafter referred to as 'the Kaska'
>
> …
>
> 8. The whole of the traditional territory claimed by the Kaska includes what is now the south-eastern part of the Yukon, also includes adjacent lands in the Northwest Territories and British Columbia as shown on the map attached hereto as Schedule "A"."

[6] Once again, in its Statement of Defence in the '06 action, Canada similarly pled that it:

> "has no knowledge of the facts alleged at paras. 4, 6 [and] 8 …of the Amended Statement of Claim; does not admit them to be true; and puts the plaintiff to the strict proof thereof."

[7] Further, in Canada's "Reply to Notice to Admit", dated May 31, 2006, at para. 1, Canada stated that it:

> "has no knowledge of the fact that the plaintiff band and its members are part of an aboriginal people of Canada known to the defendant and her servants or agents as 'the Kaska tribe' or 'the Kaska nation'; [and it] further does not admit that to be true."

[8] Canada further stated, at para. 4 of the Reply to the Notice Admit, that it:

> "admits that traditional territory claimed by the Kaska includes what is now the south-eastern part of the Yukon and also includes adjacent parts of British Columbia and the Northwest Territories.
>
> [It] further says that [it] does not admit the existence, location and extent of the 'Kaska traditional territory' because [it] does not know that the territory exists, or the location of it…"

[9] Canada submits that the Report is focussed on the claimed territory of the KDC in British Columbia and not in Yukon, and that nowhere in the Report is RRDC mentioned or referred to. Therefore, since RRDC has made it clear in the within actions that the subject matter of its claims is confined to lands in the Yukon, the Report can have no relevance. However, Canada concedes that the Yukon is mentioned in the Report, if "only in passing", and that there is also reference in the Report to "the Kaska Dena Tribal Council", "the Kaska people", "the Kaska Dena people" and "the Kaska".

[10] The leading case for the test for relevance in this context is *Peter Kiewit Sons Co. of Canada Ltd.* v. *British Columbia Hydro & Power Authority*, (1982) 134 D.L.R. (3d) 154 (B.C.S.C.). In that case, McEachern C.J. referred to the *Peruvian Guano* case[1] from the English Court of Appeal. At para. 19 of McEachern C.J. quoted Lord Justice Brett in *Peruvian Guano*:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may--not which must--either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because, as it seems to me, a

[1] *The Compagnie Financiere et Commerciale du Pacifique* v. *The Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.)

> document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences..." (my emphasis)

Although McEachern C.J. declined to follow *Peruvian Guano* on the facts before him, he did describe it as "an ancient and well established" authority "which has stood unchallenged in Britain and in [British Columbia] for 100 years" (para.22).

[11] As mentioned, with the agreement of counsel, I was provided a copy of the Report to review, as well as copies of subsequent legal opinions obtained by Canada, which refer to the Report (dated September 30, 1982 and August 3, 1983, respectively).[2] There are a number of references in the Report to the Kaska people in the Liard River drainage basin and in the Frances Lake area, which I take to be the Frances Lake in Yukon, north of Watson Lake. There is also specific reference to the Kaska Dena people residing in Watson Lake, Yukon. There are general references to the archaeological and cultural history of the Kaska Dene, including those Kaska in the Yukon. Whether and to what extent these references will assist RRDC in addressing the issues raised by Canada with respect to the identity of the Kaska tribe or the Kaska Nation, the relationship between RRDC and the Kaska, and the existence and location of the Kaska traditional territory, is not for me to decide at this stage. I agree with the submission of RRDC's counsel that the Report is relevant if it contains any evidence going to those issues. As I interpret *Peter Kiewet*, it is sufficient if this information "may" assist RRDC either to advance its own case or to undermine that of Canada's. I am satisfied that the Report meets this test of relevance.

---

[2] These documents are attached as exhibits to the Affidavit of Lisa Murphy #3, dated November 26, 2008, which I sealed pending my decision on this application.

Is the application premature?

[12] Rule 25(14) states:

> "The court may at any time, on the application of a party, order production for inspection of documents that are not privileged and that are in the possession, control or power of a party." (my emphasis)

[13] In my view, if the evidence sought is relevant, then the general rule is that the party seeking production of it is entitled to disclosure, subject only to a claim of privilege. With respect, it is no answer for Canada to argue that the facts sought by RRDC through the Report may be discoverable by other means, and/or in other documents, at a later stage in these proceedings. To delay production, which RRDC is presently entitled to, simply because RRDC "may" obtain the same evidence later in the proceeding would be unfair to RRDC, as it would likely add to the length and cost of this litigation.

[14] Further, RRDC has given notice that it may want to rely on the contents of the Report in two upcoming pre-trial motions. The first of these will be an application by RRDC to strike portions of Canada's Statements of Defence, where Canada has pled that it has "no knowledge" of matters relating to the existence of the Kaska or their traditional territory, as set out in the pleadings I quoted above. The subsequent application will be by Canada to challenge RRDC's ability to prosecute these matters as "representative" actions. One of the grounds Canada will argue on their application is that the Kaska Nation and its members cannot be identified for the purposes of the representative action. Once again, this simply underscores the possibility that the contents of the Report "may" be of assistance to RRDC in litigating both applications.

Therefore, the Report ought to be produced now, rather than later, subject to a sustainable claim of privilege.

Solicitor-client privilege

[15] The onus is clearly on the party asserting the privilege to establish entitlement: *Currie* v. *Symcore Inc.*, [2007] O.J. No. 3225 (S.C.); *Keefer Laundry Ltd.* v. *Pellerin Milnor Corp.*, 2006 BCSC 1180; *R.* v. *Chan*, 2002 ABQB 753; *Helijet Airways Inc.* v. *Field Aviation Parts Sales Ltd.*, [1993] B.C.J. No. 38; and *The Law of Privilege in Canada*, looseleaf (Aurora: Canada Law Book, 2006) p. 11-3. However, beyond that, Canada's counsel suggested that other aspects of the law in this area are evolving and unsettled.

[16] Canada principally relies on the case of *Susan Hosiery Ltd.* v. *Canada (Minister of National Revenue – M.N.R.)*, [1969] C.T.C. 353, a decision of Jackett P., of the Exchequer Court of Canada. That case held that, while claims for solicitor–client privilege are usually framed in terms of communications between the client and the lawyer, it is also well settled that the privilege can extend to communications between a lawyer and a third party, if those communications were for the purpose of obtaining a legal opinion. At para. 9, Jackett P. stated that solicitor-client privilege "extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the advice itself." And later, at para. 11, he wrote, "…what is privileged is the communications or working papers that came into existence by reason of the desire to, obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case."

[17] *Susan Hosiery* was considered by the Ontario Court of Appeal in *General Accident Assurance Co*. v. *Chrusz*, (1999) 45 O.R. (3d) 321. In *Chrusz*, the appellants were

owners of a hotel property, which the respondent insurers had insured against fire loss. A fire caused extensive damage to the hotel, and a senior claims examiner for the insurer retained one Mr. Bourret to investigate the circumstances of the fire. Mr. Bourret determined that the fire may have been arson. Upon being informed of that, the senior claims examiner retained a lawyer, Mr. Eryou, to give advice on the strategy which should be taken with respect to the proof of loss submitted by the insured. The investigator prepared a number of reports which were sent to the insurer and copied to the lawyer. The insurer contended that solicitor-client privilege extended to communications between the investigator and the lawyer because the investigator had been designated as its agent for the purposes of those communications with the lawyer.

[18] At para. 95, Doherty J.A. (dissenting in part) stated that the adjudication of claims of solicitor-client privilege must be "fact sensitive in the sense that the determination must depend on the evidence adduced to support the claim and on the context in which the claim is made" (my emphasis), and that "it is incumbent on the party asserting the privilege to establish an evidentiary basis for it."

[19] With respect to claims of solicitor-client privilege over third party communications, Doherty J.A. noted, at paras. 105 and 106, that the case law is "not extensive", but that the authorities establish two principles:

> "* not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and
>
> * where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege."

[20] At para. 108, Doherty J.A. referred to *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675, as illustrative of the first principle that communications by a third party are not protected by solicitor-client privilege merely because they assist the lawyer in formulating advice for a client. Citing Cotton L.J.:

> "... It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must also be privileged. That is a fallacious use of the word "representatives." If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. [Emphasis added.]"

[21] With respect to the second principle, Doherty J.A. referred to *Susan Hosiery* as an example of a case where solicitor-client privilege extends to communications by a third party who serves as *a line of communication* between the client and the lawyer. At para. 111, he said that in that case:

> "…the client's financial advisers who communicated with the lawyer were intimately familiar with the client's business. At the client's instruction, they met with the solicitor to convey information concerning the business affairs of the client. They were also instructed to discuss possible arrangements of those affairs presumably to minimize tax consequences. In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer."

[22] However, Doherty J.A. held that solicitor-client privilege should not depend on whether the third party is held to be “an agent” of the lawyer under the general law of agency, but rather that the applicability of the privilege “should depend on the true nature of the function” which the third party had for the client (para. 120). Further, at paras. 121 and 122, he wrote as follows:

> “Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.” (my emphasis)

[23] After going through this functional analysis Doherty J.A. held, at para. 130, that the “slim evidence” provided by the insurer did not establish that the investigator was retained for any function which could be said to be “integral” to the solicitor-client relationship. Consequently, the communications between the investigator and the lawyer were not protected by solicitor-client privilege.

[24] In *Canada (Minister of National Revenue - M.N.R.)* v. *Welton Parent Inc.*, 2006 FC 67, Gauthier J. followed Justice Doherty’s approach in *Chrusz*, noting, at para. 63, that the investigator’s function in *Chrusz* “ was to educate the solicitor as to the circumstances

surrounding the fire so that the client could receive the benefit of better informed advice from his lawyer." Further, Gauthier J. observed that the British Columbia Court of Appeal in *College of Physicians of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, also found the analysis of Doherty J. A. in *Chrusz* "compelling". Referring to the *College of Physicians* case, Gauthier J. wrote:

> "[65] In that particular case, the experts were retained to help the lawyer interpret and assess whether the evidence supported an allegation that a certain doctor had hypnotized his patient. The Court, after adopting the functional approach, said:
>
> > 'The experts were not authorized by the College to direct the lawyer to act or to seek legal advice from her. The experts were retained to act on the instructions of the lawyer to provide information and opinions concerning the medical basis for the Applicant's complaint. While the experts' opinions were relevant, and even essential, to the legal problem confronting the College, the experts never stood in the place of the College for the purpose of obtaining legal advice. Their services were incidental to the seeking and obtaining of legal advice.'"

[25] In *The Law of Privilege in Canada*, the authors (of whom Canada's counsel, Ms. Duncan, is one) discuss solicitor-client privilege in circumstances where a document has been prepared by someone other than a lawyer. At p. 11-24.1, they state:

> "in most cases, documents containing communications over which solicitor-client privilege is claimed but which are not authored by the solicitor providing advice or the client seeking advice, privilege has been found to attach to those parts of the document containing legal advice or [a] request for legal advice."

[26] The authors then go on to refer to the case of *Ragoobar* v. *Robert Bosch Inc.*, [2007] O.J. No. 4704, in which Master Hawkins reviewed a document which the defendant

claimed was subject to solicitor-client privilege (in the same way I have done pursuant to Rule 25(15)). The document had been prepared by a consulting firm retained by one of the defendants, Bosch, and dealt with what transpired between the plaintiff and the co-defendant while the plaintiff was an employee of Bosch, including the events leading to the plaintiff's dismissal. As in the case at bar, Bosch claimed the document was not relevant or was subject to privilege. Master Hawkins held that the document was clearly relevant and went on to deal with the issue of privilege, at para. 5:

> "The document is not protected by the solicitor/client professional communications privilege. The document is not a solicitor/client communication at all. The author of the document was not a client of the solicitor who commissioned the investigation leading to preparation of this document. The author of the document did not prepare it in order to obtain legal advice from that solicitor."

[27] I prefer the functional approach employed by Doherty J.A. in *Chrusz* to the agency approach in *Susan Hosiery*. Applying that approach to the case at bar, I note firstly, that RRDC does not seek disclosure of the legal opinions prepared for Canada following the completion of the Report; it only seeks the latter, which is *not* a legal assessment or analysis. Secondly, while it appears that the researcher who prepared the Report was retained by the Office of Native Land Claims, Department of Indian Affairs and Northern Development, there is no evidence that she was retained by legal counsel within that office. Thirdly, there is nothing in the Report which constitutes legal advice or a request for legal advice. Lastly, there is also no evidence that the Department specifically, or Canada generally, retained the researcher *exclusively* for the purpose of providing information to legal counsel to obtain an opinion on whether KDC's comprehensive land claim was acceptable under the federal land claims policy. As RRDC's counsel pointed out in submissions, the information in the Report may well have

been useful to Canada for purposes other than the legal opinions sought subsequently. Thus, it cannot be said in these circumstances that the researcher was “standing in the shoes of the client [Canada]”, or was “performing a function which is central to the solicitor-client relationship.” As Doherty J.A. stated in *Chrusz* , at para. 123:

> “…A representative empowered by the client to obtain [legal] advice stood in the same position as the client. A representative retained only to perform certain work for the client relating to the obtaining of legal advice did not assume the position of client for the purpose of client-solicitor privilege.”

The best that can be said of the Report, from Canada’s perspective, is that it *related to* the obtaining of subsequent legal advice. That is insufficient to cloak it with the protection of solicitor-client privilege. In my view, Canada has failed to meet its onus on this point.

[28] Even if I am wrong in this conclusion, I also note that in *Chrusz*, Doherty J.A. held, at para. 90, that solicitor-client privilege does not extend to “facts which may be referred to in … communications” (my emphasis), if they are otherwise relevant and discoverable. In the case at bar, I have determined that the contents of the Report are relevant. Further, Canada seems to have conceded that some of the facts contained in the Report may be discoverable by other means.

[29] Similarly, in *Keefer Laundry*, cited above, Gray J. held, at para. 61:

> “A lawyer is not a safety-deposit box. Merely sending documents that were created outside the solicitor-client relationship and not for the purpose of obtaining legal advice to a lawyer will not make those documents privileged. Nor will privilege extend to physical objects or "neutral" facts that exist independently of clients' communications. (***R. v. Murray*** (2000), 48 O.R. (3d) 544, 186 D.L.R. (4th) 125.)” (my emphasis)

[30] Therefore, it may well be that the factual content of the Report is not capable of being protected by solicitor-client privilege in any event.

[31] Before moving on from this point, I wish to observe that in *Keefer Laundry*, Gray J. made the distinction between the three different sub-sets of solicitor-client privilege - legal advice privilege, litigation privilege and lawyer's brief privilege - and said that the applicable legal test for each is different (at para. 59). "Legal advice privilege" involves (i) a communication between lawyer and client; (ii) that entails the seeking or giving of legal advice; and (iii) that is intended to be confidential by the parties (para. 60). This type of solicitor-client privilege is a class privilege and does not involve a balancing of interests on a case-by-case basis. In contrast, "litigation privilege" and "lawyer's brief privilege" must be established document by document. At paras. 96, 97 and 98, Gray J. stated that to invoke "litigation privilege", a party must establish two facts for each document over which the privilege is claimed:

> "1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
>
> 2. that the dominant purpose of creating the document was to prepare for that litigation.
>
> …
>
> The first requirement will not usually be difficult to meet. Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it.
>
> To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it…" [citations omitted]

Later, at paras. 105-105, Gray J. said that "lawyer's brief privilege" protects the lawyer's work product, including any notes and information or reports collected to prepare for

litigation or to give legal advice, and involves an exercise of the lawyer's skill and judgment in assembling the allegedly privileged information. The purpose of this type of privilege is to ensure that the lawyer can make all necessary inquiries, so that he or she is able to give the client complete advice and properly prepare for litigation.

[32] Reports from third parties may fall within either "lawyer's brief" privilege, or "litigation" privilege, or both, as Gray J. pointed out, at para. 93:

> "Because communications between lawyers and their clients are covered by Legal Advice Privilege, and communications and documents collected by lawyers from third parties for the purpose of formulating and giving legal advice to clients are covered by Lawyer's Brief Privilege, Litigation Privilege is properly limited to communications between clients and third parties, and to documents created by clients or third parties, for the dominant purpose of pursuing litigation. However, communications between lawyers and third parties in the context of litigation are sometimes considered to be covered by Litigation Privilege, rather than Lawyer's Brief Privilege, because they in fact are covered by both subsets of lawyer-client privilege. "

[33] In the case at bar, the Report cannot fall within "legal advice" privilege, since it is not a communication between lawyer and client. Nor can the Report come under "litigation" privilege, since, even if it was created at a time when litigation was reasonably contemplated (which I address below), there is no evidence that its "dominant purpose" was to prepare for litigation. Finally, the Report cannot be subject to "lawyer's brief" privilege, because there is no evidence that it was part of a lawyer's work product, or was collected by a lawyer to give legal advice, or that its preparation in any way involved an exercise of a lawyer's skill or judgment . Therefore, I fail to see how the Report can be considered as falling within any of the sub-sets of solicitor-client privilege.

Settlement Privilege

[34] The three criteria for settlement privilege are set out by Sopinka et al. in *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999), at p. 810:

> "(a) a litigious dispute must be in existence or within contemplation;
> (b) the communication must have been made with the express or implied intention that it would not be disclosed to the court in the event that the negotiations failed; and,
> (c) the purpose of the communication must be to attempt to effect a settlement"

[35] In *Middelkamp* v. *Fraser Valley Real Estate Board* (1992) 96 D.L.R. (4th) 227 (B.C.C.A.), the British Columbia Court of Appeal held that settlement privilege is a "class privilege" because it arises from settlement negotiations and protects the class of communications exchanged in the course of that endeavour. At para. 19, McEachern C.J.B.C., writing for the majority, said:

> "In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served."

[36] In *Histed* v. *Law Society of Manitoba*, 2005 MBCA 106, Steel J.A. of the Manitoba Court of Appeal held, at para. 37:

> "<u>The protection afforded settlement communications is less stringent than that afforded solicitor-client privilege.</u> It is not considered a substantive rule of law or a fundamental civil right. Consequently, a court will more likely carry out a balancing of interests to determine whether the circumstances justify a demand for production or, in our case, justify straying from the open court policy." (my emphasis)

[37] In the case at bar, the main issue raised by Canada under this point is whether a litigious dispute was within contemplation at the time the Report was completed. Counsel for RRDC says that there is no evidence that there was any particular dispute or threat of litigation in existence at that time. On the contrary, he points to the minutes of a cabinet meeting of the Government of Canada held on July 19, 1973, which discussed Indian and Inuit titles and claims, and preceded the subsequent communiqué by then-Minister of Indian Affairs and Northern Development, Jean Chrétien, on August 8, 1973, which announced the policy of Canada's intention to recognize and accept native land claims for negotiation. In the meeting, the cabinet agreed 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…"

The cabinet also said that the federal government would inform Quebec and British Columbia of its intentions, inviting them to participate in the negotiations and advising them that if they did not do so, the government would be obliged to proceed in any event, and "if necessary, to assist [the Indians] in the courts in asserting their title." RRDC's counsel stresses that nowhere in the minutes of this cabinet meeting is there any other reference to litigation or the potential for litigation, and that this singular reference is evidence of the government's intention to assist, and not confront, the Indian people in the land claims process.

[38] Canada's counsel points to a number of historical references to the spectre of litigation in existence at the time that the Report was prepared and completed. For

example, the federal native claims policy entitled “In All Fairness”, published on in 1981, at p.11 referred to the landmark case of *Calder* v. *British Columbia (Attorney-General)* [1973] S.C.R. 313. *Calder* was an assertion of native title by the Nisga’a First Nation in British Columbia, in which six of the judges of the Supreme Court of Canada acknowledged the existence of aboriginal title but were evenly split on whether title still applied or had lapsed. The policy document also refers to the legal cases of the James Bay Cree and the Inuit of Arctic Quebec who were then trying to protect their position in the face of the James Bay hydro-electric project. The policy document states that “[it] is from these actions that the current method of dealing with native claims [i.e. by negotiation] emerged”. On p. 12 of the policy, there is further reference to the federal government’s position that accepting claims for negotiation “would not be an admission of legal liability”. Finally, at p. 21 of the policy, there is explicit reference to the government’s preference to negotiate such land claims, with recognition that alternatives to negotiation included arbitration, mediation and “the courts”.

[39] Canada’s counsel as well points to the more recent document published by the Department of Indian and Northern Affairs entitled “Resolving Aboriginal Claims”, which sets outs, at p. 9, the Canadian government’s view of the summary of benefits of settling land claims. One of the stated benefits is that settlements avoid expensive lawsuits. Counsel for RRDC points out that this document was not published until 2003 and is insufficient to indicate a real potential for litigation at the time the Report was completed in 1982. However, I also note that then-Minister Chrétien’s communiqué of August 8, 1973 clearly makes reference to “recent proceedings in the courts” in connection with

Indian claims (p. 3), as well as specific reference to the Nisga'a and northern Quebec litigation (pp. 5 and 6).

[40] In my view, it would be somewhat naïve to suggest that the potential for litigation as an alternative to negotiation of the comprehensive land claims was not within the contemplation of the parties in 1982. Indeed, one of the central reasons giving rise to the federal government's land claims policy in 1973 was the Nisga'a litigation in the *Calder* case.

[41] However, the more meaningful question is whether the mere possibility of litigation, at that time, is sufficient to satisfy the first of the three criteria for establishing settlement privilege. In *Blue Line Hockey Acquisition Co.* v. *Orca Bay Hockey Ltd.*, 2007 BCSC 143, Wedge J., at para. 103, held that, in order to successfully invoke settlement privilege, the party seeking the privilege must establish that a litigious dispute is in existence or within contemplation, and that the communications in question were for the purpose of attempting to effect a settlement of that dispute. She continued at para. 104:

> "The mere existence of a dispute or potential dispute does not give rise to the privilege. Only where the dispute has become "litigious" does the privilege arise. A dispute is "litigious" where litigation is commenced or contemplated. The person who claims the privilege bears the onus of establishing it: ***Cytrynbaum v. Gineaut Holdings Ltd.***, [2006] B.C.J. No. 730, 2006 BCSC 468 at para. 26 [***Cytrynbaum***]."

[42] Also, as already noted, Gray J. in *Keefer Laundry*, said this, at para. 97:

> "…Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it."

[43] It is my opinion that, in the specific context of the land claim by the Kaska Dena Council in 1982, there has been insufficient evidence tendered by Canada to establish

that the dispute, or potential dispute, between the parties had truly become “litigious” at the time the Report was prepared and completed, or that it was then unlikely that the dispute would be resolved without litigation.

[44] RRDC’s counsel also raised the point, somewhat tangentially, that in the case at bar, the Report was not truly a part of the negotiation process, which he submitted did not commence in British Columbia until the mid-1990’s, more than a decade after the Report was created. There is some evidentiary support for that proposition in the document published by the Department of Indian Affairs, *Resolving Aboriginal Land Claims*, which I referred to above. Page 5 of that document indicates that the British Columbia Treaty Commission was established in 1993, with the mandate to oversee the negotiation of claims in British Columbia. There is also a reference to this point in one of RRDC’s affidavits, although the information comes from the RRDC’s counsel.[3] In any event, it seems clear that the Report was not part of any particular settlement proposal, nor was it otherwise disclosed, either publicly or confidentially, in the negotiations respecting the Kaska claims in either British Columbia or the Yukon. Therefore, I question whether it can truly be held to be a document which was ‘communicated’ in furtherance of settlement. Is it sufficient that the Report was “generated in relation to” the negotiations, as was considered in *Gitanyow First Nation* v. *Canada*, (1999) 66 B.C.L.R. (3d) 156 (S.C.)? I do not think so. The driving principle behind the notion of settlement privilege is that the law encourages settlements and permits the parties to exchange correspondence and documents with a view to resolving their disputes, without fearing that such correspondence and documents will be used as evidence if the settlement fails:

[3] Affidavit # 14 of Maureen Birkel, para. 2.

Leornadis v. *Leonardis*, 2003 ABQB 577, at para. 4. In this case, there is no evidence that the Report was used in that fashion or that it is deserving of protection for the reasons set out in *Middelkamp*, cited above.

[45] Accordingly, I conclude that settlement privilege does not apply to the Report.

Waiver

[46] In the event that I am in error above with respect to my findings that neither solicitor-client privilege nor settlement privilege applies to the Report, I will address the question of whether either or both forms of privilege have been waived. Here, counsel for RRDC submits that, in pleading that it has "no knowledge" of whether the RRDC and its members are part of the Kaska tribe of Indians, or whether the Kaska or the Kaska Nation is one of the aboriginal peoples of Canada, and whether and where Kaska's traditional territory exists in the Yukon, Canada has made *an affirmative pleading* with respect to its state of mind. Accordingly, RRDC ought to be able to make discovery of facts that relate to Canada's state of mind and fairness dictates that any privilege associated with such facts has been displaced.

[47] In *Fraser* v. *Houston*, 2002 BCSC 1378, Master Scarth, at para. 22, stated that the authorities relating to waiver of solicitor-client privilege set out the following principles:

> "1. Solicitor-client privilege should be interfered with only to the extent necessary to achieve a just result: *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860.
> 2. Waiver of solicitor-client privilege may occur in the absence of an intention to waive, where fairness and consistency so require. 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: *S. & K. Processors Ltd.* v. *Campbell Ave. Herring Producers Ltd*., [1983] B.C.J. No. 1499.

> 3. A party will waive the protection of solicitor-client privilege when it voluntarily injects into the proceeding the question of its state of mind, and, in doing so, uses as a reason for its conduct the legal advice that it has received: *Morrison* (supra).
> 4. To displace solicitor-client privilege there must be an affirmative allegation which puts the party's state of mind in issue: *Pax Management Ltd*. v. *C.I.B.C*. (1987), 14 B.C.L.R. (2d) 257 (B.C.C.A.).” (my emphasis)

It is the fourth principle which counsel for RRDC says is applicable in the case at bar, both to solicitor-client privilege and settlement privilege.

[48] RRDC’s counsel also relies on *Sovereign General Insurance Co.* v. *Tanar Industries Ltd.*, 2002 ABQB 101, where Clackson J., at para. 46, quoted with approval Berger J., as he then was, in *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*, [1992] 5 W.W.R. 531, who commented on how waiver may arise when a party raises an issue about their state of mind:

> “. . . reliance by a party upon the words or conduct of the opposite party, thereby voluntarily injecting into the suit the question of the former's state of mind and rendering relevant an exploration of that party's reliance upon legal advice; waiver results.
>
> . . .
>
> None of these cases, in my opinion, is authority for the proposition that whenever and however state of mind is placed in issue, knowledge of the law is invariably relevant and solicitor-client privilege will yield. I am comforted in this view by the following statement by Van Camp J. in *Lloyds Bank*, supra, [1991] O.J. No. 135, at p. 167 [C.P.C.]: ". . . there is not waiver in every instance where the state of mind is in issue." See also *Hartz Canada Inc*. v. *Colgate-Palmolive Co*. (1988), 27 C.P.C. (2d) 152 (Ont. H.C.).”

[49] Also, in *Leadbeater* v. *Ontario*, (2004) 70 O.R. (3d) 224, Spence J., of the Ontario Superior Court of Justice held, at para. 51:

> "The principle that solicitor-client privilege is deemed waived when a party has placed its state of mind or knowledge in issue is a particular application of the broader principle that waiver may occur when fairness requires it. Courts have recognized that the issue of fairness to the party facing a trial has become one of the guiding principles that determine what constitutes waiver by implication, or deemed waiver: *Woodglen & Co. Ltd*. v. *Owens* (1995), 24 O.R. (3d) 261 at 270-271 (Gen. Div.); *Froates* v. *Spears*, [1999] O.J. No. 77 at paras. 11-12 (Gen. Div.) (QL); J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 758, s. 14.102." (my emphasis)

[50] Earlier, in *S. & K. Processors Ltd.* v. *Campbell Ave. Herring Producers Ltd.*, (1983) 45 B.C.L.R. 218 (S.C.), McLachlin J., as she then was, commented on waiver of privilege, albeit in the context of solicitor-client privilege, at para. 6:

> "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. …" (my emphasis)

[51] I am cognizant that because settlement privilege attaches to correspondence and documents in furtherance of settlement, it is a privilege which belongs to both parties and cannot be unilaterally waived by either: *Leonardis* v. *Leonardis*, cited above at para. 4. However, it seems to me that this general proposition goes to the question of whether the parties expressly or impliedly *intended* to waive the privilege. As McLachlin J. stated in *S. & K.*, waiver may also occur in the absence of an intention to waive, where fairness so requires, as I will address below.

[52] Canada submits that there is no definitive link between the allegedly privileged communication, namely the Report, and Canada's state of mind of "no knowledge". It says that the Crown makes no reference to the Report, or the legal opinions based on it, in its Statements of Defence, either implicitly or explicitly. With respect, I cannot accept

this submission. Having reviewed the Report and having noted the several references in it to the Kaska people in the Yukon (which Canada presumably accepted as valid information, since its subsequent legal opinions, prepared in September 1982 and August 1983, were based in part on the Report), it seems an untenable position to say that the Report does not relate explicitly or implicitly to Canada's knowledge of the Kaska or the Kaska's traditional territory in the Yukon.

[53] I agree with RRDC's counsel that Canada has gone further than simply denying RRDC's allegations respecting the Kaska and the Kaska's traditional territory in its Statements of Claim. Had Canada's defence on these points been limited to a simple denial, then there would have been no issue with respect to waiver: see *Sovereign General Insurance Co.*, cited above, at paras. 40-41. However, going further and saying that Canada has "no knowledge" of such facts, affirmatively puts Canada's state of mind in issue, and fairness dictates that RRDC ought to be able to discover Canada on the point. Putting it in a slightly different way, if Canada had simply pled that it does not know whether the allegations respecting the Kaska and the Kaska traditional territory are true (as it suggested in its Reply to Notice to Admit, at para. 4), then, in my view, there would have been no argument supporting waiver of privilege. Saying one does not know whether something is true or not is equivocal and may include circumstances where a party has some actual knowledge of the alleged facts, but still cannot be sure one way or the other. However, saying that a party has "no knowledge" of such facts is an affirmative and unequivocal statement of that party's state of mind. And, while I recognize that there is not waiver in every instance where state of mind is at issue, where the issue is of such central importance to a party (RRDC) as in the case at bar, it would be unfair to deny that

party the opportunity of discovering its opponent by relying upon an assertion of privilege. Accordingly, I find in the alternative, that if either solicitor-client privilege or settlement privilege, or both, apply to the Report, there has been a waiver of privilege by Canada's "no knowledge" pleadings.

Costs

[54] RRDC seeks costs for this application in any event of the cause. According to Mark Orkin, Q.C., in *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 2007), at p. 4-2: "An award of costs in any event of the cause has been called the extreme expression of disapproval by the court." In my view, costs may be ordered in any event of the cause in situations where a party's conduct is deserving of censure or where the losing party's case was so devoid of merit that the successful party should probably not have been put to the time and trouble of having to make the application. In this case, while I have found against Canada on all of the issues, my decision was not necessarily a foregone conclusion. Canada's counsel raised fairly arguable points with respect to both privilege and waiver. In these circumstances, I will award RRDC its costs for this application, but those costs shall follow the event.

CONCLUSION

[55] I direct that Canada produce the Report to counsel for RRDC by 4 p.m. on Wednesday, January 28, 2009, keeping in mind that RRDC's application to strike the "no knowledge" pleadings in Canada's Statements of Defence is scheduled for Wednesday, February 4, 2009.

[56] Because the Affidavit of Lisa Murphy #3, dated November 26, 2008, which has the Report attached as an exhibit, also contains the legal opinions provided to Canada

on September 30, 1982 and August 3, 1983, which RRDC does not seek production of, I direct that the Affidavit will remain sealed until further order of this Court.

Gower J.