SUPREME COURT OF NOVA SCOTIA

Citation: *Cameron v. Nova Scotia (Attorney General)*, 2018 NSSC 185

Date: 20180222
Docket: Hfx No. 468437
Registry: Halifax

Between:

Alex M. Cameron

Applicant

and

The Attorney General of Nova Scotia representing her Majesty the Queen in right of the Province of Nova Scotia, Stephen McNeil and Diana Whalen

Respondents

Editorial Note: Unredacted Decision July 18, 2019, as per Order of the Honourable Justice Duncan R. Beveridge issued July 4, 2019 in CA No. 479331.

Judge: The Honourable Justice John D. Murphy

Heard: October 25 and 26, 2017, in Halifax, Nova Scotia

Closed Hearing – In Camera

Written Decision: May 11, 2018
{Oral Decision was rendered February 22, 2018.}

Counsel: Bruce Outhouse, Q.C.; Justin Adams, for the Applicant
William McDowell; Rebecca Jones, for the Respondents
Edward Gores, Q.C. *(watching brief)* for Attorney General of Nova Scotia

By the Court:

INTRODUCTION

[1] This application was brought in chambers to determine if communications are subject to solicitor-client privilege, or alternatively, whether that privilege has been waived.

[2] Mr. Cameron, a lawyer who was employed by the Nova Scotia Department of Justice from 1991 until 2017, intends to sue the Respondents, his former clients, for defamation, abuse of public office, constructive dismissal, and violation of his constitutional rights. He maintains that the Respondents have damaged his reputation and professional credibility by making public statements which imply that he acted without instructions, and he claims his name can only be cleared by adducing evidence concerning the directions he received. He therefore wishes to disclose and rely upon communications with his former employer, which are described in a Notice of Intended Action (the "Notice") and his Affidavit with exhibits affirmed September 15, 2015 (the "Affidavit"). The Respondents claim all such communications are protected by solicitor-client privilege which has not been waived.

[3] Pursuant to previous court order, proceedings in this application to date have been held in camera, documents (including the Notice and Affidavit) sealed, and recordings blocked.

[4] Privilege issues are usually determined by a judge who conducts a trial or hearing to adjudicate the merits of a claim. In this instance, to avoid being accused of breaching any ethical or legal duty by disclosing the communications, Mr. Cameron seeks a ruling before filing and pursuing his claim in open court. The Respondents agree that the privilege issue should be determined now.

FACTS

(a) Background and Parties' Positions

[5] Mr. Cameron conducted civil litigation at the Nova Scotia Department of Justice for 26 years prior to 2017. After 2001, he was generally charged with the conduct of civil litigation involving Aboriginal rights cases.

[6] In early 2016, the Sipekne'katik Band ("the Band") appealed to the Supreme Court of Nova Scotia a decision of the Minister of the Environment (the "Minister") which had approved installation by Alton Natural Gas Storage LLP of a brine storage pond connected to a proposed underground storage facility for natural gas (the "Appeal").

[7] Mr. Cameron was counsel for the Minister in the Appeal, and his intended claims against the Respondents arise from that role. The information he seeks to disclose, and for which the Respondents claim solicitor-client privilege, relates to the communications he had with his client respecting conduct of the Appeal (the "Communications"). Mr. Cameron describes the Communications in the Notice and Affidavit, and seeks an order that solicitor-client privilege does not apply, or has been waived by the Respondents, with respect to the contents of those documents.

[8] Mr. Cameron claims in the Notice and Affidavit that the written and oral submissions he advanced in the Appeal were in accordance with instructions provided during the Communications. Some facts pertaining to the Communications are disputed in affidavits filed by Francis Martin, James Huston, and Bernard Miller on behalf of the Respondents. The principal difference in the parties' description of the facts concerns whether Mr. Cameron was authorized to advance an argument that there was no constitutional duty to consult with the Band (the "Sovereignty Argument") concerning matters at issue in the Appeal.

[9] While a determination whether Mr. Cameron received direction or authority to advance the Sovereignty Argument would likely be crucial to the merits of the case, it is not relevant to the issue in this motion; namely, whether solicitor-client privilege prevents Mr. Cameron from revealing the Communications, which included direction about the submissions he was to present at the Appeal. Accordingly, these reasons will only consider the Communications and their context to the extent necessary to determine whether they attract solicitor-client privilege. I will neither set out the detailed contradictory information the parties' affidavits contain about the Communications, nor attempt to resolve the conflicting evidence to determine what instructions Mr. Cameron received concerning the Sovereignty Argument.

(b) The Communications

[10] In their submission, the Respondents refer to a brief filed by Mr. Cameron in June 2016 on a motion by the Band to stay the Appeal hearing. The Respondents say Mr. Cameron argued in that written submission that the duty to consult was not engaged, or only engaged at a low level in the case, and that he did so without receiving authority to take that position from the Department of the Environment, and after he had been cautioned by the Office of Aboriginal Affairs representatives about advancing the argument. Mr. Cameron did not address directions relating to the stay brief in the Affidavit, but in a supplementary affidavit categorically rejects the implication in the Respondents' affidavits that he prepared and filed that brief without authorization.

[11] During June and July 2016 Mr. Cameron discussed the written argument to be filed for the Appeal with senior officials from the Department of Justice and the Office of Aboriginal Affairs. Following those meetings he included the Sovereignty Argument in the Province's brief which was filed July 29, 2016 (the "Appeal Brief"). The Respondents' affidavits say that Mr. Cameron was not given instructions to do so.

[12] In November 2016, controversy developed in the House of Assembly and in the media about the written argument Mr. Cameron had presented in the Appeal Brief. As a result, officials from the Department of Justice and the Office of Aboriginal Affairs held further discussions with Mr. Cameron concerning whether he should advance the Sovereignty Argument during oral submissions at the Appeal. Mr. Cameron also initiated the involvement of Bernard Miller, a lawyer and advisor to the Premier, and Mr. Miller consulted with the Deputy Minister to the Premier and with the Premier's Deputy Chief of Staff.

[13] The parties' affidavits include references to telephone discussions and emails among Mr. Cameron and representatives of Department of Justice, Office of Aboriginal Affairs and Mr. Miller concerning the Sovereignty Argument. On the morning of the hearing, November 15, 2016, Mr. Cameron received direction via email from Mr. Miller concerning whether the "duty to consult" was to be referenced at the oral hearing.

(c) The Oral Hearing

[14] Mr. Cameron maintains that he followed his client's instructions, including the direction in Mr. Miller's November 15th email. The Respondents say he

advanced the Sovereignty Argument in clear breach of the directions he was given (Respondents' brief para. 65), and that:

> …Mr. Cameron inverted not only the sequence and priority of the argument he had been instructed to make, but also that he never made the argument he was instructed to make. He did not acknowledge the existence of a constitutional duty to consult - he suggested instead that it was simply a policy. (Respondents' brief, para. 70)

[15] If Mr. Cameron's claim is pursued, the Court will be able to examine the record from the hearing to determine whether he followed the instructions.

(d) Post hearing Activity

[16] Mr. Cameron claims that the causes of action he intends to pursue arise from conduct of the Respondents after the Appeal hearing, including statements made by Premier McNeil and Justice Minister Whalen November 17 and 24, 2016, and from his removal as counsel for the Appeal and for other litigation.

[17] Media coverage of the hearing was extensive and critical of the Sovereignty Argument. The Affidavit at paras. 44-54 and Applicant's motion brief at paras. 69-73 describe the Respondents' post-hearing statements and their reporting. The Respondents do not acknowledge the exact words Mr. Cameron says they used. I summarize the Applicant's description as follows, with the Respondents' clarifications added and underlined:

> After a Cabinet meeting on Thursday, November 17, 2016, during a media scrum, the premier said:
>
> (i) "*I believe that brief went way beyond where it needed to go. <u>I am looking for an explanation from the Justice Department</u>.*"
>
> (ii) The brief was "*not what I believe.*"
>
> (iii) "*I had no idea it was being put forward.*"
>
> The Minister of Justice stated in a media scrum at about the same time: "*I can reiterate what the premier said. Went beyond the position of gov.*"
>
> These comments were reported in the local and national media.
>
> The following statements by the Premier [were] reported in the APTN National News on Friday, November 18, 2016:
>
> > *I'm not happy, not just as the minister, but as the premier, that the position was put forward in the court… Disappointed would be a huge understatement. To say that I was furious would probably be*

> *more accurate… My hope is that the Chiefs and the Mi'kmaq community will understand it is not a reflection of who I am, and who our government is.*
>
> On November 23, 2016 the media reported on an upcoming meeting between the Premier and Nova Scotia Mi'kmaq Chiefs at which the Premier intended to apologize for the brief. The Premier was quoted as saying, "*that brief didn't reflect who I am, doesn't reflect the belief of my government…*"
>
> On November 24, 2016, the Premier was reported in the Canadian press as having said, "*The words that were attached to a brief that went before the court were not mine and were not my feelings.*"
>
> At about the same time, Minister Whelan stated publicly that the brief "*doesn't reflect the government's position.*"
>
> Among the statements attributed to the Minister of Justice, about legal briefs in her department was, "*I'll be asking more about what the process is and to be sure that we are more sensitive…*"

[18] The comments made by Premier McNeil and Justice Minister Whalen referenced in para. 17 are hereafter referred to as "the Statements."

[19] Mr. Cameron states in the Affidavit that he was extremely upset following newspaper editorial support for the Premier's "distancing himself from Mr. Cameron's arguments" and after he received hate mail.

[20] Mr. Cameron claims that the message conveyed by the Premier and the Minister of Justice was that he had acted without instructions, or contrary to instructions, in advancing the Sovereignty Argument. He requested, but did not receive an apology.

[21] On December 5, 2016, the Respondents removed Mr. Cameron as solicitor of record in the Appeal. The Affidavit states that the removal was widely reported in the media, including a report that the Acting Minister of Justice "wouldn't say whether any other discipline action had been taken against Cameron, or whether he would be allowed to work on other files involving Aboriginal issues."

[22] On December 20, 2016, the Province withdrew the Sovereignty Argument, an event Mr. Cameron says was again widely reported in the media.

[23] Halifax lawyer Dan Ingersoll, Q.C. was retained by the Respondents to review Mr. Cameron's instructions for the Appeal (the "Review"). Mr. Cameron participated in the Review, but did not receive a copy of the report. The Respondents maintain that the parties had an understanding that any discussion of

the Review with Mr. Cameron was confidential and subject to solicitor-client privilege.

[24] Mr. Cameron retired from employment with the Department of Justice on April 30, 2017, and served the Notice on the Respondents on May 2, 2017.

ISSUES

[25] The issues raised in this application are:

1. Do the Communications (as set out in the Notice and Affidavit) contain information subject to solicitor-client privilege?
    - A. Onus of establishing/displacing privilege
    - B. Does solicitor-client privilege apply to the Communications – was legal advice sought or received?
    - C. The unique position of the Attorney General, the rule of law and the public interest
    - D. Innocence at stake and unlawful conduct exceptions
2. Waiver of Privilege
    - A. Implied Waiver
    - B. Waiver by impugning conduct of counsel and disputing instructions
    - C. Fiduciary Obligations to former clients, Confidentiality and Abuse of Process
    - D. Fairness

ANALYSIS

1. DO THE COMMUNICATIONS (AS SET OUT IN THE NOTICE AND AFFIDAVIT) CONTAIN INFORMATION SUBJECT TO SOLICITOR-CLIENT PRIVILEGE?

A. Onus of establishing/displacing privilege

[26] Solicitor-client privilege is a class or blanket privilege that attaches to communications that: (i) are between a solicitor and client; (ii) entail the seeking or giving of legal advice; and (iii) are intended by the parties to be confidential.

(*Solosky v. the Queen* 1 S.C.R. 821 at 835, 837) Solicitor-client privilege vests in the client and not the lawyer. (*Smith v. Jones*, [1999] S.C.R. 455 at para. 46)

[27] Because privilege "impedes the pursuit of truth" by forcing the court to "attempt to do justice…without potentially relevant and admissible evidence", those who assert privilege have the onus to prove their entitlement to the privilege. (*Canada v. Clorey*, [1987] P.E.I.J. No. 140 at para. 8; *Hatch v. Factory Mutual* 2015 NSCA 60 at para. 14) In this case, the Respondents must establish that the Communications were made in confidence for the purpose of giving or receiving legal advice. If they do so, Mr. Cameron bears the onus to displace their *prima facie* privileged character.

B. Does Solicitor-Client privilege apply to the Communication – Was legal advice sought or received?

[28] The Respondents say the Communications provided legal instructions to Mr. Cameron and therefore attract solicitor-client privilege; he does not dispute that the Communications conveyed instructions, but maintains they were not privileged because the Respondents have not established that the Communications were directly related to the seeking, formulating or giving of legal advice.

[29] The courts have not been consistent in determining whether instructions to a solicitor are privileged. Relying on *Nixon v. Timms* 2012 ABQB 65 at para. 17 and cases referenced therein, the Respondents say the weight of authority deems instructions to be privileged, and they should not be treated differently from any other form of solicitor-client communication. Mr. Cameron maintains that in this case the instructions related to the position to be advanced to the court, and cannot be privileged because their objective was to advise him what to present to the court. Citing *Newman v. Nemes* (1978) O.J. No. 3101 (HCJ) and *R. v. Youvarajah* 2011 ONCA 654 (reversed on other issues by the Supreme Court of Canada), Mr. Cameron's position is that instructions to counsel concerning matters to be communicated to an opposing party or the court are not intended to be confidential and are not privileged.

[30] I have made a detailed review of the Communications and the affidavit evidence concerning the meetings and correspondence between Mr. Cameron and his clients. As Mr. Cameron suggests, the instructions he received relate primarily to whether he should present something – the Sovereignty Argument – to the court. The Communications do not reveal information clearly confidential, such as facts

which might prejudice the client if disclosed, competitive financial information, an opinion concerning the strength of an argument, or the likely outcome of the Appeal. The primary focus of the Communications was not to seek or provide legal advice. However, in the context of instructions about what to present to the court, the exchanges between Mr. Cameron and his clients included discussion about why he made a recommendation (Affidavit, especially paras. 12 and 13, Exhibits 2, 13-20 inclusive) concerning the Sovereignty Argument, and about how it should be addressed if raised by the judge. Legal analysis and litigation strategy, while not the main focus, were components of the Communications. In this case, it is therefore not necessary to decide if communications conveying only instructions to a solicitor are privileged.

[31] While mostly conveying instructions relating to the position to be presented to the court, and not primarily directed toward seeking or giving legal advice, the Communications contained sufficient litigation strategy and advice components to evidence intent to be confidential, and therefore attract a presumption of solicitor-client privilege. Mr. Cameron bears the onus to displace that presumption. He maintains it should not apply in this case because of the unique position of the Attorney General as his client, and because upholding the privilege would shield unconscionable conduct and diminish the rule of law.

C. The unique position of the Attorney General, the rule of law and the Public Interest

[32] Mr. Cameron says that the Attorney General is a unique litigant with special constitutional duty. He acknowledges that government can claim solicitor-client privilege, but maintains it is not available in this case because the Respondents cannot show that public interest would be jeopardized by disclosing the Communications. He relies on the Attorney General's responsibility legislated in s.29(1)(b) of the *Public Service Act* to ensure that "the administration of public affairs is in accordance with the law", and on case authorities which describe fundamental responsibilities of the Attorney General to "uphold the law", act with "dignity and fairness", "independently of partisan or political influences", and as the "guardian of the public interest." Mr. Cameron says the Statements contravened those responsibilities, and were made to deflect personal criticism for political reasons which do not equate with the public interest.

[33] In my view, any higher public interest threshold that Government must satisfy does not reduce its entitlement to solicitor-client privilege in this case. The

applicant emphasized Justice Binnie's observation in *R. v. Campbell*, [1999] 1 SCR 565 at para. 52 that solicitor-client privilege "may operate differently in some respects because of the public interest aspect of government administration." However, that the statement was made in the context of rejecting a broad assertion that no privilege exists in respect of communications between the police and crown counsel in the course of a criminal investigation, and after Justice Binnie noted at para. 49 that "the fact that [the lawyer] works for an 'in-house' government legal service does not affect the creation or character of the privilege."

[34] In *Stevens v. Canada (Prime Minister)* 161 D.L.R. (4th) 85 (FCA), para. 22, Linden J.A. noted:

> I can find no support for the proposition that a government is granted less protection by the law of solicitor client privilege than would any other client. A government, being a public body, may have greater incentive to waive the privilege, but the privilege is still its to waive.

D. The Innocence at Stake and Unlawful Conduct Exceptions

[35] Mr. Cameron seeks to invoke exceptions to the solicitor-client privilege doctrine, claiming it should not operate in this case as his "innocence is at stake", and upholding the privilege would "further unlawful conduct."

[36] To apply either exception in this case would amount to an unwarranted extension of the law. Mr. Cameron's innocence is not at stake – there is no issue involving his guilt or innocence, *Charter* rights, liberty, or risk of wrongful conviction. (*R. v. McClure* 2001 SCC 14 at para. 47)

[37] Solicitor-client privilege arose when the Communications took place; no issue of innocence or of the alleged conduct on which Mr. Cameron's proposed claim is based, unlawful or otherwise, was contemplated when confidential legal advice was sought or received. Any alleged "unlawful conduct" happened after the giving of legal advice and was unconnected with any contemplated "unlawfulness" or "innocence" at the time the Communications occurred. No advice sought from or given by Mr. Cameron during the Communications relates to the "unlawful conduct" he now wants to allege occurred, or to his "innocence." If Mr. Cameron pursues his claim, the issues will relate to whether he followed instructions, not to advice concerning innocence or unlawful conduct. The misrepresentation of the instructions that Mr. Cameron alleges the Respondents made post-Appeal does not

relate to whether the Communications were privileged, but may be relevant to whether privilege was waived.

2. WAIVER OF PRIVILEGE

A. Implied Waiver

[38] Mr. Cameron submits that any solicitor-client privilege which might otherwise apply to the Communications has been waived; the Respondents disagree.

[39] Solicitor-client privilege is a principle of fundamental justice; in *R v. McClure*, *supra*, the Supreme Court held that it

> must be as close to absolute as possible to ensure public confidence and retain relevance… It will only yield in certain clearly defined circumstances, and does not involve a balancing of interest on a case-by-case basis.

In *Smith v. Jones*, *supra*, while recognizing that solicitor-client privilege should be maintained to the extent feasible, the Supreme Court stated that it is not absolute and in certain circumstances other societal values must prevail (paras. 35, 51).

[40] Solicitor-client privilege may be waived, expressly or impliedly. In this case, Mr. Cameron, who seeks to show that privilege has been waived, bears the onus of establishing waiver. (*Syncrude Canada Ltd. v. Babcock and Wilcox Canada Ltd.*, 1992 CarswellAlta 337 at para.5)

[41] In *S & K Processors Limited v. Campbell Avenue Herring Producers Ltd.*, [1983] BCJ No. 1499 (BCSC) Justice McLauchlin (as she then was) described the test for express and implied waiver as follows 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 the 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.

[42] The Respondents submit, and I agree, that there was no intentional or informed waiver of solicitor-client privilege in this case. Mr. Cameron must rely on the doctrine of implied waiver.

[43] The Applicant claims privilege was waived when the Statements were made and action was taken by the Premier and the Attorney General; the jurisprudence indicates they were persons with authority to waive privilege in this case. (*Peach v. Nova Scotia (Transportation and Infrastructure Renewal)* 2010 NSSC 91, affirmed on Appeal 2011 NSCA 71 at para. 27*; R. v. Campbell, supra*)

B. Waiver by Impugning Conduct of Counsel and Disputing Instructions

[44] Mr. Cameron says the Respondents impugned his conduct, and thereby waived privilege.

[45] Adam Dodek in *Solicitor-Client Privilege*, (Markham: Lexis Nexis Canada Inc., 2014) discusses "Categorical Implied Waiver by Conduct", as follows:

> Certain actions by a privilege holder will almost always be deemed to constitute an implied waiver of the privilege. They may be considered categorical in the sense that if they are found to fit within a recognized category, the privilege will be deemed to have been waived. For example, when a party directly or indirectly impugns the legal advice received from a lawyer, the privilege will be deemed to have been waived. (p. 241)
>
> … Where a client imputes [sic] the conduct of his counsel through allegations of negligence, there is a forfeiture or an implied waiver of the right to confidentiality. The courts have stated that fairness in these cases dictates that counsel must not be frustrated by claims of privilege in defending these claims… (p. 242)
>
> … The privilege will also be waived when a party blames their former solicitor for a course of conduct… (p. 242)

In *R. v. Dunbar* (1982) 138 DLR (3d) 221, the Ontario Court of Appeal adopted the following passage from *Wigmore on Evidence* (2nd ed), at para. 66:

> As to what is a controversy between lawyer and client the decisions do not limit their holdings to litigation between them, but have said that whenever the client, even in litigation between third persons, makes an imputation against the good faith of his attorney in respect to his professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend his conduct. Perhaps the whole doctrine that in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation. The only question about such a principle is whether in all cases the

> privilege ought not be the same qualification, that it should yield when the evidence sought is necessary to the attainment of justice.

[46] In *R v. Hobbs*, 2009 NSCA 90 at paras. 12 and 20, this Province's Court of Appeal, following *Dunbar* and the British Columbia Court of Appeal decision in *R. v. Li,* (1993) 36 BCCA 181, acknowledged that information protected by solicitor-client privilege may be disclosed by a lawyer when necessary to defend allegations of malpractice or misconduct, or an attack upon character or integrity. *R. v. Hobbs* also noted that waiver can arise from conduct as well as words, citing with approval at para. 17 the Ontario Court of Appeal's endorsement in *Harich v. Stamp, et al.*, 1979 OR 92(d) 395 of the following passage from *McCormick on Evidence* (2nd ed) (1972) at p. 194:

> Waiver includes, as *Wigmore* points out, not merely words or conduct expressing an intention to relinquish a known right but conduct, such as partial disclosure, which would make it unfair for the client to insist on the privilege thereafter.

[47] There is Canadian authority to support the Applicant's position that a clients' disputing the instructions given to counsel may amount to a waiver of solicitor-client privilege respecting those communications. (*Nixon v. Timms*, supra, *Bentley v. Stone*, 1998 OJ No. 4823; *Biehl v. Strang*, 2011 BCSC 213; *Souter v. 375561 B.C Ltd*, [1995] BCJ No 2265 (BCCA))

[48] Mr. Cameron says that the Statements put his instructions into dispute and constitute conduct which make it unfair for the Respondents to maintain a claim for solicitor-client privilege. He submits the Statements unmistakably imply that he advanced the Sovereignty Argument either without instructions or contrary to instructions, and that there is no other reasonable interpretation. He references media coverage of the Statements, and editorial comment applauding the Premier for "wisely and assertively" "distancing" himself from "Mr. Cameron's arguments."

[49] The Applicant says the Statements impugn his conduct, are an attack on his character and integrity, and that fairness dictates that privilege has been waived and he ought to be allowed to defend his reputation by disclosing his instructions.

[50] I agree with Mr. Cameron that the Statements clearly imply that Mr. Cameron acted without instructions, or contrary to instructions, and that they bear no other reasonable interpretation. I also agree with Mr. Cameron that unless he is permitted to disclose the instructions he received, he will be prevented from

asserting the causes of action he seeks to pursue. Any claim he may have against the Respondents for defamation, abuse of public office, constructive dismissal or violation of his constitutional rights is based upon the Respondents' implication that he acted without or contrary to instructions. Unless those instructions are revealed, there is no factual foundation for the claims he seeks to advance.

[51] The Respondents maintain that the law does not support waiver of privilege in this case, even if preserving the privilege would remove any opportunity for Mr. Cameron to commence his proposed action. They say that waiver can only be implied in the context of an existing legal proceeding, that Mr. Cameron's duty of loyalty and confidence to his former clients is broader than the privilege and must be maintained, and that condoning breach of that duty would shake public confidence in the administration of justice and amount to an abuse of process.

[52] The Respondents correctly assert that implied waiver of solicitor-client privilege is most commonly deemed to occur when the privilege holder makes assertions or allegations in a legal proceeding. In my view, however, applying waiver to extra judicial public statements made by government officials in this case would not amount to the improper extension of the implied waiver doctrine which the Respondents claim would result.

[53] The Respondent cites American court decisions limiting expansion of the implied waiver doctrine. (*In Re Claus Von Burlow 828 F. 2d 94 (2nd Cir, 1987); Kolchinsky v. Moody's Corporation*, 2012 U.S. Dist. LEXIS 25650) Canadian authority, particularly in the civil context, does not restrict a former counsel's having solicitor-client privilege impliedly waived to circumstances where allegations of misconduct are made against the lawyer in a legal proceeding. Indeed, recent decisions suggest otherwise. (*Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General)*, 2007 N.J. No 453; Peach, *supra*)

[54] Although there is no existing legal proceeding in this case, an action is clearly contemplated. The present motion arises following delivery of notice of intended action, a statutory mandated first step in litigation against the Respondents. Requesting implied waiver is timely in these circumstances because the applicant requires a ruling to avoid being accused of breaching an ethical or legal duty, and the Respondents do not dispute that the privilege issue should be determined at this stage. I do not agree with the Respondents that the absence of an existing lawsuit precludes a determination whether solicitor-client privilege has been waived.

C. Fiduciary Obligations to Former Clients, Confidentiality, and Abuse of Process

[55] The Respondents submit that Mr. Cameron's ongoing duty of loyalty and confidence to his former clients obliges him "to hold in strict confidence all information concerning the business and affairs of the Respondent that was acquired in his professional capacity as a solicitor of record on the Alton Gas appeal." In my view, disclosure of the Communications, which primarily convey instructions, and do not reveal financial information, commercial activity or legal advice, would be a minimal intrusion into *prima facie* privileged client information, and would not violate confidence concerning the business and affairs of the Respondent.

[56] A client's right to communicate in confidence with counsel is fundamental. (*Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319; *Solosky v. The Queen*, *supra*; *R. v. McClure*, *supra*)

[57] Confidentiality is the indispensable condition of privilege. As Dodek explains in *Solicitor-Client Privilege*, *supra*, at page 189:

> …Waiver involves situations where a lawyer or a client has taken some subsequent action which calls into question the continuing intention to keep their communications confidential or is inconsistent with that intention. Waiver is the flip side of the 'made in confidence' requirement for the privilege to attach in the first place. As discussed in Chapters 2 and 5, confidentiality is the *sin qua non* of privilege. Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege.

[58] In this case, the Statements characterized the instructions given to Mr. Cameron, and suggested he did not have instructions to put forward the Sovereignty Argument. I agree with the Applicant that the Statements nullified confidentiality and ended the privilege which otherwise applied.

[59] The Respondents suggest that the relief sought by Mr. Cameron, a waiver of solicitor-client privilege, would undermine public faith in the legal profession and constitute abuse of process. They rely on *Manning v. Epp*, 2006 CANLII 24126 (ONSC), a case in which former counsel for a municipality made claims, including defamation, against municipal officials. The foundation of the claim rested on privileged communications concerning the scope and termination of the lawyers' retainer, and about the legal advice that was given pursuant to it. The court found that allegations in the plaintiff's claim were inconsistent with the lawyers'

obligation to hold in confidence information concerning the business and affairs of the client acquired during the professional relationship and protected by solicitor-client privilege. The court struck the claim, deeming it unprofessional and an abuse of the process of the court, and the Ontario Court of Appeal agreed with that ruling.

[60] I agree with the Applicant that *Manning v. Epp* is distinguishable. The facts and allegations in that case were extreme. The finding that some information disclosed was privileged, inadmissible, in violation of the lawyer's duty of confidence, and an abuse of process was reached in the context of an attempted collateral attack on the municipality's right to discharge counsel, and a lawyer's claims which the court found were not made out on the facts pleaded. In *Manning and Epp*, the claim rested almost entirely on information the plaintiff obtained from his former client during the course of a retainer; in this case, the claim is based principally on public statements the Respondents made to media about Mr. Cameron's work. In *Manning v. Epp* the former counsel's claim was deemed to be an abuse of process when it disclosed privileged information and information that was irrelevant and scandalous; in this case Mr. Cameron is not abusing process; rather, he is seeking the Court's ruling on an issue of privilege before proceeding with an action.

D. Fairness

[61] In *S. & K. Processors*, *supra*, McLachlin J. discussed waiver, in part, as follows:

> …waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.

Fairness is of central importance in the doctrine of waiver. Dodek in *Solicitor-Client Privilege*, *supra*, says this in discussing implied and partial waiver:

> Both (partial waiver and implied waiver) are concerned with fairness and the inconsistency of the privilege-holder trying to use the privilege while also hiding behind it at the same time, i.e. using the privilege as both a 'shield' and a 'sword'. Thus, Wigmore stated 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.…' Another way of putting it is that partial waiver prevents a party from engaging in selective and self-serving

> disclosure on a particular topic, disclosing only those privileged documents that support the position of the party and not disclosing those communications that do not. (p. 209)

[62] The Respondents cannot elect to publicly suggest that Mr. Cameron acted without instructions or contrary to instructions, and at the same time assert privilege to prevent him from revealing his understanding of the instructions.

[63] The Australian courts have considered the importance of fairness considerations in determining whether privilege is waived. In *Mann v. Carnell*, [1999] HCA 66, the High Court of Australia stated at paras. 28 and 29:

> … Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication…
>
> … Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. …What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

[64] The Federal Court of Australia in *College of Law Limited v. Australian National University*, 2013 FCA 492, stated at para. 24:

> 24. These authorities also establish the following relevant principles concerning implied waiver of privilege (noting that it is common ground here that the common law principles apply at this stage of the proceedings and not Part 3.10 of the *Evidence Act 1995* (Cth)):
>
> (a) Privilege will be waived where the conduct of the person claiming it is inconsistent with the maintenance of the confidentiality in the relevant communication which the privilege is intended to protect;

> (b) the test for implied waiver is objective, thus where such inconsistency is found, privilege will be waived regardless of the subjective intention of the party claiming the privilege;
>
> (c) whether there is inconsistency is to be determined in the context and circumstances of the case and in the light of any considerations of fairness arising from that context and those circumstances;
>
> …
>
> (g) where the party claiming privilege has disclosed or deployed the relevant information in order to achieve some forensic or other advantage for itself, or to disadvantage another person in a similar way, this may amount to conduct which is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Accordingly, the purpose for which the particular disclosure was made is important.

[65] I conclude that the Statements disclosed information to influence public favour or gain other advantage for the Respondents. The Communications do not reveal business or commercial information or legal opinion; they instruct counsel about advancing the Sovereignty Argument. The statements strongly imply that the position put forward by Mr Cameron was not that of the government. The Respondents' conduct in making the Statements is inconsistent with the maintenance of the confidentiality which privilege is intended to protect. Mr. Cameron cannot respond without disclosing the Communications. In the circumstances of this case, it would be unfair to maintain privilege and thereby bar Mr. Cameron from claiming he was disadvantaged.

Conclusion

[66] For the foregoing reasons, I conclude that by their words and conduct the Respondents have waived privilege with respect to the Communications in the Notice and Affidavit, and an order will issue granting Mr. Cameron the relief sought in the Notice of Application in Chambers filed September 19, 2017.

[67] Subsequent to delivery of this decision orally, counsel for the parties have advised the Court that agreement has been reached respecting costs.

Murphy, J.