SUPREME COURT OF NOVA SCOTIA

Citation: Halifax Dartmouth Bridge Commission v. Walter Construction Corporation, 2010 NSSC 350

Date: 20100921
Docket: Hfx. No. 227346
Registry: Halifax

Between:

Halifax Dartmouth Bridge Commission

Plaintiff

v.

Walter Construction Corporation, Cherubini Metal Works Limited, Sika Canada Inc., Mapei, Inc.,

Defendants

Parker Brothers Contracting Limited, Argo Protective Coatings Inc, Jacques Whitford Materials Limited, O'Halloran Consultants Limited, Amercoat Canada Limited, Pinnacle Agencies Limited, 2283051 Canada Inc., TSG Partnership

Third Party Defendants

Judge: The Honourable Justice Arthur J. LeBlanc.

Heard: July 23, 2010, in Halifax, Nova Scotia

Counsel: Christopher C. Robinson, Q.C., for the plaintiff, Halifax Dartmouth Bridge Commission
J. Brian Church, Q.C., for the defendants, Walter Construction Corporation and Cherubini Metal Works Ltd.
Geoffrey A. Saunders, for the defendant, Sika Canada Inc.
John P. Merrick, Q.C., for the defendant, Mapei Inc.

Phillip M. Chapman, for the third party defendants,
Parker Brothers Contracting Ltd. and
Argo Protective Coatings Inc.
Gordon F. Proudfoot, Q.C., for the third party defendant,
Jacques Whitford Materials Ltd.
Michael E. Dunphy, Q.C., for the third party defendant,
O'Halloran Campbell Consultants Ltd.
W. Hugh Murphy, for the third party defendant,
Amercoat Canada
Michael Brooker, Q.C., for the third party defendant, Pinnacle Agencies Ltd.
John P. Barry, Q.C. & Talia Profit, for the third party defendants, 2283051 Canada Inc. and TSG Partnership

By the Court:

[1] This is a motion to "enforce the previous judgment issued by Justice LeBlanc on December 30, 2009 and setting out the particular items the Plaintiff must disclose to all parties and in what format that disclosure is to take place." The proceeding arises out of the failure of a Sternflex thin wearing surface on the approach spans and the suspended spans of the bridge. The Sternflex was replaced on the approach spans with Transpo, which also failed.

[2] The decision on production of documents of December 30, 2009 (2009 NSSC 403), and the order of June 14, 2010, required the plaintiff, the Halifax-Dartmouth Bridge Commission (Bridge Commission), to disclose documents relevant to the failure and repair of a Transpo 48 wearing surface on the MacDonald Bridge in Halifax. The Bridge Commission had already produced documents respecting the 2004 decision to replace Sternflex with Transpo before the motion of December 2009. More documents were disclosed after that decision.

[3] The defendant and third party, O'Halloran Campbell Consultants (Consultants) alleges that the Bridge Commission has not complied with the order. The Bridge Commission submits that the foundation for the motion is no more than speculation

that documents exist. Moreover, the Bridge Commission says the motion is redundant in view of the existing production order, and is an attempt to delay the proceeding. Essentially, the Bridge Commission says, it has made full disclosure and complied with the order.

[4] The motion also raises issues with respect to assertions of privilege on certain documents, and compliance with undertakings given on discovery. The parties have indicated that an additional issue, whether the form in which the documents have been produced complies with the *Civil Procedure Rules*, is under discussion. I will accordingly not deal with the issue here.

Compliance with the previous decision and order

[5] After a case management meeting on January 5, 2010, Mr. Dunphy, counsel for Consultants, wrote to Mr. Robinson, counsel for the Bridge Commission, indicating the Consultants sought "all relevant documents re the assessment of Transpo as a wearing surface, the decision to use Transpo, the purchase and installation of Transpo, the failure of Transpo, the repair of Transpo, the cause of the Transpo failure, the assessment of whether to replace the Transpo and the decision to replace the Transpo."

In late January the Bridge Commission produced a Supplementary List of Documents.

[6] Consultants takes the position that this supplementary list omitted relevant materials, including documents from the files of the engineering firm Buckland & Taylor, documents regarding the cause of the failure of the approach spans, documents regarding the the assessment of replacing - and the decision to replace - Transpo on the approach spans, documents regarding discussions between the Bridge Commission, Transpo, Duron (the contractor) and Buckland & Taylor regarding responsibility for the Transpo failure and annual inspection reports for the bridge for 2008 and 2009. Consultants adds that there was only limited documentation produced in respect of "the failure and the progression of the failure" of Transpo on the approach spans and says the Bridge Commission produced no documents from later than 2007 regarding the failure of the second replacement of the Transpo on the suspended spans. I will review the parties' claims on each of these points in turn.

[7] Consultants says Buckland & Taylor, as the Bridge Commission's consulting engineering company, was heavily involved in assessing the failure of Sternflex and in the decision to replace it with Transpo. Presumably, Consultants submits, the

company had a similar role in dealing with the failure of Transpo. Consultants says the documents that have been produced predate the replacement of the Transpo and likely predate the decision to replace it. The Bridge Commission says it disclosed the file materials of Mr. Buckland on July 5, 2010, having only received those materials after the January disclosure. The materials disclosed in July included the Buckland & Taylor report concerning the failure of Transpo, which the Bridge Commission says did not previously exist.

[8] As to the cause of the failure of the approach span, the Bridge Commission pointed out that several reports by Jacques Whitford had been disclosed. Consultants says the Jacques Whitford reports did not deal with the cause or mechanics of the failure, and says it might be expected that there would be documents on this issue in the possession of the Bridge Commission, or of Buckland & Taylor, Duron or Jacques Whitford. The Bridge Commission also made reference to a report in preparation that would be disclosed when it was drafted.

[9] The Bridge Commission indicated that all documents in its possession regarding the replacement of Transpo had been disclosed. Consultants maintains that no documents have been produced in respect of an assessment to replace the Transpo on

the approach spans, and notes that the Bridge Commission refers only to documents in its own possession, and not those in possession of one of the other organizations involved. The decision to replace the Sternflex gave rise to references in the minutes of the Maintenance Committee and the Board of Commissioners. Consultants has requested - but has not received - a letter from Steve Snider, the General Manager of the Bridge Commission, explaining why no such material is available in relation to Transpo, and whether such material ever existed.

[10] Consultants makes the same argument, and seeks the same explanation, in respect of documents pertaining to the decision to replace Transpo, noting that the decision to replace Sternflex involved a motion to enter a contract and to commit the funds.

[11] The Bridge Commission says the issues of the assessment and decision to replace Transpo in the approach spans are addressed in the Buckland & Taylor report.

[12] The Bridge Commission indicated that all documents in its possession respecting the failure and the progression of the failure of Transpo on the approach spans have been disclosed. Once again, Consultants says, the plaintiff does not

indicate that materials in the hands of others (such as Buckland & Taylor) have been disclosed, and has not provided an explanation by Mr. Snider. The Bridge Commission says in reply that the failure and the progression of the failure of Transpo on the approach spans are addressed in the Buckland & Taylor report.

[13] The Bridge Commission took the position that documents regarding discussions between itself, Transpo, Buckland & Taylor and Duron are not relevant. Consultants says such discussions would be relevant to the cause of the failure. The Bridge Commission's position is that even if evidence of such discussions did exist, for which it says there is no evidence, it would be irrelevant.

[14] The Bridge Commission says the 2008 and 2009 annual inspection reports were disclosed on July 12, 2010.

[15] As to the request for recent documents respecting the failure of the second replacement of Transpo on the suspended spans, the Bridge Commission professed not to know what this related to. Consultants says this item refers to the second application of Transpo on the suspended spans, after the first application failed. It says Buckland & Taylor and the Bridge Commission could be expected to have

relevant documents on this point. The Bridge Commission says Consultants appears to be "incorrectly assuming that the [Bridge Commission] distinguishes between failures in the way [Consultants] would like it to." It says it has disclosed all that it has.

[16] In general, the Bridge Commission says disclosure is not governed by a party's suspicions or expectations as to what documents may exist in the hands of another party. With the completion of additional disclosure in July 2010, the Bridge Commission maintains that it has provided complete production of relevant documents, complying with the order. It says the argument to the contrary by Consultants is based on groundless suppositions. The *Civil Procedure Rules*, it is submitted, do not permit a party to determine what documents should be produced by another party without reference to relevance, nor do they permit a party to compel the production of documents that have not been shown to exist. In effect, the Bridge Commission argues, Consultants seeks a contempt remedy, without demonstrating a basis for one.

[17] Consultants says, in reply, that the Buckland file material suggests that there was additional documentation respecting the failure and repair of Transpo, dating back

as far as 2004. I make no finding on whether this allegation is correct. This alleged additional documentation includes reports from John Hiltz of Defence Research and Development Canada, Scott MacIntyre of Atlantic Metallurgical Consulting Limited and e-mails from the Regional Analytical Centre at St. Mary's University. Most of these documents relate to the investigation carried out in 2009. The final report is dated February 2010. There are also e-mails that were copied to Jon Eppell of the Bridge Commission, which Consultants says were not disclosed previously.

[18] Consultants says the absence of documents relating to any communications by Mr. Eppell with Buckland & Taylor or in respect of the investigation is the basis for its belief that there are relevant records in the possession of the Bridge Commission that have not been disclosed. Consultants also says there is not enough internal correspondence:

> We do not have the internal communication from the Bridge Commission (including copies of emails or memos sent and received by Jon Eppell), we do not have Maintenance Committee meeting minutes post September 18, 2008, and we do not have Board of Commissioner meeting minutes post May, 2009. And we know the investigation took

place in 2009 and 2010 with final conclusions on the failure being forwarded in February and March of 2010.

[19] On this basis, Consultants says, relevant material respecting the analysis of the Transpo failure has not been disclosed. Consultants specifically requests copies of the relevant files of AMC, John Hiltz and the Saint Mary's University Research Department. It also complains of a lack of documents from Transpo or Duron.

[20] The Bridge Commission's position is that it has complied with its ongoing obligation to disclose relevant documents. It must be said that Consultants has based its claim that production has been inadequate on little more than speculation, rather than credible evidence that documents have been withheld. Moreover, in the absence of further disclosure, Consultants demands an explanation as to why the documents it seeks do not exist or are not in the hands of the bridge Commission.

[21] I am not aware of any authority – and counsel for Consultants did not volunteer any – that would permit the court to require a party to explain the non-existence of documents that an opposing party believes should exist. The Bridge Commission has represented that the documents it has provided under the order are the entirety of the

relevant and non-privileged documents in its possession, subject to its continuing obligation to disclose. I do not see any basis upon which the court can require a party to provide evidence on the non-existence of documents that are not shown to have existed previously, simply because the opposing party believes that such documents should exist. That being said, while the court does not have any authority to require an affidavit to be filed in the manner requested, I am satisfied that it would be open to the applicant to conduct an examination for discovery of whatever person is qualified to explain whether additional documents exist in the hands of the bridge Commission.

Privilege

[22] Certain documents disclosed by the Bridge Commission contain redactions, purportedly for reasons of relevance and privilege. Consultants seeks confirmation that passages redacted on the ground of irrelevance have nothing to do with the MacDonald Bridge wearing surface. Consultants also says it has no information as to why passages marked “privileged” are claimed to be so, and asks for these documents to be reviewed by the Court.

[23] The burden to establish that an otherwise relevant document is privileged rests with the party claiming the privilege. In *Creaser v. Warren* (1987), 77 N.S.R. (2d) 429, 1987 CarswellNS 150 (S.C.A.D.), the court said, at paras. 11-13:

> Subsections (2) and (3) of Civil Procedure Rule 20.01 provide:
>
> > (2) A list of documents under paragraph (1) shall enumerate the documents in a convenient order with a short description of each document or, in the case of bundles of documents of the same nature, of each bundle.
> >
> > (3) A claim that any document is privileged from production shall be made in the list of documents with a sufficient statement of the grounds of the privilege.
>
> In our opinion, this Rule is not to be interpreted in such a way that, because documents are bundled, they are therefore exempt from "a short description of each document". The description need not be so detailed that it discloses the contents of the document in a manner that would destroy its privilege. It must be sufficient to enable a court to make a prima facie decision whether a likely claim for privilege exists. Whether a judge goes beyond the description to examine the document is, of course, in the discretion of the court. It is difficult to lay down a hard and fast rule for every document. However, the description of each document or series of similar type documents should have sufficient detail to reveal the nature of the documents to the opposing party and to avoid the necessity of frequent applications to the court for rulings.

[24] As Reid, J., said in *Grossman et al. v. Toronto General Hospital* (1983), 41 O.R. (2d) 457 at p.469:

> ...a party must candidly describe in an affidavit on production not only documents for which no privilege is claimed but also those for which a privilege is claimed. It is not enough to do the one but not the other.

[25] The Bridge Commission points out that *Creaser* concerned the adequacy of the description of a bundle of documents over which privilege was asserted, and that it does not forbid redacting privileged material from an otherwise non-privileged document.

[26] Even if part of the minutes attract privilege, Consultants submits that the Bridge Commission has waived privilege by disclosing the documents with parts redacted. Gruchy, J. discussed waiver of solicitor-client privilege in *Canada Life Mortgage Services Ltd. v. Leeside Estates Ltd.*, 2002 NSSC 30, 2002 CarswellNS 39 (S.C.), where the issue was whether a party had waived privilege on documents in the possession or control of its lawyer by submitting the lawyer for discovery. Justice Gruchy said, at paras. 22-23:

> Canuck has submitted for my consideration certain documents produced voluntarily by Lee, some of which contain handwritten notes by Muttart reflecting, apparently, advice given by Muttart to Lee. In Watkins v. Faught (1999), 179 N.S.R. (2d) 204 (S.C.) I referred to some of the cases to which I referred above and in a final consideration I said at para. [16]:

> Finally I refer to Sopinka's The Law of Evidence in Canada where the learned author (as he then was) explored the notion of fairness in relation to solicitor-client privilege. Similarly, Sopinka and Lederman in The Law of Evidence in Civil Cases at p. 182:
>
> > Two essential elements must be present for a waiver to be established. The holder of the privilege must possess knowledge of the existence of the privilege which he is foregoing and also a clear intention of waiving the exercise of his right of privilege. Although waiver may be expressly given such cases are few. More frequent are those cases in which the waiver is by implication only. If the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of the communication, then there will be waiver.
>
> Canuck argues that the disclosure of certain of the documents to which it has referred constitute a partial disclosure. Regardless of whether those documents indeed constitute a partial disclosure I have concluded that the discovery as it was conducted by Canuck, in the absence of a specific objection, constituted a partial disclosure and I need not concern myself as to whether the documents produced fell within that category.

[27] He added, at para. 25:

> At p. 666 and following in the first edition of Law of Evidence in Canada by Sopinka, Lederman and Bryant, the matter of waiver of solicitor-client privilege by implication is examined. The learned authors (at p.668) quote Professor Gary D. Watson as follows:
>
> > It seems reasonably clear that the "fairness" test has emerged as the relevant principle for determining when solicitor and client privilege is waived by conduct in the course of the litigation. While the courts have not yet clearly embraced the view that the unilateral assertion of an issue by one party can lead to compulsory disclosure of the

> adverse party's solicitor-client communications, do not be surprised if the law moves in this direction; ultimately, the fairness test may be interpreted as meaning that solicitor-client privilege is waived whenever the communications between the solicitor and the client are legitimately brought in issue in the action..

This observation by the learned author seems to reflect the same philosophy noted by Justice Van Camp in Lloyds Bank at paras. 33 and 34 as follows:

> Wigmore on Evidence Vol. 8 (1961) at 635 defined what constituted a waiver by implication as follows:
>
> > "Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his 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."
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> In S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd., 35 C.P.C. 146, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218 (S.C.) McLachlin J. said [C.P.C. pp. 149-150]:
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> > "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."

[28] Consultants submits that, having voluntarily produced documents respecting discussions at Maintenance Committee and Board of Commissioners meetings, the Bridge Commission cannot assert privilege over parts of those documents. For the principle that disclosure of a part of a document can be misleading and can constitute waiver of privilege, Consultants cites *Walsh v. Smith*, [1999] N.S.J. No. 393, 1999 CarswellNS 368 (S.C.), where Davison, J. said, at para. 8:

> Counsel for the defendant relies on the decision of Nickerson (H.B.) Ltd. v. Sommerville Belkin Industries Ltd. (1985), 72 N.S.R. (2d) 289 where Justice Nathanson wrote on waiver of privilege at p. 292. He referred to Phipson on Evidence (13th ed.) at p. 306:
>
> > If privilege is waived for one record of a particular transaction, it is waived for all other relevant documents, whether of prior or subsequent date, until some further ground of privilege arises.
>
> Particular reference is made to the following words of Justice Nathanson:
>
> > ... I hold that the communications and reports are privileged, except where the privilege has been waived. By disclosing some of the communications to the other side upon discovery, both aspects of the solicitor-client privilege covering those communications was waived. The waiver extends to all other relevant documents dealing with the very same particular subject matter.
> >
> > The extent of the scope of waiver has never been defined with exactitude. However, I am persuaded by George Doland Ltd. v.

> Blackburn Robson Coates & Co et al., supra, and by Great Atlantic Insurance Co. v. Home Insurance Co. et al, [1981] 2 All E.R. 485 (C.A.), dealing with the analogous situation of different parts of a single document rather than distinct documents, that privilege is waived with respect to a document where the same particular subject matter was previously disclosed to the other side.

[29] As to the meaning of "same particular subject matter," Justice Davison said, at para. 12:

> With respect to the second argument of the defendant, it is my view that, in the interest of full and proper disclosure, there should not be too narrow an interpretation placed on the words "very same particular subject matter". I agree with the position taken by Justice Tidman in the Harris case that delivery of some documents on the medical condition of a plaintiff does not waive the privilege for all documents dealing with medical conditions. But, in this case we are dealing with a particular claim - one for loss of earnings, and delivery of some documents relating to that issue could be misleading if all documents on that issue were not delivered. Furthermore it must be said that delivery of some documents on which a doctor may base his testimony, on an issue of earning loss, must imply an intention to waive privilege on all documents pertaining to that same issue.

[30] In *Green v. Clark*, [1995] N.S.J. No. 216, 1995 CarswellNS 58 (S.C.), Stewart, J. said, at para. 7:

> On the facts, I find the dominant purpose of the surveillance reports, in the instant, is for use in litigation, and they are, therefore, privileged from production. The same, however, cannot be said for the video tapes, given that when they were partially disclosed to the plaintiff, the dominant purpose would then have been for purpose of settlement. I am satisfied the contents of the video surveillance tapes have been sufficiently divulged to the plaintiff to cause the litigation or solicitor's brief privilege to be waived. Manes and Silver, in their text Solicitor-Client Privilege in

> Canadian Law consider the issue of waiver where there is disclosure of part of a privileged communication. At p. 192 they state:
>
> > 1.04 Unless the communication is severable because it deals with different subject matters, where there is a partial waiver of a privileged communication, the whole communication must be disclosed. Furthermore, a party is not entitled to disclose only those parts of a document which are to the party's advantage.
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> The authors, quoting from various cases, note the rationale that to allow an individual item to be plucked out of context would risk of injustice through its real weight or meaning being misunderstood...

[31] Consultants thus submits that redacted portions relevant to the application and failure of the Transpo wearing surface must be disclosed, including portions that might have otherwise been subject to privilege. Consultants seeks an order requiring the Bridge Commission to disclose complete copies of all minutes from meetings of the Maintenance Committee and the Board of Commissioners.

[32] The Bridge Commission argues that the cases cited by Consultants do not stand for the proposition that disclosure of material from a partially-redacted document does not mean that privilege is thereby waived over the entire document. Rather, these cases are concerned with the circumstances in which a waiver of privilege over part of a communication leads to a waiver of privilege over the whole. The Bridge

Commission cites the following comments by the authors of *The Law of Privilege in Canada* (Looseleaf, vol. 2), at para. 11.220.110:

> Generally disclosure of a document in which privileged information has been redacted does not give rise to a waiver of privilege. Arguments have been made that privilege attaches to the entire document and not just portions, and so it is improper to redact.
>
> The more accepted view seems to be that redaction is acceptable and does not constitute waiver as long as it is done appropriately. It is improper to 'cherry-pick', that is, revealing parts of a privileged document that are helpful and claiming privilege over what is not helpful. However, many communications have parts that are privileged and parts that are not privileged. If the entire document were produced because of the non-privileged portions, that would deprive the party of the protection of the privilege. If the entire document were withheld because of the privileged portions, that would unfairly withhold relevant information from the other party. The appropriate solution is to produce the portion of the document that is not privileged, delete the portion that is privileged and show the deletion to the opposing party to advise the opposing party that the privileged material was removed.

[33] The question of redaction of privileged material from an otherwise non-privileged document was addressed in *Nova Scotia v. Murtha*, 2009 NSSC 342, 2009 CarswellNS 634 (S.C.), where the Barristers' Society sought to redact portions of documents that referred to former clients of a disbarred lawyer. Farrar, J. (as he then was) said, at paras. 24-26:

> Although are not explicitly stated in the category of documents, it is implicit that the Society wishes to redact any information with might identify the clients of Mr.

> Murtha. To the extent that any such reduction would not adequately protect the client identity the Society takes the position that the document should not be disclosed.
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> I agree with the position of the Society that to the extent the information would disclose the identity of the client or information provided to that client by Mr. Murtha it should not be disclosed. The fact that Mr. Murtha's clients sought legal advice is subject to solicitor/client privilege. To disclose information which identifies Mr. Murtha's clients or could lead to their identity, would be to breach this confidentiality. An individual should be free to consult with a solicitor of their choice without fear of that consultation becoming known. I find that the solicitor/client privilege is broad enough to encompass the identity of the individual that is seeking advice. One can envision a situation where someone who is having marital problems seeks the advice of a family lawyer. The fact that they have sought that advice should be confidential as much as the advice which was received should be confidential.
>
> If the documents cannot be redacted to protect that identity, then the information should not be disclosed. This is subject to the issue of waiver which I will address later. Therefore, with respect to category No. 1, those documents will be disclosed on the condition that appropriate redactions are made to protect the privilege of Mr. Murtha's former clients.

[34] The Bridge Commission says the procedure outlined by the authors of *The Law of Privilege in Canada* is the procedure it has followed. I agree. It submits that there has been no waiver of privilege in redacting "discrete portions of meeting minutes dealing with a range of subjects ... in order to protect privileged information and to maintain the assertion of that privilege." Consultants agrees that redaction is permissible where the redacted material is properly subject to privilege, but maintains that it is improper to redact only parts of discussions about Sternflex and Transpo.

[35] After the hearing the Bridge Commission provided matching redacted and unredacted copies of the disputed documents to the court. In accompanying submissions, the Bridge Commission states that on a review of the redacted material, it is evident that parts which refer to communications with counsel concerning the litigation are privileged, as are parts which record discussion of the litigation in the context of the formulation and exchange of information with counsel. The discussion of the litigation itself, the Bridge Commission submits, is irrelevant: *Sydney Steel Corp. v. Mannesmann Pipe and Steel Corp.*, 1985 CarswellNS 93 (S.C.T.D.).

[36] It has been held that a minuted summary of legal advice, given to a Board of Directors' meeting, may be privileged: *Nova Scotia Power Corp. v. Surveyer, Nenniger & Chenevert Inc.*, 1986 CarswellNS 557 (S.C.), affirmed 1987 CarswellNS 112 (S.C.A.D.). While agreeing that corporate minutes have no special status in themselves, the Bridge Commission submits that minuted solicitor-client discussions for the purpose of giving and receiving legal advice may be privileged, citing *Blood Tribe v. Canada (Attorney General),* 2010 ABCA 112, where the Alberta Court of Appeal extended privilege to minutes of meetings (and other communications) between lawyers of the Department of Justice and the Department they were advising, even where the communications did not contain actual legal advice or requests for

legal advice. The Court held that such documents were within the category of documents "which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between solicitor and client for the ultimate objective of the provision of legal advice."

[37] Consultants argues that the minutes in question were not prepared by a solicitor, and says that portions relating to advice being given by a solicitor would be properly redacted; however, statements that are only communications of underlying facts that may have originated with a solicitor, or with an expert retained by the solicitor, are not subject to privilege. I am satisfied that this is a correct statement of the law. Without question it is the case that "privilege cannot be used to protect facts from disclosure *if those facts are relied on* by a party in support of its case," even where the fact "was discovered through the solicitor or as the result of the solicitor's direction. *If it is relied on it must be disclosed*.": *Global Petroleum Corp. v. CBI Industries Inc.* (1998), 172 N.S.R. (2d) 326 (C.A.), at para. 24 (emphasis in original). The Bridge Commission says the redacted parts of the minutes do not relate to facts or acts related to allegations in the pleadings, but to communications with counsel in respect of the litigation itself.

[38] Consultants submits that materials and communications relating to the preparation of an expert's report – in effect, the factual underpinnings of the report – must be disclosed if the expert's report is being relied upon. In *Flinn v. McFarland*, 2002 NSSC 272 (S.C.), MacAdam, J. considered whether the plaintiff was required to disclose a letter written by the plaintiff's counsel to an accident re-constructionist retained by the plaintiff's law firm containing commentary on an earlier draft report prepared by the re-constructionist. He held, at paras. 7, 9 and 17:

> Having considered the authorities referenced by counsel, I am satisfied, in respect to this letter, the statement by Justice Hart in Greenwood Shopping Plaza v. Neil J. Buchanan Ltd. et al (1979), 31 N.S.R. (2d) 135, at para. 59, is applicable.
>
> > It seems to me only logical that if the party wished to rely upon the testimony of its expert and was prepared to waive the privilege that he must also have intended to waive the privilege which extends to his discussions with the expert which form the basis of his report. Surely if a solicitor were called to testify as to an opinion given to his client he would have to reveal the facts related to him upon which the opinion was based. Similarly, in my opinion, an expert employed by the solicitor for the benefit of the party must, as an integral part of his evidence, be subject to cross- examination on the factual basis for his opinions, and this must be known to the party at the time the decision is made to waive the privilege and present the evidence.
>
> ...
>
> At issue is the independence of the expert's report. The expert apparently prepared a draft report which he forwarded to counsel for the plaintiff for comments and upon receipt of comments prepared a final report which has been disclosed to the

> defendants. Clearly, the extent to which the final report of the expert may be the result of counsel's comments, is both relevant and entitled to be examined by counsel for the defendants. This, however, does not extend to any earlier drafts the expert may have prepared which he, himself, may have amended, altered or revised in the course of considering the issues and his opinions. It is the fact the expert submitted a draft report to counsel for the plaintiff and then prepared a final report, that may or may not have been revised in accordance with suggestions by counsel for the plaintiff, that the defendants are entitled to pursue in examining the expert as to his opinions and the basis on which he reached his opinions, including to the extent the opinions offered are his or may be the consequence of suggestions by plaintiff's counsel.
>
> ...
>
> Whatever information and materials were provided to the expert must be disclosed. If this involves discussions with the party, counsel for a party or with a third party, it is, may be, or perhaps should have been, part of the informational basis used by the expert in reaching his conclusion, and must be disclosed. The comments by counsel, on the draft report of the accident re-constructionist, must be disclosed to the defendants.

[39] Consultants says the Bridge Commission is attempting to redact passages of the minutes that deal with the preparation of the expert's report, which has been disclosed. By disclosing the report, it is argued, the plaintiff waived any privilege relating to the report or to the documents and communications relating to the expert. The Bridge Commission answers that the documents in question here are not part of an expert's file, and says the redacted materials do not deal with the provision of factual material that is producible as part of the expert's file. They were not, in other words, related to materials made available to, or relied on, by the expert.

[40] I have reviewed the redacted and unredacted versions of the disputed documents. There is a good deal of irrelevant material. In addition, however, the Bridge Commission has indicated that certain passages are redacted for reasons of privilege. I am satisfied that privilege is appropriately claimed in most cases, on the basis that the passages in question involve discussions with counsel, or discussions of the conduct of the litigation and of counsel's advice. The exceptions are the following passages:

> (1) Tab 3, p. 19. The Maintenance Committee Minutes indicate that the Committee went into an in camera session in respect of the "PSX & Sternflex legal action. There is no indication that counsel was present. There is no basis to claim privilege over the fact that the committee temporarily went in camera.
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> (2) Tab 7, p. 3. The first two sentences of section 3 ("Business Arising from the Minutes") is properly subject to privilege. However, the remainder of the paragraph appears to be dealing with distinct subject matter: a communication between Commissioner Guptill and the General Manager regarding Mr. Buckland's written opinion.
>
> (3) Tab 9, p. 10. Section 6.1 is headed 'Arbitration – PSX & Sternflex." I do not believe that the second full paragraph on p. 10 (beginning with "Commissioner Moreash") is properly privileged.
>
> (4) Tab 17. I see no basis to apply privilege to this e-mail. While it is cc'd to counsel, this does not render the subject matter privileged.

[41] I would add that the material claimed as privileged at p. 17 of Tab 13 appears to be in part irrelevant, with the exception of the last paragraph before the "Board Chairman's Report," which is appropriately privileged.

[42] The Bridge Commission shall produce the sections of the documents identified above (numbers (1)-(4)) in unredacted form to the other parties, subject to any appeal of this decision.

Undertakings

[43] Consultants alleges that there has been no specific response to its request for completion of undertakings given during the discovery examination of Philip Barrett on July 21 and 22, 2009. Consultants identifies 26 (reduced to 22) undertakings that it alleges have not been properly addressed.

[44] The Bridge Commission says Mr. Barrett is not its employee, and has not been its employee for several years. It says it cannot be compelled to respond to undertakings offered by a witness whom it no longer employs. It says the request "concerns requests made of a witness to carry out asks; they do not contemplate action

which the [Bridge Commission] can undertake itself." It also says that any documents in its possession relating to these requests or undertakings have already been provided, including details with respect to items no. 2, 4, 11 and 12. It says that much of the remaining material is irrelevant.

[45] Consultants replies that Mr. Barrett was put forward as a witness by the Bridge Commission and had been employed by it at the relevant time. Further, Consultants says, Mr. Robinson, the Bridge Commission's counsel, represented Mr. Barrett on discovery, and in fact made gave indications that he would address various requests made. Consultants also maintains that certain undertakings and requests appear to have been addressed directly to the Bridge Commission. Consultants denies that undertaking 12 has been addressed. It agrees that undertaking 2 was addressed to Mr. Eppell and related to his employment with Consultants, and is thus not a matter properly for the bridge Commission to answer.

[46] In my view, having put forward a witness who was no longer their employee does not relieve the Bridge Commission of responsibility to fulfill undertakings given at discovery. The witness was a former employee, speaking in that capacity, about matters that transpired when he was an employee. It does not appear that the Bridge

Commission disclaimed any responsibility for these undertakings at discovery, and in some cases there is clear acceptance that Mr. Barrett's undertakings are the responsibility of the Bridge Commission. Indeed, as the Commission points out, it has already provided documents that address some of these undertakings. I am satisfied that the Bridge Commission is responsible for ensuring that undertakings relating to Mr. Barrett's activities as its official are complied with.

[47] I order the Bridge Commission to pay costs of $1000 to Consultants and $300 to each of the other parties that appeared on the application, such costs payable in the cause.

J.