CITATION: Sakab Saudi Holding Company v. Saad Khalid S Al Jabri, 2024 ONSC 6659
COURT FILE NO.: CV-21-00655418-00CL
DATE: 20241129

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SAKAB SAUDI HOLDING COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ENMA AL ARED REAL ESTATE INVESTMENT AND DEVELOPMENT COMPANY, KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL MANUFACTURING COMPANY, SAUDI TECHNOLOGY & SECURITY COMPREHENSIVE CONTROL COMPANY, TECHNOLOGY CONTROL COMPANY, and NEW DAWN CONTRACTING COMPANY ~~and SKY PRIME INVESTMENT COMPANY~~, Plaintiffs

AND:

SAAD KHALID S AL JABRI, DREAMS INTERNATIONAL ADVISORY SERVICES LTD., 1147848 B.C. LTD., NEW EAST (US) INC., NEW EAST 804 805 LLC, NEW EAST BACK BAY LLC, NEW EAST DC LLC, JAALIK CONTRACTING LTD., NADYAH SULAIMAN A AL JABBARI, personally and as litigation guardian for SULAIMAN SAAD KHALID AL JABRI, KHALID SAAD KHALID AL JABRI, MOHAMMED SAAD KH AL JABRI, NAIF SAAD KH AL JABRI, HISSAH SAAD KH AL JABRI, SALEH SAAD KHALID AL JABRI, ~~CANADIAN GROWTH INVESTMENTS LIMITED, GRYPHON SECURE INC., INFOSEC GLOBAL INC.~~, QFIVE GLOBAL INVESTMENT INC., GOLDEN VALLEY MANAGEMENT LTD, ~~NEW SOUTH EAST PTE LTD.~~, TEN LEAVES MANAGEMENT LTD., ~~2767143 ONTARIO INC., NAGY MOUSTAFA~~, HSBC TRUSTEE (C.I.) LIMITED, in its capacity as Trustee of the Black Stallion Trust, HSBC PRIVATE BANKING NOMINEE 3 (JERSEY) LIMITED, in its capacity as a nominee shareholder of Black Stallion Investments
Limited, BLACK STALLION INVESTMENTS LIMITED, NEW EAST FAMILY
FOUNDATION, NEW EAST INTERNATIONAL LIMITED, ~~NEW SOUTH EAST ESTABLISHMENT, NCOM INC.~~ and 2701644 ONTARIO INC., Defendants

BEFORE: Cavanagh J.

COUNSEL: *Munaf Mohamed K.C., Jonathan Bell, and Doug Fenton* for the plaintiffs

John J. Adair and Sean Pierce, for the defendant Saad Khalid Aljabri

Hailey Bruckner for the defendant Mohammed Aljabri

HEARD: August 13, 2024

ENDORSEMENT

Introduction

[1] The plaintiffs move for (i) a declaration that a document (the "Proffer") provided by the defendant Saad Aljabri to the Attorney General for Canada ("AGC") pursuant to s. 38 of the *Canada Evidence Act* ("*CEA*") is not subject to any form of privilege and/or that any such privilege has been waived, and (ii) an order directing Dr. Aljabri to produce a copy of the Proffer (as redacted by the AGC) to the plaintiffs.

[2] Dr. Aljabri opposes this motion and asserts that the Proffer is protected from disclosure by litigation privilege.

[3] For the following reasons, the plaintiffs' motion is dismissed.

Background Facts

[4] The plaintiffs are corporations which were established to pursue commercial and counterterrorism activities in the Kingdom of Saudi Arabia ("KSA").

[5] The defendant Saad Aljabri was an official with the Ministry of the Interior of the KSA.

[6] In this action, the plaintiffs allege that Dr. Aljabri orchestrated a massive fraud, misappropriating at least USD $5.36 billion from the plaintiffs for his personal gain and that of his alleged co-conspirators. The plaintiffs obtained *Mareva* injunctions against Dr. Aljabri and certain of his family members which remain in force.

[7] Dr. Aljabri has defended the action. He denies that he defrauded the plaintiffs and asserts that funds paid to him by the plaintiffs were provided and authorized by the Saudi government and used for counterterrorism purposes and to compensate him for his faithful and hazardous service.

Creation of the Proffer

[8] The background to the creation of the Proffer includes proceedings between the parties in the United States.

[9] On March 24, 2021, after a receivership order was granted by this Court, the plaintiffs commenced an action in the State Court of Massachusetts because, under applicable state law, an action is required to register and enforce foreign orders such as the receivership order. The plaintiffs sought an order enforcing the receivership order and then to stay the Massachusetts action pending the resolution of this action.

[10] Dr. Aljabri and his son filed a notice to have the case remanded to Federal Court. After removal of the Massachusetts action to the U.S. Federal Court, the U.S. Department of Justice appeared in the Massachusetts proceeding. On December 29, 2021, the U.S. District Court of Massachusetts dismissed the Massachusetts action, ruling that Dr. Aljabri could not defend the recognition and enforcement proceedings in the U.S. on the merits without reference to

information covered by the assertion of state secrets privilege. The U.S. decision was upheld on appeal by the U.S. First Circuit Court of Appeals.

[11] On April 21, 2021, Dr. Aljabri moved to stay this action in Ontario as an abuse of process.

[12] On July 3, 2021, then counsel for Dr. Aljabri gave notice to the AGC under s. 38 of the CEA that he believed that Dr. Aljabri would be required to disclose sensitive or potentially injurious information in this action. In Dr. Aljabri's affidavit filed in support of his stay motion, he appended a fully redacted "Confidential Appendix" setting out material subject to the *CEA* notice. The AGC completed its review of the Confidential Appendix in July 2022 and returned a redacted copy to counsel for Dr. Aljabri. The plaintiffs were provided with a copy of the redacted Confidential Appendix on September 30, 2022.

[13] Following the decision of the U.S. District Court in December 2021, Dr. Aljabri sought to re-schedule the motion he had previously brought to stay this action on the basis that his inability to adduce evidence of information for national security reasons fundamentally compromised his defence.

[14] The deadline for Dr. Aljabri to provide his motion record on that stay motion was June 6, 2022.

[15] On May 31, 2022, an official from the Canadian Security Intelligence Service delivered a s. 38 notice covering any materials that Dr. Aljabri may intend to file on the stay motion. The AGC sought an injunction to prevent Dr. Aljabri from filing his motion materials. Before a hearing was scheduled, the Federal Court issued an interim injunction (on consent, after Dr. Aljabri retained s. 38 counsel) prohibiting Dr. Aljabri from filing any material on the stay motion that may infringe his s. 38 obligations.

[16] Dr. Aljabri's counsel prepared and delivered the Proffer to the AGC in September 2022 so that a s. 38 review may be conducted.

[17] The AGC has now returned the Proffer to Dr. Aljabri with redactions meant to prevent disclosure of information the AGC has determined is sensitive or potentially injurious to Canada's national defence, national security, and/or international relations.

Federal Court Proceedings

[18] In June 2022, the AGC commenced an application in the Federal Court which resulted from the s. 38 notice and the prohibitions on disclosure. The plaintiffs and Dr. Aljabri, along with the AGC, are parties to Federal Court application.

[19] Within those proceedings, the plaintiffs brought two separate motions seeking an order for production of the redacted Proffer. Kane J. dismissed both motions. Kane J. held that the determination of whether the Proffer is subject to litigation privilege is beyond the jurisdiction of the Federal Court and that the Federal Court has no role in ordering its production. See *Canada (Attorney General) v. Al Jabri*, 2023 FC 1338, at paras. 98-108.

[20] The plaintiffs appealed these decisions. The Federal Court of Appeal heard the two appeals together and dismissed the appeals in May 2024. The Federal Court of Appeal did not rule on whether the Proffer was protected from disclosure in this action by litigation privilege.

Dr. Aljabri's refusal on his examination for discovery to produce the Proffer and undertaking to disclose all unredacted material facts from the Proffer

[21] When Dr. Aljabri was examined for discovery, he was asked to produce the Proffer. His counsel refused to produce the Proffer but undertook to provide a summary, as detailed as it can be, of all material facts that have not been redacted from the Proffer by the AGC for s. 38 concerns.

[22] In *Canada (Attorney General) v. Al Jabri*, 2023 FC 40, Kane J., at para. 6, noted that the AGC had not then yet completed the review of the Proffer and addressed whether the process of the s. 38 proceeding would be unfair to the plaintiffs:

> The Court does not agree that the process to date is unfair to Sakab or that Sakab cannot meaningfully participate in the section 38 determination. As explained below, in the context of determining the Section 38 Application, if the redacted information is relevant to the issues in the underlying litigation, the Court will consider whether and how non-injurious summaries of any redacted information can be provided to Sakab or whether and how any injurious information should be disclosed to the trier of fact on appropriate terms and conditions in order for the trier of fact to determine the issues in the underlying litigation with the benefit of this information.

[23] At the hearing of this motion, counsel for Dr. Aljabri confirmed that the undertaking will include provision of all non-injurious summaries of any redacted information prepared and provided by the Federal Court.

Analysis

[24] The issues on this motion are whether the Proffer is presumptively protected from disclosure by litigation privilege and, if it is, whether the privilege was waived.

Is the Proffer presumptively protected from disclosure by litigation privilege?

[25] The Proffer was created for Dr. Aljabri to comply with s. 38 of the *CEA*. I first set out the statutory scheme of s. 38 of the *CEA*.

Statutory scheme of s. 38 of the *Canada Evidence Act*

[26] An overview of the statutory scheme of section 38 of the *CEA* is provided in *R. v. Ahmad*, 2011 SCC 6, at paras. 17-21:

> [17] The s. 38 scheme provides a procedure to govern the use and protection of "sensitive" or "potentially injurious information". Those expressions are defined in the Act as follows:

> "potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.
>
> "sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

Section 38 places an obligation on all participants to a legal proceeding, as well as non-participating officials, to notify the Attorney General of the possibility that sensitive or potentially injurious information will be disclosed (s. 38.01).

[18] Within 10 days of receiving notice, the Attorney General must make a decision with respect to disclosure (s. 38.03(3)). Under s. 38.03(1), the Attorney General may authorize disclosure at any time and pursuant to any conditions that are deemed fit. If the party who gave notice — for example, the provincial Crown — wishes to disclose the information at issue, it may enter an agreement with the Attorney General to do so under specified conditions (s. 38.031(1)). If the Attorney General has not authorized the unconditional disclosure of the information and no disclosure agreement has been reached, the disclosure issue may be taken before the Federal Court on the initiative of the Attorney General, the Crown, the accused (if he or she has been made aware of it), or any other person who seeks the disclosure of the protected information (s. 38.04).

[19] A designated judge of the Federal Court then decides whether it is necessary to hold a hearing on the matter and, if so, who should be given notice (s. 38.04(5)). The Attorney General is required to make representations to the court concerning the identity of any persons whose interests may be affected by the disclosure order (s. 38.04(5)(a)). Some of the evidence, the records, and the oral hearing will be ex parte (seen and heard only by the Attorney General and the designated judge), while some will be private (seen and heard by the parties to the proceedings, but not by the public).

[20] The designated judge must first determine if disclosure of the information would be injurious to international relations, national defence, or national security. If the judge is of the view that no such injury would result, he or she may authorize disclosure (s. 38.06(1)). Otherwise, disclosure may be ordered only if the designated judge determines that the public interest in disclosure outweighs the public interest in non-disclosure (s. 38.06(2)). The designated Federal Court judge may also impose conditions on disclosure and order that notification of the decision be given to any person (s. 38.07). It is the Crown's position that the division of responsibility between the Federal Court and the criminal trial courts is premised on the particular expertise of Federal Court judges in determining matters pertaining to national security.

> [21] If a party wishes to contest the Federal Court order, it may be appealed to the Federal Court of Appeal, with the possibility of a further appeal to this Court (s. 38.09).

[27] To make the determination pursuant to s. 38.06, the Federal Court applies a three-part test and must consider whether (i) information is relevant to the proceeding in which disclosure is sought; (ii) if so, whether disclosure of the information would be injurious to international relations, national defence or national security; and (iii) if so, whether the public interest in disclosure outweighs the public interest in non-disclosure. See *Canada (Attorney General) v. Ribic*, 2003 FCA 246, at paras. 17-21.

Legal Principles with respect to litigation privilege

[28] Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. Examples of items to which the privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts. See *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para. 59; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, at para. 19.

[29] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, the Supreme Court of Canada explained how litigation privilege differs from solicitor and client privilege, quoting from R.J. Sharpe (Sharpe J.A. of the Court of Appeal for Ontario) in "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-165:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based

> upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

[30] In *Blank*, at para. 32, the Supreme Court of Canada confirmed that "[c]onfidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege". See also *Lizotte*, at para. 22.

[31] In *Blank*, the Supreme Court of Canada, at para. 27, held that the object of litigation privilege is to ensure the efficacy of the adversarial process, and to achieve this purpose, parties to litigation must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. The Court, at para. 60, held that the dominant purpose standard should apply to determinations of whether litigation privilege applies to documents, observing that the dominant purpose standard appears consistent with the notion that litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The Court held that the dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

[32] The onus is on the party asserting the privilege to establish, with respect to each document in issue, that the dominant purpose for its creation was existing or contemplated litigation. The time at which the dominant purpose for a document's creation is to be assessed is the time when it was created. See the *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125, at paras. 262-264.

Evidence of Dr. Aljabri in relation to the purpose of the Proffer

[33] Both the plaintiffs and Dr. Aljabri rely on the evidence given by Dr. Aljabri in his affidavit filed in response to this motion concerning the purpose for which the Proffer was created.

[34] In his affidavit, Dr. Aljabri deposes:

> 3. My defence in this action involves factual information related to my work as one of the leaders of Saudi Arabia's counter-terrorism and security operations. The relevant operations, programs and projects were often undertaken in conjunction with foreign allies, including CSIS, the CIA, and MI-6. I understand that many of the foreign allies I work with, including Canada, may consider the facts related to my work sensitive from a national security perspective.
>
> 4. I also understand that if I want to disclose, believe I am required to disclose, or think I may disclose any potentially sensitive information in this action, I must notify the Attorney General for Canada ("AGC") pursuant to s. 38 of the *Canada Evidence Act* of that possible disclosure. While I do not understand the particulars of the s. 38 process, I do understand that it involves providing the potentially

> sensitive information to the AGC and then the AGC undertakes a review of that information to determine whether the information can be disclosed in this action. I also understand that the Federal Court can review the AGC's determination(s).
>
> 5. The potentially sensitive information that may be disclosed in this action exists in two sources: (a) contemporaneous documents that were acquired to be disclosed in the litigation; and, (b) my own personal knowledge as a result of the work I undertook while in Saudi Arabia.
>
> 6. In order to provide the AGC with my personal knowledge of events, which knowledge may form part of the evidence in this action, my lawyers drafted a document that has been referred to as the "proffer". The proffer is a comprehensive memorandum that was intended to capture my complete and best recollection of events that may be disclosed in this action.
>
> 7. My lawyers provided the proffer to the AGC for a s. 38 review. The AGC has returned the proffer with redactions that the AGC must have determined were necessary to prevent the disclosure of sensitive information.
>
> 8. The proffer did not exist before this fraud action was commenced. It was prepared by my lawyers in this action for the sole purpose of reducing to writing information I have that may be disclosed in this action so that such information could be reviewed by the AGC.

Has Dr. Aljabri established that the dominant purpose of creation of the Proffer was preparation for litigation?

[35] Dr. Aljabri submits that where s. 38 of the *CEA* applies, participation in the process provided for by s. 38 is an essential part of counsel's preparation for the underlying litigation because the s. 38 process allows counsel to know what evidence is or is not available for use in this litigation. Dr. Aljabri submits that the Proffer was created only for the purpose of preparation for this action through the s. 38 process so that counsel would know what information is or is not available to be put into evidence in the action.

[36] The plaintiffs submit that the Proffer is not protected from disclosure by litigation privilege because it was not created for the dominant purpose of preparing for actual or contemplated litigation within a zone of privacy. The plaintiffs submit that Dr. Aljabri's evidence establishes that the Proffer was prepared solely for the purpose of complying with s. 38 of the *CEA* and, for this purpose, it was to be provided to the AGC in circumstances where Dr. Aljabri knew that it would be shared broadly with various third-party security partners, filed with the Federal Court, and be the subject of submissions and adjudication under the s. 38 regime. The plaintiffs submit that the Proffer was created for a purpose which is opposite to the purpose of creation of a document with an expectation of privacy. They submit that no privilege could exist in such a document.

[37] There is no question that the Proffer was created solely for the purpose of allowing Dr. Aljabri to comply with his statutory obligations under s. 38 of the *CEA*. In order to determine

whether, given this purpose, the condition to the application of litigation privilege (that the Proffer was created for the dominant purpose of preparation for litigation) has been satisfied, it is necessary to consider how s. 38 of the *CEA* relates to the civil action in which litigation privilege has been asserted.

[38] Section 38 of the *CEA* does not apply simply because a person is in possession of "sensitive information" or "potentially injurious information", as those terms are defined in s. 38 of the *CEA*. In the absence of a proceeding in connection with which a person is required to disclose, or expects to disclose or cause the disclosure of, such information, the person has no statutory obligation under s. 38 to give notice in writing to the AGC or to take any other action.

[39] The statutory obligation under s. 38 of the *CEA* arises only where a person, "in connection with a proceeding", is required to disclose, or expects to disclose or cause the disclosure of such information. This is clear from the definition of "participant" in s. 38 ("a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information") and the language of s. 38.01(1) that applies to only to a "participant".

[40] Where, in connection with a proceeding, s. 38.01(1) applies, the statutory process in s. 38 is engaged.

[41] The statutory process in s. 38 of the *CEA* determines what information that is "sensitive information" or "potentially injurious information" may be disclosed "in connection with a proceeding". Section 38 does not otherwise limit the use that a person may make of such information.

[42] When s. 38 of the *CEA* is engaged, the process provided for thereunder becomes integral to the proceeding in respect of which the notice was given. This is so because a litigant who is required to give the s. 38 notice will not know whether relevant information that is subject to the notice can be disclosed in the proceeding until the process under s. 38 has run its course. Until counsel for a litigant who has given the statutorily required notice knows what information may or may not be disclosed in the proceeding, counsel is unable to assess and decide what evidence may be tendered in the proceeding to prove facts that will advance the litigant's interests.

[43] When s. 38 of the *CEA* applies to information that may be disclosed in connection with a proceeding, the statutory process provided for thereunder, including the notification in writing required to be given under s. 38.01(1), must be viewed as a procedural regime applicable to a proceeding, in addition to other procedures under, for example, the *Rules of Civil Procedure*, that leads to a necessary determination of what information that is "sensitive information" or "potentially injurious information" may or may not be disclosed in the proceeding, which determination will affect the evidence that may or may not be tendered to prove relevant facts.

[44] Dr. Aljabri's defence to this action resulted in the engagement of the process under s. 38 of the *CEA*. Dr. Aljabri's evidence that the Proffer was created "for the sole purpose of reducing

to writing the information I have that may be disclosed in this action so that such information could be reviewed by the AGC" must be viewed in the context of this process.

[45] When Dr. Aljabri's evidence is so viewed, I am satisfied that the Proffer was created as a part of a statutory process that is integral to this action. Through this process, Dr. Aljabri and his counsel will know what information may and may not be disclosed in the action. I am satisfied that Dr. Aljabri has discharged his onus of establishing that the Proffer was created for the dominant purpose of preparation for this action. This condition for the application of litigation privilege to the Proffer is met and, where the action is pending, there is a *prima facie* presumption that the Proffer is protected from disclosure.

[46] The fact that Dr. Aljabri notified the AGC in writing in compliance with s. 38.01(1) through the Proffer, a memorandum prepared by his counsel, instead of through some other means, does not remove the litigation privilege that presumptively attaches to the Proffer, where it was created for the dominant purpose of preparation for litigation. The Proffer is presumptively protected from disclosure regardless of the extent, if any, to which its contents include statements which go further than clinical statements of facts. Even if Dr. Aljabri had been self-represented and provided a document to the AGC in compliance with the *CEA* for the dominant purpose of preparation for litigation, the document would be presumptively protected from disclosure by litigation privilege because litigation privilege applies to unrepresented parties. See *Lizotte*, at para. 22.

[47] I am also satisfied that when creation of the Proffer is viewed as an action taken to comply with a statutory process that is an integral to the civil action, the rationale for litigation privilege, that is, protecting the integrity of the adversarial process and maintaining a protected area to facilitate investigation and preparation of a case by the adversarial advocate, applies to the Proffer. See *Lizotte*, at para. 24.

If the Proffer is presumptively protected from disclosure by litigation privilege, has Dr. Aljabri waived the privilege?

[48] The plaintiffs submit that any privilege that could have existed in the Proffer has been waived as a consequence of Dr. Aljabri's litigation conduct.

[49] In *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd*., 1983 CanLII 407 (BC SC), McLachlin J., as she then was, explained, at para. 6, how waiver of privilege is established:

> [6] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter* 1981 CanLII 710 (BC SC), [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

[50] A party is not entitled to attempt to use a document over which privilege is claimed to justify or explain a position or action taken in the litigation while using the privilege as a shield to prevent the other party from testing the justification or explanation. See *United States v. Meng*, 2020 BCSC 1461, at para. 36, citing *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795, at para. 143.

[51] The plaintiffs submit that disclosure of privileged information to individuals outside the protected relationship is a waiver of privilege unless there is a common interest. The plaintiffs submit that if the document over which litigation privilege is claimed is disclosed to a third party with whom there is no common interest and where there is no expectation of confidentiality, the litigation privilege is lost by implied waiver.

[52] The plaintiffs submit that the ACG, to which the Proffer was given, does not share a common interest with Dr. Aljabri, and is adverse in interest to Dr. Aljabri, and that disclosure of the Proffer to the AGC is a waiver of any litigation privilege that may attach to the Proffer. The plaintiffs also submit that any privilege that existed in the Proffer has also been waived through the broad disclosure of the Proffer to third party security partners who are adverse in interest to Dr. Aljabri on the issue of the whether the information in the Proffer should be disclosed. I accept that the AGC and third-party security partners do not share a common interest with Dr. Aljabri.

[53] In support of these submissions, the plaintiffs cite *Meng*, *CNOOC Petroleum North America ULC v. ITP SA*, 2024 ABCA 139, *Lizotte*, *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320, and *Toronto Star Newspapers Ltd. v. Canada*, 2005 CanLII 47737.

[54] In *Meng*, which involved an extradition proceeding, the Attorney General redacted some documents and withheld disclosure of other documents because of privilege claims of various kinds, including solicitor-client privilege, litigation privilege, and public interest privilege. The motion judge, at paras. 35-39, explained the principles that apply to waiver of any of these privileges, and noted that waiver of a privilege may be explicit or implicit. The motion judge, at para. 36, cited the passage from *S. & K. Processors*, at para. 6, quoted above, and confirmed that 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 privilege. The motion judge gave as an example a person 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 subject.

[55] In *CNOOC Petroleum North America ULC v. ITP SA*, 2024 ABCA 139 the Alberta Court of Appeal, at para. 50, held, citing *Lizotte*, at para. 48, that "the voluntary disclosure of a privileged record to an unrelated third party could result in an unintentional loss of the privilege, unless, at a minimum, it was clear that the recipient of the privileged record would maintain its confidentiality". The Alberta Court of Appeal in *CNOOC* did not decide that litigation privilege is automatically lost if the document over which privilege is claimed is disclosed to a third party with whom there is no common interest unless it is clear that the recipient would maintain its confidentiality. The Alberta Court of Appeal, at para. 50, noted that there is no fixed test for when disclosure is inconsistent with maintaining the privilege, and disclosure of the record under legal compulsion is among the factors to be considered.

[56] In *Lizotte*, a self-regulating organization responsible for overseeing the professional conduct of representatives working in the insurance field sought documents from an insurer's claim file in respect of one of its insured over which litigation privilege was asserted. The organization argued that it should not be possible to assert litigation privilege against third parties. The Supreme Court of Canada rejected this submission and, at para. 48 (the paragraph cited by the Alberta Court of Appeal in *CNOOC*), gave reasons justifying its conclusion that litigation privilege can be asserted against anyone, not just against the other party to the litigation. Paragraph 48 of *Lizotte* does not address waiver or loss of privilege asserted against a litigation adversary through disclosure of a document over which privilege is asserted to third parties.

[57] The Supreme Court of Canada in *Lizotte*, at para. 49, also justified its conclusion that litigation privilege can be asserted against anyone by stating that there are cases in which the courts have held that disclosure to a third party of a document covered by litigation privilege could result in a waiver of the privilege as against all. The Court observed that those decisions are based on the assumption that litigation privilege can be asserted against third parties. The Supreme Court of Canada did not address the facts of those cases or the requirements for waiver of litigation privilege.

[58] The significance of the organization's intention to keep the documents confidential arose in *Lizotte* because the organization argued, in the alternative, that litigation privilege cannot be asserted against third-party investigators who have a duty of confidentiality. The Supreme Court of Canada, at para. 50, rejected this argument because, in light of the open-court principle, it was far from certain that documents that would otherwise be protected by litigation privilege would not be disclosed in other proceedings initiated by the organization.

[59] In *Chrusz*, the Court of Appeal addressed issues of litigation privilege in an action concerning a fire loss. The analysis by Carthy J.A. of litigation privilege was adopted by Rosenberg J.A. and was the majority decision on these issues. One issue involved a statement given by a witness to the insurer's lawyer and independent claims adjuster. A copy of the statement was provided to the witness and his lawyer. Carthy J.A. concluded that the statement taken by the insurer's lawyer from the witness is privileged in his hands. Carthy J.A. held, however, that when the witness was given a copy of the statement, he did not acquire a common interest privilege. The witness was merely a witness who was under no threat of litigation and, Carthy J.A. held, the statement in his hands is not privileged.

[60] In his reasons, Carthy J.A. noted that in some circumstances, litigation privilege may be preserved even though the information is shared with a third party. Carthy J.A. quoted with approval passages from a decision of the U.S. Court of Appeal in *United States of America v. American Telephone and Telegraph Company*, 642 F.2d 1285 (1980 S.C.C.A.) at pp. 1299-1300, including passages explaining that "the mere showing of a voluntary disclosure to a third person ... should not suffice in itself for waiver of the work product privilege" and the standard for whether work product privilege was waived is not "so broad as to allow confidential disclosure to any person without waiver of the work product privilege". The U.S. Court of Appeal held, in the passage quoted by Carthy J.A., that the existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product.

[61] Carthy J.A. concluded that even though the witness did not acquire a common interest privilege in the statement because there was no contemplation of litigation by him, he was closely enough aligned with the insurer to protect the insurer against a waiver of the insurer's privilege, and there was nothing inconsistent in the insurer giving a copy of the statement to this witness and maintaining the privilege against the litigation adversary. In *Chrusz*, the disclosure of the witness statement to the witness and his counsel was voluntary.

[62] In *Toronto Star Newspapers*, the application judge addressed whether the respondent, the Crown, could withhold from disclosure to the applicants edits to an Information used to obtain search warrants including references to an investigative report provided to the Crown by a third party for the purpose of being used to instigate or advance a criminal investigation. The application judge assumed, without deciding, that a claim of litigation privilege in general, or common interest privilege in particular, could be made but he did not accept that the party which provided the reports to the Crown and the Crown have a common interest that would support assertion of common interest privilege. With respect to the assertion of litigation privilege more generally, the application judge did not see how privilege could be maintained over documents that were publicly referenced through public announcements and where much of the material edited out of the Information on the basis of privilege and confidentiality, including the substance of the investigations by the investigator, was publicly available. The facts of this case are materially different from the facts on the motion before me, and there is no suggestion that the contents of the Proffer are publicly available.

[63] These cases show that whether disclosure of a document over which litigation privilege is asserted to an outside third party results in loss of the privilege through waiver will depend on the particular circumstances surrounding the disclosure including whether the document was disclosed under legal compulsion, whether third party recipient has a common interest with the disclosing person, and whether the document is disclosed with an expectation of confidentiality.

[64] In considering whether Dr. Aljabri's disclosure of the Proffer to the AGC, outside of a protected relationship, and the disclosure of the Proffer by the AGC to other third parties, resulted in a waiver of litigation privilege, it is important to recognize that unlike solicitor-client privilege, the purpose of which is to protect a relationship, litigation privilege applies for the purpose of ensuring the efficacy of the adversarial process. Confidentiality is not an essential component of litigation privilege. See *Blank*, at paras. 28, 32, and *Lizotte*, at para. 22. The fact that the Proffer was provided by Dr. Aljabri to the AGC and the AGC disclosed the Proffer to other third parties does not amount to a waiver of litigation privilege by Dr. Aljabri over the Proffer unless the predicates to waiver of settlement privilege are present.

[65] The elements upon which implied waiver of litigation privilege is predicated are explained in *S. & K. Processors*. In that case, the defendants produced an expert report to the plaintiffs as provided for by the *Evidence Act*. The plaintiff asked for production of correspondence between representatives of the expert and representatives of the defendants and their legal counsel, and drafts and working papers of the defendants' representatives and the expert. The defendants claimed privilege over the documents. The plaintiffs submitted that any privilege was waived by disclosure of the expert's report. McLachlin J., at para. 10, addressed the elements upon which implied waiver is predicated:

> [10] Notwithstanding the fact that the Evidence Act, s. 11, does not require production of the documents in question, can it be said that in the interests of fairness and consistency the doctrine of waiver requires their disclosure? As pointed out in Wigmore on Evidence, McNaughton revision (1961), vol. 8, pp. 635-36 relied on by Meredith J. in *Rogers v. Hunter*, supra, double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 1979 CanLII 1904 (ON CA), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.), it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[66] On the authority of *S. & K. Processors*, the elements upon which implied waiver is predicated are (i) implied intention to waive litigation privilege including through some manifestation of a voluntary intention to waive privilege, at least to a certain extent, and (ii) fairness and consistency require that the litigation privilege be waived.

[67] McLachlin J. noted, at para. 11, that it can be contended that production of the expert report under the *Evidence Act* is involuntary as compelled by statute and held that, being involuntary, it cannot constitute waiver. McLachlin J. went on to address whether it could be said that in the interests of fairness and consistency, the doctrine of waiver required disclosure of the documents because the expert report had been disclosed to the plaintiffs. McLachlin J. held that if production of the report pursuant to the *Evidence Act* could be said to constitute waiver, it cannot be said to be unfair or inconsistent that the party producing it retain any privilege that is not removed by the *Evidence Act*, and concluded that the privilege attaching to the documents was not waived.

[68] In the lower court decision in *Blank v. Canada (Minister of Justice)*, 2005 FC 1551, the application judge, at para. 41, held, citing *Stevens v. Canada (Prime Minister)* (T.D.), 1997 CanLII 4805 (FC), which cited *S. & K. Processors*, that where a statute requires disclosure of a document, no voluntariness can be said to be present and no implied waiver occurs.

[69] The plaintiffs submit that a statute does not mandate production of a privileged document unless stated in clear and unambiguous language and, therefore, a party cannot produce a privileged document in response to a statutory regime and maintain the privilege. In support of this submission, the plaintiffs rely on *Lizotte*.

[70] In *Lizotte*, the organization which sought production of documents over which litigation privilege was claimed relied on a statutory provision which authorized production of "any ... document" without further precision. The organization argued that the rule on abrogating solicitor-client privilege does not apply to litigation privilege and a legislature may abrogate

litigation privilege by statute without using express language. The Supreme Court of Canada disagreed and held, at para. 64, that litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it. The Court held that the general language of the statute was not sufficient to abrogate litigation privilege.

[71] I disagree that *Lizotte* supports the plaintiffs' submissions. In *Lizotte*, the organization seeking disclosure of documents over which litigation privilege was asserted relied on a statute as authorizing disclosure to it, notwithstanding the assertion of litigation privilege. There was no issue about whether compliance with the statutory mandate would result in a waiver of litigation privilege being asserted over the documents against another person, such as a litigation adversary. On this motion, the plaintiffs do not rely on the *CEA* as authorizing disclosure of the Proffer to them. The principle stated in *Lizotte*, that a statute cannot abrogate litigation privilege without clear and explicit language, does not apply on this motion which involves a different issue, that is, whether disclosure of a document under legal compulsion to a party against which no litigation privilege is asserted results in a waiver of the privilege that is asserted against a litigation adversary.

[72] Further, there is no evidence that Dr. Aljabri disclosed the Proffer to anyone other than the AGC. The fact that the AGC disclosed the Proffer to third parties and *amicus curiae* in the Federal Court proceedings and filed it with the Federal Court, in accordance with the statutory process, does not show that Dr. Aljabri manifested a voluntary intention to waive privilege over the Proffer or that fairness and consistency require that the privilege be waived. I note that s. 38.04(4) of the *CEA* provides that subject to s. 38.04(5)(a.1) (which requires that where the Federal Court is seized of an application, the judge shall, if he or she decides that the application should be made public, make an order to that effect), an application under s. 38 is confidential. This means that although the Proffer was filed with the Federal Court registry, it is not publicly available.

[73] The plaintiffs also submit that Dr. Aljabri has waived any privilege over the Proffer because, they say, he intends to ask this Court to dismiss the action on the basis that he cannot adequately defend himself in light of the refusal of the AGC to authorize disclosure of the information redacted from the Proffer. The plaintiffs submit that Dr. Aljabri cannot rely on the advice received from the AGC and the Federal Court as to what he can and cannot disclose in the action (as reflected in the Proffer) while, at the same time, shielding the Proffer from the plaintiffs and the Court.

[74] There is no pending motion by Dr. Aljabri to stay the action and, therefore, it would be premature for me to rule on whether such a motion, if one is brought, will involve use of the Proffer in such a way as to result in a waiver of litigation privilege.

[75] Section 38.01(1) of the *CEA* compelled Dr. Aljabri to notify the AGC in writing of the possibility of disclosure of information he believes is sensitive information or potentially injurious information. This notification, through the Proffer, engaged the mandatory process under s. 38 of the *CEA*. By complying with the *CEA* by so notifying the AGC and engaging in this mandatory process, Dr. Aljabri cannot be said to have voluntarily disclosed the Proffer. The plaintiffs have not shown an implied intention by Dr. Aljabri to waive litigation privilege,

including through some manifestation of a voluntary intention to waive privilege, at least to a certain extent. This predicate to implied waiver of litigation privilege is absent.

[76] Whether or not a necessary predicate to implied waiver of litigation privilege is implied intention, including the manifestation of a voluntary intention to waive privilege over the document at least to a limited extent, the plaintiffs have also not shown that Dr. Aljabri is using the Proffer in a manner inconsistent with his assertion of litigation privilege, such that it can be said that the privilege is waived as a matter of law, regardless of his intention. There is no evidence that Dr. Aljabri seeks to rely on the Proffer, or even a portion of it, to justify or explain a position taken in the action or as an element of his defence. He undertakes to disclose all material facts from the redacted Proffer. In these circumstances, Dr. Aljabri's provision of the Proffer to the AGC in compliance with his statutory obligation under s. 38.01(1) of the CEA is not inconsistent with maintaining settlement privilege over the Proffer as against the plaintiffs. Fairness and consistency do not require that the presumptive protection of the Proffer from disclosure to the plaintiffs based on the rationale underlying litigation privilege should be lost.

[77] I conclude that the plaintiffs have failed to show that Dr. Aljabri waived the litigation privilege that presumptively applies to the Proffer.

[78] As a result of this conclusion, it is not necessary for me to address Dr. Aljabri's alternative submission that, if it is held that litigation privilege does not apply to the Proffer or has been waived, this Court should exercise discretion to decline to order production of the Proffer.

[79] I conclude by reiterating that Dr. Aljabri has given an undertaking to (i) provide a summary, as detailed as it can be, of all material facts that have not been redacted from the Proffer by the AGC for s. 38 concerns, and (ii) provide all non-injurious summaries of any redacted information prepared and provided by the Federal Court. Compliance with this undertaking will ensure that the plaintiffs are not prejudiced in this action through the withholding from disclosure of material facts that are not redacted from the Proffer.

Disposition

[80] For these reasons, the plaintiffs' motion for (i) a declaration that the Proffer is not subject to privilege or that any such privilege has been waived, (ii) an order directing Dr. Aljabri to produce a copy of the Proffer (as redacted by the AGC) to the plaintiffs is dismissed.

[81] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel (with reasonable page limits) and approved by me.

Cavanagh J.

Date: November 29, 2024