SUPREME COURT OF NOVA SCOTIA

Citation: *Conrad v. Arichat Metal Fabrication Ltd.*, 2022 NSSC 278

Date: 20221014
Docket: Hfx No. 496393
Registry: Halifax

Between:

Leslie J. Conrad, Edwin Conrad, Dan Merzetti and Sherri Merzetti

Applicants

and

Arichat Metal Fabrication Ltd., Gregory Boucher and John Boudreau

Respondents

and

1766134 Nova Scotia Limited

Third Party

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 15, 2022, in Halifax, Nova Scotia
Written Decision:	October 14, 2022
Counsel:	Michelle M. Kelly, K.C., for the Applicants Matthew Moir for the Respondents – Arichat Metal Fabrication Ltd. and John Boudreau Adam L. Harris for the Respondent – Gregory Boucher – and the Third Party

By the Court:

INTRODUCTION

[1] This is a motion for production and discovery. The moving parties seek an order declaring that certain communications between the responding parties and their former lawyers be deemed not solicitor-client privileged or that such privilege be found waived. They also seek discovery subpoenas requiring the responding parties' former lawyers to attend examinations for discovery.

[2] This motion takes place within the context of an application in court ("the Application"). The movers of this motion for production and discovery are the Respondents in the Application. They have filed for summary judgment dismissing the Application. They seek this order for production and discovery in order to obtain information which they believe may be useful for their summary judgment motion.

BACKGROUND – First Application in Court

[3] Leslie Conrad, Edwin Conrad, Dan Merzetti, and Sherri Merzetti brought an Application in Court against A.F.L. Tank Manufacturing ("AFL") on June 29, 2010, alleging negligence against the company. They sought compensation for damage to their property caused by AFL's oil tanks. At that time, Gregory Boucher was principal for AFL and John Boudreau was a manager.

[4] On August 10, 2010, AFL filed a Notice of Defence. On February 13, 2018, AFL filed a Notice of Withdrawal and Consent to Judgment.

[5] Scott Johnson is the insurance adjuster for the Applicants. According to an affidavit sworn by Mr. Johnson, he had a conversation with Ms. Shelley Wood of Stewart McKelvey, the Applicants' then-counsel, on April 18, 2018. During that conversation, Ms. Wood told Mr. Johnson that AFL may not possess any assets on which the Applicants could recover. Ms. Wood also told Mr. Johnson that a company called Arichat Metal Fabrication Ltd. ("AMF") had purchased the assets of AFL.

[6] The Applicants decided to seek an order allowing enforcement of the judgment against AMF.

[7] On May 11, 2018, a case management conference was held with Justice D. Timothy Gabriel of this court. It was decided at that conference that the Applicants' assessment against AFL would proceed and that any order joining AMF or

determination of whether AMF was responsible for damages and costs assessed against AFL would follow. On January 14, 2019, the Applicants were granted judgment against AFL in the amount of $754, 262.63 ("the Judgment"). The Judgment remains unpaid.

[8] In early December of 2019, Gregory Boucher attended a discovery examination in aid of execution of the Judgment. He testified in his capacity as Director, President, Secretary, and recognized agent of AFL. According to the affidavit of Mr. Johnson, Mr. Boucher gave evidence that AFL ceased operations in 2010 and held no assets or monies to satisfy the Judgment.

The Second Application in Court

[9] On or about February 7, 2020, the Applicants filed a Notice of Application in Court against AMF, Gregory Boucher, John Boudreau, and Third Party 1766134 Nova Scotia Limited ("the Respondents"). The Applicants applied for an order against the Respondents on a joint and several basis for payment of the Judgment. The Applicants submitted that the Respondents are intertwined business entities and that their separate legal identity is a sham to avoid paying the Judgment.

The Motion for Summary Judgment

[10] On April 8, 2021, AFL and John Boudreau filed a motion for summary judgment of the Applicants' claim against them on the basis that it is statute-barred pursuant to the *Limitations of Actions Act*, SNS 2014, c 35. AFL and John Boudreau argued that the Applicants knew of the transaction that they now allege is a "sham" more than two years prior to the filing of their Application in Court. As a result, they say the Applicants are out of time.

[11] The Applicants filed the aforementioned affidavit of Mr. Johnson in response to John Boudreau and AFL's motion for summary judgment.

The Motion for Production and Discovery

[12] John Boudreau and AMF now seek production and discovery on the basis of a paragraph in Mr. Johnson's affidavit. They argue that paragraph 16 of the Johnson Affidavit constitutes an express waiver of privilege over the 2018 conversation between Ms. Wood and Mr. Johnson that is referenced therein, as well as an implied waiver of privilege over related communications. Specifically, they seek production of an email sent from Ms. Wood to Mr. Johnson on December 20, 2016. They also

seek the opportunity to cross-examine Ms. Wood and Mr. Jeff Waugh, both former counsel for the Applicants.

[13] For ease, I will respond to the movers of this motion as "the Respondents" throughout this decision. For clarity, John Boudreau and AMF are the movers of this motion and the other Respondents, Gregory Boucher and the Third Party, 1766134 Nova Scotia Limited, support the motion.

The Johnson Affidavit

[14] Paragraph 16 of the Johnson Affidavit states:

> I spoke with Ms. Wood on April 18, 2018. During that conversation, she informed me that she had recently learned that a company called Arichat Metal Fabrication Ltd had purchased the assets of AFL Tank Manufacturing, and that AFL Tank Manufacturing may not possess any assets on which to recover, while Arichat Metal Fabrication remained a going concern with assets. Therefore, it was decided that the Applicants would also seek an order allowing enforcement of the judgment in that matter against Arichat Metal Fabrication, at the motions for directions.

The 2016 E-mail

[15] On July 22, 2021, Mr. Moir, counsel for the Respondents, emailed Ms. Kelly, counsel for the Applicants, and wrote (in part):

> Can you confirm that you have reviewed the Stewart McKelvey and adjuster files, and confirmed that there is nothing in them, whether privileged or not, which is relevant to the question of when the adjuster became aware that AFL Tank Manufacturing Limited had been restructured? Your answer on this question may affect my advice about whether we are to press for further documentary disclosure…
>
> (Emphasis in original email)

[16] In reply, Ms. Kelly wrote (in part) on July 28, 2022:

> With respect to the review of the files of both SM and the adjuster, I can say there is nothing in them, whether privileged or not, about when the adjuster became aware that AFL Tank Manufacturing Limited has been **restructured**. I can specifically note that in all of the file material that we reviewed there is no mention of AFL being restructured. I want to be clear, there is mention of knowing of the new entity but that is it. I trust that clarifies…
>
> (Emphasis in original email)

[17] In reply, Mr. Moir wrote on July 30, 2021:

> Is the "mention of knowing of the new entity" evidence over which you are claiming privilege? Such evidence would certainly be relevant and so the only basis upon which your clients might withhold it would be privilege.

[18] In reply, Ms. Kelly wrote on July 30, 2021:

> Correct – we claim privilege given it is an email from Shelley Wood to Scott Johnson with recommendations and assessments.

[19] The Respondents seek production of the email referred to by Ms. Kelly in her July 30th email. The email they seek was sent on December 20, 2016. I will refer to it as "the 2016 email".

The Parties' Argument

[20] The Respondents say paragraph 16 of the Johnson Affidavit amounts to an express waiver of the conversation between Ms. Wood and Mr. Johnson on April 18, 2018. Further, they say paragraph 16 amounts to an implied waiver over related communications. In their motion they seek "an order declaring certain communications between Stewart McKelvey, former legal counsel to the Applicants, and the Applicants or the Applicants' insurers not to be solicitor-client privileged", generally, as well as "an order requiring the Applicants to produce an email sent from Shelley Wood to Scott Johnson of (*sic*) December 20, 2016", specifically. They say the Applicants chose to put their state of mind in issue by disclosing legal advice. They say the Applicants were not forced to make this choice in responding to the Respondents' limitations defence, and that their actions constitute a waiver of privilege. They say this court should not permit the Applicants to use privilege as both a sword and a shield, and that fairness and consistency require production of otherwise privileged communications.

[21] With respect to examining the Applicants' former lawyers, the Respondents say the lawyers have both privileged and non-privileged evidence that they can give about the case. They say they ought to be permitted to examine the lawyers about non-privileged information, as well as certain privileged information on the basis of waiver. They agree that there should be a limited scope for discovery and that they ought not be permitted to discover the former lawyers on privileged information that has not been expressly or impliedly waived.

[22] The Applicants say implied waiver requires voluntary disclosure and a reliance on legal advice, and that neither element is present here. They say paragraph 16 of the Johnson Affidavit discloses only facts; it does not disclose legal advice. Further, they say they were compelled to raise the issue of discoverability in response to the Respondents' limitations defence. They say their discoverability defence does not automatically put their state of mind in issue for the purposes of implied waiver.

[23] With respect to examining their former lawyers, the Applicants say that Mr. Waugh's affidavit discloses everything that the parties knew about the existence of the new entity. Further, they say the court need not subpoena Ms. Wood and Mr. Waugh because the Respondents will have the opportunity to examine Mr. Johnson. They say that these represent "reasonable alternatives" to examining Ms. Wood and Mr. Waugh, and the presence of these reasonable alternatives means that the court ought not compel them to testify.

ISSUES

[24] The issues I must decide on this motion are as follows:

1. Was there an implied waiver on the part of the Applicants?
2. If so, what is the proper scope of the waiver?

Solicitor-client Privilege

[25] Solicitor-client privilege was defined by Dickson J in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, as (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[26] On the importance of the privilege, Lamer J wrote in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860:

> 14 It is not necessary to demonstrate the existence of a person's right to have communications with his [or her] lawyer kept confidential. Its existence has been affirmed numerous times and was recently reconfirmed by this Court in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, where Dickson J. stated (at p. 839):
>
> > One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with

> one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client…

[27] Once solicitor-client privilege is held to apply, it must be treated as absolute as possible (*R. v. McClure*, 2001 SCC 14, at para 35) and should not be interfered with unless absolutely necessary (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, at para 43).

The Law of Waiver

[28] However, solicitor-client privilege can be displaced in a number of circumstances, including where the privilege has been waived. John Henry Wigmore's classic formulation of solicitor-client privilege, which remains a prevailing definition today, incorporates the doctrine of waiver into the definition of privilege:

> … [w]here legal advice of any kind is sought from a professional legal adviser, in his [or her] capacity as such, the communications relating to that purpose, made in confidence by the client, are at his [or her] instance permanently protected from disclosure by himself [or herself] or by the legal adviser, except the privilege be waived.
>
> (emphasis added) (quoted in McClure at para. 36)

[29] The test for waiver was summarized by McLachlin J during her time on the British Columbia Supreme Court in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499, 45 BCLR 218. McLachlin J wrote:

> 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. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

[30] McLachlin J's decision in *S. & K. Processors* establishes two forms of waiver: express waiver and implied waiver. In *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38, Farrar JA of our Court of Appeal established that for both express and implied waiver, the focus of the analysis should be on the conduct of the

privilege-holder and whether they have done something which is inconsistent with continuing to protect their privilege:

> 50 Simply put, waiver involves ending the confidentiality that would otherwise cloak solicitor-client privilege. Ending that confidentiality can happen expressly or impliedly. In the following passages, Professor Dodek explains express waiver, implied waiver, and the difficulty inherent in distinguishing the two:
>
> > 7.5 Courts use the terms "expressly", "voluntarily" and "explicitly" interchangeably to refer to the situation where the client openly decides to waive the privilege over part or all of their confidential communications with their solicitor...
> >
> > 7.6 For there to be express waiver, it must be shown that the privilege-holder: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive it. This test was set out by McLachlin J (as she then was) in ... *S. & K. Processors* ... and remains the leading authority on the issue of both express and implied waiver...
> >
> > [...]
> >
> > 7.104 ... "implied waiver" refers to the situation where a party does not explicitly waive the privilege but takes some action that is inconsistent with maintaining the privilege....
> >
> > [...]
> >
> > 7.105 The line between explicit and implied waiver is frequently blurry. What the courts refer to as "waiver by conduct" is sometimes considered explicit waiver and at other times as "implied waiver". The label attached to the waiver is far less important than the analysis and the consequences: the loss of privilege and the revelation of confidential lawyer-client communications.
> >
> > 7.106 ... Thus, the common characteristic of all types of waiver is some voluntary action on behalf of the privilege holder that is inconsistent with continuing to protect the privilege.
> >
> > 7.107 In *S. & K. Processors*... McLachlin J. laid out the test for both explicit and implied waiver...Waiver may also occur in the absence of intention to waive, "where fairness and consistency so require." This second set of principles applies to implied waiver....
> >
> > [Emphasis added]

51 Waiver involves conduct inconsistent with confidentiality. Such conduct can be express, or it can be implied. The focus of the analysis is on the conduct of the person who holds the privilege and whether they waive it by doing something which is inconsistent with continuing to protect it.

[31] Fairness and consistency are the guiding principles in an analysis of waiver. In the oft-cited decision of *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949, 43 C.P.C. (4th) 73, Gound J wrote:

> 5 Privilege may be waived expressly or impliedly. In the case at bar it is not disputed that there was no express waiver of privilege by GLC. When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor client and litigation privilege. Fairness to a party facing a trial has become a guiding principle in Canadian law. Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.

[32] The principles of fairness and consistency are open-ended and encompasses the various scenarios in which implied waiver may arise. As Farrar JA wrote for our Court of Appeal in *Cameron, supra*:

> 58 Considerations of "fairness and consistency" are central to the doctrine of implied waiver in all of its manifestations, not just where some aspect of privilege has already been waived. They apply in the case of an unintended implied waiver based on partial disclosure by the privilege holder and they apply equally in the case of an unintended implied waiver based on the privilege holder impugning the advice or conduct of his or her lawyer.
>
> …
>
> 60 The passage from *Wigmore on Evidence*, McNaughton Rev., 1961, relied on by Meredith J. in *Hunter v. Rogers* (1981), 34 B.C.L.R. 206 (B.C. S.C.) (which McLachlin J. referenced [in *S & K Processors*]) provides as follows:
>
> What constitutes a waiver by implication?
>
> > 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, ie., 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.

[Emphasis added]

> 61 The words from Wigmore on Evidence, underlined above, confirm that a privileged person's intention does not control the operation of implied waiver. Rather, it is considerations of fairness, referencing the "objective consideration" of the privileged person's conduct, which govern.

Waiver by Placing State of Mind in Issue

[33] One form of implied waiver is where a party places its state of mind in issue. As Professor Dodek explains in *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014):

> When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice. To displace the privilege there must be an affirmative allegation that puts the party's state of mind in issue by the privilege-holder. Simply putting state of mind at issue without reliance on legal advice does not suffice for waiver.

[34] The state of mind that is formed as a result of the legal advice must be material to the lawsuit. In *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada*, 2004 BCCA 512, Smith JA wrote:

> 28… it is not enough to constitute a waiver that Doman's pleading puts its state of mind in issue and that its state of mind might have been influenced by legal advice, as the chambers judge concluded. There must be the further element that the state of mind involves Doman's understanding of its legal position in a way that is material to the lawsuit. In other words, it must appear from the pleading that legal advice would be relevant to the particular state of mind put in issue. Otherwise, it cannot be said that Doman has put its knowledge of the law in issue and that enforcing the privilege will deprive GMAC of information necessary to defend against Doman's allegation that it acted reasonably.

[35] The privilege holder’s state of mind must be placed in issue by the privilege-holder him-or- herself. The opposing party cannot put the privilege-holder’s state of mind at issue in order to force a waiver of the other party’s privilege. The privilege-holder’s choice to put his or her state of mind in issue must be voluntary and deliberate (Dodek, *Solicitor-client Privilege*).

[36] For the purposes of waiver by way of placing one’s state of mind in issue, the knowledge of the privilege-holder’s counsel is imputed onto the privilege-holder. In

Jack v. Canada (Attorney General), [2004] O.J. No. 3294, [2004] O.T.C. 706, DiTomaso J wrote:

> 120 Where a defendant pleads a statutory limitation defence, the plaintiff bears the onus of proof of establishing that the cause of action arose within the limitation period. This means that the plaintiff must demonstrate that she did not know, and that it cannot be said that she ought to have known, the facts upon which her claim is based more that 6 years before the action was commenced. The relevant actual knowledge and deemed knowledge includes knowledge on the part of the plaintiff herself and of her professional advisors […] The issue of the limitation defence may also become one of plaintiff's counsel's due diligence and his or her evidence in relation to due diligence is central to a determination of that issue.
>
> 121 In order to ascertain when the plaintiff could reasonably have become aware that she had a cause of action, the defendant is entitled to know what instructions or advice was communicated to the plaintiff by her solicitors and the extent to which she acted upon such advice.
>
> 122 The critical date is when the plaintiff or her solicitors reasonably ought to have known, by the exercise of due diligence, that she had a cause of action.
>
> (Citations omitted)

[37] In *Araya v. Nevsun Resources Ltd.*, 2019 BCSC 260, Abrioux J, citing *Jack, supra*, wrote:

> 76 This state of mind includes not only the plaintiff's own subjective and objective knowledge, but where counsel has been retained prior to the date on which the cause of action was said to have been discoverable, the knowledge and investigations of counsel are also put in issue, even where the plaintiff is unaware. The knowledge of counsel is deemed to be the knowledge of the client…
>
> (Citations omitted)

[38] Caselaw confirms that, as is the case for other forms of implied privilege, the principles of fairness and consistency underly the rationale for a finding of implied waiver where a privilege-holder has placed their state of mind in issue. In *Tomasone v. Capo, Sgro,* 2014 ONSC 2922, a "state of mind" case, Master Short wrote:

> 67 One reason to compel disclosure is to prevent the party asserting the privilege from gaining the advantage of relying on some confidential communication with his lawyer to advance his position, while withholding additional information about confidential communications that might be highly relevant to the matters at issue. In such a situation, the party is using the confidentiality afforded by privilege as a sword, and not a shield, and it would be "fundamentally unfair to permit the party to shield behind a claim of solicitor-

> client privilege" evidence of its knowledge and advice of counsel in respect of the strength of a claim.
>
> (Emphasis added)

Scope of Waiver

[39] Where a waiver of solicitor-client privilege is found, interference with the right to privilege is warranted only to the extent necessary to achieve fairness (*Descôteaux c. Mierzwinski*, [1982] 1 SCR 860; *Biehl v. Strang*, 2011 BCSC 213).

[40] Determining the proper scope of disclosure includes both subject matter and temporal dimensions. As Arbrioux J wrote in *Araya:*

> 77 In respect of the scope of materials which must be produced, the two relevant dimensions concern the subject matter and the temporal period of the waiver. The former concerns the materials and information to which the waiver extends, and the latter the period of time captured by the waiver.
>
> 78 Where privilege has been waived, the scope of what must be produced is clear. Privilege is lost over any communication that has a relevant and material connection to the issue being brought forward. Once privilege over a subject matter or topic is lost, it is lost with respect to all communications on that topic, not just the ones that [the party] selects for disclosure…
>
> 79 The scope of the subject matter encompasses knowledge of the facts underlying the claim, instructions and advice regarding the claim passing between counsel and client, evidence regarding how the client acted on this advice, comments from the client on strategy, and instructions regarding commencement of a claim. It can also extend to the realm of counsel, file management practices, and due diligence in investigating claims…
>
> 80 The period of the waiver will be impacted by the circumstances of the particular case, and may extend into the time period when the limitation period is supposedly running, and until the filing date which commenced the litigation… This is from the accrual of the claim to the putative discovery date, at which time the plaintiff experienced the "paradigm shift" so as to be imbued with the requisite mix of factual and legal knowledge necessary to commence the claim.
>
> [citations omitted]

ANALYSIS

[41] It is clear that the communications sought by the Respondents are protected by solicitor-client privilege. The question, therefore, is whether the Applicants

waived that privilege by introducing into evidence paragraph 16 of the Johnson Affidavit.

[42] The Applicants submit that raising a discoverability defence does not automatically put their state of mind in issue for the purposes of waiving solicitor-client privilege. For example, in *Bielak v. Marilyn Dadouch, Firm Capital*, 2020 ONSC 855, a case cited by the Applicants, the plaintiff raised a discoverability defence, but it did not amount to waiver because the court held that there had not been a reference to, or reliance on, legal advice.

[43] The same approach was taken by Norell J in *Vidcom Communications Ltd. v. Rattan*, 2022 BCSC 522. In *Vidcom*, the defendant moved for production of documents relevant to the discoverability of the plaintiff's claim on the basis of an alleged waiver. Norell J held that the plaintiff relied only on facts, not legal advice, and therefore did not act in a way that was inconsistent with the maintenance of privilege:

> 61 Vidcom's NOCC does not plead, expressly or impliedly, that it relied upon legal advice, or that legal advice informed the timing of its decision to commence this action. It pleads only an alleged fact: that on a certain date it discovered the alleged misappropriation. The NOCC does not plead that it did not or could not understand its legal rights until prior to that date or until it consulted counsel. The NOCC does not in any way refer to legal advice.
>
> …
>
> 64 Mr. Kay argues that once Vidcom put its state of mind in issue, even without injecting legal advice into its pleadings, fairness and consistency require waiver. Mr. Kay argues that he should be able to challenge Vidcom's assertion that it first discovered the alleged misappropriation in March 2020 by looking at any privileged communications which touch on that issue.
>
> …
>
> 69 In my view, Vidcom has simply pled that it discovered the alleged misappropriation on a certain date. It has not voluntarily injected into the litigation the legal advice it may have received, or taken a position that is inconsistent with the maintenance of privilege, nor has it made legal assertions that make it unfair to maintain that privilege. Mr. Kay's argument is essentially that there might be something in the solicitor's file and it would be unfair if he did not get to explore that. I do not agree. Solicitor-client privilege must be as close as to absolute as possible, and Mr. Kay has not demonstrated any pleadings or circumstances on which fairness and consistency would require waiver of privilege.

[44] However, some courts have held that a party who relies on a discoverability defence automatically puts their state of mind in issue for the purposes of waiver. For example, in *Camosun College v. Levelton Engineering Ltd.*, 2014 BCSC 1190, Affleck J wrote:

> 13 … In particular, a party's state of mind at issue is automatically put into issue when it relies on postponement provisions of the Limitation Act because to successfully invoke postponement provisions it must be established that the party lacked the factual and legal knowledge necessary to start the action prior to the date in which it was actually commenced.
>
> (citations omitted)

[45] In *Araya*, Abrioux J wrote:

> 74 In assessing a plea of postponement, the court will necessarily be required to determine when the action should have been commenced. This invokes questions such as "when did [the plaintiffs] get appropriate advice and acquire sufficient knowledge" which would have allowed them to commence proceedings, as well as "what is the period of postponement"… This necessarily requires an inquiry into the party's subjective understanding of their own circumstances and interests…
>
> 75 Discoverability has both subjective and objective elements. It engages questions of fact, regarding when the particular plaintiff actually discovered the facts underlying his or her claim, but also considers the time when the hypothetical person, exercising reasonable diligence, would have discovered these same facts. Discoverability puts into issue the "wider circumstances surrounding both when and how the plaintiff acquired, or could have acquired, particular knowledge and what the sources of this actual or potential knowledge were": Jonathan de Vries, "*Privilege and Limitations: The Impact of Raising the Discoverability of Claims on Solicitor-Client Privilege*", (2014) 43 Advocates Quarterly 219-256 [de Vries] at 230.
>
> 76 This state of mind includes not only the plaintiff's own subjective and objective knowledge, but where counsel has been retained prior to the date on which the cause of action was said to have been discoverable, the knowledge and investigations of counsel are also put in issue, even where the plaintiff is unaware. The knowledge of counsel is deemed to be the knowledge of the client…
>
> (citations omitted)

[46] I will not attempt to resolve this disagreement amongst courts. For the purposes of this case, I agree with the Applicants' submission that raising a discoverability defence does not automatically place one's state of mind in issue.

[47] Whether the Applicants placed their state of mind in issue for the purposes of a finding of implied waiver depends on, amongst other things, whether the Applicants injected legal advice received from their former counsel into the litigation. The Respondents argue that introducing the following paragraph into evidence through the Johnson Affidavit constitutes an injection of legal advice into the litigation:

> I spoke with Ms. Wood on April 18, 2018. During that conversation, she informed me that she had recently learned that a company called Arichat Metal Fabrication Ltd had purchased the assets of AFL Tank Manufacturing, and that AFL Tank Manufacturing may not possess any assets on which to recover, while Arichat Metal Fabrication remained a going concern with assets. Therefore, it was decided that the Applicants would also seek an order allowing enforcement of the judgment in that matter against Arichat Metal Fabrication, at the motions for directions.

[48] It is well established that legal advice is not restricted to telling the client the state of the law; legal advice includes advice as to what should be done in the relevant legal context (*Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11, at para 19; *Slansky v. Canada (Attorney General)*, 2013 FCA 199, at para 82). If Ms. Wood advised Mr. Johnson to pursue enforcement of the Judgment against AMF, that would constitute legal advice.

[49] The issue therefore turns on the proper interpretation of the words "it was decided" included in paragraph 16. The issue, specifically, is whether the decision to pursue enforcement of the Judgment against AMF – i.e. the "it" in "it was decided" – was a decision reached by Ms. Wood and Mr. Johnson during the 2018 conversation referenced in paragraph 16. If so, reference to that decision made between Ms. Wood and Mr. Johnson amounts to an injection of Ms. Wood's legal advice into the litigation. It is this interpretation that is pleaded by the Respondents. The Applicants oppose this interpretation, and submit that it is not clear from the paragraph whether the decision to pursue enforcement of the Judgment against AMF was reached during the referenced 2018 conversation between Ms. Wood and Mr. Johnson. For example, the Applicants submit that Mr. Johnson might have meant that he and his colleagues at Allstate reached the decision to pursue enforcement of the Judgment against AMF after learning from Ms. Wood that AFL may no longer possess any assets on which they could recover.

[50] I have considered these two competing interpretations. When the statement is read in the context of the entire paragraph, I find that it is more likely that Mr. Johnson meant that the decision to pursue enforcement of the Judgment against AMF

was a decision that was made between he and Ms. Wood during their April 18th conversation. I have not received any evidence that would suggest that an alternative interpretation is more plausible. I say this in recognition of the fact that it is the Respondents' onus to prove that there has been an implied waiver. I find that they have proven implied waiver in the circumstances of this case, in consideration of the principles of consistency and fairness.

[51] The facts before me are distinguishable from cases such as *Bielak* and *Vidcom*. In *Bielak*, in order to substantiate her discoverability defence in response to a summary judgment motion on the basis of an expired limitation period, the plaintiff asserted that she only became aware of the facts giving rise to her claim on a certain date. Her evidence included when she obtained certain photos, when she had certain conversations, and when she first saw certain financial documents. Master Brott held that these were matters of pure fact, and placed significant emphasis on the fact that the plaintiff did not disclose or rely on any legal advice in her pleadings:

> 19 …In my view, had the plaintiff led evidence and relied on legal advice, then she would have put her state of mind in issue. Her evidence is that she was unable to draw any conclusions from the documents and she did not fully understand the information provided by Mary. Accordingly, on the facts of this proceeding, the plaintiff has not put her state of mind in issue.
>
> …
>
> 29 I have considered the plaintiff's claim of solicitor client privilege and the defendants' assertion of waiver of privilege with the above principles in mind. I am not satisfied, in the circumstances of this case, that privilege has been waived. The plaintiffs have not put into issue their state of mind. The plaintiff has not voluntarily put the privileged information — such as legal advice received or her understanding of her legal rights — in issue. She has not disclosed nor is she relying on legal advice or her understanding of the law in support of her claim or in response to the defendants' limitations defence. The plaintiff has provided the underlying facts such as what she saw and when, and those questions have been answered. The defendants cannot create a waiver by pleading a limitations defence and then simply arguing that a discoverability analysis automatically puts into issue her state of mind. It is only the plaintiff who can do so.
>
> (Emphasis added)

[52] Similarly, in *Vidcom*, Vidcom pled only that it became aware of the alleged misappropriation on a certain date, and did not refer to any legal advice that it received. This point was central to Norell J's finding that there had been no waiver:

> 52 Vidcom disagrees that it has put its mind in issue. Vidcom simply pleads a fact — the date the alleged misappropriation was first discovered, and does not assert anything akin to "based on legal advice received, Vidcom first realized in or around March 2020 that the conduct of Ms. Rattan constituted misappropriation and was actionable in law". There is nothing in the pleadings or any affidavit that makes express or implied reference to legal advice sought or obtained or relied upon by Vidcom…
>
> …
>
> 69 In my view, Vidcom has simply pled that it discovered the alleged misappropriation on a certain date. It has not voluntarily injected into the litigation the legal advice it may have received, or taken a position that is inconsistent with the maintenance of privilege, nor has it made legal assertions that make it unfair to maintain that privilege. Mr. Kay's argument is essentially that there might be something in the solicitor's file and it would be unfair if he did not get to explore that. I do not agree. Solicitor-client privilege must be as close as to absolute as possible, and Mr. Kay has not demonstrated any pleadings or circumstances on which fairness and consistency would require waiver of privilege.
>
> (Emphasis added)

[53] For similar reasons, the case before me is also distinguishable from *Rushen v. Kosub*, 2007 BCSC 2010, another case relied on by the Applicants. In *Rushen*, the purchasers of a new home sued for misrepresentations about the state of the home after they discovered signs of water damage. They also sent notice to the City of Chilliwack for the damage. The City brought an application seeking production of communications between the plaintiffs and their lawyers, as well as further examination of the plaintiffs relating to communications between them and their lawyers.

[54] In their pleadings, the plaintiffs provided facts of the various dates on which they sought and obtained legal advice. They did not provide any details of the legal advice. This was fundamental to the finding that there had been no waiver of privilege:

> 24 I note the statement that where considerations of fairness form a basis for waiver of privilege, there is always some manifestation of a voluntary intention to waive the privilege, at least to a limited extent. Here, I am unable to find evidence of such an intention on the part of the plaintiffs giving rise to considerations of fairness. They have avoided making any reference to legal advice and discussions they had with legal counsel in the course of this action.

[55] In the case at bar, there may have been no waiver had Mr. Johnson simply referred to the fact that he learned from Ms. Wood on April 18th that AFL no longer

had any assets and that a new entity, AMF, was created. However, his affidavit continues on to say that "therefore" – i.e. having learned this new information – "it was decided that" the Applicants would pursue a certain course of action: enforcement of the Judgment against AMF. Because I have found that the most plausible reading of paragraph 16 is that the decision to pursue enforcement of the Judgment against AMF was made between Mr. Johnson and his former legal counsel, the inclusion of this decision in his affidavit amounts to an insertion of legal advice into the proceeding and an implied waiver of privilege. Mr. Johnson relied on the legal advice of Ms. Wood in his decision to pursue enforcement of the Judgment against AMF on behalf of the Applicants. Ms. Wood's legal advice informed the timing of the Applicants' decision to commence their application. The legal advice was relevant to the Applicants' state of mind with respect to their ability to enforce the Judgment against AFL or AMF.

[56] While I have found that there was a reliance on legal advice, I will make a quick note on a "reliance" on legal advice versus a "reference to" legal advice. In *Bielak*, Master Brott wrote that the plaintiff would have placed her state of mind in issue had she "led evidence and relied on legal advice". In *Vidcom*, Norell J emphasized that nothing in Vidcom's evidence referenced legal advice "sought or obtained or relied on" by Vidcom. In *Rushen*, Neilson J noted that the plaintiffs avoided making "any reference to legal advice". These decisions suggest that a reference to legal advice received *may* constitute an implied waiver depending on the circumstances of the case and where fairness and consistency require it.

[57] On this point, the Applicants also refer the court to *Fraser v. Holman Exhibits Ltd.*, 2008 CarswellOnt 4815. In *Fraser*, the court held that the following statement in an affidavit was insufficient to establish a waiver of solicitor-client privilege:

> …After consulting with counsel, we learned that Mr. Fraser was in breach of his employment contract, he was in breach of his fiduciary duty to the company, that he has committed the torts of conspiring with others to harm Holman Exhibits, and he interfered with Holman Exhibits' contractual relationship and engaged in fraud.

[58] Justice Echlin held that privilege had not been waived, writing:

> 27 Holman has not explicitly waived the privilege. Can it be seen to have done so by implication? Was the disclosure inadvertent? The advice given was not referenced in detail. The full extent of the disclosure is as set out above. The communications have not entered the "public realm" in any fashion. I find that the mere reference to "after consulting with counsel" is insufficient to establish a waiver of solicitor-client privilege in this instance. <u>There was no compelling</u>

> fairness or public policy reason given by counsel to support a finding of a waiver of privilege.
>
> (Emphasis added)

[59] It is true that sometimes a mere reference to legal advice will not be held to be a deemed waiver of privilege. However, privilege may be deemed to have been waived where there is a compelling "fairness reason" to do so.

[60] In *Lawless v. Anderson*, [2009] O.J. No. 4374, 181 A.C.W.S. (3d) 889, a medical malpractice suit, the defendant brought a motion for summary judgment dismissing the action on the basis that the action was not commenced within the one-year limitation period under the applicable *Regulated Health Professions Act*, SO 1991, c 18. In response to the defendant's motion for summary judgment, the plaintiff's solicitor swore an affidavit. He was cross-examined on the affidavit and refused to answer a number of questions on the basis of privilege. The defendant moved for a motion compelling the solicitor to answer the questions and produce relevant documents from his firms' file on the basis of a waiver of privilege. Master Hawkins wrote:

> 6 In my view there has been a waiver of this privilege. I say so for the following reasons.
>
> 7 First, the plaintiff delivered a statement of claim which raises the issue of discoverability in anticipation of a limitation of action defence. This pleading devotes eleven paragraphs to the subject of discoverability, culminating with the following allegation.
>
> > The plaintiff pleads that she did not know and could not reasonably have known whether she had a cause of action against the defendants until she received the expert opinion of her expert Dr. Lista on or about June 6, 2005 and, consequently, that the limitation period with respect to her cause of action against the defendants did not begin to run until that date.
>
> 8 The allegation that the plaintiff did not know and could not reasonably have known that she had a cause of action against the defendant Anderson until June 2005 puts in issue the plaintiff's state of mind from the date of the surgery giving rise to this action until June 2005. To the extent that during this period the plaintiff's solicitors gathered information on whether the plaintiff has a cause of action, this allegation makes relevant what the plaintiff's solicitors told the plaintiff and what she told them on the subject of a possible cause of action.
>
> 9 Secondly, and of central importance to this motion, is the fact that the plaintiff's solicitor Mr. Rachlin swore an affidavit in response to this motion. Paragraphs 7 to 11 of that affidavit describe communications from the plaintiff to Mr. Rachlin in 2003 relevant to the question of whether the plaintiff had a cause of

> action against the defendant Anderson, and the question of what the plaintiff knew from time to time.
>
> 10 In *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)* (1996), 106 F.T.R. 210 (Fed. T.D.) at paragraph 15, Rothstein, J. approved the following passage from Wigmore on Evidence, McNaughton's Revision (1961), Volume VIII at pages 635 and 636.
>
> > What constitutes a waiver by implication?
> >
> > 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.
>
> 11 The last two sentences of this passage sum up what Mr. Rachlin is attempting to do: make selective disclosure of some solicitor/client communications and withhold the rest. This the court will not permit. I therefore conclude that there has been waiver of privilege against disclosure of all solicitor/client communications relevant to the issues on the defendant Anderson's motion for summary judgment.
>
> (Emphasis added)

[61] Relying on *Lawless* and the same passage from *Wigmore on Evidence*, Master Short made a similar finding in *Dramel Limited v. Multani*, 2020 ONSC 4440. In another motion for an order permitting the defendant to examine former lawyers on the basis of a waiver of privilege, Master Short found that there had been a waiver and wrote:

> 68 The last two sentences of [the *Wigmore on Evidence*] passage sum up what the mortgagors are attempting to do in the present case. It would seem they seek to make selective disclosure of some solicitor/client communications and activities and to withhold the rest. This the court will not permit. I therefore conclude that there has effectively been a waiver of privilege against disclosure of all solicitor/client communications and actions at the point in time when various documents relating to amended mortgage documents were discussed and signed.

[62] Similarly, in *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, [1996] F.C.J. No. 30, 106 F.T.R. 210, Rothstein J held:

> 24 I am satisfied that there has been a waiver of privilege of some solicitor-client communication, and that in the circumstances of this case fairness and consistency must result in an entire waiver of the privilege. This is a case in which, as Wigmore says, the conduct of the respondent touches a certain point of disclosure at which fairness requires that privilege shall cease whether that is the intended result or not.

[63] Why do fairness and consistency require a finding of limited waiver in the case before me? In referring to the April 18, 2018 conversation between he and Ms. Wood in his affidavit, Mr. Johnson, on behalf of the Applicants, presumably meant to suggest that it was at that point (April 18, 2018) that the Applicants' claim became discoverable. Separate from this fact, we have 1) a voluntary insertion of legal advice by Mr. Johnson into the litigation, and 2) knowledge of an email, sent in 2016, which speaks to the Applicants' knowledge of the existence of AMF and *may or may not* speak to the discoverability of their claim. Given the Applicants' choice to disclose the 2018 communications between Ms. Wood and Mr. Johnson, including what I have found to be legal advice, to allow them to use privilege as a shield against disclosure of the relevant portions of the 2016 email would, in the circumstances of this case, result in an unfairness to the Respondents.

[64] Whether the reference to the existence of AMF in 2016 is relevant to the discoverability of the Applicants' claim is a matter left to be argued at the summary judgment stage. Fairness requires the Respondents have access to a redacted version of the 2016 communication for the purpose of that hearing. I will expand upon the extent of the disclosure of this communication later in my decision.

Scope of the Waiver

[65] Having found that fairness and consistency require a finding that there has been an implied waiver, I must now determine whether its scope should extend beyond the relevant portion of the 2016 email. I find that it should not.

[66] Interference with the right to solicitor-client privilege is warranted only to the extent necessary to achieve fairness. The Respondents are not entitled to a fishing expedition into the Applicants' former counsels' files. When Ms. Kelly was asked whether there were any other documents relevant to the discoverability of the main claim, she advised Respondents' counsel that the only document which made reference to either the restructuring of AFL or the existence of AMF was the 2016 email. There is no reason to believe that Ms. Kelly was being untruthful and that any other relevant documents exist in Stewart McKelvey's files. Fairness only requires

access to the 2016 email because there is no reason to believe that other relevant files exist.

[67] Nor does fairness require compelling the Applicants' former lawyers, Ms. Wood and Mr. Waugh, to answer questions about otherwise privileged legal advice at the summary judgment stage. I say this for two reasons. As counsel for the Applicants pointed out, Mr. Waugh has sworn an affidavit which, the Applicants say, discloses all of the facts that the Applicants knew about the main claim and when. Secondly, Mr. Johnson will be present to testify on behalf of the Applicants at the summary judgment hearing.

[68] In *Coe v. Sturgeon General Hospital (District No. 100)*, 2000 ABQB 698, the plaintiff doctor made an application to have the defendant hospital's lawyer removed from acting as counsel in order for the plaintiff to examine the doctor at trial. The plaintiff argued that he could not obtain the relevant evidence from anyone other than the hospital's counsel. Moen J's analysis was different from the case at bar, as *Coe* involved the right to counsel. However, both *Coe* and the case before me involve an interference with solicitor-client privilege and the aim of achieving fairness, and I find the decision of Moen J helpful in this regard.

[69] Moen J held that a fairness analysis involved asking whether the plaintiff could obtain the necessary evidence from a means other than the hospital's solicitor. Moen J held that there were two reasonable alternative forms of evidence available to the plaintiff: written communications already produced and the opportunity to hear from the hospital itself at trial. Moen J wrote:

> 12 The first step in our analysis is to determine if the communications are privileged and if there are any exceptions to the privilege which apply in this case. If the solicitor-client privilege is broken by one of the exceptions, then we must ask if it is necessary to order the Defendants to disclose privileged communications from their legal counsel. In considering this latter question we must ensure that fundamental fairness is achieved for the Plaintiff. In particular, we must ask if the Plaintiff can obtain the necessary evidence without Mr. Wintermute becoming a witness at the trial.
>
> …
>
> 26 In any event, it does not follow from a waiver of privilege, if there is one, that the solicitor has to testify him or herself as to the advice given to the client. In *Descôteaux, supra*, at 876, the Supreme Court stated, in relation to the introduction of privileged evidence through a third party, that a judge must satisfy herself that there is no reasonable alternative form of evidence to prove the matter in issue. In this case there is clearly a reasonable alternative: written

> communications can be, and in fact have been, produced, and the Defendants themselves can testify as to the advice that was given.

[70] Both of these reasonable alternatives are available to the Respondents in the case before me. *Armoyan v. Armoyan*, 2015 NSSC 241 involved a motion for disclosure from various non-parties. The motion was made during acrimonious litigation involving the division of property following the separation and divorce of a formerly married couple. The former wife sought disclosure from the former husband's brother, accounting firm, and two law firms. All were non-parties to the property litigation.

[71] Again, the *Armoyan* case involved different facts and a different legal analysis than the case before me. However, I find Forgeron J's reasons with respect to the non-party law firm, Stewart McKelvey, helpful. Forgeron J denied the motion to compel production from Stewart McKelvey, and wrote:

> 129 The court denies the motion of Lisa Armoyan. A proportional assessment does not weigh in favour of production for the following reasons:
>
> - Stewart McKelvey's files relating to the shotgun negotiations and transaction, and the marriage contract are no longer in the possession of Stewart McKelvey.
> - The production of relevant information has been ordered directly against the corporate entities, George Armoyan and Deloitte. Duplicate production orders are unnecessary and inefficient.
> - The cost of production, from a time and monetary perspective, would likely be significant given the unchallenged affidavit evidence of Stewart McKelvey.
> - It is likely that portions of the files would be protected by solicitor-client privilege and lawyer work product. Solicitor-client privilege is a fundamental tenant of the administration of justice: *National Bank Financial Ltd. v. Potter*, 2005 NSSC 113 (N.S. S.C.) at paras 61 - 62.
> - Granting such an order would not accomplish the just, speedy, and inexpensive determination of the MPA proceeding.
>
> 130 The motion is dismissed.

[72] In the case before me, duplicity of oral testimony and the existence of pre-existing affidavit evidence weigh in favour of denying the Respondents' request to compel the Applicants' former solicitors to testify at the summary judgment hearing.

[73] In *Bank Leu AG v. Gaming Lottery Corp.*, *supra*, Ground J wrote: "When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor client and litigation privilege." I believe this decision achieves that balance. The Applicants are ordered to produce the 2016 email from Ms. Wood to Mr. Johnson, with the fourth paragraph under the fourth heading left, for the most part, unredacted, save for the first full sentence which is to be redacted. The remainder of the email shall be redacted in its entirety. I make no further order for production or discovery.

[74] Costs are to be decided after the motion for summary judgement is heard. The date for this hearing will have to be arranged at a time that is convenient for the Court and counsel. I will await counsels' request before commencing this exercise.

McDougall, J.