

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thomson v. A.R. Thomson Group*,  
2024 BCSC 2302

Date: 20241217  
Docket: S158569  
Registry: Vancouver

Between:

**Lisa Thomson, L.L.T. Holdings Inc. and 550934 B.C. Ltd.**

Plaintiffs

And

**A.R. Thomson Group**

Defendant

- and -

Docket: S178585  
Registry: Vancouver

Between:

**Lisa Thomson, 550934 British Columbia Ltd. and L.L.T. Holdings Inc.**

Plaintiffs

And

**James Thomson as Executor of the Estate of Allan Thomson**

Defendant

Before: The Honourable Madam Justice Watchuk

## **Ruling - Disclosure Application**

Counsel for the Plaintiffs:

R.M. Morse  
N.M. Vaartnou

Counsel for the Defendants:

T.W. Clifford  
A. Jacobs

Place and Dates of Application within Trial:

Vancouver, B.C.  
January 29 and 30, 2024

Place and Date of Ruling with Written  
Reasons for Judgment to Follow:

Vancouver, B.C.  
January 31, 2024

Place and Date of Judgment:

Vancouver, B.C.  
December 17, 2024

**INTRODUCTION**

[1] The trial of Vancouver Registry Action Nos. S158569 and S178585, heard together, was set for 15 days to commence on January 29, 2024. The trial was subsequently extended to 23 days, with the last day of trial being on May 31, 2024. This decision pertains to the application filed January 11, 2024 by the defendant, A.R. Thomson Group (“ARTG”), seeking orders for the disclosure of documents within the file of Mr. Richard Attisha, who was the former counsel for the plaintiff, Lisa Thomson.

[2] I heard the application on the first two days of trial, January 29 and 30, 2024. On January 31, 2024, I dismissed the application with reasons to follow. These are the reasons for that ruling.

[3] ARTG sought an order for delivery of documents in Mr. Attisha’s file relating to or concerning:

- a) an alleged reinstatement agreement made between Lisa and her father, Al Thomson, in November 2009—an issue at the centre of the action;
- b) advice to Lisa about whether it was in her interest to participate in an action commenced by her ex-husband, Gordon Taylor, regarding their shared company’s withdrawal from ARTG (the “Taylor Action”); and
- c) the preparation of an affidavit of Lisa filed October 12, 2011 in the Taylor Action (the “October 12, 2011 Affidavit”).

(collectively, the “Attisha Documents”).

[4] ARTG also sought a declaration that Lisa has waived privilege over these documents.

[5] ARTG submits that Lisa implicitly waived privilege over the Attisha Documents by putting them in issue through both her affidavit filed in earlier proceedings and her evidence at examination for discovery in this action.

[6] In response, Lisa—on behalf of herself and the plaintiff companies, L.L.T. Holdings and 550934 B.C. Ltd.—argues that ARTG’s application should be

dismissed, as it failed to establish that she waived privilege over the Attisha Documents. Lisa further argues that, regardless of the Court’s findings on waiver, ARTG’s application should be dismissed for failing to follow the procedure set out in the *Supreme Court Civil Rules* and failing to advance any legal basis for document disclosure.

**LISA’S AUGUST 9, 2022 AFFIDAVIT**

[7] On June 24, 2022, ARTG applied to strike Lisa’s claim in this action (the “Application to Strike”) as an abuse of process, arguing that Lisa knowingly gave evidence in other proceedings that was inconsistent with her position in this case. In response, Lisa relied on an extensive explanatory affidavit dated August 9, 2022. Justice Coval, in reasons indexed at 2023 BCSC 1498, dismissed the Application to Strike, relying on the explanatory affidavit to find that ARTG had not established her knowing advancement of irreconcilably contrary positions.

[8] In support of the current application for disclosure, ARTG submits that, in the August 9, 2022 affidavit, Lisa “goes into significant detail concerning Mr. Attisha’s retainer and advice, and attaches as exhibits documents that disclose legal advice she received from and instructions she gave to Mr. Attisha during the Taylor Action”. Specifically, ARTG submits that the August 9, 2022 affidavit:

- a) brought into question whether Mr. Attisha was aware of the alleged reinstatement agreement at the time he was providing advice to the plaintiff concerning the Taylor Action;
- b) attached documents which contain advice from Mr. Attisha to the plaintiff, and instructions from the plaintiff to Mr. Attisha, concerning whether it is in the plaintiff’s interest to participate in the Taylor Action; and
- c) brought into question the preparation of the October 12, 2011 Affidavit (in that the parts inconsistent with the existence of the alleged reinstatement agreement were actually drafted by counsel for ARTG, and not Mr. Attisha).

[9] ARTG submits that the August 9, 2022 affidavit thus brings the Attisha Documents in issue, and that Lisa’s partial disclosure constitutes a waiver of privilege over them.

**EXAMINATION FOR DISCOVERY**

[10] ARTG also submits that Lisa made a number of statements during her examination for discovery that amounted to a waiver of privilege over the Attisha Documents. These include Lisa's statements that Mr. Attisha was aware of the alleged reinstatement agreement, and that Mr. Attisha's letter dated September 24, 2012 ("Mr. Attisha's Letter") seeking a guarantee of Lisa's reinstatement was simply the result of Lisa's instructions to have this existing agreement reduced to writing. ARTG further points to Lisa's statements that the letter's lack of explicit reference to the alleged reinstatement agreement was because the parties—including Mr. Attisha—were already aware of it.

[11] ARTG argues that, in making these statements, Lisa was using privilege as a sword to explain documents and evidence inconsistent with the alleged reinstatement agreement, while also using it as a shield to prevent ARTG from testing the explanation through disclosure.

**THE JANUARY 31, 2024 ORAL RULING**

[12] As noted, on January 31, 2024, I dismissed ARTG's application for disclosure of the Attisha Documents.

[13] Before addressing the arguments regarding Lisa's alleged waiver of solicitor-client privilege in the August 9, 2022 affidavit and examination for discovery, I will address Lisa's submission that ARTG did not follow the proper procedure for document disclosure under R. 7-1 of the *Rules*.

[14] While counsel for ARTG requested some document disclosure in May 2023, this request was only for the contents of Mr. Attisha's file that related to the creation or amendment of Lisa's October 12, 2011 Affidavit. The scope of documents sought in this application is much broader. Further, counsel for Lisa did produce all non-privileged documents that related to the May 2023 demand, after which ARTG failed to bring an application for production of additional documents it still sought to dispute privilege over.

[15] While non-compliance with the *Rules* is not always fatal to an application, these legislated procedures take on extra importance when applications are brought on the first day of trial, as they become critical in “securing the just, speedy and inexpensive determination of a proceeding on its merits” (*Rules*, R. 1-3). With that in mind, I find ARTG’s lack of compliance combined with the timing of their application, while not determinative, weigh against judgment in their favour in this application.

[16] I turn to the primary issue on this application—whether Lisa waived solicitor-client privilege over the Attisha Documents.

[17] The parties agree on the law that applies to waiver of solicitor-client privilege, and I will therefore set out the principles only briefly. Typically, waiver of solicitor-client privilege occurs where the holder of the privilege expresses an intention to waive it. This is referred to as intentional waiver: *Siegerist v. Siegerist*, 2022 BCSC 1427 at para. 24. However, waiver of solicitor-client privilege may also be implied, as set out by Justice Newbury in *Brown v. Clark Wilson LLP*, 2014 BCCA 185:

[30] Subsequent decisions have also made it clear that for waiver to be implied, the privilege-holder must have raised voluntarily and for his or her own benefit the issue of whether and how he or she was influenced by the solicitor's advice; and that his or her state of mind must be material to an issue in the litigation: see, e.g., *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.* - Canada, 2004 BCCA 512 (B.C. C.A.) at paras. 17, 26, citing *Hearn v. Rhay*, 68 F.R.D. 574 (U.S. Dist. Ct. E.D. Wash. 1975), at 581.

[Emphasis added.]

[18] In *United States v. Meng*, 2020 BCSC 1461, Associate Chief Justice Holmes provided further helpful guidance on the circumstances that may amount to implied or implicit waiver:

[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 (B.C. S.C.) 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.

[19] Our Court of Appeal also recently opined on the issue of implied waiver of solicitor-client privilege in *Long v. Red Branch Investments Limited*, 2022 BCCA 293, citing *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471:

[26] Accordingly, to give rise to an implied waiver, it is not enough that the party asserting privilege (1) has put its “state of mind” in issue, as the plaintiff had done in *Soprema* by pleading negligent misrepresentation, or that it (2) had obtained legal advice about the transaction in question, as the plaintiff had done in *Soprema* about the share purchase out of which the claim arose. There is a necessary third element: the party (3) “must voluntarily inject into the litigation legal advice it received or its understanding of the law before waiver can be implied”: *Soprema* at para 49 (emphasis added). See also *Mickelson v Borden Ladner Gervais LLP*, 2017 BCSC 1584 at para 18, discussing *Soprema*’s three requirements, a description with which I agree.

[20] In the August 9, 2022 affidavit, Lisa does reference Mr. Attisha’s Letter in order to explain its purpose and support her opposition to the Application to Strike. However, Lisa does not provide any direct evidence about Mr. Attisha’s advice, or lack thereof, regarding the alleged reinstatement agreement, nor does she state her reliance on Mr. Attisha’s advice regarding the alleged reinstatement agreement. As Lisa states, the fact that Mr. Attisha’s Letter made ARTG question whether Mr. Attisha knew about the alleged reinstatement agreement does not amount to a waiver of privilege. This does not amount to a “voluntary injection” of Mr. Attisha’s advice.

[21] Additionally, the documents attached to the August 9, 2022 affidavit regarding Lisa’s participation in the Taylor Action—that being Exhibits EE and II—primarily contain advice in email exchanges that Lisa received from AI, her brother Jim Thomson, and ARTG’s lawyer, Mr. Fraser, during the course of the Taylor Action, due to the coordinated defence effort between the parties.

[22] Lisa acknowledges, and I agree, that she waived privilege over the contents of those two exhibits when she included them in support of the August 9, 2022 affidavit. However, this does not constitute an implied waiver over all of the Attisha Documents related to Mr. Attisha’s advice on whether Lisa should participate in the Taylor Action. I am satisfied that the extent to which Lisa disclosed Mr. Attisha’s advice was to demonstrate the subsequent advice she received in response from AI, Jim, and Mr. Fraser.

[23] Finally, Lisa did attach documents and make statements in the August 9, 2022 affidavit regarding the preparation of her October 12, 2011 Affidavit. However, these documents again contain the advice she was given by AI, Jim, and ARTG’s counsel at Clark Wilson—not advice from Mr. Attisha.

[24] With respect to Lisa’s statements during examination for discovery, I am also not persuaded that these amounted to an implied waiver of privilege over the Attisha Documents. I agree with Lisa in her submission that her statements to this effect were only in response to questions from ARTG explicitly asking about Mr. Attisha’s advice.

[25] The helpful review of the case law provided by Lisa satisfies me that her responses in these circumstances cannot amount to waiver of solicitor-client privilege due to the nature of questioning on an examination for discovery: *1397225 Ontario Limited v. 0805361 B.C. Ltd.*, 2017 BCSC 1830 at paras. 49–58; *Rob Leone v. Flexity Solutions Inc.*, 2017 ONSC 1536 at paras. 17–19.



**RULING**

[26] The application for document disclosure brought by ARTG is therefore dismissed.

[27] The plaintiffs are awarded costs of this application in any event of the cause.

*“The Honourable Madam Justice Watchuk”*