

Case Name:

**Fraser Milner Casgrain LLP v. Canada (Minister of
National Revenue - M.N.R.)**

Between

**Fraser Milner Casgrain LLP and Gilbert Schmunk,
petitioners, and
The Minister of National Revenue, respondent**

[2002] B.C.J. No. 2146

2002 BCSC 1344

[2002] 11 W.W.R. 682

6 B.C.L.R. (4th) 135

2003 D.T.C. 5048

116 A.C.W.S. (3d) 504

Vancouver Registry No. L022403

British Columbia Supreme Court
Vancouver, British Columbia

Lowry J.

Heard: September 6, 2002.

Judgment: September 20, 2002.

(18 paras.)

Income tax -- Enforcement -- Lawyer-client privilege from disclosure -- Waiver -- Disposition of application by judge.

The applicant law firm, Fraser Milner Casgrain, applied for a determination that privilege applied to certain documents in its possession, which had been requested by the respondent Minister of National Revenue. The documents were prepared in 1997, relation to business dealings between the firm's client

and another group of companies, and had been disclosed to the other business group in the course of the negotiations. The Minister, investigating the client, had issued a process requiring the firm to produce the documents. The firm argued that the documents were subject to solicitor-client privilege. The Minister claimed that the clients had waived their right to claim the privilege, because the documents had been disclosed to a third party.

HELD: Application allowed. The documents were protected by solicitor-client privilege. Where the documents, prepared by legal counsel for the purposes of business negotiations, were disclosed to the other side in those negotiations, privilege was not waived. Here, the two groups of companies had a common interest, and litigation privilege should be given effect.

Statutes, Regulations and Rules Cited:

Income Tax Act, R.S.C. 1985, c. 1, ss. 231.4, 232(4).

Counsel:

G.S. Funt, for the petitioners.

R.H. Carvalho, for the respondent.

1 LOWRY J.:-- Application is made concerning access to documentation that raises the question of whether privilege is waived over documents exchanged between negotiating parties for the purpose of obtaining legal advice in furtherance of concluding a business transaction.

2 The petitioners, Fraser Milner Casgrain LLP ("Fraser Milner"), a law firm, and Gilbert Schmunck, an officer of one of its clients, have been served by the respondent, The Minister of National Revenue, with process under s. 231.4 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) requiring production of a volume of documents for inspection. The petitioners take the position that the documentation is the subject of solicitor-client privilege and apply under s. 232(4) for a determination in that regard. The documents, consisting of 725 pages, have been placed in three large binders and submitted for my inspection.

3 Beginning in October 1997, Fraser Milner acted for a group of companies ("Group A") that negotiated the formation of two business partnerships, one Canadian and one American, with another group of companies ("Group B"). Mr. Schmunck was a principal of one of the companies in Group A and instructed Fraser Milner throughout. The transaction was completed in March 1998. The members of both partnerships consisted of companies from Group A and Group B.

4 The nature of the transaction was complex. There were a variety of parties and substantial assets and funds involved. Canadian and American law gave rise to cross-border tax and other commercial issues. In order to advise Group A properly, Fraser Milner required and was given the assistance of accounting firms and other law firms in Canada and the United States. During the negotiations, a number of legal matters that were of common interest to both Group A and Group B had to be addressed and, on instructions, Fraser Milner communicated with Group B and its legal and accounting advisers, both

orally and in writing, to ensure that the transaction was completed and implemented in a commercially and tax efficient manner. The documents reflecting those communications, which the petitioners have, were made for the purpose of providing legal advice that was common to the interests of Group A and Group B in having the transaction completed.

5 The respondent accepts that, apart from any documentation Group A disclosed to Group B, all of the documentation is the subject of solicitor-client privilege unless, on its face it appears otherwise, which on my inspection it does not. The respondent contends that privilege was waived with respect to all of the documentation that was disclosed to Group B.

6 The documentation disclosed to Group B was all prepared by Fraser Milner, or by PricewaterhouseCoopers, the accounting firm engaged to assist Fraser Milner in advising Group A.

7 The petitioners maintain the privilege attached to the documentation was not waived when it was disclosed to Group B because the disclosure was made to facilitate the common interest the two groups of companies shared in having the transaction successfully completed. They rely on *Archean Energy Ltd. v. Canada* (MNR) (1997), 202 A.R. 198 (Alta. Q.B.), *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, [1998] 10 W.W.R. 633 (Alta. Q.B.) and *St. Joseph Corp. v. Canada* (Public Works and Government Services), [2002] F.C.J. No. 361 (T.D.).

8 In *Archean Energy*, legal opinions concerning the tax consequences of a number of share purchases were developed for one company which subsequently provided them to a second company, the purchaser in the transactions. The opinions were held, on application by the purchaser under the Income Tax Act, to be privileged because they had been provided to further the common interest of having the transaction concluded and not with the intent of waiving the privilege attached. In *Anderson Exploration*, two corporations exchanged confidential documents of a proprietary nature in negotiating a merger. A legal opinion obtained by one was also given to the other. Later, in unrelated litigation involving a subsidiary of one of the corporations, the plaintiff sought access to the documents arising from the merger negotiations. The court held that the disclosure of the documents to third parties did not waive the privilege that attached to all of the documentation because of the common interest associated with their disclosure. And in *St. Joseph*, legal opinions exchanged in the course of a commercial transaction were held to be privileged given that the parties had a joint interest in ensuring its completion.

9 The respondent does not say that these three cases can be distinguished or that they do not wholly support the petitioners' position. It says only that all three are decisions of courts of first instance in other jurisdictions and ought not to be followed because they are not legally sound.

10 It is important to bear in mind that there are two distinct classes of privilege. The first, which the petitioners raise here, is solicitor-client privilege. It serves to preserve confidential communication between solicitors and their clients. The second is litigation privilege. It arises when litigation is anticipated and serves to preserve the integrity of the litigation process.

11 In *Buttes Gas and Oil Co. v. Hammer et al.* (No. 3), [1980] 3 All E.R. 475, Lord Denning articulated the common interest privilege that is now a well-established kind of litigation privilege. It is a privilege that can attach to legal advice and other information exchanged between those whose interests in a dispute are largely the same. Its rationale is said to be the promotion of the adversary

system: General Accident Insurance Company et al. v. Chrusz (1999), 45 O.R. (3d) 321 at 337 (C.A.) citing United States of America v. American Telephone and Telegraph Company et al. 624 F. 2d 1285 (1986) (S.C.C.A.) at 1299-1300.

12 The common interest privilege recognized in Archean Energy, and the other two cases upon which the petitioners rely, has nothing to do with the parties' interest in a dispute. Rather, it is the parties' common interest in the successful completion of a transaction that is the element that gives rise to the privilege. The rationale is the preservation of confidentiality.

13 The respondent maintains that common interest privilege can only arise where there is a common interest in actual or anticipated litigation. The promotion of the adversary system is, it says, the only justifiable rationale.

14 I cannot accept that to be so. To my mind, the economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.

15 While no authority from this jurisdiction has been cited, recognition of the kind of privilege for which the petitioners contend is not confined to the cases upon which they specifically rely. General Accident Insurance, supra, was about a common interest in litigation, but the Ontario Court of Appeal stated that the privilege has arisen in various other contexts in Canadian cases and cited, in addition to Archean Energy and Anderson Exploration, at p. 338 Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research), [1995] O.J. No. 4148 (Gen. Div.), Lehman v. Insurance Corporation of Ireland (1983), 40 C.P.C. 285 (Man. Q.B.), Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd. (1994), 24 C.P.C. (3d) 120 (N.S.S.C.), Almecon Industries Ltd. v. Anchortek Ltd., [1998] F.C.J. No. 1664 (T.D.), R. v. Dunbar and Logan (1982), 68 C.C.C. (2d) 13 (Ont. C.A.). To these can be added Western Canadian Place Ltd. v. Con-Force Products Ltd. (1997), 202 A.R. 19 (Q.B.), YBM Magnex International Inc. Re, (1999), 15 C.B.R. (4th) 140 (Alta. Q.B.), and CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2001), 6 C.P.C. (5th) 281 (Ont. Sup. Ct.).

16 There is no sound basis on which it can be said that the common interest privilege which the petitioners assert over the documents in question ought not to be recognized by this court. It is a privilege that is justifiable on the basis of preserving the confidentiality of documents containing legal advice, or documents prepared for the purpose of obtaining legal advice, that are disclosed to third parties in the kind of circumstances where the courts of other Canadian jurisdictions have held that the privilege has not been waived.

17 I conclude that the privilege attached to the documents was not waived when they were disclosed to Group B because Group A and Group B had a common interest in completing the transaction that the disclosure was made to facilitate.

18 The petitioners are accordingly entitled to the determination sought and there will be an order accordingly.

LOWRY J.