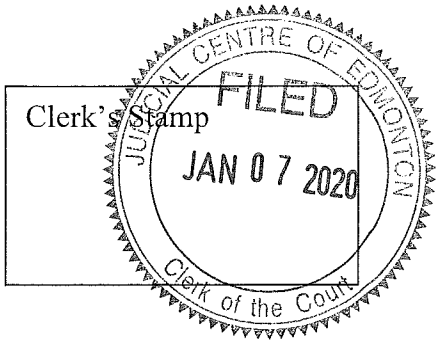

Clerk's Stamp

COURT FILE NUMBER:	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000, C. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust;
RESPONDENTS	OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN SAWRIDGE FIRST NATION and SHELBY TWINN
DOCUMENT	**SUBMISSIONS OF THE OFFICE OF THE PUBLIC TRUSTEE AND GUARDIAN ON ITS APPLICATION FOR ADDITIONAL PRODUCTION**

ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Hutchison Law** #190 Broadway Business Square 130 Broadway Boulevard Sherwood Park, AB T8H 2A3 Attn: **Janet L. Hutchison** Telephone: (780) 417-7871 Fax: (780) 417-7872 File: 51433 JLH	**Field Law** 2500 - 10175 101 ST NW Edmonton, AB T5J 0H3 Attn: **P. Jonathan Faulds, Q.C.** Telephone: (780) 423-7625 Fax: (780) 428-9329 File: 551860-8 JLH

TABLE OF CONTENTS

SUMMARY

1. Pursuant to Court's direction at the November 27, 2019 case management meeting, the Office of the Public Guardian and Trustee (OPGT) applies for the production by the intervener Sawridge First Nation (SFN) and the 1985 Trustees of specific documents or evidence for the hearing concerning the effect of the August 24, 2016 Asset Transfer Order (ATO) of Thomas J. ("the Asset Transfer Issue")

2. The requested documents are relevant and material to the issues raised by the SFN's submissions and the Court's clarification of the scope of the Asset Transfer Issue. Their production is required to ensure the Court has a full and proper evidentiary record before it to adjudicate the issues, to ensure the fairness of the Asset Transfer Issue hearing process, and to allow the OPGT to fully represent and protect the interests of the minors it is appointed to represent.

3. The submissions of the SFN depart from the evidence before, and previous findings by, the Court in this proceeding including:

a. the 1982 Sawridge Trust (the 1982 Trust) continues to exist notwithstanding the evidence of Paul Bujold that it does not;

b. the assets transferred from the 1982 Trust to the 1985 Sawridge Inter Vivos Settlement (the 1985 Trust) were to be held for the benefit of the beneficiaries of the 1982 Trust, notwithstanding the evidence filed by the SFN and the Trustees that the purpose of the transfer was to hold the assets for the beneficiaries of the 1985 Trust;

c. the transfer of assets was not permitted because it was beyond the powers of the 1982 Trustees and constituted an impermissible variation of the 1982 Trust, notwithstanding the transfer has been approved by the Court in the ATO and, as submitted by the Trustees to the Court, was permissible based on Pilkington principles;

d. the 1985 SFN Membership resolution approving the transfer of assets was ineffective, despite being relied on by the Trustees and the parties as valid and notwithstanding SFN's failure to provide any evidence regarding the circumstances of the membership meeting;

e. the assets in the 1985 Trust other than those transferred from the 1982 Trust, and in particular a debenture with the face value of $12 million, are of negligible or no value;

f. that selected correspondence between Canada and the SFN demonstrates restrictions on the assets in question that precluded the transfer, while the more complete collection of correspondence suggests Canada concluded otherwise;[1]

4. The SFN submissions are either unsupported by evidence or based on fragmentary documentary evidence and have never been the subject of production by the SFN. If these submissions are to be entertained by the Court, production allowing the parties to test their validity and the Court to reach a decision on them is required. The alternative to additional production is for the Court to strike such submissions.

5. The OPGT brings this application without prejudice to its previously stated positions that:[2]

a. the SFN's submissions are beyond the proper scope of the hearing concerning the effect of the ATO. The SFN's submissions would have this Court revisit the application that led to the ATO, including requiring the Court to go beyond the facts and law accepted by Thomas, J, make new findings of fact and law, and then apply those new findings to the interpretation of the Order. As set forth in its prior briefs, the OPGT submits this constitutes a collateral attack on, rather than an interpretation of, the ATO;

b. the remedies sought by the SFN, particularly the concepts of a resulting or constructive trust, are barred by applicable limitation periods, laches, acquiescence or estoppel; and

c. the SFN submissions ask the case management justice to grant final relief without the consent of the parties including the OPGT.

[1] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 17-19.
[2] OPGT Notice of Application, filed December 20, 2019, paragraph 3 and 19

BACKGROUND

6. Prior to the ATO being issued, the OPGT was actively pursuing production of evidence and documents relevant to the asset transfer, including a 5.13 Application seeking production from the SFN. [3]

7. The Trustees then proposed the ATO as a resolution to that aspect of final relief sought in their advice and direction application. The SFN explicitly, and with prejudice, stated their support for the terms of the ATO. The SFN was privy to the correspondence leading to the ATO and received the Trustees' ATO application and submissions, without changing their prior support for the ATO.[4] In the July 27, 2016 questioning of Paul Bujold conducted by SFN counsel, counsel for the OPGT confirmed that "everyone in the room is agreed on the assets clarification".[5]

8. The OPGT relied on the parties' consent to, and the SFN's endorsement of, the ATO in withdrawing its 5.13 production application in relation to the asset transfer issues. As a result of the ATO, the parties narrowed the remaining issues in this application to the determination of whether the definition of beneficiary in the 1985 Trust could be amended, and if it could, to deal with a distribution plan for the 1985 Trust.

9. As a result, the OPGT did not question on the Affidavits of Records served after the ATO was entered in relation to asset transfer issues.[6] For example, the OPGT did not question on the correspondence between SFN and Canada respecting the s.64 and 66 *Indian Act* issues, which correspondence was not produced by Affidavit of Record until after the ATO had resolved the asset transfer issues.[7]

10. As a result of the agreement resulting in the ATO, there has been almost no questioning on, and very limited production, respecting the asset transfer and none respecting the submissions now made by the SFN.[8] The SFN has not been required to produce evidence

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[3] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 5 and Exhibit C and D.
[4] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 8-11 and Exhibit F
[5] Questioning of Paul Bujold, OPGT November 15, 2019 Submissions, Tab G, pg. 5-8
[6] Affidavit of Roman Bombak, sworn December 19, 2019. paragraph 13 and 14
[7] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 12-14 and Exhibit G.
[8] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 15 and 16

relevant and material to the ATO or the Asset Transfer Issue, nor has it been required to provide a sworn statement regarding the efforts made to locate such documents or their ongoing existence. [9] The information the SFN has placed before the Court in this regard consists largely of the assertions and "understanding" of SFN or its counsel.

11. The SFN now seeks to overturn the ATO and to do so without ever having been subject to ordinary production requirements respecting the basis on which it seeks such a result. Matters the SFN was on record with this Court as being "irrelevant" to the asset transfer in 2016, are now the subject of argument and relied on by the SFN in its asset transfer issue submissions.[10]

12. As of the date of this submission, the SFN has not responded to the request to consider voluntary production. The 1985 Trustees have proposed a form of Consent Order to resolve the application vis a vis the Trustees, which the OPGT has endorsed.[11]

SUBMISSIONS

Production and Fairness

13. This Court has invited applications to seek solutions that would make the Asset Transfer issue process fairer.[12]

14. The SFN has filed submissions it submits are relevant to the Asset Transfer Issue. The submissions include significant reliance on understanding, assertions or submissions that are not tested, and in many respects, conflict with the evidence in the record.

15. A fair process cannot rest on unsworn evidence or representations by counsel.[13] As the SFN itself acknowledges, there should be no reliance on oral submissions, or indeed written submissions, "that are not given as evidence which can be cross examined".[14]

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[9] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 23
[10] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 6 and Exhibit E
[11] Affidavit of Roman Bombak, sworn December 19, 2019, paragraph 20 and Exhibit L; Consent Order, **Tab 1**,
[12] Case Management Meeting Transcript, November 27, 2019, page. 6, line 33 to pg. 7, line 29, **Tab** 2
[13] ***Shawesh v. Paul*** (2013) ABCA 321 at para. 11, **Tab 3**
[14] SFN November 20, 2019 Reply Submissions, paragraph 56

16. Further, the OPGT's reliance on the SFN's agreement with the terms of the ATO in 2016, and withdrawal of the 2016 production application against the SFN, requires that with the SFN's revised positions, production be revisited.

17. The need for fairness in this process is heightened by:

a. The potential for the positions taken by SFN and the Trustees to result in final relief in this proceeding;

b. the significant detrimental impact the SFN's revised positions, and such relief, will have on the interests of minors, arguably further engaging this Court's parens patriae jurisdiction.[15]

18. Further, the documents the OPGT seeks are both relevant and material to the issues and arguments now raised, and understandings relied upon, by the SFN. If the documents sought may assist this Court in determining any one of the issues raised by the SFN, they are material. [16]

19. The Court has authority to direct the production of these specific documents, requested by the OPGT pursuant to Rules and applicable tests. [17] As detailed in the submissions below and in relation to each category, all documents requested must, based on other positions taken, exist and are in the power and control of the SFN, the Trustees or both. If the documents do not exist, that is also material evidence the Court requires to weigh the SFN's positions.

20. Regarding existence of the documents, based upon the known events around the 1985 asset transfer and normal operation of a First Nation and the 1982 Trust, the documents requested by the OPGT must exist. If the documents never existed, or have not been preserved, those remain important evidentiary points for the Court to be aware of when weighing the SFN submissions. The documents sought from SFN would ordinarily be under SFN's control, rather than the control of the 1985 Trustees. Given the SFN's previous position that they were

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[15] E. v. Eve [1986] SCR No. 60 (S.C.C.), **Tab 4**
[16] ***Weatherill (Estate of) v. Weatherill*** (2003) ABQB 69, par 16-17, **Tab 5**, OPGT Production Authorities; Rule 5.2, Alberta Rules of Court, **Tab 6**
[17] Alberta Rules of Court, Rules 2.10, 5.2, 5.10, 5.11, 5.13, 5.27 and 6.3, **Tab 6**; ***Trimay Wear Plate Ltd. v. Way*** (2008) A.J. No. 1075 (Q.B.), **Tab 7**.

irrelevant it cannot be assumed they have been shared with, or are available through, the Trustees.

21. The specific evidence the OPGT seeks is specifically enumerated in paragraph 1, subparagraphs (a) to (i) of its Application filed December 20, 2019. They are addressed in the same order in these submissions.

(a) The tax filings and financial statements of the 1982 Trust from January 1, 1985 to present

22. In support of its position, the SFN argues that the 1982 Trust remains in existence, notwithstanding the evidence of Paul Bujold to the contrary, and that its current trustees are the present Chief and Council of the SFN.[18] The SFN further argues that the 1982 Trust has never been dissolved by an act of the 1982 Trustees, notwithstanding their transfer of all the assets of the 1982 Trust to the 1985 Trust.[19]

23. The credibility of these assertions would be significantly impacted if the 1982 Trust ceased to file any tax returns, and ceased to produce financial statements, after the 1985 asset transfer.

24. The production of such records, or evidence that such records were never created, is required in order to allow the Court to evaluate the SFN submission and the competing positions of the OPGT and the SFN respecting the existence of the 1982 Trust.

(b) The 1985 Trust financial statements from 2005 to present and any other financial records that establish the current value of the $12 million debenture

25. The 1985 Trust contains assets that were settled directly into the 1985 Trust, for the benefit of the 1985 beneficiaries including a debenture with a face value of $12 million. Such assets were not a part of the 1985 asset transfer and their status as assets of the 1985 Trust held for the 1985 Trust beneficiaries is unaffected by any interpretation of the ATO.

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[18] Affidavit of Darcy Twin, filed September 26, 2019, paragraphs 6 and 15; SFN November 20, 2019 Reply, paragraph 37-39.

[19] Brief of the Intervenor, Sawridge First Nation, on the Asset Transfer Issue, filed November 15, 2019, (SFN Nov. 15 Brief), at paras.24, 31, 32; Reply Brief of Sawridge First Nation on Asset Transfer Issue, filed November 20, 2019 (SFN Nov. 20 Brief) at paragraphs 37-39

26. In its submissions the OPGT has argued there is no basis for any suggestion that the ATO intended the assets received by the 1985 Trust from the 1982 Trust be treated differently than assets received from other sources, such as the debenture.

27. The SFN has responded to this submission with the assertion, unsupported by evidence, that it understands this debenture "may no longer be of any value" and that the 1985 Trust has no proprietary interest therein. The SFN argues that as a result all assets in the 1985 Trust should be found to be held for the benefit of the 1982 beneficiaries.[20]

28. Any consideration of the SFN's submissions concerning the status of the assets in the 1985 Trust, and in particular the submission that the assets are held for the benefit of the 1982 beneficiaries, requires this Court have proper evidence before it concerning those assets. As regards the debenture, the SFN cannot gloss over its significance with an unsupported "understanding" that it is of limited value.

29. The OPGT seeks production of financial statements and other documents in the hands of the Trustees or SFN that establish the value of the debenture and the nature of the Trust's interest in that debenture. The OPGT submits such records are required to allow the Court to properly consider and evaluate the competing submissions of the OPGT and the SFN with respect to the debenture and its significance for the interpretation of the ATO.

(c) Copies of Notices to SFN Band Members For the Members Meeting to Approve the Asset Transfer

(d) Evidence regarding the consultation process with SFN Members prior to the April 15, 1985 vote

(e) Provide Minutes of the 1982 Trustee meetings, held prior to April 15, 1985, including Trustees' resolutions, referencing the proposal to transfer the 1982 assets to the 1985 Trust and to hold Band members' or beneficiary meetings regarding the transfer.

(f) Provide Minutes of the Sawridge Chief and Council meetings held prior to April 15, 1985, including Band Council resolutions, referencing the proposal to transfer the 1982 Trust assets to the 1985 Trust and to hold Band members' or beneficiary meetings regarding the transfer.

[20] SFN Nov. 15 Brief, para. 106 and 107

30. These groups of documents share the common characteristic of establishing the understanding, intentions, and information provided to the SFN (via Chief and Council, who were also the 1982 Trustees) and the SFN Members (who were also the 1982 beneficiaries) in relation to the 1985 asset transfer.

31. The relevance and materiality of those matters arises in relation to at least the following positions taken by the SFN that:

a. the 1982 Trustees actions in relation to the 1985 asset transfer were not permitted, and the implication that the 1982 Trustees knew their actions were not authorized;[21]

b. the 1982 Trust simply changed its name in 1985;[22]

c. the 1982 Trust still exists, or that the 1985 Trust remains, in some manner, accountable to the 1982 Trust, Trustees and beneficiaries.[23]

32. The purpose and intentions of the SFN and its Members, including the information and understandings they were operating upon leading up to the April 1985 asset transfer are both relevant and material to whether these assertions by the SFN have any air of reality, credibility or weight.

33. The SFN seeks, in essence, the equitable remedy of a resulting or constructive trust – a declaration that the 1985 Trust holds the assets for the 1982 beneficiaries on the terms of the 1982 Trust Deed.[24] Given the nature of the remedy sought, and the timelines involved, applicable limitations periods and equitable concepts of laches, estoppel and acquiescence are relevant and material to the positions taken by the SFN.

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[21] SFN November 20, 2019 Reply, paragraph 34.
[22] SFN Brief dated November 15, 2019, paragraphs 89-91.
[23] SFN Brief dated November 15, 2019, paragraphs 24, 57, 102, 105, 107, and 109; SFN Reply dated November 20, 2019, paragraphs 37-39
[24] SFN November 15, 2019 brief, paragraph 2, 102, 104 and 107 and Tab 9 Authorities; SFN November 20, 2019 Reply Brief, paragraph 1,

34. In order for the Court to be in a position to make findings on these issues, it must have a complete evidentiary record regarding the purpose, wishes, intentions, knowledge, information provided to and advice given to the SFN, Chief and Council (either as Chief and Council or as the 1982 Trustees) and SFN Members (either as members or as 1982 Beneficiaries).

35. The SFN has suggested that 1985 SFN Members' resolution is not effective.[25] If the SFN seeks to go behind the resolution, they must be compelled to provide the documentation that would allow the Court to weigh the information provided to SFN members in advance of the April 15, 1985 Members' meeting, the notices provided for the SFN Members meeting (which would confirm it was duly convened) and the information Chief and Council (or the 1982 Trustees) had regarding the SFN Members meeting.

36. If, as it appears, the SFN is asserting the position that somehow the 1985 Trust remains somehow accountable to the 1982 Trust and its beneficiaries, the intentions and understandings of the 1982 Beneficiaries (at the time, identical to the SFN Membership) is both relevant and material to consideration of those issues.

(g) Provides correspondence or financial reporting documents dated prior to April 15, 1985 that address the source of funds used to buy the assets now held in the 1985 Trust, including correspondence to or from Canada approving the original release of SFN capital and revenue funds for the purchase of those assets;

37. The SFN submissions appear to be premised on the position that all, or the vast majority, of assets held in the 1985 Trust were originally purchased by SFN with capital and revenue funds released to SFN by Canada pursuant to s. 64 and 66 of the *Indian Act*. There is no specific evidence to establish that position before this Court. [26]

38. Catherine Twinn's submissions assert that the funds used to purchase the assets were not all capital and revenue funds.[27]

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[25] SFN Brief dated November 15, 2019, paragraph 31; Transcript of October 30 Case management Hearing, page 2 line 37 to page 3, line 1 (Tab xx0

[26] SFN November 15, 2019 submissions, paragraphs 5, 12 and 16

[27] Catherine Twinn Brief dated November 15, 2019, paragraph 66(b)(A)

39. Given the SFN's heavy reliance on the nature of the funds affecting the validity of the 1985 asset transfer, the matter of the source and character of the funds is central to their position. Documents respecting these assertions will be available either from SFN, or at SFN's request, from Canada. Pursuant to s.64 and 66 of the *Indian Act*, any capital and revenue funds (and the amounts) released by Canada to SFN will have been authorized both by the Minister and by SFN Chief and Council. [28]

(h) The complete exchange of correspondence between Sawridge First Nation, or its advisors, and Canada beginning in December 1993 and continuing into at least 1994, regarding the existence of the 1985 Trust and Canada's concerns in relation to s.64 and s.66 of the *Indian Act*;

40. The SFN specifically relies on the December 23, 1993 letter from Indian and Northern Affairs Canada inquiring about the Sawridge Trusts to suggest that the assets in the trusts were subject to an obligation that the funds be used for the benefit of Sawridge members,[29] The SFN has not produced the subsequent chain of correspondence with Canada nor other evidence concerning the manner in which this situation was resolved. While further correspondence between SFN advisors and Canada arising from the December 23, 1993 letter has been provided by the Trustees, these also do not demonstrate the resolution of the issue.

41. It is the evidence of the SFN deponent, Darcy Twinn, that so far as he was aware Canada did not interfere in the operation of the 1985 Trust.[30] The OPGT respectfully submits having raised this issue in its argument it is incumbent upon the SFN to provide complete production of all documents pertaining to the matter and its ultimate resolution.

(i) Provides documents prepared prior to May 1985 and directed to the SFN, the 1982 Trustees and the 1985 Trustees from their respective financial or legal advisors, that address:

i. transfer of assets from the 1982 Trust to a new trust;
ii. Advice, comments or discussion regarding the consequences of an asset transfer for the interests of the 1982 Beneficiaries;

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[28] s. 64 and 66, *Indian Act*, R.S.C. 1985 c. I-5, November 15 Submissions of SFN, Tab 3
[29] *Ibid*
[30] Questioning on Affidavit of Darcy Twin, October 18, 2019, page 29 line 12 to page 30 line 14

iii. **Advice, comments or discussion regarding the need to consult with, inform, or hold a vote by the SFN Members or 1982 beneficiaries in relation to a transfer of assets.**

42. The existence of such expert advice is clear, including from the SFN Questioning of Paul Bujold, as described below. The OPGT notes that the consent Order proposed by the Trustees and endorsed by the OPGT will provide documents under this heading on the terms set out in the Order. The OPGT notes that this is in accord with the general rule that documents in the hand of the Trustees, including legal and other advice obtained by the Trustees in connection with the operation and management of the trust, is not privileged in the hands of the trustees as against trust beneficiaries.[31] The OPGT respectfully submits this principle applies equally with respect to documents pertaining to legal and other advice received by the SFN which were shared with or provided to the Trustees by the SFN. Any waiver of privilege in favor of the Trustees amounts to a waive in favor of the beneficiaries on whose behalf those Trustees act.

43. The categories of such documents sought herein are directly relevant to the submissions of the SFN herein for the reasons previously set out. The OPGT does not in this application seek disclosure of legal or other advice pertaining to the current litigation. Its request in this application is limited to advice given in connection with the asset transfer at the time of its planning and execution.

44. The OPGT also notes that the SFN has previously elicited evidence of such advice from the Trustees representative, Paul Bujold. In particular the SFN sought and received evidence from Mr. Bujold concerning his discussions with accountant, Ronald Ewoniuk, and legal adviser Maurice Cullity concerning the creation and purpose of the 1985 Trust. This further underscores the relevance of the production sought by the OPGT and that the SFN has waived privilege concerning these matters as between itself and the Trustees. Selwective waiver of privilege is not permissible.[32]

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[31] ***O'Rourke v. Darbishire,*** [1920] All ER Rep 1, 57 SLR 730 at 740. **Tab 8; *Ballard Estate (Re),*** 20 OR (3d) 350, 1994 CanLII 7513 at paras 7-10. **Tab 9*; Pothos Leasing Ltd. v. Headon*, 2003 CanLII 25534 (ON SC), paras. 13-17, Tab 10**

[32] ***Rozak Estate v. Demas,*** **[2011 A.J. No. 398,** at paras 96-100, **Tab 11**

RELIEF SOUGHT

45. As noted, the OPGT and the Trustees have agreed to resolve this application, as it applies to the Trustees, by way of Consent Order. Once the Trustees' Further Supplementary Affidavit of Records is received, the OPGT can assess whether there is any need for questioning of witnesses.

46. The OPGT maintains its production request in relation to the SFN at this time, on the grounds set out above, but awaits the SFN's response regarding a voluntary resolution. The OPGT submits that the SFN must be required to provide evidence to support its understandings, assertions and submissions, or the same must be struck from the record and given no consideration by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2020

HUTCHISON LAW

Per:

JANET L. HUTCHISON

Solicitors for the Office of the Public Guardian and Trustee of Alberta

FIELD LAW

Per:

P. JONATHAN FAULDS, Q.C.

Solicitors for the Office of the Public Guardian and Trustee of Alberta

LIST OF AUTHORITIES

Tab	Authorities
1.	Consent Order
2.	Case Management Meeting Transcript, November 27, 2019
3.	*Shawesh v. Paul (2013)* ABCA 321
4.	*E. v. Eve* [1986] SCR No. 60 (S.C.C.)
5.	*Weatherhill (Estate of) v. Weatherhill* (2003) ABQB 69
6.	Rule 5.2, Alberta Rules of Court
7.	*Trimay Wear Plate Ltd. v. Way* (2008) A.J. No. 1075 (Q.B.)
8.	*O'Rourke v. Darbishire,* [1920] A11 ER Rep 1, 57 SLR 730
9.	*Ballard Estate (Re)*, 20 OR (3d) 350, 1994 CanLii 7513
10.	*Pothos Leasing Ltd. v. Headon,* 2003 CanLii 25534 (ON SC)
11.	*Rozak Estate v. Demas,* [2011] A.J. No. 398

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (Application by the Office of the Pubic Trustee and Guardian for Additional Production)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTYFILINGTHIS DOCUMENT	Dentons Canada LLP 2500 Stantec Tower 10220 – 103 Avenue Edmonton, AB T5J 0K4 Attention: Doris C.E. Bonora and Michael Sestito Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

UPON the application by the Office of the Pubic Trustee and Guardian ("OPGT") for certain relief regarding additional production filed December 20, 2019 (the "Production Application");

AND UPON noting that the parties do not agree on the relevance of the documents sought by the OPGT in the upcoming application regarding the effect of the Order of the Honourable Mr. Justice Thomas granted on August 24, 2016, regarding the transfer of assets from the 1982 Trust to the 1985 Trust (the "Asset Transfer Order");

AND UPON noting that the Sawridge Trustees wish to preserve privilege but are prepared to allow certain privileged documents to be produced provided that such production does not amount to a full release of any privilege owing to the Sawridge Trustees.

AND UPON reviewing the court file, including the Asset Transfer Order and the order granted on Dec 19, 2018 by the Honourable Mr. Justice Henderson regarding privilege (the "Privilege Order");

IT IS HEREBY ORDERED:

1. The Sawridge Trustees shall file an affidavit that addresses paragraph 1(a) – (i) set out in the Production Application that will address the results of searches for the documents requested.

2. The affidavit contemplated in paragraph 1 does not constitute an admission by the Sawridge Trustees that such documents are relevant and the Sawridge Trustees are given the right to address the relevance of such documents at any future application.

3. The affidavit contemplated in paragraph 1 does not constitute a general waiver of privilege by the Sawridge Trustees

4. The parties are still bound by the Privilege Order and nothing in this order affects the contents of the Privilege Order in respect of documents that have already been produced.

The Honourable Mr. Justice J.T. Henderson

APPROVED AS TO FORM AND CONTENT:

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Edward H. Molstad, Q.C.
Counsel for the Sawridge First Nation

Action No.: 1103-14112
E-File Name.: EVQ19TWINNR
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

IN THE MATTER OF THE TRUSTEE ACT,
R.S.A. 2000, c. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")

ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN and DAVID MAJESKI, as TRUSTEES FOR THE 1985 SAWRIDGE TRUST (the "1985 Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
November 27, 2019

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alternative, maybe that will arise as well.

But if I do not have sufficient confidence in the state of the record, I reserve the right to say no, this will not happen on this application. I can't tell you how I will rule on that until I have a better handle on the record that's before me. And I don't have that today, I will propose to address that issue specifically in the reasons. So, I will hear argument, I hopefully will be able to give you an answer, I will do my best to give an answer, but I, sitting here today, cannot tell you with an absolute certainty that you will walk away with an answer. There is a chance that I will be concerned about the state of the record and, therefore, I will not be able to give you an answer. And that's really where I think we will be.

I want to specifically address a concern or a caution that was raised with me by Mr. Faulds, I believe, at the last appearance, and that is inviting me to look at page 56 and 57 of the transcript of the October 30th hearing. And there, Mr. Faulds I think was pointing me to commentary that could suggest that there were two issues at stake here - one, is whether I agreed or would conclude that the 1985 trust assets were being held by the 1985 trustees for the benefit of the 1985 beneficiaries; and, if I didn't agree on that front, we would stop and do something else. And I see his -- I see that there is something in the record that would point in that direction but I can tell you that that is not what I was attempting to articulate at the time I made those comments. What I was doing, and if we follow along, I was trying to suggest that that is something that Mr. Faulds had referred to earlier in the presentation.

The two issues that I see, and always have, are the asset transfer issue and the jurisdictional issue. It would not be possible to cut the asset transfer issue in two parts and finish off by saying yes or no to whether or not the 1985 trustees hold for the benefit of the 1985 beneficiaries, and then wait for further argument. That is not possible. Because to get to the point where I make a ruling on 1985, I'm going to have to have considered the context, and the background, and most importantly, what was the status of this trust immediately prior to Justice Thomas granting his order.

So that is where I think we are. Now, we did hear further submissions from the parties last time with respect to two issues - document production and process. I've previously given a ruling, and indeed there was debate about that just a few minutes ago, my prior ruling was that there's no need for any further document production. That is the ruling. If there is something in particular that any of the parties think they need in order to properly advocate their position, I am prepared at least on the surface to reconsider my ruling if you tell me what you want and why it would impact the decision that I have to make. So if anyone wants to make submissions on that, they're welcome to do that.

Secondly, on the issue of process, if someone has some suggestion as to how we could conduct this process in a manner that would come to a fairer result for everyone, I'm happy to hear from you. But, at the moment, we have an application that's been brought by the trustees in the ordinary course, as trustees do from time to time, to seek advice and direction that is routinely conducted on the basis of affidavit evidence and heard in chambers, and that's the way I think that this has been set up. That would seem to be a fit and proper process. It would permit, in my view, a fair opportunity to have all of the submissions made with respect to potential outcomes. And, in the absence of some submissions or suggestions to the contrary, that's how we will go.

MR. FAULDS: My Lord, might I ask --

THE COURT: Sure.

MR. FAULDS: -- in respect of those last two points, how would you like -- if any of the parties or the intervenor do indeed wish to present that, is a letter to Your Lordship sufficient to set that out or would you prefer an application?

THE COURT: You know, I don't like letters, generally speaking, because then we're waiting for other parties to comment and it just doesn't -- it's not a proper process, in my mind. So if you, or any of the parties, if any of the parties want to deal with either of those issues, if there are particular documents that you want to see, tell me what in particular you want and tell me how those documents will impact in a material way the outcome of the decision, just call my assistant, and I have no free days between now and Christmas, but there's always 8:30, there's lunch hours, and there's 4:30 if we need to. Similarly, if someone has an idea as to a fairer mode of hearing that we could undertake on the 16th of January, I'm -- I want to do whatever we can to make sure that we give everyone the fairest opportunity to make a full presentation so that a proper outcome can be had in relation to this case.

MR. FAULDS: Thank you.

THE COURT: Okay. Anything else we need to deal with?

MS. OSAULDINI: In terms of the January hearing, we would like the opportunity to file further written submissions in light of the clarification today.

THE COURT: Yes. That was the other issue I had wanted to raise. There is been some water under the bridge since the briefs were filed and I -- I think it would be quite appropriate if supplemental briefs were provided if you thought that was necessary. I would -- I don't want to turn this into a ping-pong game where

In the Court of Appeal of Alberta

Citation: Shawesh v Pahl, 2013 ABCA 321

Date: 20130927
Docket: 1303-0075-AC
Registry: Edmonton

Between:

Emad Abdayhadi Shawesh

Respondent
(Plaintiff)

- and -

Cst. Jennifer Pahl and Cst. Nathan Downing

Appellants
(Defendants)

- and -

Michael Boyd, Chief of Police and Edmonton Public Library Board, Cst. Ng, Cst. Ozimko, Cst. Ledig, Cst. Hankewich, Cst. Jason Lafond, Edmonton Public Library Security Officer Brian Farr, Edmonton Public Library Security Officer Stephanie West, Edmonton Public Library Security Officer James Lehti, Corporate Security Peace Officer Mike Perlinski and Corporate Security Peace Officer Melissa Shewchuk

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment of the Honourable Madam Justice Conrad and the Honourable Mr. Justice Slatter

Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall Concurring in the Result

Appeal from the Order by
The Honourable Mr. Justice A.W. Germain
Dated the 27th day of February, 2013
Filed on the 13th day of March, 2013
(Docket: 1103-01529)

Memorandum of Judgment

The Majority:

[1] The appellants appeal the dismissal of their summary judgment application.

[2] The respondent sued the appellants, and several other police officers and library security officers, alleging that he was assaulted by them. The police officers brought summary judgment applications, and the chambers judge dismissed the action against some of them for lack of service, and another for lack of any merit. No cross-appeal was brought, and we express no opinion on whether the service in this case was sufficient or curable.

[3] The only evidence at the summary judgment application was provided by the police officers, as the respondent did not file an affidavit. The appellant Pahl deposed that she was on duty at the counter at the police station when someone reported an injured man in the street. She and another officer went out to the street, and found the respondent injured. Pahl deposes that she and the other officer assisted the respondent to a nearby bench, helped him call an ambulance, and eventually arranged for a police wagon to take him to the hospital. While she acknowledges being in contact with the respondent, she directly denies any assault.

[4] The appellant Downing was a police recruit, who was riding along in the police wagon that took the respondent to the hospital. He deposed that he stood by the passenger door of the wagon while the respondent entered it, and never came into any physical contact with the respondent.

[5] The trial judge dismissed the application for summary judgment, holding that there was some evidence of "contact" that precluded summary dismissal. This ruling reflects several errors. Firstly, the respondent had filed no evidence, and it was an error for the trial judge to rely on his unsworn statements as evidence that he was assaulted by the appellants. Rule 1.1(2) makes it clear that the ordinary rules apply to self-represented litigants, and that includes the rule that a plaintiff must produce some evidence to resist a summary dismissal application.

[6] The second error is that mere contact is not sufficient to constitute an assault. Constable Pahl's assistance to the respondent in removing him from middle of the road would not amount to an assault.

[7] The third error was that Constable Downing deposed positively that he never touched the respondent, but merely observed him on the scene. There was no basis for the finding that there was any contact between this appellant and the respondent.

[8] On this record, the appeal must be allowed. The evidence of the appellants at the summary dismissal application was uncontradicted, and the action is summarily dismissed

against the two appellants. Rule 323.1 is waived and the Registrar may enter the judgment if it complies with these reasons. In the circumstances there will be no costs of the appeal.

Appeal heard on September 6, 2013

Memorandum filed at Edmonton, Alberta
this 27th day of September, 2013

Conrad J.A.

Authorized to sign for: Slatter J.A.

O'Ferrall J.A. (concurring in the result):

[9] I concur in the result. I too would have allowed the appeal. However, I would have referred the matter back to the chambers judge.

[10] With respect to the chambers judge's dismissal of the defendants' summary dismissal applications, the sworn evidence of the defendants was not contradicted by any sworn evidence of the plaintiff. And although the plaintiff, a self-represented litigant with limited command of the English language, repeatedly asserted in open court that he had been assaulted by the defendants, the chambers judge's dismissal of the defendants' summary dismissal applications appears to have offended the principle that once a defendant adduces evidence indicating a claim has no merit, the burden shifts to the plaintiff to adduce evidence indicating that the claim does have merit.

[11] Rule 6.11 of the *Alberta Rules of Court*, AR 124/2010, provides that when making a decision on an application, the Court may only consider certain forms of evidence. The permitted forms of evidence do not include unsworn statements made in open court. They do include affidavit evidence or, with the court's permission, oral evidence given in the same manner as it would have been given at trial (i.e., under oath and subject to cross-examination - Rule 8.17(1)).

[12] In my view the chambers judge should have either granted the defendants' application for summary dismissal, as the majority have ruled, or he should have given the self-represented plaintiff an opportunity to properly put evidence before the court, whether by way of a sworn affidavit or by way of oral testimony given under oath (i.e., "in the same manner as at trial", to use the words of Rule 8.17(1)).

[13] The reason I would have referred the matter back to the chambers judge was that, on the record before us, I was unable to ascertain whether the opportunity to present evidence was given to the plaintiff. It may be that on a prior appearance it was explained to the plaintiff what would be required of him, by way of evidence, on an application for summary dismissal. If it was and the plaintiff simply failed or refused to properly present his evidence, then the defendants' applications for summary dismissal ought to have been granted. If plaintiff was not given the opportunity to present proper evidence, then the chambers judge may wish to give him that opportunity. It is up to the chambers judge to make that call.

[14] Secondly, while there was no appeal by the self-represented plaintiff of the chambers judge's dismissal of his claims against the other four police constables "due to lack of service" of the Civil Claims on the constables, I question the ruling. The plaintiff filed Civil Claims in Provincial Court and thereafter purported to serve them. The claims were later transferred to the Court of Queen's Bench because the Provincial Court cannot hear a claim against a "peace officer for anything done by that person while executing the duties of that office": *Provincial*

Court Act, RSA 2000, c P-31, s 9.6(2)(d). The plaintiff purported to serve the Civil Claims he filed in Provincial Court on the four constables by delivering them in envelopes to the front desk of the Edmonton City Police Service's downtown headquarters. The envelopes were addressed to the four constables. However, the plaintiff did not personally serve the four constables. The chambers judge appeared to be of the view that personal service of the documents was required. And, as a consequence, he ruled that no proper service took place.

[15] No doubt personal service is the "gold standard" to employ words used by the chambers judge. But it is not the only standard. Both the *Provincial Court Act*, RSA 2000, c P-31, s 29(1) and the *Alberta Rules of Court* (R 11.5) are permissive in that they both describe ways in which Civil Claims and commencement documents "may" be served.

[16] A Civil Claim in Provincial Court may be served personally, or by leaving a copy at the defendant's "most usual place of abode" with "some resident of the abode" who is "apparently 16 years of age or older": s 29(1)(a). It may also be served by mailing it by registered mail: s 29(1)(b).

[17] Likewise, a commencement document in the Court of Queen's Bench may be served personally or sent by recorded mail addressed to the individual: R 11.5.

[18] In my view, by using the permissive word "may", section 29(1) of the *Provincial Court Act* does not prescribe how a Civil Claim must be served; but the methods set forth in both the *Provincial Court Act* and the *Alberta Rules of Court* suggest that personally delivering the document to the defendant's place of work could constitute good service in absence of evidence that the document never came to the defendant's attention.

[19] In this case, there was no such evidence. Indeed there was evidence to the contrary. Counsel for the four police officers had four unopened envelopes addressed to them in her possession on the day she was in court applying on their behalf for a dismissal for lack of service. In fairness to her, she volunteered that information. I can do no better than quote the transcript (ARD p 23-24, 32 and ff):

> Counsel [for the constables]: Now - now what the plaintiff did was he dropped off some envelopes at the downtown headquarters police ... I actually have them here with me. Ozimko, Ledig, CST, Constable, I'm assuming, and Lafond written on them and dropped them at the front desk of the Edmonton Police Headquarters.
>
> The Court: And the date of that, again?
>
> Counsel: February 14, 2011. ...

The Court: So do we concede that if that droppage was valid service, they are in time.

Counsel: If it was valid service, but -- but we would submit that it's absolutely not.

[20] There could be little doubt about what was in the envelopes because similar envelopes containing the Civil Claim were served on Constables Pahl and Downing and the Chief of Police. Those Civil Claims also named the four constables as defendants. In the case of Constables Pahl and Downing, the plaintiff swore an affidavit of service saying he personally left a true copy of the Civil Claim, the Notice to Defendant and a form of Dispute Note "at the registered office of the above named corporation at 9620 - 103 Avenue", which is the address of the Edmonton Police Service's headquarters. For some reason Constables Pahl and Downing were served but the others were not.

[21] As indicated above, the plaintiff has not appealed the dismissal of his claims against these four constables on the basis that service was effected. And there may be good reasons why he did not. So I do not wish to say more than the ruling raised questions for which we had no answers.

[22] However, to be clear, my objective in writing this concurring judgment was simply to indicate I would have given the chambers judge an opportunity to determine whether the plaintiff ought to have been given a chance to present evidence substantiating his claim. Otherwise I agree with the majority that the appeal ought to be allowed and the plaintiff's claim summarily dismissed.

Appeal heard on September 6, 2013

Memorandum filed at Edmonton, Alberta
this 27th day of September, 2013

O'Ferrall J.A.

Appearances:

Emad Abdayhadi Shawesh In Person (with interpreter)

M.A. Wolowidnyk
for the Appellants

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

1985: June 4, 5 / 1986: October 23.

File No: 16654.

[1986] 2 S.C.R. 388 [1986] 2 R.C.S. 388 [1986] S.C.J. No. 60 [1986] A.C.S. no 60

Eve, by her Guardian ad litem, Milton B. Fitzpatrick, Official Trustee, appellant; v. Mrs. E., Respondent; and Canadian Mental Health Association, Consumer Advisory Committee of the Canadian Association of the Mentally Retarded, The Public Trustee of Manitoba, and Attorney General of Canada, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR PRINCE EDWARD ISLAND

Case Summary

Courts — Jurisdiction — Parens patriae — Scope of doctrine and discretion required for its exercise — Whether or not encompassing consent for non-therapeutic sterilization of mentally incompetent person — Chancery Act, R.S.P.E.I. 1951, c. 21, s. 3 — Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2.

Family law — Mentally incompetent person — Application made for non-therapeutic sterilization of adult daughter by parent — Whether or not court authorized to grant consent — Whether or not authority to be found in statutes — Whether or not authority flowing from parens patriae power — Mental Health Act, R.S.P.E.I. 1974, c. M-9, am. S.P.E.I. 1976, c. 65, ss. 2(n), 30A(1), (2), 30B, 30L — Hospitals Act, "Hospital Management Regulations", R.R.P.E.I., c. H-11, s. 48.

Human rights — Disabled persons — Mentally incompetent person — Application made for non-therapeutic sterilization of adult daughter by parent — Whether or not court authorized to grant consent — Whether or not authority to be found in statutes — Whether or not authority flowing from parens patriae power.

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"Mrs. E." applied to the Supreme Court of Prince Edward Island for permission to consent to the sterilization of "Eve", her adult daughter who was mentally retarded and suffered from a condition making it extremely difficult to communicate with others. Mrs. E. feared Eve might innocently become pregnant and consequently force Mrs. E., who was widowed and approaching sixty, to assume responsibility for the child. The application sought: (1) a declaration that Eve was mentally incompetent pursuant to the Mental Health Act; (2) the appointment of Mrs. E. as committee of Eve; and (3) an authorization for Eve's undergoing a tubal ligation. The application for authorization to sterilize was denied, and an appeal to the Supreme Court of Prince Edward Island, in banco, was launched. An order was then made appointing the Official

Trustee as Guardian ad litem for Eve. The appeal was allowed. The Court ordered that Eve be made a ward of the Court pursuant to the Medical Health Act solely to permit the exercise of the parens patriae jurisdiction to authorize the sterilization, and that the method of sterilization be determined by the Court following further submissions. A hysterectomy was later authorized. Eve's Guardian ad litem appealed.

Held: The appeal should be allowed.

The Mental Health Act did not advance respondent's case. This Act provides a procedure for declaring mental incompetency, at least for property owners. Its ambit is unclear and it would take much stronger language to empower a committee to authorize the sterilization of a person for non-therapeutic purposes. The Hospital Management Regulations were equally inapplicable. They are not aimed at defining the rights of individuals.

The parens patriae jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity -- the need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.

While the scope of the parens patriae jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not [page390] for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person.

Sterilization should never be authorized for non-therapeutic purposes under the parens patriae jurisdiction. In the absence of the affected person's consent, it can never be safely determined that it is for the benefit of that person. The grave intrusion on a person's rights and the ensuing physical damage outweigh the highly questionable advantages that can result from it. The court, therefore, lacks jurisdiction in such a case.

The court's function to protect those unable to take care of themselves must not be transformed so as to create a duty obliging the Court, at the behest of a third party, to make a choice between two alleged constitutional rights -- that to procreate and that not to procreate -- simply because the individual is unable to make that choice. There was no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. Further, since the parens patria jurisdiction is confined to doing what is for the benefit and protection of the disabled person, it cannot be used for Mrs. E.'s benefit.

Cases involving applications for sterilization for therapeutic reasons may give rise to the issues of the burden of proof required to warrant an order for sterilization and of the precautions judges should take with these applications in the interests of justice. Since, barring emergency situations, a surgical procedure without consent constitutes battery, the onus of proving the need for the procedure lies on those seeking to have it performed. The burden of proof, though a civil one, must be commensurate with the seriousness of the measure proposed. A court in conducting these procedures must proceed with extreme caution and the mentally incompetent person must have independent representation.

Cases Cited

Considered: X (a minor), Re, [1975] 1 All E.R. 697; D (a minor), Re, [1976] 1 All E.R. 326; Eberhardy, Matter of, 307 N.W.2d 881 (Wis. 1981); Grady, In re, 426 A.2d 467 (N.J. 1981); Hayes, Guardianship, [page391] Matter of, 608 P. 2d 635 (Wash. 1980); referred to: Cary v. Bertie (1696), 2 Vern. 333, 23 E.R. 814; Morgan v. Dillon (Ire.) (1724), 9 Mod. R. 135, 88 E.R. 361; Beall v. Smith (1873), L.R. 9 Ch. 85; Beverley's Case (1603), 4 Co. Rep. 123 b, 76 E.R. 1118; Wellesley v. Duke of Beaufort (1827), 2 Russ. 1, 38 E.R. 236; Wellesley v. Wellesley (1828), 2 Bli. N.S. 124, 4 E.R. 1078; Beson v. Director of Child

(q) prescribing the classes of grants by way of provincial aid and the methods of determining the amounts of grants and providing for the manner and times of [page406] payment and the suspension and withholding of grants and for the making of deductions from grants;

(r) respecting such other matters as the Lieutenant Governor in Council considers necessary or desirable for the more effective carrying out of this Act.

29 As will be evident from a reading of s. 16, the purpose of the regulations is to regulate the construction, management and operation of hospitals. They are not aimed at defining the rights of individuals as such. Section 48 of the regulations (which appears to have been enacted under s. 16(k)) does not so much authorize the performance of an operation as direct that none shall be performed in the absence of appropriate consents, except in cases of necessity. The enumerated consents and necessity are at law valid defences in certain circumstances to a suit for battery that might be brought as a result of an unauthorized operation. So, for the purposes of managing the workings of the hospital, the regulations require that these consents be signed. They do not purport to regulate the validity of the consents; this is otherwise governed by law. Indeed, I rather doubt that the Act empowers the making of regulations affecting the rights of the individual, particularly a basic right involving an individual's physical integrity. For in the absence of clear words, statutes are, of course, not to be read as depriving the individual of so basic a right. In a word, the intent of the regulations is to provide for the governance of hospitals, not human rights.

30 In summary, MacDonald J. appears to have been right in doubting that the trial judge had properly addressed the threshold question of whether Eve was incompetent. In truth, however, these questions of possible statutory power only amounted to a preliminary skirmish. Argument really centred on the question of whether a superior court, as successor to the powers of the English Court of Chancery could, in the exercise of its parental control as the repository of the Crown's jurisdiction as parens patriae, authorize the performance of the operation in question here. It is to that issue that I now turn.

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Parens Patriae Jurisdiction -- Its Genesis

31 There appears to have been some uncertainty in the courts below and in the arguments presented to us regarding the courts' wardship jurisdiction over children and the parens patriae jurisdiction generally. For that reason, it may be useful to give an account of the parens patriae jurisdiction and to examine its relationship with wardship.

32 The origin of the Crown's parens patriae jurisdiction over the mentally incompetent, Sir Henry Theobald tells us, is lost in the mists of antiquity; see H. Theobald, The Law Relating to Lunacy (1924). De Prerogativa Regis, an instrument regarded as a statute that dates from the thirteenth or early fourteenth century, recognized and restricted it, but did not create it. Theobald speculates that "the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties"; see Theobald, supra, p. 1.

33 In the 1540's, the parens patriae jurisdiction was transferred from officials in the royal household to

the Court of Wards and Liveries, where it remained until that court was wound up in 1660. Thereafter the Crown exercised its jurisdiction through the Lord Chancellor to whom by letters patent under the Sign Manual it granted the care and custody of the persons and the estates of persons of unsound mind so found by inquisition, i.e., an examination to determine soundness or unsoundness of mind.

34 Wardship of children had a quite separate origin as a property right arising out of the feudal system of tenures. The original purpose of the wardship jurisdiction was to protect the rights of the guardian rather than of the ward. Until 1660 this jurisdiction was also administered by the Court of Wards and Liveries which had been created for the purpose.

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35 When tenures and the Court of Wards were abolished, the concept of wardship should, in theory, have disappeared. It was kept alive, however, by the Court of Chancery, which justified it as an aspect of its parens patriae jurisdiction; see, for example, Cary v. Bertie (1696), 2 Vern. 333, at p. 342, 23 E.R. 814, at p. 818; Morgan v. Dillon (Ire.) (1724), 9 Mod. R. 135, at p. 139, 88 E.R. 361, at p. 364. In time wardship became substantively and procedurally assimilated to the parens patriae jurisdiction, lost its connection with property, and became purely protective in nature. Wardship thus is merely a device by means of which Chancery exercises its parens patriae jurisdiction over children. Today the care of children constitutes the bulk of the courts' work involving the exercise of the parens patriae jurisdiction.

36 It follows from what I have said that the wardship cases constitute a solid guide to the exercise of the parens patriae power even in the case of adults. There is no need, then, to resort to statutes like the Mental Health Act to permit a court to exercise the jurisdiction in respect of adults. But proof of incompetence must, of course, be made.

37 This marks a difference between wardship and parens gatriae jurisdiction over adults. In the case of children, Chancery has a custodial jurisdiction as well, and thus has inherent jurisdiction to make them its wards; this is not so of adult mentally incompetent persons (see Beall v. Smith (1873), L.R. 9 Ch. 85, at p. 92). Since, however, the Chancellor had been vested by letters patent under the Sign Manual with power to exercise the Crown's parens patriae jurisdiction for the protection of persons so found by inquisition, this difference between the two procedures has no importance for present purposes.

38 By the early part of the nineteenth century, the work arising out of the Lord Chancellor's jurisdiction became more than one judge could handle and the Chancery Court was reorganized and the work assigned to several justices including the Master of the Rolls. In 1852 (by 15 & 16 Vict., c. 87, s. 15 (U.K.)) the jurisdiction of the Chancellor regarding [page409] the "Custody of the Persons and Estates of Persons found idiot, lunatic or of unsound Mind" was authorized to be exercised by anyone for the time being entrusted by virtue of the Sign Manual.

39 The current jurisdiction of the Supreme Court of Prince Edward Island regarding mental incompetents is derived from the Chancery Act which amalgamated a series of statutes dealing with the Court of Chancery, beginning with that of 1848 (11 Vict., c. 6 (P.E.I.)) Section 3 of The Chancery Act, R.S.P.E.I. 1951, c. 21, substantially reproduced the law as it had existed for many years. It vested in the Court of

Chancery the following powers regarding the mentally incompetent:

> ... and in the case of idiots, mentally incompetent persons or persons of unsound mind, and their property and estate, the jurisdiction of the Court shall include that which in England was conferred upon the Lord Chancellor by a Commission from the Crown under the Sign Manual, except so far as the same are altered or enlarged as aforesaid.

By virtue of the Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2, the jurisdiction of the Chancery Court was transferred to the Supreme Court of Prince Edward Island. It will be obvious from these provisions that the Supreme Court of Prince Edward Island has the same parens patriae jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there.

Anglo-Canadian Development

40 Since historically the law respecting the mentally incompetent has been almost exclusively focused on their estates, the law on guardianship of their persons is "pitifully unclear with respect to some basic issues"; see P. McLaughlin, Guardianship of the Person (Downsview 1979), p. 35. Despite this vagueness, however, it seems clear that the parens patriae jurisdiction was never limited solely to the management and care of the estate of a mentally retarded or defective person. As early as 1603, Sir Edward Coke in Beverley's Case, 4 Co. Rep. 123 b, at pp. 126 a, 126 b, 76 E.R. 1118, at p. 1124, stated that "in the case of an idiot or fool natural, [page410] for whom there is no expectation, but that he, during his life, will remain without discretion and use of reason, the law has given the custody of him, and all that he has, to the King" (emphasis added). Later at the bottom of the page he adds:

> 2. Although the stat. says, custodiam terrarum, yet the King shall have as well the custody of the body, and of their goods and chattels, as of the lands and other hereditaments, and as well those which he has by purchase, as those which he has as heirs by the common law.

At 4 Co. Rep. p. 126 b, 76 E.R. 1125, he cites Fitzherbert's Natura Brevium to the same effect. Theobald (supra, pp. 7-8, 362) appears to be quite right when he tells us that the Crown's prerogative "has never been limited by definition". The Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.

41 The famous custody battle waged by one Wellesley in the early nineteenth century sheds some light on the exercise of the king's parens patriae jurisdiction by the Lord Chancellor. Wellesley (considered an extremely dissolute and objectionable father due to his philandering ways and vulgar language, in spite of his "high" birth), waged a lengthy court battle to gain custody of his children following the death of his estranged wife who had entrusted the care of the children to members of her family. In Wellesley v. Duke of Beaufort (1827) 2 Russ. 1, 38 E.R. 236, Lord Eldon, then Lord Chancellor, in discussing the jurisdiction of the Court of Chancery, touched upon the King's parens patriae power at 2 Russ. 20, 38 E.R. 243. He there made it clear that "it belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them". He then underlined that the jurisdiction has been exercised for the maintenance of children solely when there was property, not because of any rule of law,

but [page411] for the practical reason that the court obviously had no means of acting unless there was property available.

42 The discussion on appeal to the House of Lords (Wellesley v. Wellesley (1828), 2 Bli. N.S. 124, 4 E.R. 1078) is also instructive. Far from limiting the jurisdiction to children, Lord Redesdale there adverted to the fact that the court's jurisdiction over children had been adopted from its jurisdiction over mental incompetents. He noted that "Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way"; 2 Bli. N.S. at p. 131, 4 E.R. at p. 1081. The jurisdiction, he said, extended "as far as is necessary for protection and education"; 2 Bli. at p. 136, 4 E.R. at p. 1083. It continues to this day, and even where there is legislation in the area, the courts will continue to use the parens patriae jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit; see Beson v. Director of Child Welfare (Nfld.), [1982] 2 S.C.R. 716.

43 It was argued before us, however, that there was no precedent where the Lord Chancellor had exercised the parens patriae jurisdiction to order medical procedures of any kind. As to this, I would say that lack of precedent in earlier times is scarcely surprising having regard to the state of medical science at the time. Nonetheless, it seems clear from Wellesley v. Wellesley, supra, that the situations in which the courts can act where it is necessary to do so for the protection of mental incompetents and children have never been, and indeed cannot, be defined. I have already referred to the remarks of Lord Redesdale. To these may be added those of Lord Manners who, at Bli. pp. 142-43, and 1085, respectively, expressed the view that "It is ... impossible to say what are the limits of that jurisdiction; every case must depend upon its own circumstances."

[page412]

44 Reference may also be made to Re X (a minor), [1975] 1 All E.R. 697, for a more contemporary description of the parens patriae jurisdiction. In that case, the plaintiff applied to Latey J. for an order making a fourteen year old girl who was psychologically fragile and high strung a ward of the court and for an injunction prohibiting the publication of a book revealing her father's private life which, it was felt, would be grossly damaging psychologically to her if she should read it. Latey J. issued the wardship order and the injunction requested. In speaking of his jurisdiction in the matter, he had this to say, at p. 699:

> On the first of the two questions already stated, it is argued for the defendants, first, that because the wardship jurisdiction has never been involved in any case remotely resembling this, the court, though theoretically having jurisdiction, should not entertain the application, but bar it in limine. I do not accept that contention. It is true that this jurisdiction has not been invoked in any such circumstances. I do not know whether they have arisen before or, if they have, whether anyone has thought of having recourse to this jurisdiction. But I can find nothing in the authorities to which I have been referred by counsel or in my own researches to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing, and protection against harmful associations. That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature. That the courts

Weatherill (Estate of) v. Weatherill, 2003 ABQB 69

Date: 20030128
Action No. 0103 14560

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

MALORA LEE, TRUSTEE OF THE ESTATE OF
MARY LOUISE WEATHERILL

Plaintiff
(Respondent)

- and -

WILLIAM WEATHERILL, DIANE WEATHERILL and BONNIE WALD

Defendant
(Appellants)

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE F. F. SLATTER

APPEARANCES:

G. H. Crowe
for the Plaintiff/Respondent

S. Pride-Boucher
for the Defendant/Appellant

[1] This appeal from the Master involves the question of whether the Plaintiff is required to produce a certain document (a 1998 will of the Plaintiff) as part of the discovery process. The learned Master dismissed the application for production of the will, and the Defendants appeal.

Facts

[2] As this is an interlocutory application, and none of the facts have been proven, I will only comment on them to the extent that is necessary. I am merely repeating the allegations in the pleadings, without making any specific findings about matters in dispute.

[3] This is a family dispute about a particular piece of land. The Plaintiff and her late husband owned the land for many years. There is some evidence on the record that the lands were always "earmarked" for the Defendant William Weatherill. In the 1980's he entered into an agreement to purchase the land, but the agreement was frustrated by the untimely death of his father. At a meeting in 2000 there was a "family agreement" that William should purchase these lands, and not pay the full price in anticipation of an inheritance from the Plaintiff. In May of 2000 the Defendant William and his wife entered into an agreement with the Plaintiff to purchase these lands. On the face of it, the purchase price appears to be below the fair market value of the lands, and this transfer is now challenged. Allegations of undue influence are made in the pleadings, and the pleadings also question the capacity of the Plaintiff to contract at the relevant times.

[4] A little more background is necessary in order to understand the present dispute about discovery of documents. In May of 1998 the Plaintiff attended before a solicitor, Richard Wyrozub, and gave him instructions for the preparation of a will. The will was apparently prepared and executed, and it is the production of this will that is in dispute. It is alleged that after the will was executed the Plaintiff discussed her will with her children, and advised that "the lands would go to the boys".

[5] In November of 1998 Reginald Weatherill, another son of the Plaintiff and a brother of the Defendant William, had Mr. Wyrozub prepare a farm lease for the lands. This ten-year lease was executed in February of 1999. It is alleged that the other members of the family did not know about this lease. The validity of this lease is also being challenged in collateral litigation between William and Reginald, to which the present Plaintiff has been added as a third party.

[6] The Plaintiff had executed an enduring power of attorney. On September 7, 1999 this power was triggered when her physician issued a declaration of incapacity.

[7] On January 8, 2000, the Plaintiff prepared a holograph will. This will is listed in the affidavit of records filed by the Plaintiff.

[8] In May of 2000, the challenged transfer of the lands took place.

[9] In 2001 a trustee was appointed for the Plaintiff, and this action was commenced. On March 18, 2002, it was ordered that this action and the action concerning Reginald's lease should be tried together. The Defendants in this action applied for production of a copy of the 1998 will, but on September 23, 2002 the Master dismissed that application. After referring to

Geffen v. Goodman Estate, [1991] 2 S.C.R. 353 the learned Master stated in a brief memorandum that he had "concluded there is nothing in that case that leads me to believe that a will executed in 1998, before the declaration of incapacity [by the physician in 1999], can help the Defendants overcome the presumed undue influence in May of 2000."

The Duty to Discovery Documents

[10] The parties are in agreement as to the duty of a litigant to discover records. The only dispute is over the application of the law to the facts. Both parties note that Rule 187.1(2) requires the parties to "disclose relevant and material records". They both then refer to Rule 186.1 which reads:

> **186.1** For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

The Defendants argue that the making of the will in 1998 is relevant to the capacity of the Plaintiff in 2000 when the disputed transaction took place. They also argue that the contents of the will are relevant to the issue of undue influence, because the will may show the intention of the Plaintiff to deal with the lands in a way that is consistent with the challenged transaction. In an argument that the Master accepted, the Plaintiff argues that the real issue is the capacity of the Plaintiff in the year 2000, and that the events of 1998 are too remote to be "relevant and material".

[11] Up until 1999 discovery in Alberta was very wide-ranging. Generally discovery was available on anything "touching the matters". This form of discovery was found to be excessive. It was requiring the production of documents and the answering of questions that were only relevant in the remotest sense. It was felt that some parties were abusing the Rule by relying on literal compliance with it; demands were being made for the production of endless lists of documents that had little bearing on any real issue. As a result, the Rules Committee recommended that discovery be limited to matters that are "relevant and material". The purpose of the Rule was to control abuses and to limit the costs of litigation, while still allowing an appropriate degree of pre-trial discovery.

[12] In my view the courts should take a pragmatic view of the scope of discovery. Too formalistic an application of the Rule serves to increase the costs of litigation, rather than decreasing them. This case is a good example. The cost of photocopying the disputed will would have been a few dollars. Instead of that, the parties have spent thousands of dollars

arguing about whether the document is producible. This was not the result intended by the amendment to the Rule.

[13] The pragmatic counsel who is called upon to produce a document which is arguably irrelevant, or at least not materially relevant, will analyze the situation as follows. First of all, the document cannot help or hurt counsel's client. If the document can help or hurt, then it is material. If the document is truly harmless, the pragmatic counsel will produce it rather than fight over it.

[14] The pragmatic counsel might nevertheless decline to produce such harmless documents for a number of reasons:

(a) Floodgates. Counsel may be concerned that the request for one or a few documents is merely a precursor to a flood of similar requests. At some point the floodgates must be closed. Controlling excessive demands for documents was one purpose of the new Rule.

(b) Confidentiality. Harmless documents may be confidential. The confidentiality in question may be personal, or it may relate to business secrets. While confidentiality is not a bar to discoverability, it may be a factor that prompts the pragmatic counsel to decline to produce a record which is not materially relevant, but which could easily and cheaply be produced.

(c) Expense. There may be harmless documents that will be very expensive to collect and obtain. This may be because the document is filed in a way that makes it difficult to access, or it may be in the control of a third party who demands a fee, or for other reasons. In these instances the pragmatic counsel might decline to incur the expense of producing what appears to be a marginally relevant document.

I do not suggest that the Rule over the discoverability of a document should be determined by the expediency of the day. Parties are not required to produce the documents that are not material and relevant, and they should be entitled to refuse to produce if they so choose. However, the above factors can be explored by the Court in trying to understand why production of a particular document is resisted. If the records being requested are modest in number, they are not confidential, and they are not expensive to obtain, then why is the litigant fighting so hard to avoid production, given that the documents are by definition supposedly harmless? Is the production of the document within the mischief the 1999 amendments were designed to prevent? These are factors that can certainly be taken into consideration when costs are considered.

[15] Examination for discovery now is narrower than it used to be. It is however still quite wide, and is perhaps still wider than the test for admissibility at trial. Certainly discovery is not

narrower than admissibility at trial. In interpreting the Rules, the Court should avoid creating an artificial situation where a litigant is not entitled to obtain information on discovery, which the litigant could quite clearly introduce at the trial.

[16] In determining whether a document is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. Where does the burden of proof lie? Is the issue something that is capable of direct proof, or is it something like a person's state of mind, which can only be proven indirectly. Does one party essentially have to try and prove a negative? How are cases of this type usually proven at trial? The less amenable a fact is to direct proof, the wider will be the circle of materiality. There are some facts that can only be proven by essentially eliminating all the competing scenarios, thereby leaving the fact in issue as the sole logical inference. When a state of mind is in issue, it can generally only be proven by demonstrating a pattern of conduct of the person whose state of mind it is. In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.

[17] That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

[18] It is sometimes said that the new Rules prevent the discovery of "tertiary" issues. This is one way of saying that the 1999 amendments were intended to prevent excessive discovery. However, as a working tool the search for "tertiary" issues is unhelpful in many cases. There is no clear dividing line between primary, secondary, and tertiary evidence. As I have indicated, some facts can only be proven by tertiary or even more remote evidence. A good example is an attempt to prove a negative. The application of the new Rule to particular fact situations must be primarily pragmatic.

[19] The Defendants argue that the will is relevant to two issues. The first is the capacity of the Plaintiff. It seems clear from the record that the Plaintiff did not suffer any sudden and catastrophic loss of capacity. At worst she is experiencing the normal effects of the aging process. It is not uncommon for medical experts to testify that this sort of loss of capacity is gradual, and perhaps exists before it is apparent. The passage of time between the will in October of 1998 and the challenged transfer in May of 2000 is not so great that a court might not draw an inference on capacity in 2000, from capacity in 1998. Now that the two actions have been combined for trial, the capacity of the Plaintiff at the time of the 1999 lease is also

in issue. It would seem artificial to say that the will is producible in the lease action, but not in this action. It is not necessary for the purpose of this application to decide if the Court would draw any inferences on capacity in 2000, based on capacity in 1998; it is a possible line of reasoning and not mere speculation, and the record would appear to be materially relevant. It may assist in determining an issue at trial.

[20] The Defendants argue that the contents of the will are not relevant to any issue of capacity. It is true that the circumstances surrounding the making of this will perhaps have more to say about the Plaintiff's capacity than the actual contents. However, if the contents of the will bear a rational relationship to her family's circumstances and her estate as it existed at that time, that is some evidence of her capacity. Evidence of this type is routinely introduced in trials involving capacity and undue influence.

[21] Likewise, the will is relevant to the issue of undue influence. In such cases it is important to know whether it was truly the transferor's intention to transfer the property, or whether that intention was imposed on her. As I have indicated, there is some family history suggesting that these lands were always earmarked for the Defendant. If the 1998 will left the lands to William, that would be compelling evidence. Likewise, if the will said anything about Reginald being entitled to farm the lands, that too would be relevant. If the will is silent, or disposes of the land in some inconsistent way, that is also relevant. Again, whether the trial judge will draw any inferences from this need not be decided at this point; it is only necessary to show that the inference is possible.

[22] The Defendants argue that a person's intention in a testamentary instrument is not necessarily the same as that same person's *inter vivos* intention. That is undoubtedly true, but it is not uncommon for people to commence distribution of their estates prior to their death. The acceleration of inheritances is not unknown. These are all factors that the trial judge must take into account in deciding whether to draw the inferences the Defendants urge. The ability of a party to make the argument at trial should not be foreclosed by too limited a view of discovery.

[23] The Defendants point out that the law suggests that the onus of disproving undue influence will fall on them. There are cases that suggest that undue influence will be presumed where transfers are made at an undervalue and the donee is in a position of confidence with the donor: ***Tulick Estate v. Ostapowich*** (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381. If this law was found to apply to the facts of this case, the Defendants would have the burden of proving a negative, namely that there was no undue influence. They are also required to prove the mental state of the Plaintiff. Such issues are notoriously hard to prove, and they are impossible to prove directly. Accordingly, in a case like this there is a wider category of discovery that would be "material".

[24] It seems clear to me that on this record the Defendants would be entitled to call Mr. Wyrozub at trial as a witness, and ask him how he assessed the Plaintiff's capacity in 1998 when the will and the lease were prepared. It seems unlikely that the trial judge would rule that his evidence is so unlikely to be relevant that he could not even be called. If his evidence can

be called at trial it seems particularly artificial to say that documents surrounding his evidence are not producible on discovery.

[25] Viewed from the other side, no compelling reason has been shown why production would be abusive. Production of the will might well trigger production of Mr. Wyrozub's file, but that in itself would not be a major undertaking. There is no floodgates issue. The Plaintiff protests that the Defendants are asking for something which is "none of their business". The privacy interest in question would be that of the Plaintiff. Having alleged in this claim that she was unduly influenced, she does not have a strong argument that documents relating to her motivation to dispose of her property should now be kept confidential. Furthermore, there is evidence that she discussed the contents of her will with her family. Expense is not an issue. As I have mentioned, the will could be photocopied for a few dollars.

[26] In all of the circumstances, it appears that the document in question might well assist the Court in making the findings of fact that are required regarding capacity and undue influence. Those are notoriously difficult issues to prove, and they are almost invariably proved indirectly and by inference. The production of this document is not within the mischief that the 1999 amendments to the Rules were designed to prevent. I have concluded that the document is relevant and material, and it should be produced.

[27] The parties may speak to costs within 30 days of the date of these reasons, if they are unable to agree.

HEARD on the 21st day of January, 2003.
DATED at Edmonton, Alberta this 28th day of January, 2003.

J.C.Q.B.A.

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 85/2016

VOLUME ONE

Published January, 2018

(2) If a certification order is obtained under the *Class Proceedings Act*, an action referred to in subrule (1) may be continued under that Act.

Amendments to pleadings in class proceedings

2.7 After a certification order is made under the *Class Proceedings Act*, a party may amend a pleading only with the Court's permission.

Information note

Rule 13.11 *[Pleadings: specific requirements for class proceedings]* describes how class proceedings must be titled.

Questioning of class and subclass members

2.8(1) If under section 18(2) of the *Class Proceedings Act* the Court requires a class member or subclass member to file and serve an affidavit of records, the Court may do either or both of the following:

(a) limit the purpose and scope of the records to be produced and of questioning;

(b) determine how the evidence obtained may be used.

(2) If a class member or subclass member is questioned under section 18(2) of the *Class Proceedings Act*, the Court may do either or both of the following:

(a) limit the purpose and scope of the questioning;

(b) determine how the evidence obtained may be used.

Information note

Section 18(2) of the *Class Proceedings Act* reads:

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 7, one or more of the representative plaintiffs, a defendant may, with leave of the Court, discover other class members or subclass members.

Class proceedings practice and procedure

2.9 Despite any other provision of these rules, the Court may order any practice and procedure it considers appropriate for a class proceeding under the *Class Proceedings Act* to achieve the objects of that Act.

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Information note

The rules about making applications to the Court are in Part 6 *[Resolving Issues and Preserving Rights]* – see rule 6.3 *[Applications generally]*.

Part 5: Disclosure of Information

Purpose of this Part

5.1(1) Within the context of rule 1.2 *[Purpose and intention of these rules]*, the purpose of this Part is

(a) to obtain evidence that will be relied on in the action,

(b) to narrow and define the issues between parties,

(c) to encourage early disclosure of facts and records,

(d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and

(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.

(2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

Information note

This Part does not apply to actions started by originating application unless the parties otherwise agree or the Court otherwise orders. See rule 3.10 *[Application of Part 4 and Part 5]*.

Division 1 How Information Is Disclosed

Subdivision 1 Introductory Matters

When something is relevant and material

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

Records for which there is an objection to produce

5.8 Each record in an affidavit of records that a party objects to produce must be numbered in a convenient order, and the affidavit must identify the grounds for the objection in respect of each record.

Who makes affidavit of records

5.9(1) Subject to subrule (2), an affidavit of records must be sworn by

(a) the party,

(b) if the party is a corporation, by the corporation's corporate representative, or

(c) if a litigation representative is appointed for a party, by the party's litigation representative.

(2) A suitable person, other than the lawyer of record of the party, may swear the affidavit of records if

(a) it is inconvenient for the party, the corporate representative or the litigation representative to do so, and

(b) the parties agree or the Court so orders.

Subsequent disclosure of records

5.10 If, after a party has served an affidavit of records on other parties, the first party finds, creates or obtains control of a relevant and material record not previously disclosed, the first party must

(a) immediately give notice of it to each of the other parties,

(b) on written request and on payment of reasonable copying expenses, supply each of the other parties with a copy of it, and

(c) prior to scheduling a date for trial, serve a supplementary affidavit of records on each of the other parties.

Order for record to be produced

5.11(1) On application, the Court may order a record to be produced if the Court is satisfied that

(a) a relevant and material record under the control of a party has been omitted from an affidavit of records, or

(b) a claim of privilege has been incorrectly or improperly made in respect of a record.

(2) For the purpose of making a decision on the application, the Court may

(a) inspect a record, and

(b) permit cross-examination on the original and on any subsequent affidavit of records.

Penalty for not serving affidavit of records

5.12(1) In addition to any other order or sanction that may be imposed, the Court may impose a penalty of 2 times the amount set out in item 3(1) of the tariff in Division 2 of Schedule C *[Tariff of Recoverable Fees]*, or any larger or smaller amount the Court may determine, on a party who, without sufficient cause,

(a) does not serve an affidavit of records in accordance with rule 5.5 *[When an affidavit of records must be served]* or within any modified period agreed on by the parties or set by the Court,

(b) does not comply with rule 5.10 *[Subsequent disclosure of records]*, or

(c) does not comply with an order under rule 5.11 *[Order for a record to be produced]*.

(2) If there is more than one party adverse in interest to the party ordered to pay the penalty, the penalty must be paid to the parties in the proportions determined by the Court.

(3) A penalty imposed under this rule applies irrespective of the final outcome of the action.

Information note

One of the additional sanctions that may be imposed is the striking out of pleadings. See rule 3.68(3) *[Court options to deal with significant deficiencies]*.

Obtaining records from others

5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if

(a) the record is under the control of that person,

(b) there is reason to believe that the record is relevant and material, and

(c) the person who has control of the record might be required to produce it at trial.

(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

Inspection and copying of records

5.14(1) Every party is entitled, with respect to a record that is relevant and material and that is under the control of another party, to all of the following:

(a) to inspect the record on one or more occasions on making a written request to do so;

(b) to receive a copy of the record on making a written request for the copy and paying reasonable copying expenses;

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(a) keep in safe custody the recorded questioning,

(b) if required to do so, honestly and accurately transcribe the recorded questioning and deliver a copy of the transcript, as required, and

(c) on or attached to any transcript

(i) state the person's name,

(ii) specify the date and place where the questioning occurred, and

(iii) certify the transcript, or the portion of the questioning transcribed, as complete and accurate.

(5) A person is qualified to record and transcribe oral questioning under this Part if the person is

(a) an official court reporter,

(b) a person appointed by the Court as an examiner under the *Alberta Rules of Court* (AR 390/68), or

(c) a shorthand writer, sworn to record the questioning word for word and to impartially fulfill the duties imposed by subrule (4), who

(i) is an agent or employee of an official court reporter or an examiner, or

(ii) has been approved by the parties.

Continuing duty to disclose

5.27(1) A person who is or has been questioned must, by affidavit, correct an answer if

(a) the answer was incorrect or misleading, or

(b) the answer becomes incorrect or misleading as a result of new information.

(2) The correcting affidavit must be made and served on each of the other parties as soon as practicable after the person realizes that the answer was or has become incorrect or misleading.

Written questions

5.28(1) Unless the Court otherwise orders or the parties otherwise agree, the following rules apply with respect to written questions and the answers to them:

(a) the written questions must be numbered and succinct;

(b) the answers provided to the questions must be given by affidavit and must state the question being answered;

(c) the party being questioned must serve the answers to the questions on each of the other parties within a time agreed on by the parties or ordered by the Court.

(2) A party is entitled to ask

Part 6:
Resolving Issues and Preserving Rights

Division 1
Applications to the Court

What this Division applies to

6.1 This Division

(a) applies to every application filed in the Court unless a rule or an enactment otherwise provides or the Court otherwise orders or permits;

(b) does not apply to originating applications unless the parties otherwise agree or the Court otherwise orders.

Application to the Court to exercise its authority

6.2 When the Court has authority under these rules, a person may make an application to the Court that the Court exercise its authority.

Subdivision 1
Application Process Generally

Applications generally

6.3(1) Unless these rules or an enactment otherwise provides or the Court otherwise permits, an application may only be filed during an action or after judgment is entered.

(2) Unless the Court otherwise permits, an application to the Court must

(a) be in the appropriate form set out in Schedule A, Division 1 to these rules,

(b) state briefly the grounds for filing the application,

(c) identify the material or evidence intended to be relied on,

(d) refer to any provision of an enactment or rule relied on,

(e) specify any irregularity complained of or objection relied on,

(f) state the remedy claimed or sought, and

(g) state how the application is proposed to be heard or considered under these rules.

(3) Unless an enactment, the Court or these rules otherwise provide, the applicant must file and serve on all parties and every other person affected by the application, 5 days or more before the application is scheduled to be heard or considered,

(a) notice of the application, and

(b) any affidavit or other evidence in support of the application.

Trimay Wear Plate Ltd. v. Way, [2008] A.J. No. 1075

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

R.A. Graesser J.

Heard: May 20, 2008.

Judgment: September 30, 2008.

Docket: 9703 22138

Registry: Edmonton

[2008] A.J. No. 1075 2008 ABQB 601 456 A.R. 371 172 A.C.W.S. (3d) 880

Between Trimay Wear Plate Ltd., Plaintiff, and Keith Way and Premetalco Inc., carrying on business under the firm name and style Wilkinson Steel and Metals, Defendants

(29 paras.)

Case Summary

Civil litigation — Civil procedure — Discovery — Production and inspection of documents — Orders and compelling production — Orders for production — Application by the defendants for an order directing two non-party corporations to produce records allowed in part — The non-party corporations were the shareholders of the plaintiff — Other than two documents, the defendants did not provide the degree of specificity required to establish that the third parties had any relevant and material records — The rest of the records sought were of tertiary relevance to the issues in the lawsuit

Application by the defendants for an order under Rule 209 directing two non-party corporations to produce records they claimed were relevant to the action. The plaintiff sought damages or an accounting of profits from the defendants, claiming that they breached fiduciary duties owed to them and misappropriated proprietary information. The non-party corporations were the shareholders of the plaintiff. The records sought to be produced were documents related to the alleged proprietary nature of the plaintiff's technology and documents related to the damages claimed.

HELD: Application allowed in part.

The mere fact that the third parties were associated with the plaintiff was not a sufficient basis to require production. A close affiliation between the target entity and a litigant did not remove the requirements of Rule 209 that the records sought be relevant and material The defendants did not provide the degree of specificity required to establish that the third parties had any relevant and material records, other than with respect to the purchase agreement and the lease of the welding machine. Aside from those two documents, the records sought were of tertiary relevance to the issues in the lawsuit.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta. Reg. 390/1968, Rule 209

Counsel

Donald J. Wilson, Davis LLP, for the Plaintiff.

Robert P. James, Parlee Mclaws, for the Defendants.

Louis Belzil, Bennett Jones, for the Third Parties.

Reasons for Judgment

R.A. GRAESSER J.

Introduction

1 The Defendants apply for an order under Rule 209 directing two non-party corporations to produce records they claim are relevant to the action.

2 Trimay seeks damages or an accounting of profits from the Defendants, claiming that Way breached fiduciary duties owed to Trimay and misappropriated proprietary information of Trimay, for the benefit of his new employer Premetalco Inc. Way left Trimay's employ in 1996 and immediately went to work for Premetalco. Trimay alleges that Way and Premetalco used Trimay's confidential and proprietary information to compete with it in the wear plate business. Trimay also alleges that Way improperly solicited clients and prospective clients of Trimay. The Defendants deny the allegations. The action, commenced in 1997, is now being case managed by me.

3 This application arose in the course of case management.

Facts

4 The non-party corporations are 735458 Alberta Inc. and Alberta Industrial Metals Ltd. The evidence before me is that 735458 is the sole shareholder of Trimay. Alberta Industrial is the sole shareholder of 735458. Maurice Shugarman and Garry Stein are officers of Trimay. They are directors of Alberta Industrial, and they or their holding companies are shareholders in that company. Stein is a director of 735458.

5 The evidence discloses that Trimay purchases materials from Alberta Industrial. Both Trimay and 735458 operate out of the same facility. 735458 and Alberta Industrial lease equipment to Trimay, which Trimay uses in the production of wear plate. Alberta Industrial has invested in Trimay. Alberta Industrial was involved in an investigation into the activities of a former senior manager of Trimay, which the Defendants allege are relevant to the qualification of Trimay's damage claim.

6 The records sought to be produced from 735458 and Alberta Industrial are described as:

(a) documents relating to the alleged "proprietary" nature of Trimay's technology and processes; and

(b) documents relating to the damages claimed by Trimay.

7 Production of these records was sought by the Defendants when examining officers of Trimay for discovery, and the Plaintiff has since refused to produce records of 735458 and Alberta Industrial.

Argument

8 The Defendants rely on Rule 209, which provides:

> 209(1) On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when
>
> (a) the record is in the possession, custody or power of a person who is not a party to the action,
>
> (b) a party to the action has reason to believe that the record is relevant and material, and
>
> (c) the person in possession, custody or power of the record might be compelled to produce it at the trial.
>
> (1.1) The Court may also give directions respecting the preparation of a certified copy of the record, which may be used for all appropriate purposes in place of the original.
>
> (2) A person producing a record is entitled to receive such conduct money as the person would receive if examined for discovery.
>
> (3) The costs of the application shall in the first instance be borne by the party making the application but if it thereafter appears to the Court that by reason of the production there has been a saving of expense the Court may award the whole or part of the costs to the party making the application.

9 The Defendants allege that one of the fundamental issues in the action is whether or not Trimay had any proprietary or confidential information in the first place. The Defendants deny they are liable to Trimay for damages or an accounting, and dispute the amount of damages being claimed by Trimay. Damages are very much in issue

10 Trimay has not yet elected whether it will seek damages (its own losses) arising out of the alleged

misconduct of the Defendants, or whether it will seek an accounting of the Defendants' profits (disgorgement). The Defendants dispute Trimay's losses and claim, amongst other things, that Trimay's losses for some of the relevant time resulted from or were contributed to by mismanagement of the former senior manager.

11 The Defendants rely on ***Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.***, (1990) 74 Alta. L.R. (2d) 262 (C.A.) and ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.***, (1988), 63 Alta. L.R. (2d) 189.

12 With reference to the records sought, the Defendants are particularly interested in the purchase agreement whereby 735458 acquired the shares in Trimay, although they seek:

(a) documents surrounding 735458's ownership of Trimay, which they say are relevant to whether any proprietary processes or technology exist;

(b) documents concerning 735458's and Alberta Industrial's business dealings with Trimay, which they say are relevant to Trimay's costs and are thus relevant to Trimay's damage claim;

(c) documents concerning Alberta Industrial's business dealings with Trimay which they say relate to the former the Defendants' allegations about mismanagement of Trimay and are thus relevant to damages; and

(d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to Trimay's damage claim.

13 The Defendants reference the tests for production from third parties as set out in ***Ed Miller Sales***:

* the documents should be "probably relevant";
* the application is not a fishing expedition;
* the documents need not necessarily be admissible;
* the documents must be adequately described;
* the third party's objections must be considered; and
* the application is not a means of obtaining discovery from a stranger to the action.

14 [7] Since ***Ed Miller Sales*** and ***Esso Resources*** were decided, Rule 209 has been amended to apply to records that are "relevant and material". At the time of those decisions, documents could be sought from third parties which "any party has reason to believe ... relates to the matters in issue". As is obvious, the current rule provides a narrower scope of production than was the case when ***Ed Miller Sales*** and ***Esso Resources*** were decided.

Response

15 [8] 735458 and Alberta Industrial resist the application, and cite ***Koenen v. Koenen***, [2001] A.J. No.

223, 2001 ABCA 46, ***Berube v. Wingrowich***, [2005] A.J. No. 588, 2005 ABQB 367, ***Ed Miller Sales*** (supra), ***Esso Resources Canada Ltd. v. Stearns Catalytic Ltd***, (1989), 98 A.R. 374 (Q.B.) Aff'd (1990), 108 A.R. 161 (C.A.), ***Wasylyshen v. Canadian Broadcasting Corp.*** [2006] A.J. No. 1169 (Q.B.), and ***Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd.***, [1996] A.J. No. 291 (C.A.). They also refer to the commentary on Rule 209 in Stevenson and Côté, *Alberta Civil Procedure Handbook*, vol. I (Edmonton: Juriliber, 2005) at 215-216.

16 [9] In essence, the third parties argue that the application should fail for lack of specificity of the Defendants' requests. Instead of seeking production of specific documents, the Defendants seek discovery in general areas of questioning. The third parties point to a lack of evidence that the purchase documents dealt with proprietary processes or technology. They also point out that many of the records relating to business transactions between Trimay and the third parties can be obtained through Trimay.

Analysis

17 [10] As noted by Veit J. In ***Berube***, the mere fact that entities are associated with a party is not a sufficient basis to require production. A close affiliation between the target entity and a litigant does not remove the requirements of Rule 209 that the records sought be relevant and material (at para. 4).

18 [11] ***Wasylyshen***, referring to the *Alberta Civil Procedure Handbook*, notes that Rule 209 is to be interpreted narrowly and is to be used only to gain access to specific records.

19 [12] Lack of specificity was key to the Court of Appeal denying the application for production in ***Metropolitan Trust***.

20 [13] Here, the Defendants have identified only 2 specific documents: the purchase agreement between 735458 and the former owner of Trimay's shares, and a lease agreement between Trimay and 735458 of a welding machine.

21 [14] There is no evidence before me that any of the records sought relating to business transactions between Trimay and 735458 and Alberta Industrial are unavailable through Trimay. The Defendants are apparently seeking to corroborate the accuracy of information that has been provided to them by Trimay, although there is no evidence to suggest that the information provided by Trimay is unreliable.

22 [15] The Defendants have already had extensive discovery of Trimay's officer and Messrs. Stein and Shugarman concerning management issues surrounding Trimay and the investigation of the former senior manager. Production of records from the third parties is apparently sought to corroborate the information already provided by Trimay's officers. Again, there is no evidence to suggest that the information already provided is inaccurate.

23 [16] In argument, there was considerable discussion about the lease of the welding machine, which apparently could not be located by Trimay. There was also considerable discussion about what may or may not be in the share purchase agreement.

Decision

24 [17] On the evidence and submissions before me, I am not satisfied that the Defendants have provided the degree of specificity required to establish that the third parties have any relevant and material records, other than with respect to the purchase agreement and the lease of the welding machine.

25 [18] The lease has not been produced by Trimay, and should be produced by 735458. It is relevant to an item of expense, which is relevant to Trimay's costs of production of the products in issue in the lawsuit.

26 [19] The purchase agreement is relevant to the extent that it may disclose whether proprietary processes or technology were considered in the purchase of the shares. This is clearly relevant to the existence of trade secrets. 735458 should produce this agreement, but in producing it, is entitled to expurgate irrelevant and confidential information such as the purchase price and financial details.

27 [20] Otherwise, I am of the view that the records sought are of tertiary relevance to the issues in the lawsuit, at best. Records relating to corroboration of information already provided, or only testing credibility, may be relevant, but are not generally material. I am not convinced of the materiality of any of the records sought, other than the lease and purchase agreement discussed above.

28 [21] Other than with respect to the two specific documents, the Defendants' application is dismissed.

29 [22] There has been mixed success on the application. I will leave costs in the cause on this application. In the event that the Plaintiff succeeds in this action, the third parties should also have their costs of the application. If the Defendants succeed, their costs of this application are recoverable from the Plaintiff, but not the third parties.

R.A. GRAESSER J.

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it is part of the ordinary business or practice of a bank to collect cheques for their customers. If therefore a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals. Their Lordships think therefore that the evidence of bank officials in *Kendall's* case as to the practice of banks was rightly tendered and received, as indeed the Court in that case decided.

Coming now to the reasons alleged for holding the learned trial judge to have been wrong in holding no negligence proved, they really amount to this, that the bank ought not to have collected a cheque for a customer who was of such recent introduction and about whom they knew nothing. There was, however, nothing suspicious about the way the account was opened. A customer, however genuine and respectable, could hardly, assuming him to start with a deposit of £20 in cash, have opened it in any other way. Was then the fact that a cheque was paid into that account for collection two days after the account was opened a circumstance of an unusual character calculated to arouse suspicion and provoke inquiry? For if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque it would render banking business as ordinarily carried on impossible; customers would often be left for long periods without available money. Now if the cheque here had been for some unusually large sum, perhaps suspicion might have been aroused. This is really a question of degree, and their Lordships cannot say that the trial judge was wrong in thinking that £743 was not a sum of such magnitude as to create the duty of inquiry.

If the cheque had been in different form things might well have been otherwise. Their Lordships cannot help remarking that to a certain extent the appellants have themselves to thank for what has happened, owing to the terms of their instructions. If they had insisted that in the case of payments made at the office, as they did insist in the case of drafts sent by post, the cheques should be made payable to the Commissioners of Taxation, then there would have been something on the face of the cheque to arouse inquiry. The fact that the cheque was to bearer distinguishes this case from the case of *Permewan*. In that case, in the case of thirty-six cheques, the cheques were drawn in favour of the Commissioners, or had such markings on them as showed that they were drawn for the purpose of paying duties. This was held, their Lordships think rightly, to be a circumstance which ought to have put the bank on inquiry when such cheques were presented by a private individual. Their Lordships do not think it necessary to consider and decide as to whether the majority or minority were right as to the other twenty-two cheques in that case, the point being whether the markings on those cheques did or did not sound such a note of alarm as ought to have put the bank on their guard. There was here no note of warning of any kind on the cheque, and accordingly the conditions which arose in the *Permewan* case do not apply.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Counsel for the Appellants—Rome, K.C. —Austen-Cartmell. Agents—Light & Fulton, Solicitors.

Counsel for the Respondents — R. A. Wright, K.C.- Jowitt. Agents—Slaughter & May, Solicitors.

HOUSE OF LORDS.

Thursday, February 26, 1920.

(Before Lords Finlay, Sumner, Parmoor, and Wrenbury.)

O'ROURKE *v.* DARBISHIRE AND OTHERS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Agent and Client—Privileged Communication — Solicitor Acting Both as Trustee and Agent of the Trust — Allegation of Fraud—Extent of Privilege.

The fact that the solicitor of a trust is also a trustee does not affect the privilege attaching to confidential communications seeking or giving professional advice. *In re Postlethwaite*, 1887, 35 Ch. D. 722, *considered* and *distinguished.*

Where fraud is claimed to defeat such privilege a *prima facie* case must be established—dicta of Romer, L.-J., and Lord Davey in *Bullivant* v. *Attorney-General for Victoria*, [1900] 2 Q.B. 163, [1901] A.C. 196, *considered.*

The right to refuse production of documents on the ground that they relate solely to the case of the resisting party is not confined to such documents as the resisting party could put in as evidence in support of his own case.

Knight v. *Waterford* (*Marquess of*), 1836, 2 Y. & C., Ex. 22; *Hey* v. *De la Hey*, 1886, W.N. 101, *distinguished.*

Bewicke v. *Graham*, 1881, 7 Q.B.D. 400, *approved.*

Appeal—Arbitration—Judicial Reference—Competency of Appeal.

Observations on the competency of appeal against the decision of a judge who, in the course of proceedings before him for discovery, at the request of both parties has looked at certain documents to ascertain whether they should be produced.

Decision of the Court of Appeal, [1919] 1 Ch. 320, *affirmed* (Lord Finlay dissenting with regard to one item).

The *facts* appear from their Lordships' considered judgment, which was delivered as follows:—

LORD FINLAY — This case raises some important questions with regard to the right to require production of documents.

The order made by Peterson, J., for production was reserved by the Court of Appeal, from whose judgment the present appeal has been brought.

The writ in the action was issued on the 11th February 1915. The plaintiff's claim is to the estate of the late Sir Joseph Whitworth, who died on the 22nd January 1887, leaving property, real and personal, said to be of the value of £1,000,000 or more. The plaintiff claims as representing the heiress-at-law and one of the two next-of-kin of the testator. The representatives of the executors of Sir Joseph Whitworth are defendants. The defendants Ellen M'Gowan and Elise Jenkins are the executrices of the other next-of-kin of the testator.

The amended statement of claim was delivered on the 12th April 1916, and the defence in June of the same year. The affidavit of documents was filed on the 1st May 1917, and a further affidavit on the 3rd May 1918. In this last affidavit the defendants claimed that they were not bound to produce a number of documents on the ground of professional privilege, and on the further ground that the documents relate solely to the defendants' case and not to the plaintiff's case, and do not in any way tend to support the plaintiff's case or to impeach that of the defendant's.

The statement of claim alleges that the deceased Sir Joseph Whitworth left a will, dated the 3rd December 1884, and four codicils, the effect of which is stated, and that the widow Lady Whitworth, Mr Christie, and Mr Darbishire were the trustees and executors.

By the will and the first three codicils it is alleged that provision was made for educational purposes, and various legacies were given, the fourth codicil being in the following terms (par. 8 of the statement of claim)—"I declare that the gift in my first codicil of all other property if any not effectually disposed of beneficially by my said will or by that codicil to my wife and Richard Copley Christie and Robert Dukinfield Darbishire for their own absolute benefit in equal shares which gift I have augmented by the provisions of my second codicil shall include all the real and personal estate belonging to me and not otherwise disposed of by my will or any codicil thereto. And I accordingly give to them such real and personal estate in equal shares for their own benefit having full confidence that they will respectively desire to carry out my wishes to the utmost of their power but nothing in this codicil or in my will or my first three codicils contained shall be construed so as to impose any trust upon my residuary legatees and devisees or any of them or in any manner to abridge or qualify their absolute ownership or rights. And subject to the provisions herein contained I hereby confirm my said will and first three codicils.

The statement of claim charges in pars. 11 and 12 that the trustees and executors took the residuary estate upon a secret trust which was never defined or was invalid by reason of the Mortmain Acts or otherwise (so that there would be a resulting trust for the heir-at-law and next-of-kin), and further that if the trustees and executors took for their own useand benefit, the dispositions had been obtained by them from the testator by fr aud. Particulars were delivered under these two paragraphs stating that the fraud was in devising and carrying out the scheme embodied in the will and codicils whereby the testator was left in the belief that his wishes as to the disposal of the residue of his estate for educational purposes would be carried out by the executors, whereas they intended to appropriate the greater part of the testator's estate for their own use.

The statement of claim further alleges (par. 23) that a deed of release, dated the 31st December 1889, was made between Fanny Uniacke of the first part, Ellen M'Gowan of the second part, the defendant Joseph Whitworth M'Gowan of the third part, and Whitworth's executors of the fourth part. This deed recited that the parties of the first, second, and third parts (the heiress and next-of-kin of the testator) had expressed their intention to take proceedings for the recall of the probate of Sir Joseph Whitworth's will and codicils, and that a compromise had been arranged on the terms that Whitworth's executors were to pay £75,000 to be divided in the proportion specified between Fanny Uniacke and her children and Ellen M'Gowan and Joseph M'Gowan. By this deed the first, second, and third parties released to Whitworth's executors all the real and personal estate of the testator discharged from all claims. The statement of claim alleges that the execution of this release was procured by the fraud of Whitworth's executors in concealing from the other parties to the deed the facts as to the testator's will and codicils, as alleged earlier in the statement of claim, and that the executors appropriated to their own use a considerable part of the testator's estate.

The claim made in the action is that Whitworth's executors should be declared to be trustees for the heir-at-law and next-of-kin of the testator, and that the deed of release should be cancelled or declared not to be binding.

The application for production of documents was heard in the first instance by Petersen, J., and he made the order of the 3rd July 1918 for the production of the documents described in the schedule to that order. The Court of Appeal, consisting of Bankes, Warrington, and Scrutton, L.JJ., reversed this order, holding that the documents in question were covered by professional privilege. On the present appeal it was urged on behalf of the plaintiff—(*a*) That the professional privilege did not exist, the solicitor being himself one of the trustees and executors; (*b*) that the plaintiff had what was called a "proprietary right" as one of the cestui que trust to see all documents relating to the trust; (*c*) that no privilege exists where the communication has been made for the purpose of carrying out a fraud, and that this was the case with regard to the documents in question.

I shall take these points in order—(*a*) Mr Darbishire, one of the three trustees, acted as solicitor for the trust. The privilege is claimed in respect of communications between him as such solicitor and his co-trustees with reference to the trust. Peterson, J., held on the authority of *Postlethwaite's* case (35 Ch. D. 722) that there could be no privilege where the solicitor consulted was himself one of the trustees. In my opinion any such proposition is erroneous in point of law, and I think that no such proposition is involved in the decision of North, J., in that case. Trustees are entitled to consult a solicitor with reference to the affairs of the trust, and the communications between them and their legal adviser are privileged if for the purpose of obtaining legal advice. Why should such communications be less privileged because the solicitor is himself one of the trustees? There is no valid distinction between such communications with the solicitor who is himself a trustee, and such communications with a solicitor who is outside the trust altogether. Of course the privilege is confined to communications genuinely for the purpose of getting legal advice. It would not extend to mere business communications with reference to the trust, not for the purpose of getting legal advice. In the present case the affidavit of the 3rd May 1918 states that the communications were for the purpose of getting legal advice. No sufficient reason has been shown for discrediting this affidavit as untrue or as made under some misconception of fact or law. The statement is not inherently incredible, as was suggested on behalf of the appellant, and I think that the Court of Appeal was right in giving effect to it.

When the decision in *Postlethwaite's* case is examined it will be found that it does not really support the proposition contended for.

The judgment must be read with reference to the facts of the case. The plaintiffs were admittedly cestui que trust of the testator's property. They averred that one of the trustees had himself secretly purchased part of the trust property and made a profit out of it. As cestui que trust they had a right to see all the documents relating to the trust passing between the trustees, and this right could not be got rid of by the employment by the one trustee of the other as his solicitor.

(*b*) It was further urged that the plaintiff, as representing the heir and one of the next-of-kin of the testator, has a right to see any documents relating to the trust as being one of the cestui que trust. I assume that the plaintiff is the representative of the heir and next-of-kin, but it does not follow that he is a cestui que trust. By the will and codicils the property is expressed to be given to the trustees and executors absolutely free from any trust. The plaintiff's case is put in the alternative. The first alternative is that the trustees and executors took the property on the terms of a secret trust, and that as such trust has failed owing to its not having been sufficiently defined or by reason of the statutes of Mortmain, the representatives of the heir and next-of-kin of the testator are entitled to the property as on a resulting trust. Whether there was such a secret trust, which has failed, is a matter in dispute in the action, and at present there is not even a *prima facie* case that the plaintiff is a cestui que trust on this ground. The second alternative put forward by the plaintiff is that the trustees and executors induced the testator to leave the property to them by fraudulently leading him to believe they would apply it for educational purposes in accordance with his wishes, while in fact they from the first intended to appropriate it to themselves as it is alleged they have done. No more serious charge could well be put forward. It cannot be assumed to be true for the purpose of obtaining inspection of documents, and it is putting the case with great moderation to say that the appellant has not made out any *prima facie* case of the truth of these charges. There is a complete absence of evidence to show that the appellant is in a position to claim inspection on this ground, and there is nothing to show that the "proprietary right" on which the appellant relies in fact exists. To establish any such right it would further be necessary for the appellant to get rid of the deed of release of the 21st December 1889. The release was given so long ago as 1889 and the fraud alleged has yet to be proved. There is certainly no *prima facie* case that it can be set aside, and so long as the deed stands the appellant cannot be a cestui que trust.

(*c*) The appellant also relied on the proposition that no privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud.

This is clear law, and if such guilty purpose was in the client's mind when he sought the solicitor's advice professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some *prima facie* evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a *prima facie* case as would make it right to treat the claim

of professional privilege as unfounded.

A great many cases were cited to your Lordships on the question of professional privilege, but I do not think it is necessary to go through them. *Bullivant's* case ([1901] A.C. 196) was cited by the respondents. The question there arose not on application for discovery but with regard to a witness who was being examined under a commission from the Courts of New Zealand, and who claimed professional privilege. The House of Lords decided that in the absence of a definite allegation of fraud the privilege prevailed. The question, what more is necessary to get rid of the privilege, was not discussed.

For these reasons I agree with the Court of Appeal in thinking that inspection should in this case be refused on the ground of professional privilege, subject to what I shall say as to item 434 later in the judgment.

The Court of Appeal thought that professional privilege was sufficient to dispose of the case, and gave no judgment on the second ground, which was thus stated in par. 4 of the further affidavit:—"To the best of our knowledge, information, and belief the said documents numbered 434 and 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action, or in so far as they do relate to the same relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach our own."

This claim was rejected by Peterson, J., on the ground that on perusal by consent of the documents in item 434, for which amongst others this privilege had been claimed, he thought that they might tend to support the plaintiff's case to some extent. He therefore declined to give effect to this claim with respect to any documents, as in his opinion the defendants' affidavit must have been made under a misconception of the law applicable to this head of privilege or a misapprehension of the effect of the documents. I agree with the Court of Appeal in thinking that this mistake as to item 434 was not a sufficient reason for treating this claim as unfounded in all cases. This ground of privilege has been elaborately argued before us, and I propose to state the conclusions at which I have arrived.

The grounds on which privilege under this head was denied were—(1) That such privilege is confined to documents which are admissible in evidence; (2) that it sufficiently appears in this case that the affidavit in which this privilege is claimed is untrustworthy. There is no case confining privilege of this kind to documents which are admissible in evidence, and such a limitation would be inconsistent with the principle on which it rests.

A great many passages were cited from Wigram on Discovery (2nd ed. 1840) in which the documents which are the subject of this privilege are described as "evidences," and it was urged that this showed that the privilege could not be claimed in respect of any document not admissible in evidence. It is, however, a mistake to suppose that "evidences" (an old phrase in English law) necessarily denotes only documents which are admissible in evidence. The principle laid down by Wigram on Discovery (p. 264, par. 346) is that a plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case or to the evidence by means of which that case is to be established. It is obvious, as Mr Tomlin pointed out in his extremely clear and cogent argument, that to exempt from inspection only documents which are admissible in evidence would leave open to inspection many documents which might reveal what the case of the opponent is and the evidence by means of which it is proposed to establish it.

A party is entitled to get inspection of any documents relating to his own case. He is not entitled to see documents relating exclusively to his opponent's case in order that he may prepare means of meeting it or try to discover flaws in it. The whole of the plaintiff's argument on this head seems to me to rest on a misconception of the meaning of the terms "evidences" as used in this connection. Of course in a very great number of cases the documents which have come into question have been title-deeds or other documents which are admissible in evidence, but there is an entire absence of authority to show that the privilege is confined to such documents, and if it were so confined the value of the privilege would be greatly lessened. The affidavit in the present case is in the form which has been in use for a great many years, and your Lordships are now in effect asked to say that judges, counsel, and solicitors have all failed to appreciate the law on a matter of everyday practice, and that every affidavit which has been made claiming such privilege within the memory of man has been erroneous and insufficient. The proposition put forward on behalf of the appellant on this head seems to me to be entirely novel, erroneous in principle, and destitute of authority.

I think the affidavit in the present case is sufficient, and that if it were necessary to rely on this head of privilege the defendants have properly claimed it.

Some questions of a special nature have arisen with regard to documents under item 434. These documents consist of—(1) A case and opinion of counsel taken on behalf of the testator; (2) a case and opinion of counsel taken by the trustees and executors after the testator's death.

In my opinion the appeal as to these documents should not have been entertained by the Court of Appeal; the decision of Peterson, J., with regard to them was not appealable. The learned Judge was invited by the defendants' counsel to inspect these documents and to say whether they should be produced. He did so and decided that the plaintiff should see them. An order made under the circumstances was in the nature of an award, not a judgment.

The statement of Peterson, J., as to what took place is set out in the appendix. He begins by touching on certain legal con-

siderations, and points out that the plaintiff could not claim to inspect the documents under the second head of item 434. He then says that the plaintiff also rested his claim to inspect on the ground that fraud was charged, and proceeds thus—"Whether this is correct or not I need not consider for the purpose of this part of the case, as in both cases comprised in item 434 counsel for the defendants invited me to peruse the two cases and opinions and say whether in my judgment they ought to be produced. I have done so, and although I do not say that the plaintiff will derive much comfort and support from them, in my opinion he ought to have the opportunity of seeing them."

There are of course many cases in which documents are shown to the judge to give him materials for his judgment and to form an element for his appreciation of the case as a judge. Peterson, J., in the passage which I have quoted above expressly states that he considers it unnecessary to determine a legal point which was raised as he had been invited to say on perusing the documents whether they should be produced. This seems to me to show that he understood that he was invited to decide summarily what should be done as a matter of fairness and not to decide merely on legal considerations. In other words, that he was to arbitrate. His language is quite unequivocal and his decision would be appealable only if it appeared that he had misunderstood the effect of what passed before him.

A reference to the proceedings as set out in the supplemental appendix shows I think that he was quite right.

At the beginning of the discussion as to this item the counsel for the respondents said—"Now so far as item 434 is concerned, although our views are that we have good grounds for resisting the production of those—[those are the two opinions]—we are quite content that your Lordship should see those, and if your Lordship thinks that they ought to be produced, then they shall be produced, so that I need not trouble about the principle concerned there."

This to my mind is a clear statement that the respondents would produce the documents if the learned Judge on seeing them thought they ought to be produced, and on this basis the parties dispensed with discussion of principle. The undertaking that the documents should be produced if the Judge on seeing them thought that they ought to be produced is quite inconsistent with there being any right of appeal from his decision on this point.

Later in the argument respondents' counsel said—"If the views I put before your Lordship are sound, I submit that this application must fail except so far as your Lordship thinks it is proper that they should succeed on those two cases. Perhaps I may hand those up. [*Same handed to his Lordship.*] Those are item 434, and if your Lordship thinks that the notes and memoranda in item 435 are not sufficiently claimed we do not mind their seeing those, but with regard to all the rest I submit that the claim must fail."

Then followed a discussion in which counsel on both sides took part as to whether it was desirable that the Judge should have the drafts as well as the cases themselves, and in answer to an observation from the other side as to the case submitted to Mr Theobald the respondents' counsel said—"My friend must not take it in that way. If it is going to be disputed I submit there is great dispute about the first. I invite your Lordship to look at them. As a matter of fact your Lordship will see that that was a case to advise, amongst others, the executors nominated personally. Even if my friend relies upon *Russell* v. *Jackson* ((1851) 9 Hare 387, 10 Hare 204) that would not necessarily avail him. It would apply to the right which they might have with regard to advice they had taken for themselves personally. I am leaving it in your Lordship's hands. I do not in the least admit that the first case is a clear case."

These passages appear to me to show clearly that the matter was left in his Lordship's hands to determine summarily and not in the ordinary way as a judge, and they are in conformity with the view which he himself took of his functions under the consent of the parties.

At the close of the judgment Peterson, J., went through the documents with counsel, stating that the documents to be produced included both cases in item 434. The defendants' counsel then asked for leave to appeal "in regard to such parts of your decision as are against us," which Peterson, J., granted, nothing being said by anyone as to excepting from the appeal the decision as to item 434. But I do not think that this can alter the effect of what had taken place before the decision. The leave to appeal can operate only on what is appealable. The question is not whether the parties entered into an express agreement that there should be no appeal, but whether they took a course which is inconsistent with the existence of a right to appeal. The fact that general leave to appeal was given may have been due to inadvertence, or to the fact that the parties had not present to their minds at the moment the effect in this respect of the course which had been adopted.

I should add that the perfect good faith of counsel in this matter is beyond question. The only point raised is as to the legal effect on the right to appeal of what passed.

In *Bustros* v. *White* (1876, 1 Q.B.D. 423) Sir George Jessel, M.R., delivering the judgment of the Court of Appeal, said that where to avoid further affidavits the Judge at the desire of both parties has looked into the documents himself and decided whether they should be produced, it is not competent to either party to appeal (p. 427). The view so expressed by an exceptionally strong Court of Appeal, consisting of eight Judges (Jessel, M.R., Kelly, C.B., James, and Mellish, L.JJ., Baggalay, J.A., Lush and Denman, JJ., and Pollock, B.) has never, so far as I am aware, been dissented from and in my opinion it is right. It appears to me to be directly applicable to the facts of the present case in which this course was taken to avoid a legal argument.

I cannot agree with the view expressed by Bankes, L.J., that Peterson, J., was asked to look at the documents merely in order that he might see whether the claim of privilege on the ground that they related only to the defendants' case was justified. Such a view is in conflict with what took place on the argument, and is contradicted by the terms in which Peterson, J., in his judgment gave his view on what had taken place.

If the right to inspection of the documents 434 had to be determined by legal considerations applicable in cases where the parties have not consented to cut the knot in the fashion adopted here, I think that as to the documents under head (1) the appellant would succeed, and that he would fail as to those under head (2).

As to (1) the case was submitted to counsel and his opinion taken in the lifetime of the testator. Both the plaintiff and the defendants claim under the testator, the plaintiff as representing their heir and the next-of-kin, the defendants as representing his trustees and executors under his will. The foundation of the law of professional privilege is that it is necessary in order that a person may be able without danger to make full disclosure to his professional advisers. It follows that as between him or his representatives and third persons claiming not under the testator but adversely to him, the privilege exists, but as was pointed out by Turner, V.C., in *Russell* v. *Jackson* (1851, 9 Hare 387 and 10 Hare 207) the reason of the privilege does not exist in the case of competition between persons all claiming under the testator, as the disclosure in the latter case can affect no right or interest of the client. The bill in that case was filed by the next-of-kin against the executors of the deceased, who were also his residuary legatees and alleged that the gift of the property was made upon a secret trust for the foundation of a school and that the defendants were trustees for the heir-at-law and next-of-kin—(See judgment 10 Hare, pp. 207, 208). The solicitor to the testator, who after his death became solicitor to the executors, was examined under commission, and a motion was made to suppress parts of his deposition on the ground of professional confidence. It was held that the communications between the testator and his solicitor might be read, but that the communications between the executors and the solicitor after the death of the testator were privileged. The Vice-Chancellor gives his reasons at length (9 Hare, p. 391-3). Bankes, L.J., in his judgment says—"With reference to the case and opinion in the lifetime of the testator, in my opinion that first case is covered by the conclusion which Peterson, J., arrived at in another part of his judgment, namely, that a person who claims a document under a proprietary right must first of all establish the existence of that right, and that not having been done in this case it appears to me that the plaintiff must fail in his claim with reference to that first case." This rule has no application to the point under discussion. As was explained by Turner, V.C., in the case just cited it is not by "proprietary right" that the privilege is negatived but by the fact that as both claim under the testator the ground of this kind of privilege fails.

The production of the documents under head (1) could not be resisted on the second ground put forward by the defendants—namely, that they relate only to the defendants' case. Peterson, J., himself inspected these documents and came to the conclusion that they related in part to the plaintiff's case.

With regard to head (2) under 434 professional privilege would have prevented any right to inspect. The parties have, however, taken a course which makes it unnecessary to consider these legal questions.

The Court of Appeal reversed the order of Peterson, J., *in toto*. By some inadvertence it was not realised that this order would exempt from inspection in item 435 "memoranda and notes of evidence in actions," and in item 437 "draft and fair copies, bill of costs July 1882 to December 1886, and diaries before the 22nd January 1887," for which protection had not been claimed. These matters should be set right and for the reasons I have given I think that the appeal ought to be allowed under item 434 as regards the cases and opinions both in the lifetime of the testator and after his death; otherwise the appeal should be dismissed.

LORD SUMNER—This appeal has raised three questions which, as they were copiously and earnestly argued and go to the root of long-settled practice, require a reasoned solution, though I do not imagine that the answer to them could ever have been in doubt. These questions are—(1) Does a pleaded charge of fraud strip those against whom it is made of the ordinary right to rely on professional privilege as a ground for resisting production of documents? (2) Is that privilege taken away because the relation of solicitor and client, on which it rests, arises between persons who are trustees and executors, and are in effect parties to the action? (3) Is the claim to refuse production of documents on the ground that they do not support his opponent's case but only his own, a claim which is available solely for such documents as the claimant could give in evidence in support of his own case?

(1) No one doubts that the claim for professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties. To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud. No one doubts again that you can

neither try out the issue in the action on a mere interlocutory proceeding, nor require the claimant to carry the issue raised to a successful trial before he can obtain production of documents which are only relevant to that issue and only sought for the purpose of proving it. I am, however, sure that it is equally clear in principle that no mere allegation of a fraud, even though made in the most approved form of pleading, will suffice in itself to overcome a claim of professional privilege properly formulated.

North, J., in the first of the grounds of decision in *In re Postlethwaite* (35 Ch. D. 722) seems to have otherwise held. I think that he overlooked the fact that in one of the cases which he relied upon no fraud appeared on the pleadings at all, and that in the other numerous facts had already been admitted or ascertained. So far I think that his decision was wrong.

If the dicta in *Bullivant's* case of Romer, L.J. ([1900] 2 Q.B. at p. 169) and of Lord Davey ([1901] A.C. at p. 203) are to be read as supporting such a view, I think they ought not to be followed. As I read the opinion of Lord Halsbury, he clearly holds that a *prima facie* case must be "made out" without purporting to define in what "mode" this is to be done, and without sanctioning a mere pleaded allegation as sufficient. The right of the one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection, are parallel rights; in itself neither is paramount over the other. It is therefore the business of the party claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach, because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this by establishing a *prima facie* case of fraud in fact. Evidence, admission, inference, from circumstances which are common ground, or "what not," as Lord Halsbury says, may serve for this purpose. I do not pretend to define what material may and what may not be used. The imperfections of his pleadings or the dubious character of his procedure in the action may militate against the claimant's case. The fact that a motion to strike out his pleadings has been made and has failed does not establish that he has a sufficient *prima facie* case for this purpose. The stage in this action is only an interlocutory one and the materials must be weighed, such as they are, without the apparatus of a formal trial of an issue. On such materials the court must judge whether the claim of privilege is displaced or not.

This is, as I understand it, the view taken by the Court of Appeal, though expressed in somewhat different language. It is not my business even to form any opinion now as to the plaintiff's prospects at the trial, but I see no ground for thinking that on the material before it the Court of Appeal was not justified in holding that no sufficient foundation had been laid for setting aside the respondents' claim of professional privilege.

(2) The necessity which has sometimes been said to be the foundation for the claim of professional privilege is not the necessity for confiding in the particular solicitor consulted, but the necessity for letting a litigant confide in some solicitor. It is equally obvious that this principle involves allowing the litigant to choose his own solicitor and to consult the person in whom he feels confidence. To limit the persons among whom he can choose might be to deny him a choice. To say that if he chooses to consult a co-executor he does so on the terms that their written communications will be open to his opponent, so penalises that particular choice that in effect it is a prohibition. For reasons stated later I say nothing of the special case when a solicitor and client are executors of a will under which the party claiming production is a beneficiary, but I do not wish to be understood as accepting the appellant's argument, which I think it irrelevant at present to discuss.

(3) No case has been cited which decides that the right to refuse production of relevant documents, on the ground that they only support the possessor's case, is limited to "evidences" of his case in the sense that they are such as could be put in evidence by him and form part of his title. Before the Judicature Acts many cases were decided on claims to refuse production of documents which their possessor might have put in evidence, and none are forthcoming, it seems, in which the documents could not have been so used. The two cases which were said to have decided the point —*Knight* v. *Waterford* (*Marquis of*), 1836, 2 Y. & C., Ex. 22, and *Hey* v. *De la Hey*, 1886, W. N. 101—turn out on examination to be decisions on other grounds. Very little can be inferred from such a condition of the reported authorities. It may be accidental. In any case the point turns on different considerations. The orders and rules made under the statutory authority of the Judicature Acts are the code which is paramount in matters which they regulate. The same word "relate" is used in them in connection with the obligation to make discovery by affidavit and with the right to refuse production on the specified ground in question. In terms neither is limited, and relevancy and that alone is the test. In substance that must be so as to discovery, and no reason has been suggested why it should not equally be so as to privilege from production, and for many years this has been regarded as settled practice. The contrary would work injustice. I think the appellant's contention fails.

As to the questions arising upon item 434 the two cases for the opinion of counsel and the opinions of counsel thereon I am not disposed to allow the appeal. If the documents were submitted to the learned Judge in order that he might decide once for all whether they should be produced or not his decision could not be appealed (*Bustros* v. *White*, 1 Q.B.D. at p. 427), but the reason for this must be that both parties have so intended. The joint request of both parties that the learned Judge should inspect the

documents for himself would in itself raise a presumption that the intention was to submit them for his final decision, but the special language used may negative that. Contrary to the respondents' contention I think in the present case the language used would not in itself negative that presumption, though it is true that after the judgment of Peterson, J., was given counsel for the now respondent said—"Will your Lordship give us leave to appeal in regard to such parts of your decision as are against us?" which included these particular documents, and leave was given, and at the request of the other side was made "mutual." The case, however, goes further. If the learned Judge's decision is unappealable it is because the parties have agreed that it should be so, and here this is in dispute. Mr Tomlin says that whatever words he used this never was his meaning. The agreement whatever it was never was reduced into writing and signed, and in themselves the words are susceptible of more than one interpretation. It has not been contended for the appellant that by accepting Mr Tomlin's language in the wider sense his position has in any way been changed on the faith of the words being so intended and understood, and the question therefore is whether there was any *consensus animorum* between counsel if the decision Mr Tomlin asked for was meant to be appealable, and the decision Mr Hughes assented to take was understood to be unappealable.

This controversy has been raised before the Court of Appeal and in substance decided. Such a case must be exceptional, and I think must be rare and must depend mainly upon the statements of counsel. It is hardly a matter suitable for appeal to your Lordships' House, and I see no sufficient reason for interfering with the determination of it at which the Court of Appeal arrived.

There is a further point as to the opinion of counsel, No 1 of No 434. It was taken in the lifetime of the testator, and though the defendants' first affidavit covers it by the description "Cases and instructions to counsel to advise the executors of Sir Joseph Whitworth as to his will and codicils, and counsel's opinion and notes thereon," their second affidavit showed that it consisted of communications "between the testator and his counsel," and only the second is said to have been between counsel and the executors. The Lords Justices examined the documents in the first item as Peterson, J., had done. They agree with Peterson, J., that they might be used to support the plaintiff's case, and one of the grounds on which protection was claimed fails accordingly, but they go on to say that the claim of professional privilege covers them. This is the claim of the client, and if the testator alone was the client I do not quite see how the defendants could set up professional privilege. It may be, however, that the proposed executors and legatees joined in taking this opinion. I have not seen the papers. Peterson, J., rejected the claim to refuse production, partly on what has been called the "proprietary" ground, partly because he thought that no professional privilege can be claimed between co-executors. He does not negative the possibility that the proposed executors were also Mr Theobald's clients in the matter, and if so, the view of Bankes and Warrington, L.JJ., would be explained. I am not satisfied that your Lordships should interfere. It is a question of particular documents, not of general principle.

The remaining matters relate to the application of well-settled rules to the particular facts of this case in a mere interlocutory proceeding. I agree that the appellant has no claim to see these documents, including the first of the two cases for opinion in No. 434, except under the law relating to discovery, because while the releases obtained by "Whitworth's executors" stand, to say nothing of the fourth codicil, he cannot claim to see them as being his documents in any sense. I am satisfied that if the two letters dated 30th December 1895 and 26th January 1895 have been wrongly appreciated by the respondents in relation to discovery (which I by no means decide) their error has not been such as to cast doubt on their general understanding or observance of their obligations, or to vitiate their claims to withhold disclosure in respect of other documents.

In drawing up the order of the Court of Appeal an error has been made as to which I think the respondents have been to blame, and might well have been made liable in costs to some extent, but as two of your Lordships think differently, as the appellant has already seen some of the documents which the order has erroneously dealt with, and as counsel has undertaken for the production of the others when requested, and as the order being interlocutory is only of importance as affecting production, I acquiesce in their views.

I agree that the appeal should be dismissed with costs.

LORD PARMOOR—Sir Joseph Whitworth died in January 1887, seized or possessed of real or personal estate of great value. The appellant is the legal personal representative of Fanny Uniacke, who was the heiress-at-law and one of the two next-of-kin of the testator. The respondents are the respective legal personal representatives of the executors of Sir Joseph Whitworth. The action related to the estate and testamentary disposition of Sir Joseph Whitworth, and the plaintiff charged that there was either a secret trust or that the executors took the residuary real and personal estate for their own absolute use and benefit, and that the form in which the testamentary disposition was arranged or settled was a mere fraudulent device or scheme for appropriating to the use of the executors a very large portion of the estate of the testator. It is not necessary to determine how far the action is well constituted, so long as the probate of the will and codicils of the testator have not been recalled. The appeal must be determined on the pleadings as they stand. The question is whether an order for production of the documents con-

tained in the second part of the schedule of documents should be made. These documents relate to the matters in question in the action, but their production is refused on the ground that they are privileged either as being documents which consist solely of professional communications of a confidential nature, which for the purpose of obtaining legal advice have passed between the executors and their solicitors, or on the ground that the documents either do not in any way relate to the matters in issue in this action, or in so far as they do relate, relate solely to the case of the defendants and not to the case of the plaintiff, and do not in any way tender a support to the plaintiff's case or impeach that of the defendants. In form this privilege is sufficiently claimed, but it was urged on behalf of the appellants that over a long period of years the meaning of the claim for privilege on the ground that the documents related exclusively to the case of the defendants had been misunderstood, and that the privilege only extended to such documents as might be admissible in evidence to support the defendant's case. The claim for privilege was disputed by the appellant on various grounds, and the question for determination is whether and how far these objections raised on behalf of the appellant can be maintained.

A cestui que trust in an action against his trustees is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission or the establishment of the status on which the right is based. I agree in the view expressed by Peterson, J., that the rule as to the right of a cestui que trust to the production of trust documents for inspection does not apply when the question to be tried in the action is whether the plaintiff is a cestui que trust or not. In the present case not only is the status of the appellant as a cestui que trust disputed, but in addition a release was executed, which unless it can be set aside is a bar to his claim. It is not necessary to consider on what grounds the release is attacked, but it is obvious that there may be formidable difficulties in the way of the appellant under this head. The attention of your Lordships is directed to various authorities, but it is sufficient to refer to *Wynne* v. *Humberston*, 1858, 27 Beav. 421, and to *Compton* v. *Earl Grey*, 1826, 1 Y. & J. 154.

The second point raised on behalf of the appellant was based on the proposition that professional privilege does not apply to a case in which a solicitor who is a trustee has acted as professional adviser to himself and his co-trustees, who are co-defendants in the action. It was not contended that this principle would apply where professional advice was taken on a personal matter affecting one of the trustees, but in the present case the affidavit of documents shows that the privilege is claimed in respect of documents which do relate to the trust matters in question. It is notorious that in many cases solicitors are appointed as co-trustees with full power to act as solicitors in their professional capacity in relation to trust matters, and to make in respect thereof ordinary professional charges.

As a matter of principle, it is difficult to understand why confidential communications made to a solicitor in his professional capacity should cease to be privileged because such solicitor has been appointed as a co-trustee by the testator with a power to act as solicitor in the affairs of the trust. There is no less necessity in such a case to protect in the interests of justice such a disclosure of the facts and conditions as is required to obtain professional and confidential advice. To hold otherwise would deprive a lay trustee of a privilege which would attach to communications made to an outside solicitor, with the result that it might be necessary for him to take such advice in preference to that of the solicitor especially cognisant of the trust affairs. It is not a relevant consideration that communications between co-defendants, none of whom are solicitors, are not privileged. In the argument on behalf of the appellant reliance was placed on the case of *In re Postlethwaite*, 35 Ch. D. 722. In this case the plaintiff, who sought the production of documents, was undoubtedly a beneficiary. Further, a charge was made in the statement of claim that the purchase in the name of a third person was a fraudulent device intended to cover up a real purchase by one of the two trustees. As to this it is not necessary to say more since the decision turned on the special circumstances of the case. I agree with Warrington, L.J., that the claim to have the documents produced was placed on the proprietary right of the plaintiff, and not on the ground that the claim of privilege was destroyed owing to the fact that the solicitor consulted was also a co-trustee. If, however, the judgment of North, J., can be extended to cover the claim made by the plaintiff in this case the principle is stated in too wide terms and cannot be maintained.

The third point relied on by the appellant as an answer to the claim of professional privilege is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. Such a case must be differentiated from a case in which after the commission of a crime, or in order to meet a charge of fraud made against him in a civil action, a client consults a solicitor

in his professional capacity, employing him to obtain the benefit of his confidential advice and assistance. The appellant does make in his pleadings a charge that a fraud has been concocted between the solicitor and client, and the question which arises is whether such a *prima facie* case of a definite character has in some way been brought to the notice of the Court as to justify the Court in holding that the appellant has the ordinary right of production of documents relating to his case, the defendents in respect of such production not bringing themselves within the protection of professional privilege.

It may be that the allegations in the statement of claim, apart from any other source of information, are sufficiently explicit to negative the claim of professional privilege, but the proposition that the mere pleading of fraud is in itself sufficient necessarily to defeat the claim of professional privilege cannot be maintained. To admit this proposition would be equivalent to saying that the claim to protection for professional privilege—a claim founded in the interest of the proper administration of justice—could be defeated by the skill of a pleader and the use of technical language whenever it was desired to obtain an inspection of documents otherwise privileged in the expectation of the discovery by this means of information to support a charge of fraud. On the other hand in order to obtain the production of documents it is certainly not necessary to prove the existence of fraud, and such an obligation might result in the non-production of documents which in a particular instance might constitute the only evidence on which the plaintiff relied to establish his case.

In the case of *Bullivant* v. *Attorney-General for Victoria* ([1901] A.C. at p. 201) Lord Halsbury in advising the House says—"The line which the Courts have hitherto taken and I hope will preserve is this—that in order to displace the *prima facie* right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation, or affidavit, or what not." This passage relates to the giving of evidence before commissioners, but there is no difference in the principle applicable in such a case and the principle applicable to the production of documents on an interlocutory application. Whether the circumstances brought to the notice of the Court in a particular case are sufficiently explicit to establish a *prima facie* case of definite fraud either by allegation, affidavit, or in some other way, will depend on special facts in each case—*Reg.* v. *Cox and Railton*, 1884, 14 Q.B.D. 153. But something more is required than mere pleading, or than mere surmise or conjecture. If in the present appeal there is disclosed a real *prima facie* case of definite fraud, this must be found in the allegations contained in the pleadings and particulars, seeing that there has been no affidavit and no information from any other source. In the statement of claim fraud is alleged as an alternative to a secret trust, on the ground that the form in which the testamentary disposition of the testator was settled or arranged by Christie and Darbishire was a mere fraudulent device or scheme for appropriating to the use of Whitworth's executors a very large portion of the testator's estate. This allegation is not supported by the statement of any facts which might give positiveness or distinctness to the charge, but rests on nothing more than pleading or mere surmise and conjecture. In my opinion this is insufficient either to support the right of the appellant to inspection or to defeat the claim of the defendant to the protection of professional privilege, and I agree with the decision arrived at by the Court of Appeal under this head. I desire to add that the refusal of the Court to strike out the statement of claim on the application of the defendants does not of itself establish any case of *prima facie* fraud or make the case other than one of mere surmise and conjecture.

The next question for consideration is whether the claim of privilege has been sufficiently made in the statement that the documents relate solely to the case of the defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach that of the defendants. It was argued on behalf of the plaintiff that to support the claim for privilege the documents must be such as might be admissible in evidence to support the case of the defendants. I think that this is an impossible contention, and that to assent to it would be to admit a proposition which is not supportable either in principle or by authority. The affidavit for discovery of documents includes all documents in the possession and power of the deponent which relate to the matter in question and clearly is not limited only to such documents as may be admissible in evidence. Such a limitation would destroy in great part the value of discovery; but if documents must be disclosed in the affidavit of documents independently of whether they are admissible in evidence or not, it is difficult to suggest any reason why the claim of privilege against production should not cover the same documents. For instance the copy of a document, although not in itself admissible in evidence, comes within the same category as the original document in so far as concerns the privilege of production, but if there were an obligation to produce, it would give the same information as the document itself, though such a document would itself be protected on the ground that it is admissible in evidence. This novel doctrine assumes that the word "relate" can be read as synonymous to admissible in evidence—an assumption for which there is no warrant.

The attention of your Lordships was called to a number of passages in the works of Hare and Sir J. Wigram. It is not necessary to consider these passages in detail, but I can find none which support the proposition that there is no privilege attaching to documents which relate exclusively to the case of one party to an action, unless such

documents may be admissible in evidence in support of his case. To quote one passage to the contrary from Sir J. Wigram's book, p. 264—"A plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case, or of the evidence by means of which that case is to be established."

Numerous authorities were quoted to your Lordships in the argument on behalf of the plaintiff, but there is no case which holds that a document not admissible in evidence is outside the claim of privilege although such document relates solely to the opponent's case and not to the case of the party seeking production—*Bewicke* v. *Graham* (7 Q.B.D. 400) is a direct authority that the claim of privilege is sufficiently made in the form similar to that used in the present case. Compare *Budden* v. *Wilkinson*, [1893] 2 Q.B. 432.

The only cases which could present any difficulty are *Knight* v. *Marquis of Waterford*, 2 Y. & C. Ex. 22, and *Hey* v. *De la Hey*, 1886 W.N. 101. I have had the advantage of reading the opinion expressed by Lord Wrenbury on these cases and desire to express my entire concurrence. It was further argued that the affidavit filed on behalf of the defendants was on its face untrustworthy. This argument raises no question of principle, but there appears to be no adequate reason for displacing the oath of Mr Darbishire. The test to be applied is well stated in the case of *Roberts* v. *Oppenheim* (1884, 26 Ch.D. 724) by Cotton, L.J.—"We ought not to speculate in order to get rid of the protection claimed, and we ought to accept the affidavit as conclusive unless the Court can see distinctly that the oath of the party cannot be relied on."

In the course of his exhaustive argument Mr Hughes handed in for the convenience of your Lordships a chart of the documents. Documents 434 (1) if privileged from production are only so privileged as documents which relate entirely to the case of the defendants — Documents 434 (2) may be privileged either under the claim of professional privilege or as documents which relate entirely to the case of the defendants. These documents were inspected by the learned Judge, and it was argued that he acted as arbitrator between the parties with their consent, and that no appeal would lie against the order for production. The matter is not free from doubt, and there was a difference in the understanding of the two counsel both of whom with evident sincerity referred to what passed before the learned Judge at the trial. It is sufficient to say that I am not prepared to differ from the conclusion of the Court of Appeal. The order of the Court of Appeal includes documents, to the production of which the counsel for the defendants agreed in the hearing before Peterson, J., and on which no appeal was opened in the Court of Appeal, and documents for which no privilege was claimed in the affidavit of Mr Darbishire. The order should be that, the respondents undertaking to produce these documents, the appeal should be dismissed with costs.

LORD WRENBURY — As legal personal representative of the heiress-at-law and one of the next-of-kin of the testator the plaintiff claims to be entitled to certain part of the testator's estate. His claim is made not under the will but upon the footing of an intestacy as regards so much of the estate as upon the face of the will was given to the three executors absolutely in equal third shares. If he is right the executors are trustees for him and none the less by reason of the fact that he claims not under a gift contained in the will but by reason of there being, as he says, no effectual beneficial gift there contained. The executors are trustees for whomsoever is beneficially entitled to the testator's property.

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestui que trust, and the beneficiaries are entitled to see them because they are beneficiaries. The first case in *Talbot* v. *Marshfield* (1865, 2 Dr. & Sm. 549) is an instance.

But this plaintiff cannot as matters stand say that he is a beneficiary. That is the very question to be determined in the litigation. Before he can establish that he is a cestui que trust he has two difficulties to surmount. The one is that he must establish that there is property undisposed of by the will. The will on its face purports to dispose absolutely of the whole. He says there was a secret trust, that this trust failed, and that the funds in the hands of the executors are, as between them and him, bound by a trust which he can enforce, viz., a trust for those who would be entitled if the secret trust failed as he says it did. One question at issue in the action is whether there was any such secret trust or whether the executors are right in saying as they do that the property was given absolutely to them in equal third shares. The other difficulty is that Mrs Uniacke (as whose legal personal representative he sues) executed on the 21st November 1889 a release which laid the above question at rest in a manner fatal to his claim, and unless and until he succeeds in setting that release aside he has no claim to any part of the estate. That release is thirty years old, the parties to it are dead. Evidence has thus been lost, and there is no presumption that it will be, and no *prima facie* case made to lead to the belief that it will be, set aside.

In this state of facts the plaintiff cannot assert a proprietary right to the documents on the footing that they are his, and cannot enforce inspection on that ground. If authority be needed, *Wynne* v. *Humberston* (27 Beav. 421) is clear authority upon the point.

This being so the plaintiff must succeed, if at all, upon the ground that he has a right to discovery of the documents—a right to inspect them nothwithstanding they are not his—because they relate to the matters in question in the action. *Prima facie* he is entitled to inspection on that ground. It is for the defendants to show valid grounds for protecting them from inspection. The grounds upon which they resist inspection have to be considered under three heads.

The first is professional privilege. As to this the plaintiff says—There is no professional privilege, because the solicitor who was consulted was himself one of the trustees. In my opinion this contention cannot be supported. Professional privilege is based upon public policy. It is considered that for purposes of justice a client ought to be in a position to go to his solicitor and be wholly untrammelled in speaking to him without any reserve; that he ought to be in a position to obtain his advice, and that all this should be done under the veil of professional confidence. Lord Brougham in *Greenough* v. *Gaskell* (1833, 1 My. & K. 98) gives the true foundation of the doctrine. I see no ground of principle why this should be affected by the fact that the solicitor is a co-trustee with the client. The appellant says that the solicitor trustee is bound to answer the cestui que trust as to any matter relating to the trust. So he is, unless he is constrained by some superior duty. To say that professional confidence is not a superior duty is to beg the question. If the trustee who is not solicitor is asked the question he is entitled to claim privilege, for otherwise public policy would be defeated in compelling him to answer. His privilege cannot lapse because the solicitor whom he consults owes a duty to another. And if the trustee who is solicitor is asked he is entitled to reply that he is constrained by the privilege of his client which he is not entitled to break. But, says the appellant, the trustee should have gone to some other solicitor. In the present case the testator in fact by his first codicil authorised the trustee solicitor to act as solicitor to the trust. But I do not rely on this as differentiating the case. There is nothing wrong in employing a co-trustee as solicitor. If privilege would have existed if the solicitor had not been trustee I cannot see anything that will destroy privilege when he is. Other considerations would arise if the case made were that the trustees were conspiring to defraud the trust, for it is no part of a solicitor's duty to advise his client how to commit a fraud. This is a separate ground which I shall deal with presently.

The appellant relies on *In re Postlethwaite*, 35 Ch. D. 722. The case differs from the present in material particulars. The plaintiff there was a cestui que trust; there was no question about that. He had a proprietary right, and had that right to see every document in the trustees' hands which had been obtained by them as trustees. Protection could only be claimed (and it was claimed) on the ground that the documents came into existence on an occasion when the lay trustee was consulting the solicitor trustee not as solicitor to the trust but as his private solicitor. The illustration given by North, J., in *In re Postlethwaite* upon his second ground is far from convincing. Not everything that is said at a professional interview between solicitor and client is privileged any more than the whole of a letter, some part of which contains professional advice and other part bears no such character, is privileged.

In my opinion this plaintiff, who cannot at present affirm that he is, or even say that he has established a *prima facie* case that he is, a cestui que trust, cannot succeed on the ground of proprietary right, and cannot on the mere ground that the solicitor was a co-trustee exclude the privilege if in other respects it is rightly claimed.

The second question for consideration is whether privilege has rightly been claimed by the defendants on the ground that the documents relate solely to the defendants' case and not to the case of the plaintiff, and do not tend to support the plaintiff's case, and do not contain anything impeaching the defendants' case. Upon this the plaintiff has advanced a contention which is startling to me, that privilege under those words can only be claimed for documents which the defendants could put in evidence at the trial. The words are to be understood, he says, as if they ran "relate solely to and could be used by the defendants in support of their case." My first observation upon this is that these are not the words, and it would have been easy to require these words if this were the meaning. The second observation is that this cannot be the meaning of the words, and for this reason. The verb used is "relate." The same word is used in defining the whole class of the documents as to which the affidavit of documents is to be made. They are all the documents which "relate" to the matters in question in the action, whether they be capable of being given in evidence or not. The documents to which the affidavit is to extend is not confined to documents which somebody could use in evidence. The same meaning must be attributed to the word in the language under consideration.

Further, it is obvious that there are many documents which the defendants could not put in evidence which they would be entitled to protect from inspection. The defendant's private diary, which may be most useful to him in enabling him to determine and speak to a relevant date, is a document which he cannot put in evidence, but the plaintiff could not get inspection of it. So if the defendant has made a copy of a deed relating only to his own title, or has made for his own use a translation of a document in Norman French, or has prepared for his own guidance a note or abstract of what he is in a position to say in evidence, he could not put the copy or translation or note in

evidence (unless as regards the copy deed or the translation the original had been lost, and he was entitled to use secondary evidence), but the plaintiff could not obtain discovery of such documents as those so as to acquaint himself with the contents of the deed or the nature of the proposed evidence. Numerous authorities have been cited by the appellant in which the word "evidences" has been used, and in which documents which were "evidences" in the sense that the defendant could use them as evidence have been protected. But no cases have been cited in which an order has been made that documents which were not "evidences" be discovered on the ground that although privilege was appropriately claimed in all other respects the opposite party was entitled on that ground to inspect them, unless it be *Knight* v. *Waterford* (*Marquess of*) (2 Y. & C. Ex. 22) and *Hey* v. *De la Hey* (1886, W. N. 101). Neither of these cases goes this length. In the former case the map, it was said, "may possibly be evidence of the extent of the manor, and may therefore throw some light on the plaintiff's claims" (*see* 2 Y. & C. Ex., at p. 41). The Court rolls were "a collection of Court rolls which he holds for the benefit of others," and as to the answer and the letters reasons are assigned which support production on grounds of special matters, not grounds of general application. In *Hey* v. *De la Hey* the defendants by their affidavit claimed that the documents "were intended to be or might be used by the defendants in evidence," and the Court ordered production on the ground that they could not be so used. They were letters between co-defendants, and the ground was obviously a good one. The documents were discoverable unless there were some other ground of privilege on which the affidavit and the report are alike silent. To found anything upon a report of this kind in the Weekly Notes is, in my opinion, impossible.

Upon this point *Bewicke* v. *Graham* (7 Q.B.D. 400) is important and establishes, I think, the law as I understand it to be—(see Bray on Discovery, 1885 ed. p. 485).

The defendants' claim of privilege under this second head is, in my opinion, good.

Then the scene changes and the plaintiff says—"Granted all this, it remains that these documents are discoverable because I allege a case of fraud." Here he relies principally upon *Bullivant's* case ([1900] 2 Q.B. 163; 1901 A.C. 194), and in particular upon the words of Romer, L.J., "the claim of privilege is unavailing in cases where fraud or illegality is alleged, and the existence of that fraud or illegality being in issue the documents are relevant to that issue." To cite these words and rely upon them as laying down a general principle apart from the context and the facts with reference to which they were uttered is, of course, quite inadmissible. For instance, if the affidavit showed that the documents related to professional advice sought for and obtained by the party in anticipation of litigation or under the stress of litigation in respect of the alleged fraud, no one could dispute that they were protected. The Lord Justice's words must, of course, be qualified accordingly. Not every document relevant to the issue of fraud, but documents which are not upon some other ground privileged, are exposed to production. For the present purpose it is sufficiently accurate to say that documents relating to the conception and carrying out of the alleged fraud are not, but documents arising in professional confidence as to defence against the alleged fraud are protected.

Further, as regards documents which upon the principle above stated are open to inspection, the plaintiff must in asking for them go at any rate so far as to satisfy the court that his allegations of fraud are not merely the bold assertions of a reckless pleader, but are such as to be regarded seriously as constituting *prima facie* a case of fraud resting on solid grounds. Here again a sentence from Lord Davey's opinion in *Bullivant's* case is to be read carefully and its meaning to be ascertained from the circumstances in which it was uttered. "I do not dissent," he says, "from what was said by Mr Haldane, that it must be assumed for the present purpose that the case stated in the pleadings is true for the purpose of testing the right to production.

In *Bullivant's* case an information had been filed in the Supreme Court of Victoria and a commission had been issued to take the evidence of a witness in this country. Upon this examination he was called upon to produce a certain book. The question in the action was whether the defendant was "evading" a statute. In the Court of Appeal the case was decided upon the footing that the allegations of intent to evade were allegations of fraud. The House of Lords reversed the Court of Appeal on the ground that evasion of a statute is not, in one sense of the word, a fraud and that there was no sufficient allegation of fraud. Upon this state of facts Lord Davey's words obviously fell far short of the meaning that if fraud be alleged the Court must assume that it is true. Lord Halsbury's words are that "before professional confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." If I may venture to express this in my own words, I should say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the Court good ground for saying that *prima facie* a state of things exists which, if not displaced at the trial, will support a charge of fraud. This may be done in various ways—admissions on the pleadings of facts which go to show fraud—affidavits in some interlocutory proceedings which go to show fraud — possibly even without admission or affidavit allegations of facts which if not disputed or met by other facts would lead a reasonable person to see at any rate a strong probability that there was fraud, may be taken by the Court to be sufficient. Every case must be decided on its merits—(*Reg* v. *Cox*, 14 Q.B.D. 163). The mere use of the word "fraud" or the prefix of the adverb "fraudulently" from time to time throughout the narrative will not suffice

The Court of Appeal found in the present case no sufficient allegation of a case of fraud. I agree. Par. 11 of the statement of claim "charges" that the testator communicated to his executors a secret trust which was either too indefinite or was invalid by reason of the Mortmain Acts. Suppose he did. Who was defrauded by his doing so? Not the testator, for *ex hypothesi* it was he who made the communication; he was a party to it and intended it. Par. 12 "charges" that the form in which the testamentary dispositions was (*sic*) arranged or settled by two of the executors was a fraudulent device for appropriating to the executors a part of the testator's estate and that the third executor was a party to it. This is a "charge" of the existence of a "scheme," not the allegation of any facts which tend *prima facie* to support a case of fraud. And there is nothing whatever in the way of admission or evidence or circumstances of suspicion to found a probability or a *prima facie* case of fraud. This ground therefore in my judgment fails.

It follows that the appeal wholly fails, subject to something which must be said as to some particular documents. . . .

As regards the documents Nos. 434 (1) and (2), these were inspected by the judge with the consent of the parties. It is a matter of everyday occurrence that to save time and dispute the parties say, "Let the judge see the document," meaning that he is to look at it as further material upon which to base his judicial decision whether it is privileged or not. No one in such a case intends to make the judge an arbitrator, and I am satisfied that the parties in the present case did not so intend. As to the right decision as regards those, the matter stands thus—No. 434 (1) is a case and opinion taken in the testator's lifetime. No. 434 (2) is a case and opinion taken after his death. In my opinion both of these are protected, and the order under appeal is right. No. 434 (2) is protected by professional privilege —No. 434 (1) is not—(*Russell* v. *Jackson*, 9 Hare, 387). No. 434 (1), however, is protected upon the grounds stated by Lord Sumner in his judgment.

The defendants giving an undertaking to produce the documents Nos. 435 (2) and 437 (1), as to which the order under appeal is obviously wrong by a slip, this appeal should in my judgment be dismissed, with costs.

Appeal dismissed.

Counsel for the Appellants — Hughes, K.C. — J. B. Matthews, K.C. — Beddell. Agents—Edmund O'Connor & Company, Solicitors.

Counsel for the Respondents — Tomlin, K.C. — D. Hogg, K.C. — Dighton Pollock. Agents—Pennington & Son, for Tatham, Worthington, & Company, Manchester, Solicitors.

HOUSE OF LORDS.

Friday, March 5, 1920.

(Before the Lord Chancellor (Birkenhead), the Lord Chief Justice (Reading), Lords Haldane, Dunedin, Atkinson, Sumner, Buckmaster, and Phillimore.)

REX *v.* BEARD.

Criminal Law—Murder—Act of Violence Done in Furtherance of Rape—Plea of Drunkenness—Intent.

Homicide by an act of violence done in the course or in the furtherance of a felony involving violence is murder.

Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Observations on *Rex* v. *Meade*, [1909] 1 K.B. 895.

Their Lordships' judgment was delivered by

LORD CHANCELLOR (BIRKENHEAD) — Arthur Beard was convicted of murder at Chester Assizes and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal servitude. The case is brought to your Lordships' House under section 1, subsection 6, of the Criminal Appeal Act 1907 upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance. The facts which are relevant may be shortly stated.

About 6 p.m. or a little later on the 25th July 1919 a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and when she struggled to escape from him he placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation. There was some but not much evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. This evidence was of a character which is not unusual in crimes of violence, but in view of the legal problems to which this case has given rise it requires examination.

Most Negative Treatment: Check subsequent history and related treatments.

1994 CarswellOnt 579
Ontario Court of Justice (General Division), Commercial List

Ontario (Attorney General) v. Ballard Estate

1994 CarswellOnt 579, [1994] O.J. No. 2281, 119 D.L.R. (4th) 750, 20 O.R. (3d) 350, 33 C.P.C. (3d) 373, 50 A.C.W.S. (3d) 929, 5 W.D.C.P. (2d) 543, 6 E.T.R. (2d) 34

Re Estate of HAROLD EDWIN BALLARD

RE BUSINESS CORPORATIONS ACT, R.S.O. 1990, c. B.16, CHARITABLE GIFTS ACT, R.S.O. 1990, c. C.8, CHARITIES ACCOUNTING ACT, R.S.O. 1990, c. C.10 and PUBLIC TRUSTEE ACT, R.S.O. 1990, c. P.51

ATTORNEY GENERAL OF ONTARIO and PUBLIC TRUSTEE v. STEVE A. STAVRO, JOHN DONALD CRUMP and TERENCE V. KELLY (Executors of Estate of HAROLD EDWIN BALLARD, deceased), KNOB HILL FARMS LIMITED, MLG VENTURES LIMITED and MAPLE LEAF GARDENS, LIMITED

Lederman J.

Heard: September 19, 1994
Judgment: October 12, 1994
Docket: Docs. 94-CQ-54358, Commercial List No. B217/94

Counsel: *Frank J.C. Newbould, Q.C.*, and *Benjamin T. Glustein*, for moving parties (plaintiffs).
Bryan Finlay, Q.C., for responding parties (defendants) Steve A. Stavro, John Donald Crump and Terence V. Kelley, Executors of the Estate of Harold Edwin Ballard.

Subject: Civil Practice and Procedure; Estates and Trusts; Evidence
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.i Solicitor-client privilege
Estates and trusts
I Estates
I.12 Actions involving personal representatives
I.12.d Practice and procedure
I.12.d.iv Discovery
Estates and trusts
I Estates
I.12 Actions involving personal representatives
I.12.d Practice and procedure
I.12.d.viii Costs
I.12.d.viii.B Personal liability of representative
Evidence
XIV Privilege
XIV.1 Solicitor and client privilege
XIV.1.f Miscellaneous

Remedies
II Injunctions
II.8 Practice and procedure
II.8.k Costs
II.8.k.i Entitlement

Headnote

Estates --- Actions involving personal representatives — Practice and procedure — Discovery
Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — General
Discovery — Discovery of documents — Privileged document — Solicitor-client privilege — Production by executors of communications concerning management of estate, including correspondence between executors and solicitors for executors.
Estates — Actions involving personal representatives — Practice and procedure — Discovery — Communications concerning management of estate — Communications passing between executors and solicitor for executors — Residual legatee entitled to production of communications.
The estate of the deceased was under administration. The plaintiffs brought a motion for an order directing the production by the executors of all communications concerning the management of the estate, including all communications from solicitors for the executors to the executors relating to the matters in issue in this action. The executors opposed on the grounds that the documents were protected by solicitor-and-client privilege.

Held:

The motion was granted; production of relevant communications between the solicitors and executors was ordered.
Communications that passed between an executor or trustee and a solicitor were not privileged as against beneficiaries who were claiming under the will or trust. In this case, "beneficiary" included the plaintiff who had a contingent interest under the will.
The proper approach in determining this issue was to consider the rationale of the solicitor-and-client privilege. In this case, the fact that the beneficiary was only a residual legatee since its interest was contingent and had not vested, did not affect the application of the "joint interest" principle. There was no difference between beneficiaries with a present interest and those with only a contingent interest.
A property right analysis was inappropriate. It was untenable to insist that a potential beneficiary had to wait until the completion of the administration of the estate to inspect the information that the trustees had gathered. The right to actual property should not have been determinative of whether an individual was entitled to information.
Furthermore, this action was based on allegations of breach of fiduciary duty and lack of good faith. In actions of this sort, the documentation was to be made available to the beneficiaries raising those allegations.

Table of Authorities

Cases considered:

Froese v. Montreal Trust Co. of Canada (July 5, 1993), Doc. Vancouver C926261, Master Joyce (B.C. Master), [1993] B.C.W.L.D. 2073, leave to appeal to B.C. C.A. refused (August 6, 1993), Doc. CA017569, Gibbs J.A. (B.C. C.A.), [1993] B.C.W.L.D. 2387 — *applied*

Froese v. Montreal Trust Co. of Canada (August 6, 1993), Doc. CA017569, Gibbs J.A. (B.C. C.A.), [1993] B.C.W.L.D. 2387 — *referred to*

Goodman Estate v. Geffen, [1991] 2 S.C.R. 353, 42 E.T.R. 97, [1991] 5 W.W.R. 389, 80 Alta. L.R. (2d) 293, 172 N.R. 241, 125 A.R. 81, 14 W.A.C. 81, 81 D.L.R. (4th) 211 — *followed*

Londonderry's Settlement, Re; Peat v. Walsh, [1964] 3 All E.R. 855, [1965] Ch. 918 — *considered*

Ontario (Attorney General) v. Ballard Estate (1994), 5 E.T.R. (2d) 212, 20 O.R. (3d) 189 (Gen. Div. [Commercial List]) — *applied*

O'Rourke v. Darbishire, [1920] A.C. 581, [1920] All E.R. Rep. 1 (H.L.) — *considered*

Stewart v. Walker (1903), 2 O.W.R. 990, 1903 CarswellOnt 674, 6 O.L.R. 495 (Ont. C.A.) — *followed*

Talbot v. Marshfield (1865), 2 Drew. & Sm. 549, 62 E.R. 728 — *applied*

Words and phrases considered:

beneficiary — "Where counsel part company is whether 'beneficiary' includes one who merely has a contingent or residual interest under the will or trust. I had stated that it does ..."

"joint interest" principle — "The proper approach is to bear in mind the rationale of the solicitor-client privilege and whether it has any applicability to this kind of situation. The Supreme Court of Canada in *Goodman Estate v. Geffen* (1991), 81 D.L.R. (4th) 211 made it clear that there are situations where the privilege does not even arise as where the interests of the party seeking the information are the same as those of the 'client' who retained the solicitor in the first place. For example, in contested wills cases courts have received the evidence of instructions given to solicitors who prepared wills for testators in order to determine their true intentions. In *Stewart v. Walker* (1903), 6 O.L.R. 495 (Ont. C.A.), Moss C.J.O. explained the reason as follows [at pp. 497-498] [emphasis added]:

The nature of the case precludes the question of privilege from arising. The reason on which the rule is founded is the *safeguarding of the interest of the client, or those claiming under him when they are in conflict with the claims of third persons not claiming, or assuming to claim under him* and that is not this case, with the question is as to what testamentary dispositions, if any, were made by the client.

This principle was extended by the Supreme Court of Canada in the *Goodman Estate v. Geffen* case to the validity of a trust agreement after the death of the settlor ...

. . . . .

Thus, there is no need to protect the solicitor-client communication from disclosure to those very persons who are claiming under the estate. The communications remain privileged as against third parties who are strangers or are in conflict with the estate, but as was stated in *Stewart v. Walker*, supra, not those who are claiming under the estate. And that is because the trustee and beneficiary have a joint interest in the advice as Phipson has suggested [*Phipson On Evidence*, 14th ed., London, Sweet & Maxwell, 1990]:

No privilege attaches to communications between solicitor and client as against person having a *joint interest* with the client in the subject matter of the communication, e.g. as between ... trustee and *cestui que trust*.

. . . . .

If the 'joint interest' principle is the appropriate test by which to assess claims of privilege by a trustee against a beneficiary, the fact that [F] here is only a residual legatee as its interest is contingent and has not vested should not affect the application of the rule.

. . . . .

Moreover, the cases have stated that, whatever approach to the claim of privilege is taken, in actions where the beneficiary is alleging lack of good faith or breach of fiduciary duty, this information is to be made available to him or her."

proprietary right — "... 'proprietary right' in the sense of its dictionary meaning, i.e. owning something as property akin to ownership in land (see *Shorter Oxford Dictionary*, Clarendon Press, 1993) with the right to information on the basis of commonality of interest. When Lord Wrenbury used the phrase 'proprietary right' [in *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.)] he was saying no more than the documents in question are in a sense the beneficiary's and is therefore entitled to access them. They are said to belong to the beneficiary not because he or she literally has an ownership interest in them but, rather, because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust."

Motion by plaintiffs for order compelling production by executors of all communications concerning management of estate, including all communications from solicitors for executors to executors relating to matters in issue in action.

***Lederman J.*:**

1 This is a motion by the plaintiffs for an order directing the production by the Executors of all communications concerning the management of the Harold E. Ballard Estate ("the Estate"), including all communications from solicitors for the Executors to the Executors relating to the matters in issue in this action. The Executors resist on the basis that solicitor-client privilege attaches to such communications and precludes access by the plaintiffs to such information.

2 Both counsel recognized the principle that communications passing between an executor or trustee and a solicitor are not privileged as against beneficiaries who are claiming under the will or trust. The rationale was set out in the classic statement of Lord Wrenbury in *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.) at pp. 626-627 as follows:

> If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries.

3 Where counsel part company is whether "beneficiary" includes one who merely has a contingent or residual interest under the will or trust. I had stated that it does, without much elaboration in my Reasons delivered on August 15, 1994 [reported at 5 E.T.R. (2d) 212] at pp. 32-33 [p. 213], granting an interlocutory injunction.

4 Mr. Finlay has re-visited that issue on this motion. He argued that the very basis upon which the principle is founded is that the beneficiary has a proprietary right to the information. Until an estate is administered and property remains available upon the completion of the administration, it cannot be said that any potential beneficiary has an estate, right or interest, legal or equitable, in the property. This point was made by Professor D.W.M. Waters in his article, "The Nature of the Trust Beneficiary's Interest" (1967), 45 Can. Bar Rev. 219 at 244, as follows [footnote omitted]:

> And *Sudeley* [*v. A.G.*, [1897] A.C. 11] is the leading authority at the heart of the controversy over the nature of the trust beneficiary's interest. In that case, decided with a bluff and direct manner, the House of Lords stated categorically that until the residue of an estate is ascertained no residuary legatee has anything other than a personal right of action against the representatives for due administration. "In a certain sense a person may have a claim", said Lord Halsbury L.C., "a person may be entitled to this, that, and the other; but the whole controversy turns upon the character of the particular thing to which the legatee is entitled". There is no point in talking about "interests", "estates" and "entitlement", he said, because until there are ascertained properties forming the residue that sort of language is fallacious. All the legatee has meanwhile is a debt, and that is the end of the matter.

5 That being so, Mr. Finlay submitted that a party claiming to be a beneficiary of a trust is not entitled to receive documents protected by solicitor-client privilege unless his or her status as a beneficiary is first determined. Here, he argued, the Public Trustee represents only potential beneficiaries. This is so because the Estate is still under administration and the executors are still required to pay the debts and other obligations of the Estate. It is possible that upon completion of the administration of the Estate there will be no assets available for the Harold E. Ballard Foundation ("the Foundation"), the residual legatee under the will and trust. Therefore, it cannot be said with certainty that there will ever be a vesting of assets in the Foundation. Where, as is the case here, the charities are not ascertained trust beneficiaries and do not as yet have a specific property interest in the trust, the Public Trustee's right consists of the right to compel the due administration of the trust, by action if necessary. Mr. Finlay asserted that in such action its rights of obtaining production are not proprietary in nature but are governed by ordinary rules concerning production in litigation and subject to solicitor-client privilege.

6 This analysis confuses "proprietary right" in the sense of its dictionary meaning, i.e., owning something as property akin to ownership in land (see *Shorter Oxford Dictionary*, Clarendon Press, 1993) with the right to information on the basis of

commonality of interest. When Lord Wrenbury used the phrase "proprietary right" he was saying no more than the documents in question are in a sense the beneficiary's and is therefore entitled to access them. They are said to belong to the beneficiary not because he or she literally has an ownership interest in them but, rather, because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust.

7 The proper approach is to bear in mind the rationale of the solicitor-client privilege and whether it has any applicability to this kind of situation. The Supreme Court of Canada in *Goodman Estate v. Geffen* (1991), 81 D.L.R. (4th) 211 made it clear that there are situations where the privilege does not even arise as where the interests of the party seeking the information are the same as those of the "client" who retained the solicitor in the first place. For example, in contested wills cases courts have received the evidence of instructions given to solicitors who prepared wills for testators in order to determine their true intentions. In *Stewart v. Walker* (1903), 6 O.L.R. 495 (C.A.), Moss C.J.O. explained the reason as follows [at pp. 497-498] [emphasis added]:

> The nature of the case precludes the question of privilege from arising. The reason on which the rule is founded is the *safeguarding of the interest of the client, or those claiming under him when they are in conflict with the claims of third persons not claiming, or assuming to claim under him* and that is not this case, with the question is as to what testamentary dispositions, if any, were made by the client.

8 This principle was extended by the Supreme Court of Canada in the *Goodman Estate v. Geffen* case to the validity of a trust agreement after the death of the settlor. Wilson J. explained the reason for so doing as follows at p. 235:

> In my view, the considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were.

9 Similar considerations come into play when the issue is the disclosure of legal opinions obtained by a trustee. He or she is duty bound to act in the best interests of the beneficiaries and the legal advice that the trustee sought and obtained from the lawyer was for the purpose of furthering their interests. In *Talbot v. Marshfield* (1865), 2 Drew. & Sm. 549, 62 E.R. 728, the Court stated at p. 729:

> [Counsel's opinion were] taken by the [trustees] to guide them in the exercise of a power delegated to them by the trusts of the will, and which, if exercised, would affect the interests of the other *cestuis que trust*. The opinion was taken before proceedings were commenced or threatened, and in relation to the trust. Under these circumstances it appears to me that all the *cestuis que trust* have a right to see that case and opinion. It was contended that it was not taken for the benefit of all the *cestuis que trust*; but all the *cestuis que trust* have an interest in the due administration of the trust, and in that sense it was for the benefit of all, as it was for the guidance of the trustees in their execution of their trust.

Thus, there is no need to protect the solicitor-client communication from disclosure to those very persons who are claiming under the estate. The communications remain privileged as against third parties who are strangers or are in conflict with the estate, but as was stated in *Stewart v. Walker*, supra, not those who are claiming under the estate. And that is because the trustee and beneficiary have a joint interest in the advice as Phipson has suggested [*Phipson On Evidence*, 14th ed., London, Sweet & Maxwell, 1990]:

> No privilege attaches to communications between solicitor and client as against persons having a *joint interest* with the client in the subject matter of the communication, e.g. as between ... trustee and *cestui que trust*.

Similarly, in *Solicitor-Client Privilege in Canadian Law* (Butterworths, 1993) by R.D Manes and M.P. Sinclair, the authors after recognizing that there can be no privilege asserted against beneficiaries of a trust over communications between a trustee and a trustee's solicitors with respect to the business and affairs of the trust, go on to state at pp. 62-63:

> This rule is consistent with the principle underlying privileged communications between co-parties or joint clients, that the privilege does not maintain between them.

10 This "joint interest" basis for concluding that no privilege can be advanced by trustees as against beneficiaries is in keeping with the Supreme Court of Canada's recent principled approach to the law of evidence generally. In *Goodman Estate v. Geffen*, supra, Wilson J. stated at pp. 234-235:

> In the present case the respondents argue that no analogy can be drawn between these wills cases and the situation here. I disagree. It is implicit in their argument that the common law has as yet only recognized an "exception" to the general rule of the privileged nature of communications between solicitor and client when dealing with the execution, tenor or validity of wills and wills alone. Their argument is reminiscent of earlier days when the "pigeon hole" approach to rules of evidence prevailed. Such, in my opinion, is no longer the case. The trend towards a more principled approach to admissibility questions has been embraced both here and abroad (see, for example, in Canada, *Ares v. Venner* (1970), 14 D.L.R. (3d) 4, [1970] S.C.R. 608, 12 C.R.N.S. 349 (hearsay), and *R. v. Khan* (1990), 59 C.C.C. (3d) 92, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1 (hearsay), and in the United Kingdom, *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421 (H.L.) (similar fact)), a trend which I believe should be encouraged.

11 There may well be appropriate exceptions to this "joint interest" rule, as in the case of *Re Londonderry's Settlement*, [1964] 3 All E.R. 855 (C.A.) where it was more important to preserve the confidentiality of deliberations with respect to the trustees' exercise of discretion in deciding which beneficiaries were to take. Danckwerts L.J. explained the policy reasons for this exception at p. 861 as follows:

> It seems to me that there must be cases in which documents in the hands of trustees ought not to be disclosed to any of the beneficiaries who desire to see them, and I think the point was a good one which was taken in the affidavit of Lord Nathan, that to disclose such documents might cause infinite trouble in the family, out of all proportion to the benefit which might be received from the inspection of the same. It seems to me that, where trustees are given discretionary trusts which involve a decision on matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner.

The matter is by no means static and the balancing of interests may well call for a different result depending on the circumstances.

12 If the "joint interest" principle is the appropriate test by which to assess claims of privilege by a trustee against a beneficiary, the fact that the Foundation here is only a residual legatee as its interest is contingent and has not vested should not affect the application of the rule. Halsbury sees no difference between those with a present interest and those with only a contingent interest [*Halsbury's Laws of England*, 4th ed., vol. 48, para. 830, Butterworths, 1985] [footnotes omitted]:

> Duty to give information to beneficiary. A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information or the means of obtaining information as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust.

13 A property right analysis unfortunately leads one astray and to the illogical conclusion that a potential beneficiary has to wait until the completion of the administration of the estate and until there is specific property available to him or her before he or she can see information that the trustees have gathered. In a hypothetical case, it may be that in the end, the residual legatee will receive nothing because the executors or trustees have not acted in good faith or breached their fiduciary duty. It is untenable that in such circumstances, a trustee can invoke the doctrine of privilege merely be cause the residual legatee has received or will receive nothing under the trustee's administration when the reason for that outcome may be the trustee's own misconduct. The right to actual property therefore cannot be determinant of whether that individual is entitled to the information.

14 Moreover, the cases have stated that, whatever approach to the claim of privilege is taken, in actions where the beneficiary is alleging lack of good faith or breach of fiduciary duty, this information is to be made available to him or her. In *Froese v. Montreal Trust Co. of Canada*, [1993] B.C.J. No. 1529 (B.C. Master) (QL); leave to appeal to B.C. C.A. refused, [1993] B.C.J. No. 1847, the Master put it this way at para. 27:

> I am of the opinion that in the context of litigation in which the plaintiff alleges breach of duty in the administration of a trust and the documents which are sought to be examined are relevant to that issue the plaintiff may succeed on the basis of proprietary right if he makes out a prima facie case that he is a beneficiary of the trust and establishes that the documents are documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee. In my view, to require the plaintiff to pursue and complete an action to determine this preliminary issue before documents relevant to the issue of the breach of the alleged trust can be produced would not promote the economical and expeditious resolution of disputes and would not be in the interests of justice.
>
> [To the same effect, see the remarks of Danckwerts L.J. at pp. 861-862 and Salmon L.J. at p. 863 in *Re Londonderry's Settlement*, supra.]

The action brought by the Attorney General of Ontario and the Public Trustee is based on allegations of breach of fiduciary duty and lack of good faith.

15 In the circumstances, therefore, the defendant Executors cannot assert a general claim of solicitor-client privilege as against the Public Trustee in this case and production of relevant communications between the solicitors and the Executors is hereby ordered. As to the relevancy of particular communications, hopefully counsel can sort that out between them, failing which the issue can be put before the Case Management Judge for determination. Costs of this motion will be to the plaintiffs in the cause.

Motion granted.

End of Document

COURT FILE NO.: 16751/02
DATE: 20031129

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: POTHOS LEASING LIMITED and CATHERING HEADON, 833672 ONTARIO INC. AND CHRISTOPHER ASHTON

BEFORE: H.J.W SIEGEL J.

COUNSEL: Bois Wilson for the Plaintiff
Orie H. Niedzviecki for the Defendant

DATE HEARD: June 27, 2003

ENDORSEMENT

[1] In this matter, the applicants appeal the decision of Master Hawkins dated April 2, 2003 ordering that certain questions be answered by Ms. Headon in the manner contemplated by the Master's order.

Background

[2] The main action arose out of a business opportunity to acquire an interest in certain lands identified by Ms. Headon. On October 6, 2001, Ms. Headon caused 833672 Ontario Inc. (the "Trustee") to offer to purchase the lands, which was subsequently accepted on or about October 22, 2001. In the interim, Ms. Headon met with a principal of the respondent, who orally agreed to advance the $100,000. The purchase agreement was replaced by a new agreement dated October 23, 2001 (the "Purchase Agreement"), having a purchase price of $3,485,000. The deposit was advanced on or about October 27, 2001 by the respondent.

[3] During the period from October 27, 2001 to the end of November, 2001, the parties negotiated a joint venture agreement (the "Joint Venture Agreement") which was entered into in late November. The recitals to the Agreement state that the plaintiff and Ms. Headon have agreed to enter into a "Joint Venture" for the purchase of the lands and desire to set out their respective rights and obligations in the "Joint Venture". The term "Joint Venture" is defined as "the joint venture created pursuant to this Agreement between Pothos and Headon carrying on business under the name 'Venture'". In clause 2.01 of the Agreement, the Trustee declared that it entered into the Purchase Agreement as bare trustee and nominee for and on behalf of the Joint

Venture. The Joint Venture Agreement did not contain any provisions dealing with termination of the Agreement or dealing with breach of the Joint Venture Agreement.

[4] A dispute arose between the parties. The applicants take the position that the respondent has repudiated the Joint Venture Agreement. On this basis, the applicants say the trust established in clause 2.01 of the Joint Venture Agreement terminated. The respondent says the applicants breached the Joint Venture Agreement and seek damages. They seek an accounting of all monies received on the subsequent assignment of the Purchase Agreement by the Trustee and an accounting of all monies derived from the lands. They also seek a mandatory injunction to provide the names and addresses of all persons to whom the applicants have transferred or paid any funds received on the sale of the lands.

Issues and Standard of Review

[5] The applicants appeal paragraphs 1, 3 and 4 of Master Hawkin's order. Two questions, numbered 2 and 10, deal with disclosure of Ms. Headon's current address. The remaining questions deal with production of files of two solicitors, Howard Kutner and Stephen Weese. After dealing with the applicable standard, I will deal with each issue in turn.

[6] The applicable principles for a review of a Master's interlocutory order are set out in:

> 1. *Marlene Investments Ltd. v. McBride* (1979), 23 O.R. (2d) 125 (H.C.J.), which says that, on an appeal from a Master on an interlocutory order involving the exercise of discretion, there should be no interference with the order unless it is clearly wrong; and
>
> 2. *McEvenue et al. v. Robin Head Multifoods Inc. et al* (1997), 33 O.R. (3d) 315, which says that, where an appeal is taken from a Master's order on a question of law, the appropriate standard is one of correctness.

[7] These principles are summarized by Southey J. in *Marleen* at page 126 in his statement to the effect that a court should only interfere with the Master's order if the Master exercised his discretion on a wrong principle, or misapprehended the facts. Misapprehension of the facts amounts to disregarding or failing to appreciate the relevant evidence, making a finding not reasonably supported by the evidence or drawing an unreasonable inference from the evidence: see *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, which addresses the circumstances in which an appellate court may interfere with a finding of fact by a trial or motions judge but is equally applicable to the role of a motions judge reviewing a decision of a Master on an interlocutory order.

Production of Ms. Headon's Address

[8] Master Hawkins ordered that questions 2 and 10 need not be answered unless an individual solicitor in the office of the respondent's solicitors agrees to a confidentiality arrangement. The endorsement of Master Hawkins recited the applicants' reason for resisting confidentiality. Ms. Headon asserts she was subject to acts of property destruction at her prior residence and doesn't wish to reveal her current residence fearing physical violence directed at her. There is no

suggestion these acts are related to the respondent. Master Hawkins gave no explicit reasons for his decision.

[9] The applicants' solicitor argues there is no reason to disclose the information until such time, if any, as the respondent is granted the Mareva injunction sought in this proceeding. The respondent says there is no evidence for Ms. Headon's assertions of property damage. The respondent wants to do a title search to determine whether it assists in determining the source of financing for Ms. Headon's purchase. It says Ms. Headon was previously bankrupt.

[10] I do not believe there is any basis for disturbing the Master's order on this issue. This portion of the order involved the exercise of discretion. There is sworn affidavit evidence of Ms. Headon suggesting a legitimate concern for her safety and no compelling reason to make such disclosure until a Mareva injunction, or other relief directly relating to title to Ms. Headon's residence, is granted in favour of the respondent. The applicants have also provided the respondent with information as to the cost, source of financing and mortgagee in respect of Ms. Headon's home. As there is a reasonable basis for this part of the Master's order, it should not be disturbed.

Production of Solicitor's Files

[11] The appeal with respect to the Master's order in respect of the following three questions was dealt with collectively in this motion:

> Question 35: *Tell me exactly what happened to your interest in the land and what you got Weese to do in respect of that. What did you instruct Weese to do?*
>
> Question 568 (first part): *Howard Kutner's legal files insofar as they relate in any way, shape or form to these matters, we would like produced.*
>
> Question 568 (second part): *As a separate narrower undertaking, any of the correspondence that went back and forth between Howard Kutner and Weese.*

[12] The Master ordered that each of these questions be answered. The relevant portion of the Master's endorsement is as follows:

> [5]. Q. 35 was regarded by both sides as a request for disclosure of solicitor/client communications as between Ms. Headon and solicitor Weese. The plaintiff alleges that the interest of the Def 833672 Ontario Inc. ("800") in the offer being assigned was subject to a trust in favour of the plaintiff and the def Headon and although there is an issue as to whether the trust had been terminated by the time Ms. Headon acting on behalf of 800 instructed Mr. Weese, this part of the plaintiff's claim has not been dismissed or struck out,

> communications passing between a trustee (here 800 acting through Ms. Headon) and a solicitor (here Mr. Weese) are not privileged as against a beneficiary claiming under the trust (here the Plaintiff). See, re *Ballard Estate* [1994] O.J. No. 2281.
>
> [6]. Q. 568 (P118 L29 – P119 L4 and P 119 LL5-10) were argued next. Defence counsel concedes that my ruling on Q35 applies to the second of these Qs, and that it should be answered, as regards the first of these Qs, Ms. Headon conceded at several places that solicitor Kutner acted for both her and the plaintiff in relevant transactions (see 383 – 386; 390-391). That being said, Ms. Headon may not assert solicitor/client privilege in Mr. Kutner's relevant files as against the plaintiff, this Q should be answered by requesting Mr. Kutner to produce his relevant files or relevant extracts from them.

[13] The applicants conceded that, as a general matter, communications passing between an executor or trustee and a solicitor are not privileged as against beneficiaries who are claiming under a trust: see *Re Ballard Estate* (1994), 20 O.R. (3d) 350; [1994] O.J. No. 2281. They say, however, that there is an exception where the issue before the court is the very existence of the trust: see *O'Rourke v. Darbishire*, [1920] A.C. 581 at p. 620, [1920] All E.R. Rep. 1 (H.L.) at p. 13. In the present action, the applicants say the issue before the Court is the existence of the trust after March 1, 2001. They further argue that where the exercise of a right, in this case of a beneficiary, would interfere with another person's right to keep such communication confidential, the conflict should be resolved in favour of protecting confidentiality: see *549029 Alberta Ltd. v. First City Trust Co* [1997] A.J. No. 728 (Alta.Q. B.). They go on to say that, in the present action, in order to defeat an assertion of solicitor-client privilege, the respondent must make out a *prima facie* case of fraud and that the communications being sought were made in order to get advice with respect to furtherance of the fraud. They say there is no evidence of fraud in this proceeding and therefore no basis on which the claim for solicitor-client privilege can be defeated.

[14] The respondent says that it is not required to prove the existence of a trust, only that there is a *prima facie* case that the trust existed past March 1, 2001. It says it has met that test, particularly as it says there is no principle of trust law that says that the trust ceased to exist even if the beneficiary "breached the trust", by which I understand the respondent to mean breached the Joint Venture Agreement.

[15] I agree with the respondent. In my opinion, the principle is accurately captured by the following passage in *Froese Montreal Trust Co. of Canada* [1993] B.C.J. No. 1529 [B.C. Master] at para 27 (as cited in *Ballard Estate):*

> I am of the opinion that in the context of litigation in which the plaintiff alleges breach of duty in the administration of a trust and the documents which are sought to be examined are relevant to that issue the plaintiff may succeed on the basis of proprietary right if he makes out a prima facie case that he is a beneficiary of the trust and establishes that the documents are documents obtained or prepared by the trustee in the administration of the trust and in the

> course of the trustee carrying out his duties as trustee. In my view, to require the plaintiff to pursue and complete an action to determine this preliminary issue before documents relevant to the issue of the breach of the alleged trust can be produced would not promote the economical and expeditious resolution of disputes and would not be in the interests of justice.

[16] In this case, there is no doubt that a trust was created initially. This distinguishes this situation from others cited by the applicants in which the issue was the creation not the termination of a trust. The arrangements between the respondent and Ms. Headon are governed entirely by contractual principles which, when ultimately determined, will also resolve the issue of the entitlement of the respondent to any beneficial interest in the subject matter of the bare trust. In the absence of any contractual provisions dealing with the termination of the trust and, in particular the termination of the trust in the event of breach of the Joint Venture Agreement, the respondent has a strong argument that the trust continued. In any event, I am satisfied that there is at least a *prima facie* case that the trust continued past March 1, 2001.

[17] The respondent is therefore entitled to all communications between Ms. Headon on behalf of the Trustee and the solicitors for the trust, or between the solicitors for the trust, in respect of matters relating to administration of the trust property. The decision of the Master with respect to questions 35 and the second part of question 568 required production of communications between Ms. Headon and Mr. Weese, and between Mr. Kutner and Mr. Weese, on this basis. Accordingly, I conclude that the Master applied the correct legal principle in his decision in respect of these questions.

[18] The first part of question 568 related to production of Mr. Kutner's legal files insofar as they relate to "these matters". The applicants argue that these files of Mr. Kutner should be subject to solicitor-client privilege on the basis of clause 7.12 of the Joint Venture Agreement which reads:

> Each party acknowledges and agrees that Howard Kutner, solicitor shall act for and on behalf of Headon and that Pothos has been advised to obtain independent legal advice and Pothos has obtained said advice or as [sic] determined that said advice is not necessary. In any event Pothos and Headon shall be equally responsible for the legal fees incurred by Headon and the legal fees incurred by Pothos.

[19] For the sake of clarity, this part of the decision does not relate to communications between Mr. Weese and Mr. Kutner that are required to be disclosed for the reason set out above.

[20] The respondent says that because Mr. Kutner had acted for both parties in the past he could not act for Ms. Headon alone in respect of the arrangement under the Joint Venture Agreement. I do not think this necessarily follows automatically as a matter of law. Each case depends on its own facts. In the absence of evidence relevant to any potential conflict of Mr. Kutner, I reject this argument of the respondent.

[21] The respondent also says that Mr. Kutner's representation of the Trustee after the Joint Venture Agreement was signed is determinative. It says that, by acting for the Trustee in respect of the lands, it says Mr. Kutner began acting for both parties. On this basis, the respondent says it is entitled to disclosure, not because solicitor-client privilege has been waived but because Mr. Kutner became the respondent's solicitor in respect of matters relating to the lands: see *Tatone v. Tatone* [1980] O.J. No. 2789. It says that clause 7.01 was superseded under these circumstances. The respondent argues that the answers given by Ms. Headon to questions 383 – 386 and 390 – 391 constituted admissions of Ms. Headon that Mr. Kutner acted for both parties. They also rely on the accounts of Mr. Kutner rendered to both parties on May 27, 2002 in accordance with the second sentence of clause 7.01.

[22] The Master is clearly correct in concluding that, as a matter of law, no solicitor-client privilege can be claimed in circumstances of a joint retainer. The issue before this Court is whether there are reasonable grounds for concluding that Mr. Kutner acted for both parties in this matter after the execution of the Joint Venture Agreement. In my opinion, the Master had reasonable grounds for reaching that conclusion, including the answers to the questions referred to in the Master's endorsement, and the account rendered by Mr. Kutner describing his professional services. Based on the foregoing, there is, therefore, no basis for disturbing the decision of the Master.

[23] I wish to identify one related matter. It is unclear whether the materials in Mr. Kutner's files include materials relating to Mr. Kutner's representation of Ms. Headon in the negotiation of the Joint Venture Agreement in addition to materials relating to his involvement after the Agreement was signed which have been addressed above. I have proceeded on the basis that either the question did not extend to such materials or that, notwithstanding clause 7.01, Mr. Kutner acted for both parties in the negotiation of the Joint Venture Agreement. I do not interpret the order of Master Hawkins as requiring disclosure of any files of Mr. Kutner relating to his representation of Ms. Headon in the negotiation of the Joint Venture Agreement insofar as it is clear that he acted solely for Ms. Headon on that matter. If any such materials were privileged, I do not think that the fact that Mr. Kutner may have acted for both parties, after execution of the Joint Venture Agreement, in respect of the lands, or in respect of documentation proposed to be executed between the parties, can retroactively remove such privilege. Insofar as this issue has not been specifically addressed by the parties to date, either party has the right to seek interlocutory relief to clarify the issue.

[24] The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter in accordance with the following schedule. The applicant shall deliver a copy of its submission to the respondent within fifteen days of the date of these reasons. The respondent shall deliver a copy of its submission to the applicant within ten days of receipt of the applicant's submission. The applicant shall file with the Court a bound volume containing the two submissions and any reply submission within five days of receipt of the respondent's submission. Any such submissions seeking costs shall identify all lawyers on the matter, their respective years of call and rates actually charged to the client and shall include supporting documentation as to both time and disbursements.

H.J. W Siegel J.

Released: November 29, 2003

Rozak Estate v. Demas, [2011] A.J. No. 398

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

R.A. Graesser J.

Heard: February 23, 2011.

Judgment: April 7, 2011.

Docket: 0503 17780

Registry: Edmonton

[2011] A.J. No. 398 2011 ABQB 239 509 A.R. 337 53 Alta. L.R. (5th) 368 200 A.C.W.S. (3d) 969 2011 CarswellAlta 577

Between Brad Brogden, Administrator Ad Litem of the Estate of Brooklyn Alyssa Rozak, Plaintiff, and Michael Demas, Carl Blashko, Darren Neilson, John Doe, Capital Health, operating a hospital known as The University of Alberta Hospital, Caritas Health Group, operating a hospital known as The Grey Nuns Hospital and the Governors of the University of Alberta, Defendants

(124 paras.)

Case Summary

Civil litigation — Civil procedure — Discovery — Examination for discovery — Duty of witnesses to inform themselves — Range of examination — Objections and compelling answers — Privilege — Relevancy — Undertakings — Appeal by defendants from Master's decision dismissing their application to compel plaintiff to answer refusals allowed in part — Cross-appeal by plaintiff from order he answer two questions dismissed — Plaintiff sued doctors involved in deceased wife's care, but initially named wrong doctors — Defendants alleged limitations period expired by time plaintiff added them — Plaintiff required to inform himself on steps taken to identify individuals involved in wife's treatment — Steps taken by counsel and communications about defendants' identity relevant — Since diligence was at issue, solicitor-client privilege was waived — Plaintiff required to answer questions, limited to relevant time period.

Appeal by the defendants from the Master's decision dismissing their application to compel the plaintiff to answer undertakings he refused. Cross-appeal by the plaintiff from the Master's order requiring him to answer two questions. The plaintiff's wife was taken to the hospital because of concerns with her mental health and safety. The emergency doctor sent her for a psychiatric consultation and she was then discharged and committed suicide that night. The plaintiff initially sued the wrong doctors, and then amended his Statement of Claim to name the defendant doctors. The defendants argued that the amendments were barred by the expiry of the limitations period. The plaintiff was cross-examined on his affidavit and refused a number of required undertakings. The Master ordered the plaintiff to answer Undertaking 13, which required him to inquire as to the medical directories his counsel had access to and Undertaking 16, which required him to disclose when

he first told his counsel he recalled his wife being treated by a resident of Middle Eastern descent. The Master denied the defendants' request with respect to five other undertakings.

HELD: Appeal allowed in part.

Cross-appeal dismissed. It was appropriate for the plaintiff to inform himself of the steps taken on his behalf to indentify individuals involved in his wife's treatment. The plaintiff was not claiming he named the wrong doctors as a mere misnomer; he intended to sue the incorrect doctors, so whether he and his counsel exercised diligence in determining doctor identity was in issue. To succeed with his underlying application, the plaintiff would have to establish the steps he took or did not take to ascertain doctor identity were reasonable, or that the limitations period did not start to run until later than alleged. All portions of the undertakings relating to doctors not part of the underlying application or time periods later than the alleged limitations period were not relevant and did not have to be answered. Undertaking Eight did not have to be answered at all because it was not about the relevant time period. Information about steps taken to identify doctors before counsel was retained was solely within the plaintiff's knowledge, so he was required to answer Undertaking Six. Since diligence was at issue, privilege was waived with respect to steps take by both the plaintiff and his doctor, so the plaintiff was required to answer Undertaking Nine. Whether there was anything preventing plaintiff's counsel from contacting the hospital was relevant and went to diligence, so the plaintiff was required to answer Undertaking 10. Communications between the plaintiff and his counsel about the identity of the doctors also went to diligence, so Undertaking 22 had to be answered. The Master's order requiring the plaintiff to answer Undertakings 13 and 16 was upheld.

Statutes, Regulations and Rules Cited:

Limitations Act, RSA 2000, c. ch. L-12, s. 3(1)(a), s. 6(1), s. 6(4)(b), s. 6(4)(1), s. 6(5)(b)

New Rules of Court, Rule 6.7, Rule 6.8

Rules of Court, Rule 314(2)

Counsel

Philip Kirman, for the Plaintiff.

David Hawreluk and Alison Archer, for the Applicants Kevin Neilson, Lara Ostolosky and Omar Din.

[Editor's note: A corrigendum was released by the Court on April 11, 2011; the corrections have been made to the text and the corrigendum is appended to this document.]

Memorandum of Decision

R.A. GRAESSER J.

relevant date for Dr. Kevin Neilson is July 2, 2005. Any lack of diligence after that date does not affect the outcome of the underlying application.

90 The undertaking which might be required to be answered would be "what information was received or determined that Darren Neilson should be added as a defendant prior to July 2, 2005". Because counsel was not retained until August, 2005, the answer to that undertaking would be solely in Mr. Brogden's knowledge, and he should be required to answer it.

Undertaking 8

91 Request 8 seeks information as to what steps were taken on Mr. Brogden's behalf to determine why Darren Neilson was named as a defendant.

92 As the answer to that question relates to a period long after July 2, 2005, I do not see any relevance to it and it need not be answered.

Undertaking 9

93 Request 9 seeks information as to what steps were taken on Mr. Brogden's behalf between June 4, 2005 and June 1 2008 to determine whether any other physician should be named as defendants in the lawsuit, particularly Dr. Ostolosky and Dr. Din.

94 The relevant date for Dr. Ostolosky is November 12, 2005. The relevant date for Dr. Din is mid-February, 2006.

95 If steps were taken on Mr. Brogden's behalf other than by or for his lawyers, that information should be provided as regards Dr. Ostolsky to November 12, 2005 and as to Dr. Din to February 15, 2006.

96 With respect to steps taken on Mr. Brogden's behalf by his counsel, solicitor-client privilege and solicitor's work product privilege are raised.

97 At the outset, I need not weigh into whether solicitor's work product privilege is or is not a subset of litigation privilege or a stand-alone privilege of lesser. Whether as a subset of litigation privilege or standing on its own, work product privilege has lesser standing than solicitor-client privilege. ***Blank v. Canada***, 2006 SCC 39, ***R. v. Card***, 2002 ABQB 537, ***Hudson Bay Mining & Smelting Co. v. Cummings***, 2006 MBCA 98, ***Moseley v. Spray Lakes Sawmills*** (1980) Ltd., (1996), 39 Alta. L.R. (3d) 141 (Q.B.), are to that effect.

98 Privilege can be waived by giving evidence of a privileged communication, or where a party, by his testimony or pleading voluntarily raises a defence or asserts a claim which makes information provided by his solicitor relevant. Selective waiver is not permitted:

> ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.***, 1992 CanLII 6132; ***True Blue Cattle Co. v. Toronto-Dominion Bank***, 2004 ABQB 147, ***Petro Can Oil & Gas Corp. v. Resource Service Group Ltd.***, [1988] A.J. No 336 (Q.B.), aff'd (1988), 32 C.P.C. (2d) xlvi (Alta. C.A.);

Alberta Wheat Pool v. Estrin, [1986] A.J. No. 1165 (Q.B.), aff'd (1987) 17 C.P.C. (2d) (xxxiv) (Alta. C.A.); ***Marion v. Wawanesa Mutual Insurance Company***, 2004 ABCA 213.

99 Positions cannot be taken that are inconsistent with maintaining privilege; privilege on a particular issue or point cannot be waived selectively or unfairly.

100 I hasten to add that preservation and protection of solicitor client privilege (and to a lesser extent litigation privilege and solicitor's work product privilege) is important, and privilege should not be interfered with other than in the few exceptional circumstances recognized by the courts:

Pritchard v. Ontario Human Rights Commission, 2004 SCC 31,

Descoteaux c. Mierzwinski, [1982] 1 S.C.R. 860,

Smith v. Jones, [1999] 1 S.C.R. 455, and

R. v. Fosty, [1991] 3 S.C.R. 263.

101 Where the issue of diligence has been legitimately raised (as it has here because of the Plaintiff's application to add the doctors as defendants after the standard without-discoverability period of two years from the injury), the Plaintiff's diligence as well as his solicitor's diligence becomes relevant. As the only way the doctors have of testing such diligence is through cross-examination on Mr. Brogden's affidavit and seeking undertakings with respect to his counsel's actions (unless the doctors wanted to risk examining the Plaintiff's counsel under Rule 6.8 as their witness rather than through cross-examination), solicitor client privilege may well have to yield on issues relating to knowledge of doctors, and the diligence of the solicitors in informing that knowledge. It would be unfair to allow the plaintiff to essentially say "I didn't do anything, I left it all to my lawyers" and then refuse to say what the lawyers have told him they did, or even ask them about it.

102 That is not to say that the resulting waiver or loss of privilege extends to anything beyond diligence in discovering the identity of the doctors involved. Mr. Brogden's affidavits do not go beyond diligence issues, and anything beyond that would be irrelevant to the underlying application let alone being an unwarranted incursion into privilege.

103 In the context of the undertaking sought, as modified by me above, I do not see that it is improper to ask what steps the solicitors took from the time they were retained until the relevant date specified above. Mr. Brogden has brought diligence into issue by applying to add the doctors as defendants, and discoverability is necessary to extend the limitation period for suing each of the doctors to or beyond the relevant dates.

Undertaking 10

104 Request 10 seeks information as to whether there was anything preventing Mr. Brogden or anyone on his behalf from contacting the University Hospital to make inquiries as to the identities of the doctors who were involved in Ms. Rozak's care.

105 I see this as a question of diligence - was there some reason why Mr.Brogden's counsel did not

contact the University Hospital or its solicitors to determine specifically which doctors were involved, particularly after receipt on November 16, 2005 of the University Hospital chart in which Dr. Kevin Neilson's signature, Dr. Ostolosky's name and Dr. Din's signature and printed name are found (legibility issues aside).

106 As regards Dr. Kevin Neilson, the question is irrelevant as the relevant date for him had passed before counsel was retained.

107 As regards Dr. Ostolosky, the relevant date is November 12, 2005. In my view, the undertaking should be answered with respect to her to November 12, 2005. My view on privilege is the same as with requested undertaking 9.

108 As regards Dr. Din, the relevant date is February 16, 2006, and the undertaking should be answered with respect to him to February 16, 2006.

109 Any times after February 16, 2006 are simply not relevant to the application to amend.

Undertaking 13

110 In request 13, the doctors seek information as to what materials were available to Mr. Brogden's counsel between August, 2005 and June 1, 2008 (when the Amended Statement of Claim was issued). Mr. Brogden objects to this as it is part of his solicitor's work product.

111 Firstly, as with the other undertaking requests, times after February 16, 2006 are not relevant to the application to amend. So the time frame is in any event narrowed to August, 2005 to February 16, 2006. Diligence is in issue. It seems to me that it is relevant to know what resources the plaintiff (or his counsel) actually had readily available to them, or obtained for the purposes of determining the appropriate parties, during this relevant time frame. Certainly the doctors are free to argue what sources of information **might** have been available to the plaintiff or his counsel, but it is clearly relevant to know what information they actually had.

112 Mr. Brogden's counsel has already advised that they had the 2005 Canadian Medical Directory in their offices and that they consulted it regarding Dr. Darren Neilson. There are issues relating to his identity, as well as whether Dr. Din's identity is ascertainable from the University Hospital Chart. I see no valid objection to Mr. Brogden being asked to enquire of his solicitors what resources they had in their offices to ascertain doctors' identities during this period.

113 As to privilege, if any materials were obtained for the purpose of this litigation in this period, privilege has been waived by the plaintiff putting his due diligence in issue. If materials (such as directories) are simply part of counsel's library, I do not see that it could be claimed that they were obtained for the dominant purpose of this litigation. In that regard, I do not see the request as being any more objectionable than asking if counsel had the Western Weekly Reports or the Supreme Court Reports in their offices. They may be there for litigation purposes generally, but no one file specifically. It would be difficult to see how a "dominant purpose" test for privilege could be met.

114 The requested undertaking should be answered, but limited to the period ending February 16, 2006.

Undertaking 16

115 In request 16, the doctors want to know when Mr. Brogden told his counsel that Ms. Rozak had been treated by a male resident or intern of East Indian or Middle Eastern descent. This was objected to on the basis of the answer being a protected solicitor-client communication.

116 Doubtless the question goes to the a well-protected area: communications between solicitor and client for the purpose of giving and receiving legal advice. However, in my view the privilege relating to the answer has been waived by the issue of due diligence in determining Dr. Din's involvement and identity being brought into issue by Mr. Brogden. If the answer relates to a period after February 16, 2006, the specific date or circumstances need not be disclosed as being irrelevant. But if such a disclosure was made before February 16, 2006, the doctors are entitled to know that.

117 22 The doctors want to know why Dr. Din's involvement and identity were not recognized by counsel following receipt of the University Hospital records on November 16, 2005. Ordinarily, what was done with the records, or how they were interpreted, would be the subject of work product privilege. In some cases, obtaining records would be included in that privilege. That would not apply here, however, as the records were obtained from one of the parties to the lawsuit.

118 Again, because Mr. Brogden's diligence is in issue, any privilege relating to the records as to that issue has been waived. The doctors are entitled to know why Dr. Din's identity and involvement were not recognized after November 16, 2005, and whether there were any impediments to following up on the records until at least February 16, 2006.

XI. Conclusion

119 In the end, I find that the learned Master erred in law in declining to order that Mr. Brogden inform himself from counsel and advise as to undertaking requests 6, 9, 10 and 22. The answers to those requests fall within the exceptions to privilege - whether solicitor and client or litigation privilege or work product privilege. Number 8 need not be answered, but on the basis of relevance rather than privilege.

120 I agree with the Master's conclusion on Number 13.

121 While I agree with his decision on Number 16, he did not deal with privilege. The question was clearly relevant, but the response strikes directly at solicitor-client communications and would clearly be privileged but for waiver. As noted above, Mr. Brogden waived privilege over that communication by putting his diligence into issue.

122 I also agree with the Master's comment that "the Court should lean towards protecting the file of counsel". Privilege is an essential part of our legal system, and must be protected, subject to waiver and the very limited exceptions described in the case law.

XII. Costs

123 Despite the fact that I have directed that all but one of the requested undertakings be answered, I have in all cases limited the scope of the inquiries. The doctors sought information for periods much later than is relevant on the application to amend. I thus view the result as having mixed success for both sides: the plaintiff has to provide more information than he was prepared to, and the doctors will receive less information than they sought.

124 As a result, costs of this application, and the application before the Master, should be in the cause.

R.A. GRAESSER J.

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Corrigendum

Released: April 11, 2011

The citation has been corrected from "Brogden v. Demas" to "Rozak (Estate)" on the cover page.

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