COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118

Date: 20210324
Docket: CA46408

Between:

John Graham

Applicant

And

Canada (Minister of Justice)

Respondent

FILE SEALED IN PART

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Voith

On judicial review from: A decision consenting to waiver of specialty (*Extradition Act*, S.C. 1999, c. 18) issued by Canada (Minister of Justice) on February 2, 2010.

Counsel for the Applicant (via videoconference):	M.E. Sandford, Q.C. A. Tolliday
Counsel for the Respondent (via videoconference):	D.J. Strachan, Q.C. K.M. Tanner J. Murray, Articled Student (appearing on February 10, 2021, only)
Counsel appearing as *Amici Curiae* (via videoconference):	C.M. Considine, Q.C. C.A. Massey
Place and Date of Hearing:	Vancouver, British Columbia February 10 and 12, 2021
Place and Date of Judgment:	Vancouver, British Columbia March 24, 2021

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Voith

Summary:

The applicant sought disclosure of a legal memorandum prepared for the Minister of Justice in 2010 in response to a request made by the United States of America for waiver of specialty. The applicant had been extradited on a federal murder charge. The U.S. sought waiver of specialty to permit prosecution of the applicant on South Dakota state charges. The Minister waived specialty, and the applicant was convicted of the South Dakota state offence of felony murder (kidnapping). The applicant seeks disclosure of the memorandum in aid of his petition for judicial review of the Minister's decision to waive specialty. The respondent provided the applicant with a redacted version of the memorandum. The respondent claims solicitor-client privilege over the redacted portions of the memorandum.

Held: Application allowed in part. The memorandum was clearly made in the context of a solicitor-client relationship. Solicitor-client privilege is a broad class privilege, the scope of which is not determined by the context of a particular case. The respondent did not impliedly waive privilege over the whole of the memorandum when it disclosed certain background facts contained within it. Further, the respondent did not waive privilege by making a statement to the media, or as a consequence of statements made by U.S. state prosecutors. The only redacted portions of the memorandum ordered to be disclosed to the applicant are those relating to the identity of the author(s) and recipient(s) of the memorandum, and certain headings and subheadings. The remaining redacted portions of the memorandum fall within the protection of the privilege.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] By petition filed September 30, 2019, John Graham seeks judicial review of a decision made by the then Minister of Justice (the "Minister") on February 2, 2010, consenting to waiver of specialty to permit his prosecution on South Dakota state offences different from the federal offence set out in the surrender order. Among other things, he will argue on the petition that the Minister failed to observe the requirements of procedural fairness specific to this context and breached his s. 7 *Charter* rights by failing to inform him of the waiver of specialty request made by the United States of America, or give him an opportunity to be heard before the decision to waive specialty was made. He will seek an order quashing the Minister's decision as well as various alternative forms of relief including declarations that the Minister breached his *Charter* rights and failed to observe the principles of natural justice.

[2] After the Minister waived specialty, the applicant was convicted in 2010 of the South Dakota state offence of felony murder (kidnapping). He was sentenced in 2011 to life imprisonment without the possibility of parole. As matters stand, the applicant's appellate remedies in the United States have been exhausted. He hopes that a favourable result on the petition may give rise to some form of post-conviction relief in the United States.

[3] It is in this context that the applicant seeks an order, in advance of the hearing of the petition, disclosing a Memorandum dated January 29, 2010. The Memorandum was prepared by counsel in the International Assistance Group ("IAG") of the Department of Justice and sent to the Minister in response to the waiver of specialty request made by the United States.

[4] The applicant's related motions for a *Laporte*-style index (*R. v. Laporte* (1993), 84 C.C.C. (3d) 343 (Sask. C.A.)) of all materials before the Minister at the time of his decision, and for the disclosure of additional documents pursuant to the framework set out in *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.), were withdrawn in the course of the hearing.

[5] The respondent, the Minister of Justice of Canada ("Canada"), has already provided to the applicant a redacted version of the Memorandum that discloses background information relevant to the waiver of speciality request and to the decision the Minister was required to make. Canada did so at first instance by extracting from the Memorandum factual information that was put before the Minister. These factual extracts were sent to the applicant in a separate communication. Subsequently, Canada disclosed to the applicant a redacted version of the Memorandum which revealed to the applicant the same factual extracts, but in the context in which they appear in the Memorandum. Following discussions with *amici curiae*, Canada disclosed additional portions of the Memorandum. When Canada took these steps, it made clear to the applicant in writing that it was not waiving solicitor-client privilege over legal advice set out in the Memorandum.

[6] Canada continues to claim solicitor-client privilege over the redacted portions of the Memorandum. The applicant submits that the claim of privilege has not been established with respect to all, or at least some, of the redacted content of the Memorandum. If the Court concludes that Canada's claim of solicitor-client privilege is sound, the applicant submits that the redacted portions of the Memorandum should nonetheless be disclosed because Canada has waived the privilege, either in whole or in part.

[7] For reasons indexed as 2020 BCCA 347, Canada was directed to produce the Memorandum (under seal) to the Court to facilitate a ruling on the privilege claim. The Court appointed *amicus curiae* to assist in the resolution of this matter, including by making submissions on the *in camera* and *ex parte* hearing that would be required, and to ensure the applicant's counsel were not excluded from the hearing any more than was necessary to protect the privilege.

[8] In the first public phase of the hearing, the applicant made submissions respecting the context in which the application came before us and the general principles governing solicitor-client privilege, including the circumstances in which the protection of the privilege may be waived. In the second *in camera* and *ex parte* phase of the hearing, we heard from counsel for Canada and *amici* on the application of those general principles to the claim of solicitor-client privilege asserted over the redacted portions of the Memorandum. In the third and final public phase of the hearing, the applicant was given an opportunity to make further submissions informed, at least in a general way, by the issues and questions raised on the *in camera* and *ex parte* phase of the hearing.

[9] I would direct the release of these reasons in this form to counsel for Canada and to *amici* on March 24, 2021. A memorandum outlining the procedure that follows has been sent to the parties. Counsel for Canada and *amici* were directed not to make public the contents of these reasons until they are published on the Court's website. Any objection to the public release of these reasons on grounds that they could result in the inadvertent disclosure of information that is intended to

be protected by the terms of this judgment, together with the redactions counsel for Canada and *amici* consider to be necessary to protect the privilege, should be communicated to the registry in writing by March 29, 2021. In the absence of such communication, the reasons for judgment will be released in this form to the applicant and to the public on March 30, 2021. I would adopt this procedure out of an abundance of caution to avoid any inadvertent breach of the privilege.

II. Background

[10] It is unnecessary to set out much of the extensive history of this case to decide the relatively narrow issues that arise on this application. What follows is a brief summary of the background sufficient to put those issues in context.

[11] The applicant, a Canadian citizen and a member of the Champagne and Aishihik First Nations, was extradited in 2007 to stand trial in the United States District Court on the federal felony offence of first degree murder of Anna Mae Aquash, also a Canadian citizen and a member of the Mi'kmaq First Nation.

[12] The applicant and Ms. Aquash were active in the American Indian Movement in the 1970s. The murder was committed in 1975 on the Pine Ridge Reservation in South Dakota. It was alleged that the applicant executed Ms. Aquash by shooting her in the back of the head because he believed she had become an informant for the Federal Bureau of Investigation.

[13] Following the applicant's surrender, the United States District Court held it did not have jurisdiction over the federal murder charge on which the applicant had been indicted as it was not alleged, nor could it be established, that either the applicant or Ms. Aquash were of Native American origin—an essential element of the federal offence with which the applicant then stood charged.

[14] In light of the jurisdictional challenges to a federal prosecution, and while the applicant remained in federal custody, the United States, by Diplomatic Note dated December 18, 2009, asked Canada to waive the rule of specialty to permit prosecution of the applicant on South Dakota state charges involving the killing of

Ms. Aquash. Proceeding against the applicant on state charges would not engage the jurisdictional impediments that arose in the federal prosecution.

[15] The rule of specialty is reflected in Article 12 of the *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*, 3 December 1971, Can. T.S. 1976 No. 3. Briefly, the rule of specialty dictates that a person who has been extradited not be tried or punished in the territory of the requesting state for any pre-extradition offence(s) or conduct other than that for which extradition was sought and granted. The application of the rule may be waived by the requested state pursuant to Article 12(1)(iii) of the *Treaty*. The decision to waive specialty is an executive decision that falls to the Minister.

[16] The United States sought waiver of specialty to permit the applicant's prosecution on a South Dakota indictment that included the following state offences: felony murder (kidnapping); felony murder (rape); and premeditated murder. In making the request, the United States advised that the applicant could only be convicted of one of the state charges. The penalty upon conviction for any of the listed state offences is life imprisonment without the possibility of parole. This distinguishes the state charges from the federal charge on which the applicant had been surrendered. Had the applicant been convicted of the federal charge, he would have been subject to the imposition of a life sentence with parole eligibility after 10 years. This distinguishing factor was known to the Minister at the time of the decision to waive specialty and is reflected in a portion of the Memorandum that has been disclosed to the applicant. As the United States District Court had ordered the federal indictment upon which the applicant was being held to be dismissed by February 3, 2010, the United States sought a decision from the Minister by February 2, 2010.

[17] As noted earlier, the Memorandum that is the subject of this application was sent by IAG counsel to the Minister on January 29, 2010, in response to the request made by the United States that Canada waive specialty to permit the applicant's prosecution on the aforementioned South Dakota state charges.

[18] On February 2, 2010, the Minister waived specialty by consenting to the prosecution of the applicant on the state charges of felony murder (kidnapping) and premeditated murder. The Minister declined to consent to the applicant's prosecution in South Dakota for felony murder (rape).

[19] It appears to be common ground that the applicant was not given notice of the waiver of specialty request made by the United States, not afforded an opportunity to make submissions in response to the request, and not advised of the Minister's decision when it was made.

III. Positions of the Parties and *Amici*

[20] The applicant advances a number of alternative submissions in support of the disclosure application.

[21] First, he notes that the burden rests with Canada to establish the existence of the privilege claimed: *British Columbia (Securities Commission) v. C.W.M.*, 2003 BCCA 244 at para. 47; *1185740 Ontario Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 1990 at para. 6 (T.D.). He submits Canada has failed to establish that the Memorandum was prepared and communicated to the Minister in the context of a solicitor-client relationship.

[22] Second, the applicant argues that even if the criteria required to establish solicitor-client privilege as set out in *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 at 837, have been met (i.e., the Memorandum was prepared in the context of a solicitor-client relationship, involved the giving of legal advice, and was intended to be kept confidential), the portions of the Memorandum that recite background facts are severable from any legal advice that might be contained within it and are not protected by solicitor-client privilege.

[23] In support of this second submission, I understand the applicant to make two related points.

[24] He says an analogy should be drawn between a Ministerial decision to waive specialty and a Ministerial decision to surrender a person to the requesting state. In the latter context, the IAG prepares a Departmental Brief for the Minister's consideration which contains, among other things, a recitation of the history of the proceedings and a summary of the submissions made on behalf of the person sought on the issue of surrender. This brief is disclosed to counsel for the person sought who is given an opportunity to provide comments which are sent to the Minister for his or her consideration in deciding whether to order surrender. In a separate document, IAG counsel provides the Minister with legal advice on whether the person sought should be surrendered. This document is not disclosed to counsel for the person sought and is understood to be protected by solicitor-client privilege: see *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631.

[25] In this case, the Memorandum that lies at the heart of this application is a single document amalgamating background facts which would be disclosed in the surrender context and legal advice which would not. Based on practices that have developed in the surrender context and the analogy between a decision to surrender and a decision to waive specialty, the applicant submits that background facts relevant to waiver of specialty that are set out in the Memorandum should not attract the protection of solicitor-client privilege.

[26] In addition, the applicant says that any background information provided by third parties—including the United States—which may have been incorporated by IAG counsel into the Memorandum are not protected by solicitor-client privilege. In support of this submission he relies on *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665. That case was decided in the context of a request made pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 and the severability provisions contained therein. The applicant and *amici* submit that *College of Physicians of B.C.* stands for the proposition that legal advice privilege does not extend to third-party communications unless those communications are in furtherance of a function essential to the existence or operation of the solicitor-client relationship: see

also *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241 at para. 120 (Ont. C.A.).

[27] I should pause to note that I do not understand Canada to contest the analogy drawn by the applicant between a decision to surrender a person sought and a decision to waive specialty. Indeed, Canada appears to have relied on that analogy in its decision to disclose portions of the Memorandum containing background facts in stand-alone, narrative form. Further, I do not understand Canada to claim privilege over third-party informational communications that passed from the United States to IAG counsel, except where that information appears in the Memorandum in a form inextricably tied to the conveyance of legal advice. The position taken by Canada—that a third-party communication that would not, in itself, attract a claim of solicitor-client privilege, may nonetheless be protected where its disclosure would risk revealing legal advice because the two have become inextricably intertwined—is supported by *College of Physicians of B.C.* at paras. 67–68; see also *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 38. I do not understand *amici* to challenge the soundness of the position Canada takes on this point. Rather, *amici* submit that we should be skeptical of Canada's attempt to have third-party information declared privileged on grounds that it is intertwined with privileged legal analysis or advice.

[28] Third, in an argument largely endorsed by *amici*, the applicant submits that the scope to be afforded the privilege must take its meaning from context and that, in the circumstances of this case, concerns about the absence of procedural fairness surrounding the Minister's decision to waive specialty are "strongly supportive of a highly attenuated interpretation of solicitor-client privilege". He submits that giving generous scope to the privilege in this case would "substantially obscure" the basis for the Minister's decision to waive specialty in respect of the state offences of felony murder (kidnapping) and premeditated murder.

[29] Applying a restrictive approach to the scope of the privilege, along with this Court's decision in *College of Physicians of B.C.*, the applicant submits that solicitor-client privilege cannot be maintained insofar as the redacted portions of the Memorandum address:

- U.S. procedural history or U.S. law as those details were conveyed to IAG counsel by the U.S. authorities. Again, the applicant says the mere communication of that information by the IAG to the Minister does not amount to the provision of privileged legal advice;
- the Canadian legal framework for the decision the Minister was required to make, which the applicant characterizes as forming part of the informational component of what was before the Minister;
- any analysis undertaken by the IAG on whether the test for committal, ordinarily undertaken in the judicial phase of extradition, was met with respect to the proposed South Dakota state charges;
- the legal principles relating to waiver of specialty;
- the *Charter* principles the Minister was obliged to have in mind in determining whether to waive specialty;
- potential objections or impediments to waiver of specialty; and
- the identity of the author(s) and recipient(s) of the Memorandum, as well as the identity of information sources relied on by the IAG.

[30] Finally, in the event this Court concludes that the claim of solicitor-client privilege has been established with respect to some or all of the redacted content of the Memorandum, the applicant submits that Canada has impliedly waived privilege by or as a result of: (1) advancing the position that everything that was before the Minister when the decision to waive specialty was made has been disclosed, while at the same time withholding disclosure of the Memorandum; (2) making deliberate, partial disclosure to him of the contents of the Memorandum "[i]n … circumstances [where] fairness and consistency … compel waiver over the entire communication";

(3) making a statement to the media about his case through a spokesperson for the Department of Justice; and (4) statements made by prosecutors representing the State of South Dakota in the Circuit Court, Seventh Judicial District, concerning the Minister's decision to waive specialty.

[31] Canada acknowledges that the unusual context in which this application comes before us flows from its considered decision to disclose to the applicant the type of background information he would have received had the decision related to surrender, not waiver of specialty.

[32] Canada characterizes the Memorandum as a "blended" document containing non-privileged background facts and privileged legal advice. Canada submits that when it disclosed to the applicant portions of the Memorandum containing a discrete and severable narrative of the factual background giving rise to the request, it did not waive solicitor-client privilege as privilege never attached to these portions of the document. Accordingly, Canada submits that the question of waiver does not arise.

[33] Canada does argue, however, that solicitor-client privilege attaches to the portions of the Memorandum that remain redacted because those portions contain legal analysis, legal advice, or the expression of background context and legal analysis/advice that is so intertwined as to fall within the protection of the privilege.

[34] In my view, and at minimum, what flows from the position Canada has taken on this application is this: if it is possible to identify additional portions of the Memorandum that are of the same ilk as the information already disclosed—factual background divorced from the expression of legal advice—it, too, should be disclosed. I do not understand Canada to contest this articulation of the nature of our task.

[35] At the same time, we are reminded by Canada that the scope of the privilege is wide and that in resolving this application we must be alert to the risk that the disclosure of what might, at first glance, appear simply to be background information, could conceivably permit an informed reader to infer the contents of the

redacted legal advice: see *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 46, referred to with approval in *Lee* at paras. 39–40; *Blank v. Canada (Minister of Justice)*, 2005 FC 1551 at paras. 33, 36, rev'd in part 2007 FCA 87. Canada submits that if this cautionary note is not observed, there is a risk that a properly claimed privilege—one fundamental to the proper administration of justice—will be breached without justification: *R. v. McClure*, 2001 SCC 14 at para. 35; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at paras. 9–10; *Lee* at para. 51.

[36] Finally, Canada rejects the proposition that it has done anything to waive, either directly or by implication, the protection of the privilege that attaches to the undisclosed portions of the Memorandum.

[37] As the foregoing discussion makes clear, we are not being asked in this case to opine generally on the question of whether factual background or generally applicable legal principles set out in a document which frame the communication of legal advice could ever be severable from the advice itself in a case where privilege was asserted over the entirety of the communication. Further, I would emphasize that the application before us does not engage the provisions of the *Access to Information Act*, R.S.C. 1985, c. A-1 and, in particular, the provisions of s. 25 relating to the severability of non-protected from protected information.

[38] This case may be atypical in that privilege is not being claimed by Canada over background facts set out in the Memorandum, including those obtained from the United States, except where those facts are intrinsically bound up with the conveyance of legal advice. Whether privilege could have been claimed over the entirety of the contents of the Memorandum is, therefore, an academic issue that does not arise on this application. Further, I do not wish to be taken as expressing any view on whether the disclosure of background facts to a person sought in the context of surrender has any particular relevance to the determination of whether the

Memorandum before us, or one like it, attracts a claim of solicitor-client privilege, in whole or in part.

[39] Given the unusual context in which this application arises, and the way in which the issues have been framed, I see our task as being intensely case-specific. In my view, and for these reasons, I think it most unlikely that our decision will have any precedential value.

[40] To complete the picture, *amici* filed for use on the *in camera* and *ex parte* portion of this hearing a detailed, colour-coded copy of the Memorandum as a means of addressing whether Canada has "over-redacted" the document and thereby withheld from the applicant material that does not fall within the protection of the privilege. Using eight different colours, *amici* engaged in a line-by-line analysis of the Memorandum in an effort to separate its content into three broad categories: factual information; legal principles; and legal analysis or advice. Generally speaking, *amici* submit that those portions of the Memorandum falling into the first two categories should be disclosed to the applicant. In brief, *amici* say the way in which the Memorandum has been redacted goes beyond what is necessary to protect the privilege.

IV. Analysis

Solicitor-client privilege and waiver

[41] I begin my analysis by rejecting the applicant's contention that Canada has failed to establish the Memorandum was prepared and communicated to the Minister in the context of a solicitor-client relationship. From the surrounding context, the only reasonable inference to be drawn is that the sole purpose for which the Memorandum was brought into existence was to provide the Minister with legal advice concerning his statutory responsibility for the implementation of extradition agreements as reflected in s. 7 of the *Extradition Act*, S.C. 1999, c. 18. Specifically, the nature of the relationship between IAG counsel and the Minister, and the circumstances in which the advice was sought and given, establish beyond any doubt that the Memorandum was prepared in the context of a solicitor-client

relationship: *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 49–50. The fact that the Memorandum does not bear on its face a security classification or assert that its contents are protected by solicitor-client privilege, does not affect my conclusion on this point. While the presence of such indicators may be relevant to the analysis in another case, their absence in this case cannot defeat a claim to solicitor-client privilege where it is otherwise clear that the communication was prepared in the context of a solicitor-client relationship.

[42] The applicant's alternative submission that those portions of the Memorandum consisting of a narration of background facts are severable from any legal advice that might be contained within it and not protected by solicitor-client privilege, has effectively been conceded by Canada in this case. To reiterate, Canada submits the issue we have to decide is whether any other portions of the Memorandum, conceptually indistinguishable from those portions that have already been disclosed, should be provided to the applicant on grounds that they lie outside the protection of the privilege. As noted, Canada argues that the redacted portions of the Memorandum are distinguishable from what has been disclosed to date because they contain legal advice or factual background and legal advice that is inextricably intertwined. I will return to address this issue in greater detail later in these reasons.

[43] I do not consider that much needs to be said about the application of this Court's decision in *College of Physicians of B.C.* to the circumstances of this case. As noted earlier, Canada was clear in oral argument that privilege is not being claimed over communications between the United States and Canada. In other words, I understood Canada to concede that background information supplied by the United States to the IAG and passed on to the Minister should be disclosed unless inextricably intertwined with the conveyance of legal advice. Resolution of the issue before us is, therefore, not driven by the determination of contentious legal principles, but through a case-specific examination of the context in which the legal analysis and legal advice appears in the Memorandum.

[44] I would also reject the applicant's submission that we should bring to our analysis a narrow, context-dependent conception of the scope of the privilege given the concerns about procedural fairness that animate the petition. In my view, this submission is inconsistent with the well-established proposition that solicitor-client privilege is a class privilege entitled to sedulous protection. Once established, the scope of the privilege is broad. It encompasses all interactions between the client and his or her lawyer when the lawyer is engaged in providing legal advice. The privilege is so fundamental to the administration of justice that it must be as close to absolute as possible. It does not involve a balancing of interests on a case-by-case basis: *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 893; *McClure* at paras. 27–28, 34–35.

[45] The two authorities relied on by the applicant on this point (*Hammami v. College of Physicians and Surgeons*, 2000 BCSC 1555 at para. 42, and *Melanson v. Workers' Compensation Board* (1994), 146 N.B.R. (2d) 294 at paras. 32–34, 37 (C.A.)) are neither binding on this Court nor authoritative. Both cases pre-date *McClure*. Further, the suggestion of the New Brunswick Court of Appeal in *Melanson* that privilege might give way where there has been a failure to observe the principles of natural justice was expressly rejected in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31. Writing for the Court, Major J. said this:

> [31] Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may co-exist without being at the expense of the other.

Melanson was relied on by the court in *Hammami*. The rejection of the approach taken in *Melanson* necessarily undermines the authority of *Hammami*, which can no longer be regarded as good law on this point.

[46] I am likewise unable to credit the applicant's contention that by disclosing to him those portions of the Memorandum that contain a narrative statement of background facts disconnected from the expression of legal advice, Canada must be taken to have waived privilege over the entirety of the contents of the Memorandum. Assuming for the purposes of this analysis that, contrary to Canada's position, the

disclosed portions of the Memorandum could conceivably have attracted a claim of solicitor-client privilege, I am of the view that nothing done by Canada has had the effect of waiving, expressly or impliedly, privilege over the redacted portions of the Memorandum.

[47] As noted in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd*. (1983), 45 B.C.L.R. 218 at 220 (S.C.), waiver of solicitor-client privilege is ordinarily established where the holder of the privilege voluntarily evinces an intention to waive it. Waiver may also be implied by the conduct of the privilege holder in certain circumstances. For example, if a party advances a state of mind defence and relies on legal advice to justify conduct, waiver may be inferred: *Campbell* at paras. 67–68; *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at para. 22; *Lee* at para. 55.

[48] Additionally, waiver may also be found to have occurred in limited circumstances where fairness and consistency require this result. Generally speaking, in cases where fairness has been invoked in support of a finding of waiver, there has been some manifestation by the privilege holder of a voluntary intention to waive the privilege, at least to some extent. In these circumstances, achievement of the principles of fairness and consistency may lead to a finding that the privilege has been waived in its entirety. The issue was helpfully canvassed by Holmes A.C.J. in *United States v. Meng*, 2020 BCSC 1461:

> [37] Implicit waiver may take place where a party does not expressly waive privilege, but takes a position in relation to privileged materials that is inconsistent with maintaining the privilege. This may be by, for example, selectively disclosing part of a privileged document or a category of privileged documents on a particular subject, but withholding the remainder of the document or other documents on that same subject. In these circumstances, to uphold the privilege over the remaining communications would be unfair, because the opposing party and the court would be deprived of access to the full narrative. In *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 143, Madam Justice Warren explained:
>
> > The common thread in the cases where implied waiver is found is that the privilege holder has attempted to use and, at the same time, to shelter behind privileged documents. In such cases, fairness and consistency require production because the privilege holder uses the privilege as a sword to justify or explain a position or action while also using the privilege as a

> shield to prevent the other party from testing the justification or explanation.
>
> [38] In a case of the selective disclosure of privileged documents, fairness and consistency require the disclosure of all documents on the same subject so to ensure that the partial disclosure does not give an unfair advantage or create a misleading picture: *McDermott v. McDermott*, 2013 BCSC 534 at paras. 113-117; *Huang* at para. 149.
>
> [39] Waiver will cause loss of privilege only in relation to the particular subject matter over which privilege has been waived. This limit ensures that waiver extends only as far as is necessary to ensure fairness: *R. v. Sipes*, 2012 BCSC 635 at para. 22; *Biehl v. Strang*, 2011 BCSC 213 at para. 47.
>
> [Emphasis added.]

[49] To be clear, I do not understand the applicant to advance as a general proposition that partial disclosure of a communication protected by solicitor-client privilege will invariably result in a deemed waiver of privilege over the entire communication. Rather, the applicant argues that, in the circumstances of this case, fairness and consistency requires what he characterizes as a partial waiver of solicitor-client privilege to be treated as a full waiver of the privilege. In his supplementary written submissions, the applicant expressed his position on this point in the following terms:

> The Memorandum was created as part of a decision-making process related to waiver of specialty that was entirely *ex parte* and *ad-hoc*. ...
>
> If fulsome information is not now provided to the applicant concerning communications between the IAG and the Minister regarding the proper procedures to be employed in the decision-making, the facts of the case, the U.S. procedural history, U.S. law, and all aspects of the law including constitutional considerations … then meaningful review of the Decision is compromised. In other words, fairness and consistency within the meaning of *S & K Processors Ltd*. requires it.
>
> [Emphasis added.]

[50] I do not consider that the interests of fairness and consistency have been shown to justify a finding of implicit waiver and consequent disclosure of the redacted portions of the Memorandum. Canada has not voluntarily injected the legal advice at issue on this application into the litigation. I can discern nothing in the conduct of Canada warranting a conclusion that it has inappropriately relied on the privilege as both a sword and a shield—strategically disclosing only that which

serves its interests, while at the same time seeking to shelter under its protection other information of the same ilk. Rather, Canada has attempted to draw a distinction between pure factual background and the communication of legal advice. In disclosing portions of the Memorandum containing what it considers to be pure factual background, Canada has consistently asserted solicitor-client privilege over the balance of the document.

[51] In my view, there is no merit in the applicant's contention that Canada's assurance that everything before the Minister at the time the decision was made had been disclosed somehow requires disclosure of the redacted portions of the Memorandum. It is abundantly clear that Canada was saying that everything before the Minister except the Memorandum—a document over which privilege has consistently been claimed—was in the applicant's hands.

[52] The position Canada has taken on this application also appears to be consistent with the generally understood implications of redacting "blended" documents as expressed by R.W. Hubbard et al., *The Law of Privilege in Canada* (Toronto: Thomson Reuters, 2016) (loose-leaf updated January 2020), vol. 2, ch 11 at 70.59:

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

> [Footnotes and citations omitted.]

[53] I also see no merit in the applicant's contention that Canada must be taken to have waived privilege by virtue of a statement to the media made by a Department of Justice spokesperson on February 22, 2010. The statement upon which the applicant relies, including the context in which it was reported in the *Yukon News*, is reproduced below:

> While the reason for Graham's extradition hinged on the federal charges, the federal Department of Justice is not revisiting the decision to extradite him, said Carole Saindon, a spokesperson for the department.
>
> Graham is still facing murder charges from the state of South Dakota, which, despite not warranting extradition, mean that Graham shouldn't be brought back to Canada.
>
> "Extradition is completed once a person has been surrendered to the requesting state," wrote Saindon in an e-mail. "In this instance, Mr. Graham has been surrendered to the United States and therefore the extradition is complete."
>
> "While the US federal indictment against Mr. Graham was recently dismissed by the U.S. District Court in South Dakota, Mr. Graham is still facing charges under South Dakota state law in relation to the same conduct," wrote Saindon.

[54] Put simply, there is nothing in the media statement that discloses any legal advice given by the IAG to the Minister on the issue of waiver of specialty.

[55] I turn next to the applicant's contention that Canada has waived privilege by communicating to the requesting state aspects of the legal advice the Minister received which were, in turn, communicated by the assigned state prosecutor to a judge of the Seventh Judicial Circuit Court in the course of state proceedings against the applicant.

[56] In support of his position on this point, the applicant relies on transcripts of two appearances before the Circuit Court judge.

[57] The first appearance occurred on March 8, 2010, after the Minister had consented to waiver of specialty. Counsel for the applicant sought the disclosure of documents confirming the Minister had waived specialty so as to permit his

prosecution on state charges. In response to this disclosure request, the following exchange occurred between Mr. Mandel and Mr. Oswald, the state prosecutors, Mr. Murphy, counsel for the applicant, and the judge:

> **Mr. Mandel**: When the transfer from federal to state jurisdiction took place, it is what they refer to in Canada as a waiver of the Rule of Specialty. And again, the Court -- excuse me. The Administer [*sic*] of Justice up there considered the similarities between the state case and the federal case and waived the Rule of Specialty to put him here in state court for the state to proceed against him.
>
> **The Court**: I assume those are public records?
>
> **Mr. Mandel**: Um --
>
> **The Court**: And what records in this proceeding would not be public?
>
> **Mr. Mandel**: I guess I don't know what the procedure is up in Canada.
>
> …
>
> **The Court**: What's the problem with providing the waiver of specialty? … And if there is such a document, whether he be entitled to it or not, my question is, where is the harm in providing it and -- first of all, does it exist; and secondly, if the proceedings for whatever this waiver of specialty is are available, have you had the opportunity to review those? Mr. Mandel?
>
> …
>
> **Mr. Mandel**: Well, I will try and explain it as best I can. You know, I'm not -- I don't consider myself an expert on this, but I have at least been through it so I have some experience with it.
>
> The waiver of the Rule of Specialty does not go back through the court system in Canada. That's a determination made by the Canadian Minister of Justice whether it's permissible … whether or not we're allowed to do this. And under Canadian law, there is not a right for representation. There, frankly, is not a proceeding in the sense of a court proceeding. The defendant is not entitled to representation at that which is why they didn't provide him representation up there.
>
> …
>
> **The Court**: My question is, do you have, A, a copy of the ruling by whoever it is in Canada that made that ruling?
>
> And if so, is there some problem with or some reason why it should not be provided?
>
> You know, is it a secret document?
>
> Is it a public record?
>
> **Mr. Oswald**: I actually don't know the answer, whether or not they make that record public up there.
>
> I guess my objection would be that we're litigating an issue that really isn't before this court.

> **The Court**: I don't know that were [*sic*] litigating it.
>
> My point is, if we don't need to, we shouldn't. And -- simply because it's easy enough, I assume, for the state, or in this case assistance from the Federal Government, to obtain that record, find out if it's a public record and available to peruse the record and decide if there is some objection to producing it. At which point it can come before me in the wisdom of [an] *in camera* proceeding and we can examine it subject to those rules and make a decision.
>
> …
>
> So it would be my thought that the government will, A, determine if it's a public record. If it is, they will either advise Mr. Murphy how to get it or will get it and provide it to Mr. Murphy.
>
> Is there is an objection -- if it's a secret record, you -- which wouldn't surprise me -- but if it is somehow a confidential document that the government can obtain or provide evidence that it can't obtain it, then we -- and you object to giving it to Mr. Murphy, we'll have an *in camera* review. And if it's innocuous, Mr. Murphy will be satisfied, you will be satisfied, and we'll get on the way with trying this matter.
>
> …
>
> So my direction is, find out if it's a public record and if it is, inform Mr. Murphy how he can get it or the government will get it and provide it.
>
> Other than that, if there is some objection, I need to know about it. And we'll review it *in camera* if we can. …
>
> **Mr. Murphy**: … Now you've kind of asked Mr. Mandel whether he has it [the waiver of specialty] and he hasn't answered that question. He skirted that question. …
>
> **The Court**: All right. So we'll, just ask that question flat out.
>
> Do you have a copy … of the documents that relate to the Canadian Government's waiver of the -- of specialty?
>
> **Mr. Mandel**: Your Honor, I think I -- I have some of them electronically. But what I don't -- even if I don't, through main justice, I think whatever they've got copies of, assuming that it's -- can be made public, I can get from them.
>
> [Emphasis added.]

[58] The second appearance relied on by the applicant occurred on November 29, 2010, as his trial on state charges was about to commence. On this occasion, the state prosecutor advised the trial judge that while the indictment contained a charge of felony murder (rape), "Canada doesn't have felony murder rape and has not allowed us to proceed." He further advised, "I can't move forward on that count because of Canada" and that "I don't want to create an international incident", but

"because of the extradition agreements, we are unable to move forward on the felony murder rape".

[59] Against this background, the applicant says it is evident that information pertaining to legal advice was passed from Canada to South Dakota state prosecutors and then disclosed, at least in part, to the Circuit Court judge. The applicant says the information disclosed to the court touched on the U.S. state prosecutors' understanding of why the Minister did not waive specialty with respect to the offence of felony murder (rape) and the entitlement of the applicant to legal representation in response to the U.S. request. The applicant submits that these instances of disclosure to persons outside the solicitor-client relationship had the effect of waiving privilege over any and all legal advice provided by the IAG to the Minister regarding waiver of specialty.

[60] I do not agree. The U.S. state prosecutors' understanding of the factors that may or may not have been considered by the Minister does not evince an intention on the part of Canada to waive privilege, nor can it reasonably be considered to amount to an implied waiver. The test for waiver must take into account the near absolute protection solicitor-client privilege is afforded, why that is so, and the need for the doctrine of implied waiver to be triggered only in clearly defined circumstances: *Soprema* at paras. 50–51.

[61] There is no evidence that Canada disclosed to the United States the legal advice conveyed by the IAG to the Minister, and there is no evidence that the U.S. state prosecutors' comments were informed by the disclosure of that advice to them. In short, I do not accept that a substantive rule of law so fundamental to our justice system can casually be waived by a third party's public expression of his or her understanding of the legal position taken by the privilege holder. While I do not consider my conclusion on this issue to rest on uncertain ground, if it was necessary to do so I would have been inclined to invoke, in aid of my conclusion, the proposition that where there is ambiguity about whether the privilege has been waived, it must be upheld: *Descôteaux* at 875.

Application of the privilege to the Memorandum

[62] Applying the foregoing discussion to the circumstances of this case, I turn to consider whether any of the redacted portions of the Memorandum should be disclosed to the applicant.

[63] I will deal first with the redactions highlighted by *amici* in yellow on the Memorandum disclosed for use in the *in camera* and *ex parte* portion of this hearing. As the applicant is already aware, these redactions relate to the identity of the author(s) of the Memorandum, their telephone and fax number(s), the intended recipient(s) of the Memorandum, and headings and subheadings used in the Memorandum. I did not understand Canada to strenuously argue that all of the yellow highlighted redactions should be withheld from the applicant as falling within the scope of the privilege.

[64] I would order Canada to disclose to the applicant the file number, the identity of counsel in the IAG who authored or reviewed the Memorandum, the identity of its intended recipients, the headings that appear on pages 1, 2 and 3, and the redacted subheading number on page 13 of the Memorandum that appears next to the disclosed subheading “Felony Murder”. I would not order the disclosure of any of the other redacted subheadings. As any accomplished legal writer knows, subheadings, when used in a legal argument, are not separate and divisible from the argument itself. Rather, they form part of the argument and are designed to propel the reader through a legal analysis. The same will often be true of subheadings used in a communication that conveys legal advice. They are part and parcel of the advice itself. Disclosure of the subheadings necessarily discloses those topics counsel considered central to the provision of legal advice. In my view, all of the other subheadings in the Memorandum fall within the protection of the privilege.

[65] I turn next to deal with redacted factual information highlighted in pale and dark green by *amici*. I accept for the purpose of this discussion that at least some of this information was supplied to IAG counsel by the United States. *Amici* submit that these redactions should be categorized as severable factual background; that is, the

redactions involve basic factual information about the case similar to that which has already been disclosed. They submit that none of this highlighted information falls within the protection of the privilege. In addressing some of these redactions, *amici* go so far as to suggest that it is possible to separate out and order the disclosure of a sentence or sentence fragment containing factual background without intruding on the solicitor-client privilege.

[66] I am not persuaded that approaching the issue in the way *amici* suggests would give proper effect to the scope of the privilege. In many cases, the pale and dark green highlighted "factual" portions of the Memorandum *amici* suggest should be disclosed are adjacent to, or sandwiched by, legal analysis or advice provided by IAG counsel. These portions of the Memorandum are not, in my view, in the same category (or of the same ilk) as the factual background expressed in narrative form at the beginning of the Memorandum.

[67] I make two additional points that I consider should guide the Court's analysis of whether the pale and dark green highlighted portions of the Memorandum should be disclosed.

[68] First, the identification and distillation of facts a legal advisor considers to be relevant to the advice they have been engaged to provide will often be bound up with the advice ultimately conveyed. In commenting on the centrality of solicitor-client privilege to the proper functioning of the justice system and its unique status in law, Major J. wrote in *McClure* at para. 33:

> The law is complex. Lawyers have a unique role. Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.
>
> [Emphasis added.]

[69] In a similar vein, and in the context of an application for the disclosure of material forwarded to the Deputy Attorney General for consideration in determining whether to consent to the preferment of a direct indictment, Dawson J. made these observations in *R. v. Ahmad* (2008), 59 C.R. (6th) 308 (Ont. S.C.J.):

> 84 … Obviously a discussion of the facts and what is to be taken from them will almost always be integrally bound into the giving and receiving of legal advice. Inferences to be drawn from facts, what facts the evidence establishes alone and in combination with the other evidence, and the interrelationship between the facts and the law and the policy of the law are all likely to be closely related to the legal advice requested and given. It seems to me that the contents of the recommendation package fall squarely within what was considered to be advice covered by the privilege in *Buffalo v. Canada*, [1995] 2 F.C. 762, 125 D.L.R. (4th) 294 (Fed. C.A.), at para. 8. The concluding portion of the passage is particularly apt.
>
> > ... The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; *it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context*. (Emphasis added)
>
> 85 I find it of no significance that the facts associated with the advice in this case were flowing from the [Public Prosecution Service of Canada] legal advisors to the Deputy Attorney General, as the client. In many solicitor-client relationships it is not at all uncommon for facts to flow from the lawyer to the client as part of the advice. …
>
> 86 I draw strength for my conclusion that the contents of the recommendation package are privileged from a number of other sources. In *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97 (S.C.C.), four members of the Supreme Court of Canada concluded that a memorandum prepared by a Department of Justice counsel advising the Minister of Justice in an extradition surrender matter was covered by solicitor-client privilege. Cory J. described the contents of the memorandum as including a summary of all proceedings involving Mr. Idziak, a summary of Mr. Idziak's representations to the minister and a recommendation (para. 62).
>
> [Italic emphasis in original; underlined emphasis added.]

[70] The extradition judge in *Meng* was faced with a task similar to the one that arises in this case. Specifically, the judge was asked, in the context of an application for the disclosure of redacted emails exchanged between IAG counsel, to consider

whether portions of the communications should be disclosed as reflecting no more than factual narrative, akin to information already provided to the person sought. The judge concluded that because certain of the redacted portions of the communications pertained to the exchange of legal opinions, they were not in the same category as background facts already disclosed. Further, the judge found that the disclosure of background facts did not have the effect of waiving privilege. Importantly, for our purposes, the judge refused to order the disclosure of background facts where those facts were intertwined with the communication of legal advice:

> [47] I have considered whether one or both of two portions of emails each appearing in documents EXT_RESP-00240 and EXT_RESP-00246 reflect no more than factual narrative relating to the MLAT, and not communications for the purpose of giving or seeking legal advice. These are portions of emails sent by IAG Director General, Janet Henchey, to IAG Senior Counsel. On a review of the email chains as a whole, I conclude that although these portions do include background, they are nonetheless functionally intrinsic to the legal opinions expressed in other portions, and that they are therefore subject to the privilege. They are part of the "continuum of communications" in which the legal opinion is provided: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 33.
>
> [Emphasis added.]

[71] Second, in the absence of authority on point, and none was drawn to our attention, I am not inclined to accept as a general proposition that disclosure of a particular fact on an earlier occasion necessarily leads to a conclusion that disclosure of the same fact would not violate the privilege where the fact is repeated because it is considered by the legal advisor to form, and does form, an integral part of the advice communicated. Nor am I prepared, in the specific context of this case, to accept that disclosure of a fact in the Memorandum necessarily forecloses a privilege claim when that same fact is subsequently restated and embedded in the provision of legal advice.

[72] In my view, the portions of the Memorandum highlighted in pale and dark green by *amici* provide essential contextual backdrop for, and are intimately connected with, the communication of legal advice. They are not severable without unjustifiably intruding on the privilege.

[73] I turn now to address what *amici* characterizes as the expression by IAG counsel of the legal principles considered to be relevant to the decision the Minister was required to make. These redactions are reflected in portions highlighted in blue, turquoise and purple on the sealed Memorandum filed for use on the *in camera* and *ex parte* portion of the hearing. The close relationship between these colour-coded categories of information is such that they may conveniently be dealt with together.

[74] *Amici* submits that these portions of the Memorandum may be disclosed without compromising solicitor-client privilege because: (1) the information at issue does not go beyond the recitation of general principles of law; (2) the principles of law referred to in the Memorandum are publicly available and could be easily lifted from the jurisprudence on point, or accessed in legal textbooks; (3) concerns about procedural fairness that animate the underlying petition "favour … a narrow interpretation of solicitor-client privilege with respect to this information"; (4) some of the legal principles sourced in U.S. law were likely provided to the IAG by the requesting state, a third party, and not protected by the privilege; and (5) in order for the applicant to have a meaningful opportunity for judicial review of the Minister's decision, it is critical that he have some understanding of the "legal considerations that were brought to the Minister's attention".

[75] I am unable to accept *amici*'s submissions respecting the blue, turquoise and purple redactions. While I agree that the blue highlighted portions of the Memorandum express what appear to be uncontentious principles of law, I do not see that this puts them outside the scope of the privilege. A legal advisor's summary of the framework of principles applicable to the client's situation is an integral component of legal advice and, in my view, falls squarely within the privilege. Again, we were taken to no authority suggesting otherwise.

[76] That these legal principles are in the public domain has, in my view, no impact on the determination of whether they are protected by solicitor-client privilege when they are selected, organized and presented by the advisor in an opinion that

seeks to convey to the client the legal framework within which a decision should be made.

[77] I have already expressed my view that the scope of the privilege is not determined on a case-by-case basis through the exercise of judicial discretion to do what appears to be “fair” in the circumstances: *Soprema* at paras. 50–51.

[78] While I accept that information obtained from third parties and passed to the client by a lawyer who simply acts as a conduit for the conveyance (rather than in furtherance of a function essential to the existence or operation of the solicitor-client relationship) will generally not attract the protection of the privilege, that is not the issue here. The issue here is whether third-party information is inextricably interwoven into the advice contained within the privileged communication. In my view, it is. I am unable to accept *amici*’s submission that a legal principle (or fact) embedded in a paragraph that clearly contains legal analysis or advice should be disclosed, even in this unusual context. Generally speaking, the articulation of legal principles framing the analysis are an inherent part of any advice given. These portions of the Memorandum are not, in my respectful view, in the same category as the factual background already disclosed. I conclude, therefore, that the blue, turquoise and purple highlighted redactions properly fall within the protection of the privilege.

[79] Finally, I come to the redacted portions of the Memorandum that have been highlighted by *amici* in orange and red. *Amici* acknowledges that these portions of the Memorandum involve either analysis by IAG of how the applicable legal principles might apply to the applicant’s case (highlighted in orange) or direct advice to the Minister about what he should consider, how he should weigh the various factors, and the decision he should come to on the question of waiver of specialty (highlighted in red). In my view, all of these passages are properly subject to the claim of solicitor-client privilege and need not be disclosed.

V. Conclusion

[80] I would allow the application, but only to the limited extent of requiring Canada to disclose those yellow highlighted portions of the Memorandum identified herein.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Voith"