COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Peak Products Manufacturing Inc. v. Gross,* 2023 BCCA 214

Date: 20230525
Docket: CA48319

Between:

Peak Products Manufacturing Inc., Peak Products International Inc., Peak Innovations Inc., Peak Products America Inc., Peak Products USA Corporation, Peak Rsg Services Inc., Peak Products Corporation, Peak Products Industries Inc., Peak Products Industrial Inc., Mountaintop Holdings Inc., 561885 BC Ltd., Synergize Innovations Inc., West Coast Summit Holdings, Peak Installations Inc., H2Go Installations Inc., Onpoint Compliance Solutions Inc., Superspike Inc., Synergize International Inc., 6191533 Canada Inc., 6251242 Canada Inc., 7260326 Canada Inc., 7259158 Canada Incorporated, 7258356 Canada Inc., 6504558 Canada Inc., Peak Products Pty. Ltd., Synergize Incorporated, and all corporations and entities, wherever situated, captured by The February 1992 Agreement (individually and collectively referred to as the "Peak Group of Companies") and John Anthony Gross aka John Gross

Appellants
(Defendants)

And

Phil Gross

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Dickson
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated May 24, 2022 (*Gross v. Peak Products Manufacturing Inc.*, 2022 BCSC 861, Vancouver Docket S213994).

Counsel for the Appellants: I.G. Nathanson, K.C.
C. Ohama-Darcus

Counsel for the Respondent: W.G. Wharton

Place and Date of Hearing:	Vancouver, British Columbia December 1, 2022
Place and Date of Judgment:	Vancouver, British Columbia May 25, 2023

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Grauer

Summary:

The appellants appeal the dismissal of their application for a declaration that the respondent impliedly waived solicitor-client privilege by relying on the existence of conditional instructions to sue to advance the defence of absolute privilege in defending against a counterclaim alleging defamation and abuse of process. Held: Appeal dismissed. A privilege-holder does not voluntarily make their own understanding of their legal position relevant in litigation where absolute privilege is a material issue, and impliedly waive solicitor-client privilege, merely by asserting the privilege and stating as a matter of fact that it applies because an impugned statement was made when there were conditional instructions to sue. Further, since the respondent is not relying on the content of his conditional instructions to explain or justify his conduct, in relying on solicitor-client privilege to prevent their disclosure he is not seeking to use the privilege as both a sword and a shield.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This appeal concerns the test for implied waiver of solicitor-client privilege and its application when a litigant claims an impugned statement was made on an occasion of absolute privilege. The underlying litigation involves a dispute between two brothers, Phil Gross Jr. and John Gross, as well as a group of companies controlled by John. Because the brothers share the same last name, I will refer to them by their first names. I will refer to the corporate defendants as the Peak Group.

[2] In 2021, Phil commenced an action against John and the Peak Group to enforce an asset sharing agreement that he alleges he and John concluded in 1992. Before commencing the action, he sent two pre-litigation letters: first, a demand letter to John; second, a letter to the registered and records office of the Peak Group enclosing the demand letter and an unfiled notice of civil claim that referred to criminal charges involving John (the “Draft Claim”). Two weeks later, Phil filed a notice of civil claim that did not include express reference to criminal charges (the “Filed Claim”). Shortly thereafter, John and the Peak Group filed a counterclaim alleging defamation and abuse of process on the basis that some of the statements made in the letters and Draft Claim were false and amounted to an attempt to extort funds in return for not filing the Draft Claim.

[3] Phil applied to have the counterclaim struck on the basis that the impugned statements were made to give notice of the impending litigation, and were protected by absolute privilege. To support this defence, Phil asserted on the strike application that his plea of absolute privilege was supported by the "objective patent facts and circumstances". Among these, he pleaded, was that "[a]t the time of the [letter's] distribution, there were already conditional instructions to sue as demonstrated by the draft [notice of civil claim]". John and Peak Group took the position that by this assertion of fact, Phil impliedly waived solicitor-client privilege. They argued that by relying on the statement of conditional instructions to advance the privilege defence, the applicability of which was a material issue, Phil voluntarily put his state of mind in issue. They maintained that unless solicitor-client privilege was waived he would have an unfair litigation advantage. Justice MacDonald disagreed and dismissed their application for declaratory relief.

[4] John and the Peak Group appeal the dismissal of their application. In their submission, the judge erred in concluding that Phil did not impliedly waive solicitor-client privilege because he did not put his state of mind in issue by referring to the conditional instructions to sue.

[5] In my view, the judge made no error in reaching her conclusion. On the contrary, she correctly identified and applied the test for implied waiver of solicitor-client privilege bearing in mind the context in which the statement of conditional instructions to sue was made. A party does not put their state of mind in issue and waive solicitor-client privilege merely by asserting a legal position and stating that they instructed counsel or received legal advice in order to advance a claim or defence in the course of litigation. However, depending on the issues for determination, they may do so by relying on their own understanding of their legal position or the legal advice they received. In this case, Phil did neither by asserting and relying on the existence of conditional instructions to sue when he made the impugned statements in order to advance the defence of absolute privilege.

[6] For these reasons and those that follow, I would dismiss the appeal.

Background

[7] Phil and John have been estranged since 1996. Prior to their estrangement, they worked together in a business that manufactured and sold building products.

[8] On March 29, 2021, counsel for Phil sent a demand letter to John alleging that they made an asset sharing agreement in February 1992 and seeking its enforcement. The demand letter provided:

> We remind you of the agreement made in February 1992, said agreement made between yourself and Phil Gross, Jr. as was memorialized by Shawn Hatch in which it was agreed, among other things, that you and Phil Gross Jr. had been involved with various companies in the business of manufacturing and supplying building products and that any interest in future companies in the business of manufacturing and supplying building products would be held for the other party as a one-half interest therein for the benefit of the other party.
>
> We are now seeking to have the shares of the Peak Group of Companies distributed in the amount of one half of the shares to Phil Gross Jr.
>
> As the Peak Group of Companies are clearly captured by the agreement, please advise of the steps that will be taken to transfer to Phil Gross Jr. one-half of the shares of the Peak Group of Companies.
>
> If we do not hear from you in short order, we will be taking the legal steps necessary to enforce the agreement.

[9] John did not respond to the demand letter.

[10] On April 8, 2021, counsel for Phil sent a letter to Farris LLP, which is the registered and records office of the Peak Group. The letter enclosed a copy of the demand letter and the Draft Claim, which named John and the Peak Group as defendants. The Draft Claim included references to the alleged February 1992 asset sharing agreement and various criminal charges and processes, including a 1994 “44 Count Criminal Fraud Indictment” involving John and others. In the Draft Claim, Phil sought various forms of relief against the Peak Group, including the appointment of a receiver/manager, an injunction restraining them from disposing of assets or withdrawing funds from bank accounts, and an order for partition and sale.

[11] In the April 8 letter to Farris LLP, Phil’s counsel wrote:

> We enclose an unfiled Notice of Civil Claim in the matter of Phil Gross v. John Gross et al. Please forward the unfiled Notice of Civil Claim to the Directors of the Defendant corporations.
>
> In the event that we do not hear from the Defendants by Thursday, April 15, 2021, we will be filing the attached Notice of Civil Claim in the British Columbia Supreme Court.

[12] On April 22, 2021, Phil filed a notice of civil claim in the underlying action. Unlike the Draft Claim, the Filed Claim did not expressly refer to the 1994 criminal charges and processes involving John. In the Filed Claim, Phil sought 50% of the shares in the Peak Group, injunctive relief against John, the Peak Group and others, and the appointment of a receiver/manager.

[13] On September 21, 2021, Phil filed an amended notice of civil claim.

[14] On October 27, 2021, John and the Peak Group filed a response to the amended notice of civil claim and a counterclaim in which they alleged, among other things, that:

(1) sending the pre-litigation letters and enclosures constituted an abuse of process because they wrongfully interfered with the contractual relationships between John and the Peak Group and were an unlawful attempt to extort funds; and

(2) the Draft Claim sent to Farris LLP with the April 8 letter contained defamatory statements concerning John.

[15] On November 10, 2021, Phil filed a response to the counterclaim, together with an application under *Rules* 9-5 and 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 to strike the counterclaim and certain paragraphs of the response related to the abuse of process and defamation claims. In both, he asserted that the impugned statements are not actionable because they were made in the course of judicial proceedings, and are protected by absolute privilege.

[16] Phil relied on *Peak Innovations Inc. v. Pacific Rim Brackets Ltd.*, 2009 BCSC 1034 in support of his position with respect to absolute privilege. In *Peak*

Innovations, Justice Groves found the "objective patent facts" of the case were that a cease and desist letter concerning an alleged infringement of intellectual property rights "was written and delivered on an occasion of absolute privilege": at para. 63. Similarly, Phil asserted on the strike application that the "objective and patent facts and circumstances" of this case were that the allegations in the letters and enclosures are sufficiently related to the pleadings, and that "[a]t the time of the [letter's] distribution, there were already conditional instructions to sue as demonstrated by the draft [notice of civil claim]".

[17] On November 30, 2021, John and the Peak Group filed a cross-application seeking a declaration that Phil had waived solicitor-client privilege with respect to (1) any instructions to counsel concerning the advancement of his claim against John and the Peak Group prior to April 22, 2021; and (2) the purpose of sending the March 29 and April 8, 2021 letters. In particular, John and the Peak Group contended that Phil waived solicitor-client privilege because he put his state of mind in issue by relying on the assertion that "[a]t the time of the [letter's] distribution, there were already conditional instructions to sue" to defend himself against the counterclaim.

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[18] The judge dismissed all of the applications. Although only the dismissal of the application for declaratory relief is under appeal, I will begin by summarizing the judge's reasons for dismissing Phil's applications because they provide useful context for understanding why she concluded that he did not impliedly waive solicitor-client privilege.

Application to Strike and Summary Judgment

[19] After setting out the procedural history and positions of the parties, the judge outlined the requirements of *Rules* 9-5 and 9-6. Then she discussed the defence of absolute privilege.

[20] The judge explained that absolute privilege "attaches to any statements made by lawyers, judges and witnesses in the course of judicial proceedings", including communications made in the course of the inquiry with respect to, or in preparation for, judicial proceedings: at para. 38, citing *Duncan v. Lessing*, 2018 BCCA 9 at para. 47 and *Peak Innovations* at paras. 24–28. She also explained that absolute privilege is located in the law of defamation, is intended to ensure that litigants and their counsel are not impeded in making statements they consider appropriate, and a "judicial proceeding is a protected occasion and attaches absolute privilege to any statements made on such an occasion": at para. 40, citing *Duncan* at paras. 6, 54. Accordingly, she observed, the question was "whether the two Letters at issue, with the attached draft notice of civil claim, were written and delivered on an occasion of absolute privilege": at para. 43.

[21] In addressing that question, the judge distinguished *Peak Innovations*, where Justice Groves dismissed an action for defamation and related causes of action based on the doctrine of absolute privilege. In particular, she stated, *Peak Innovations* was distinguishable because it involved a summary trial decided on actual evidence, whereas this case involved an application to strike the counterclaim.

[22] The judge went on to conclude that the counterclaim was not bound to fail for the following reasons:

1. It was not clear whether the impugned statements in the April 8 letter and Draft Claim fall under the doctrine of absolute privilege, given that the mere possibility of future proceedings is not enough to ground a claim for absolute privilege;

2. John and the Peak Group alleged all three elements of the tort of abuse of process (a collateral and improper purpose outside the administration of the law; an overt act in furtherance of the illegitimate purpose; and damages resulting from the wrongful use of the legal process), which may not require prior litigation;

3. Absolute privilege would only apply if there is some nexus between the impugned statements in the April 8 letter and the Draft Claim, on the one hand, and the Filed Claim, on the other. Although the Draft Claim and the Filed Claim are largely the same, it was not readily apparent that the impugned statements regarding criminal charges are sufficiently related to the objects of the litigation, which concerns an alleged breach of contract.

4. While defamatory statements are covered by absolute privilege, there is an unsettled question of law as to whether that doctrine applies to the tort of abuse of process.

[23] Based on these considerations, the judge was not persuaded it was plain and obvious that the counterclaim and paragraphs of the response to amended notice of civil claim in question were bound to fail, and she dismissed the application to strike them. She also declined to grant summary judgment because there were genuine triable issues as to whether the conditional instructions to sue were sufficient to meet the test for absolute privilege and whether the doctrine of absolute privilege applies to the tort of abuse of process. In her view, those questions "are best answered at trial, where the parties may adduce evidence and make submissions": at para. 71.

[24] After dismissing Phil's applications, the judge turned to the question of present relevance, namely, whether Phil impliedly waived solicitor-client privilege when he asserted that "[a]t the time of the [letter's] distribution, there were already conditional instructions to sue as demonstrated by the [draft notice of civil claim]" to advance the defence of absolute privilege.

Waiver of Privilege

[25] The judge began this section of her reasons by setting out the precise nature of the declaration sought by John and the Peak Group. In particular, she noted, they sought a declaration that Phil had waived solicitor-client privilege with respect to i) any instructions to counsel concerning the advancement of his claim prior to April 22, 2021, and ii) the purpose for sending the March 29 and April 8, 2021 letters. Then she summarised the positions of the parties on the application.

[26] Specifically, the judge stated, John and the Peak Group argued that para. 22(b) of Phil's strike application constituted a waiver of solicitor-client privilege because, having "voluntarily disclosed its instructions in an attempt to establish the defence of absolute privilege", he "cannot both seek to justify his reliance on absolute privilege based on his instructions while at the same time sheltering himself from disclosing those instructions", which would "prevent [them] from testing the explanation provided": at para. 77. She also noted Phil's argument that there was no voluntary waiver of privilege, lawyers "frequently refer to the fact that they have received instructions", and the statement of conditional instructions, which was substantially same as the statement at issue in *Peak Innovations*, "was no more than that obvious fact": at paras. 78–79.

[27] Next, the judge reviewed the salient legal principles with respect to solicitor-client privilege and implied waiver. In doing so, she noted that solicitor-client privilege: is fundamental to the Canadian legal system and has evolved into a substantive rule of law; must be as close to absolute as possible to ensure public confidence in the legal system; and ought not to be waived unless the documents over which solicitor-client privilege is claimed are material to an issue before the court: at paras. 80–82, citing *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at para. 30, leave to appeal ref'd (S.C.C.); *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at paras. 29, 50, 53; *Mayer v. Mayer*, 2012 BCCA 77 at para. 178*; Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at para. 20; *Kasian Estate v. Kasian*, 2021 BCCA 273 at para. 52.

[28] Citing *Soprema*, the judge observed that solicitor-client privilege will be deemed to be impliedly waived when a party places their state of mind in issue, for example by referring to legal advice which helped them to form their state of mind on a matter material to the claim: at para. 83. She also observed that solicitor-client privilege will be considered waived where a party makes its state of mind material in a way that would confer an unfair litigation advantage on the claiming party if privilege is enforced or fairness and consistency require a waiver: at para. 86. However, she noted, there is a distinction between denying an allegation and putting

state of mind in issue. In particular, a "mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege": at para. 87, citing *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada*, 2004 BCCA 512 at para. 19.

[29] The judge then emphasized two key points that led her to conclude Phil did not impliedly waive solicitor-client privilege by referring to the conditional instructions to sue on the strike application. First, she stated, Phil relied on the Draft Claim, which was "largely the same as" the Filed Claim, and not on his state of mind. In other words, she found that the statement of conditional instructions did not engage Phil's state of mind. Second, she stated, solicitor-client privilege is not to be lightly abrogated.

> [90] I am not persuaded that the plaintiff simply referring to conditional instructions, without more, is sufficient to waive solicitor-client privilege. I emphasize two points. First, I do not agree that the Instructions Statement engages the plaintiff's state of mind. The language in the Instructions Statement is: "[a]t the time of the letters distribution there were already conditional instructions to sue as demonstrated by the draft NOCC" (emphasis added). As such, the plaintiff is relying on the draft notice of civil claim, not his state of mind.
>
> [91] The defendants argue that I cannot rely on the draft notice of civil claim because it was never filed. That would be an effective argument if the plaintiff had never filed a notice of civil claim. However, here, a notice of civil claim that was largely the same as the draft notice of civil claim attached to the April 8, 2021 Letter was filed.
>
> [92] Second, the law is clear that solicitor-client privilege is not to be lightly abrogated. If reference to instructions alone was sufficient to open a lawyer's file, the notion of solicitor-client privilege would be significantly undermined. As Master Baker held in *Concord Pacific Acquisitions Inc. v. Hong Leong Oei*, 2016 BCSC 1054 at para. 16:
>
> > [16] … [W]hen counsel says "I was instructed to prepare a counter-proposal" that is insufficient to waive privilege. But when counsel goes beyond that and avers to the reasoning (be it the solicitor's thinking or the client's) it amounts … to entering the mind of the client and in my respectful view [that] waives privilege…
>
> [93] In the present circumstances, the plaintiff's state of mind was not put into play. There was nothing in the statement referring to the plaintiff's reliance on legal advice. Rather, the plaintiff relied on the attached draft notice of civil claim to support its claim that there were conditional instructions.
>
> [Emphasis in original.]

[30] The judge acknowledged the defendants' argument that fairness required her to find Phil had waived solicitor-client privilege. She also acknowledged that the conditional instructions to sue related to whether the impugned statements in the letters and Draft Claim were covered by absolute privilege, which was a matter of substance. Nevertheless, she was not persuaded that Phil impliedly waived solicitor-client privilege by referring to the conditional instructions to sue:

> [95] Counsel for the defendants argues this is a question of fairness. The plaintiff has raised the issue of instructions, putting his state of mind in play, and if counsel is unable to examine the plaintiff, the plaintiff will have an unfair litigation advantage. However, I find that the plaintiff did not place his state of mind before this Court. As such, there is no unfair litigation advantage.
>
> [96] I accept that the conditional instructions at issue here speak to a matter of substance in this case: whether the pre-litigation communications were captured by absolute privilege. However, based on a strict interpretation of solicitor-client privilege waiver, I find that simply referring to conditional instructions in the notice of application is insufficient to waive the privilege. I agree with counsel for the plaintiff that if a simple reference to having instructions could operate to waive privilege it would be difficult for counsel to ever communicate with the opposing side.

[31] Based on the foregoing analysis, the judge dismissed the application for declaratory relief.

Issues on Appeal

[32] John and the Peak Group submit the judge erred in law in concluding that Phil did not impliedly waive solicitor-client privilege because his reference to conditional instructions to sue did not put his state of mind in issue. Specifically, they submit, she erred by:

(a) holding that nothing in the statement of conditional instructions to sue referred to Phil's reliance on legal advice;

(b) limiting her consideration of waiver of solicitor-client privilege to the language of the statement of conditional instructions without regard to the context in which that statement was made; and

(c) failing to consider consistency and fairness in her analysis of implied waiver.

[33] In the alternative, John and the Peak Group submit the judge erred by concluding that Phil did not waive solicitor-client privilege when he voluntarily introduced the conditional instructions to support his application to strike the counterclaim and sought to use confidentiality as a sword rather than as a shield.

[34] Phil responds that nothing in his statement that there were "conditional instructions to sue as demonstrated by the draft NOCC" engaged his state of mind or voluntarily injected the legal advice he received or his understanding of his legal position into the litigation. Nor, he submits, did fairness and consistency require the judge to find a waiver of solicitor-client privilege.

Discussion

Standard of Review

[35] According to Phil, the applicable standard of review is palpable and overriding error because John and the Peak Group largely allege factual errors and contest the judge's findings as to whether his state of mind was put in issue and whether there was any reference to legal advice. In support, he cites *Mayer* at para. 188 for the proposition that "whether there has been an implied waiver of privilege is a question of mixed fact and law, reviewable on a standard of palpable and overriding error".

[36] According to John and the Peak Group, the applicable standard of review is correctness because the central issue is whether the judge identified and applied the test for implied waiver of solicitor-client privilege correctly. In support, they cite *Soprema* at para. 16 for the proposition that whether a judge correctly identified and applied the test for implied waiver of privilege is a question of law to be evaluated on a standard of correctness.

[37] I agree with John and the Peak Group. The applicable standard of review on this appeal is correctness. Both parties accept that the judge correctly identified the test for implied waiver of solicitor-client privilege. The central issue is whether she

correctly applied the test in circumstances where the privilege-holding party asserted that there were conditional instructions to sue to advance the defence of absolute privilege. This is an extricable question of law.

Implied Waiver of Solicitor-Client Privilege

[38] As the judge recognized, the bright-line test for determining when a party has impliedly waived solicitor-client privilege in the course of litigation by making their state of mind an issue is articulated in *Soprema* and *H.M.B. Holdings*. Drawing on those authorities, Justice Grauer explained in *Long v. Red Branch Investments Limited*, 2022 BCCA 293 that, in addition to putting state of mind in issue or obtaining legal advice regarding a relevant transaction, a party asserting privilege "must voluntarily inject into the litigation legal advice it received or its understanding of the law" for a waiver to be implied: at para. 26, citing *Soprema* at para. 49 (emphasis added by Grauer J.A.). The voluntary injection may arise from the pleadings, evidence or argument asserted by the privilege-holding party: *Long* at para. 27, citing *H.M.B. Holdings* at para. 47. The "state of mind" thus injected must be material to an issue in the litigation: *Brown v. Clark Wilson LLP*, 2014 BCCA 185 at para. 30; *Doman* at paras. 27–31; *Soprema* at paras. 29, 33–48.

[39] In addressing questions of implied waiver, this Court has repeatedly emphasized the fundamental importance of the right to communicate in confidence with counsel. For example, in *Doman*, Justice Smith affirmed that solicitor-client privilege will not be abrogated lightly and will only be considered waived "when a party makes its state of mind material to its claim or its defence in such a way that to enforce the privilege would be to confer an unfair litigation advantage on the party claiming [the privilege]". In other words, he stated, quoting from *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.), a privilege-holder may impliedly waive solicitor-client privilege in the absence of an intention to waive, but a waiver will only be implied where fairness and consistency so require: *Doman* at para. 12, citing *S. & K. Processors* at 220–221.

[40] In *Soprema*, Justice Harris articulated the test for determining when a party has impliedly waived solicitor-client privilege by making their state of mind a material issue in the context of an action for negligent misrepresentation. Given the nature of that claim, the plaintiff's "state of mind" was an issue in the litigation because it had to prove that it relied in fact and relied reasonably on an alleged misrepresentation. The plaintiff had apparently received legal advice regarding the transaction in question, but it did not rely on that advice to show reasonable reliance on the misrepresentation. In the circumstances, Justice Harris explained, it had not "in this sense, voluntarily made its understanding of its legal position a material issue in the litigation. Nonetheless, the legal advice the plaintiff received may be relevant to its 'state of mind' because it bears on the question whether the reliance was reasonable": at para. 2 (emphasis in original).

[41] In conducting his analysis, Justice Harris reviewed the underlying principles and leading authorities on implied waiver of solicitor-client privilege. In doing so, he described some of the context-dependent ways in which a party may voluntarily make their own understanding of the law or reliance on legal advice received a material issue in litigation and thus waive solicitor-client privilege:

> [28] … Parties may expressly raise reliance on legal advice they received as a justification or an excuse: see e.g., *R. v. Campbell,* [1999] 1 S.C.R. 565. They may assert misconduct or incompetence of their legal advisers (see e.g., *R. v. Dunbar,* [1982] O.J. No. 581 at paras. 68-72, 68 C.C.C. (2d) 13 (C.A.)), dispute instructions (see e.g., *Newman v. Nemes,* [1978] O.J. No. 3101, 8 C.P.C. 229 (Ont. H.C.J.)), or seek to justify mistakes in affidavits as made by counsel (see e.g., *Souter v. 375561 B.C. Ltd.,* [1995] B.C.J. No. 2265, 130 D.L.R. (4th) 81 (C.A.)). In other cases, a party may make a deliberate partial disclosure of a privileged communication and fairness and consistency will compel waiver over the entire communication. One must be cautious, therefore, in treating statements of principle articulated in one context as applying in another, without regard to the legal principles inherent in that statement of principle. Indeed, on my review of the cases, there is a weighty argument that underlying the reasoning in those cases is the view that a party will impliedly waive privilege only if it has voluntarily put in issue its understanding of its legal position. It is in those circumstances that it would be inconsistent with the conduct of the party to maintain privilege and unfair to do so, because in those circumstances maintaining privilege would indeed confer an "unfair" litigation advantage.

[42] However, Justice Harris stated, sometimes waiver will not be implied because a privilege-holder's understanding of their legal position or the legal advice they received is not material to the issues joined between the parties. For example, he noted, in *Doman*, Justice Smith explained that *Pax Management Ltd. v. C.I.B.C.* (1987), 14 B.C.L.R. (2d) 257 (C.A.), turned on the proposition that what was in issue were questions of fact about the truth of certain representations, and any legal advice received would have been irrelevant to that issue. Similarly, Justice Harris remarked, "it may well be that much of the result in *Doman* turned on this Court's appreciation that Doman's understanding of its legal position, based on the advice it had received, was not material to the issues in that litigation": *Soprema* at para. 29.

[43] In *Doman*, Justice Smith affirmed that "a mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege". He also quoted from *Pax Management*, where he noted Justice Wallace held that by denying the plaintiffs' allegations of fraudulent misrepresentation and pleading that its officials' representations were true, the bank did not impliedly waive solicitor-client privilege because it "had no alternative but to deny the allegations" and it did not alter the plaintiffs' position in the litigation by doing so. As Justice Smith explained, this differed markedly from the affirmatively pleaded allegation in *Rogers v. Bank of Montreal* (1985), 62 B.C.L.R. 387 (C.A.), where the bank made its mental state a material fact by pleading that it relied on the receiver's advice as to its legal position: *Doman* at paras. 19–20.

[44] After discussing *Doman* and other authorities, Justice Harris went on in *Soprema* to emphasize that solicitor-client privilege must be as close to absolute as possible, must only yield in clearly defined circumstances, and does not involve a case-by-case balancing of interests: at 50. Furthermore, he observed, where legal advice may have influenced a party's state of mind on a material issue upholding solicitor-client privilege will inevitably confer a litigation advantage by denying the opposing party access to relevant information. However, that advantage is not necessarily unfair. Nor, he stated, is maintaining solicitor-client privilege inconsistent with the conduct of a privilege-holding party where they do not rely on legal advice

they received to justify their conduct while also shielding that legal advice from disclosure to the opposing party:

> [53] Where legal advice may have influenced a party's "state of mind" on a material issue, it is inevitable that upholding the privilege will confer a litigation advantage on the party claiming it because the other would be denied access to relevant information about the opposing party's state of mind. One might think that this is an inevitable result of recognizing and upholding claims of solicitor-client privilege because part of the point of privilege is to protect from disclosure communications which are otherwise material and relevant. But it does not follow from this that that litigation advantage is "unfair". I do not think one can properly describe a litigation advantage "unfair" when it results from the recognition and protection of a fundamentally important principle in the legal system. Furthermore, protecting privilege in these circumstances does not raise an issue of inconsistency because the party asserting the privilege is not relying on the advice it received to justify its conduct at the same time as it shields that advice from disclosure.

Did Phil put his state of mind in issue by referring to the conditional instructions to sue?

[45] John and the Peak Group contend that the judge erred in concluding Phil did not put his state of mind in issue when he referred to the conditional instructions to sue and relied on that statement to advance the defence of absolute privilege. In their submission, she took an overly narrow view of the law respecting implied waiver of privilege by limiting her consideration of Phil's state of mind to claims that he relied on legal advice and finding that he did not waive solicitor-client privilege because he did not make such a claim. While they concede that Phil did not refer to reliance on legal advice, they say that reliance on legal advice is not required to waive privilege under the *Soprema* test. Rather, they say, the *Soprema* test also extends to circumstances in which a party "voluntarily injects its understanding of its legal position" as a material issue into the litigation.

[46] However, John and the Peak Group say, the judge applied the *Soprema* test in this case as if reliance on legal advice is required to support a finding of implied waiver of solicitor-client privilege. In particular, they say, she failed to consider and address whether Phil's statement that there were conditional instructions to sue when the letters and Draft Claim were distributed implied his understanding of his

legal position, upon which he relied to defeat the abuse of process claim. In their submission, by failing to deal with this element of the *Soprema* test for implied waiver, the judge incorrectly applied the test.

[47] In support of their submission, John and the Peak Group emphasize that reference to the legal advice a party received is not always required to waive solicitor-client privilege where the party refers to the presence or absence of instructions to counsel. For example, they note, in *Transportaction Lease Systems Inc. v. Virdi et. al.*, 2007 BCSC 132, privilege was waived where a party denied that he gave certain instructions to counsel. In addition, as is clear from the reference to *Souter v. 375561 B.C. Ltd.*, [1995] B.C.J. No. 2265 (C.A.) at para. 28 of *Soprema* (quoted above), a party can waive privilege by putting the state of their instructions to counsel in issue. In such circumstances, they say, while the instruction provided may not disclose the legal advice received, it can engage the party's understanding of their legal position.

[48] According to John and the Peak Group, Phil put his state of mind in issue by referring to the conditional instructions to sue because he voluntarily injected his implicit understanding of his legal position into the litigation and relied on the statement of conditional instructions to advance the absolute privilege defence, which the judge correctly recognized as a material issue. In other words, they say, Phil relied on his implicit understanding of his legal position, which under *Soprema* amounts to the same thing as relying on legal advice. Moreover, he did so where the conditional instructions "speak to a matter of substance in this case: whether the pre-litigation communications were captured by absolute privilege": reasons at para. 96. Further, in presenting the conditional instructions as a "patent fact", Phil sought to fall directly within *Peak Innovations* and enable his counsel to argue that the counterclaim should be dismissed based on the defence of absolute privilege. In their submission, this combination of factors established a clear nexus between Phil's statement of conditional instructions and his understanding of his legal position.

[49] Given the foregoing factors, John and the Peak Group argue that unless solicitor-client privilege is impliedly waived to the modest extent they seek, Phil will receive an unfair litigation advantage. This is so, they argue, because otherwise they will not be permitted to test the content of the conditional instructions, which will be an issue at trial with respect to whether the impugned statements were made on an occasion of absolute privilege. While they concede that the Draft Claim may support Phil's claim that there were conditional instructions to sue at the material time, they emphasize the Draft Claim is not the instructions, which they say Phil voluntarily injected into the litigation to support his absolute privilege argument. Accordingly, they argue, they should be able to test those instructions and Phil's purpose for making the impugned statements, which is manifestly relevant to their abuse of process claim.

[50] In addition, John and the Peak Group contend, the judge erred further by only considering the language of the statement of conditional instructions without regard to the context in which Phil made the statement. This is apparent, they say, from her remarks that "[i]f reference to instructions alone was sufficient to open a lawyer's file, the notion of solicitor-client privilege would be significantly undermined" and "simply referring to conditional instructions in the notice of application is insufficient to waive [solicitor-client] privilege": reasons at paras. 92, 96. While they accept that generally speaking those remarks are accurate, they say that they reveal the judge ignored the overall context in which Phil made the statement of conditional instructions, which was significant because the Draft Claim was never filed and the statement represented the basis of their counterclaim for abuse of process. Bearing in mind this context, they repeat that by stating there were already conditional instructions to sue when the Draft Claim was sent, Phil made his state of mind material to the absolute privilege defence and relied on it as a basis for his motion to strike.

[51] In advancing this submission, John and the Peak Group emphasize several contextual factors they say the judge should have considered, but did not, when deciding whether Phil voluntarily made his state of mind an issue. These include the multiple references to criminal charges in the Draft Claim that were missing from the

Filed Claim, the absence of any explanation for the differences between the two, and the draconian remedies Phil sought against the companies, which were not parties to the asset sharing agreement that he alleged. Based on this unusual factual matrix, they submit that the letter and Draft Claim were an attempt to cause the companies' directors to exert pressure on John as a means of unlawfully extorting him to settle to avoid its filing. However, they say, in holding that Phil was relying on the Draft Claim, not his state of mind, the judge failed to consider these important contextual factors, and she failed to interpret the statement of conditional instructions correctly.

[52] Finally, John and the Peak Group contend that the judge erred by failing to consider principles of consistency and fairness. Given that Phil placed his state of mind in issue by relying on the conditional instructions to sue, they say, the judge should have considered whether he would receive an unfair litigation advantage in the absence of an implied waiver of solicitor-client privilege. However, she refused to do so, stating that "… I find that the plaintiff did not place his state of mind before this Court. As such, there is no unfair litigation advantage": at para. 95.

[53] I am not persuaded by any of these submissions.

[54] First, I do not accept that the judge applied the *Soprema* test as if reliance on legal advice is required to support a finding of implied waiver of solicitor-client privilege. In my view it is clear from her reasons, read as a whole, that she fully recognized and applied all aspects of the *Soprema* test in determining that Phil did not make his state of mind material such that enforcing solicitor-client privilege would be inconsistent or unfair. In doing so, she noted that Phil did not refer to or rely on legal advice, which she correctly characterized as one example of how a privilege-holder can make their state of mind material and thus impliedly waive privilege: at paras. 83, 93. However, she did not limit her analysis to that single aspect of the *Soprema* test.

[55] Nor did the judge only consider the language of the statement of conditional instructions without regard to the context in which Phil made the statement. On the

contrary, she expressly referred to the contextual factors that John and the Peak Group identify and argue that she ignored. However, despite the presence of those factors, the judge was not persuaded that Phil made his state of mind material to the defence of absolute privilege by stating that "[a]t the time of the [letter's] distribution, there were already conditional instructions to sue as demonstrated by the draft [notice of civil claim]".

[56] In my view, the judge was correct.

[57] In reaching this conclusion, I accept that Phil relied on the existence of the conditional instructions to sue to advance the defence of absolute privilege. In other words, I accept that Phil asserted as a fact that his counsel had conditional instructions to sue when the letters and Draft Claim were distributed and that he relied on that assertion to support his argument that the impugned statements were made on an occasion of absolute privilege. Importantly, however, he did not rely on the content of the conditional instructions or his own understanding of his legal position, implicit or otherwise, to establish the nature of the occasion in question. More specifically, he did not rely on the content of the instructions to establish that the impugned statements were made on an occasion of absolute privilege because they were closely connected to an impending judicial proceeding: see *Peak Innovations* at para. 31, quoting *Dingwall v. Lax et al* (1988), 63 O.R. (2d) 336 at para. 16 (S.C.). That was the salient issue joined between the parties. With respect to that issue, as the judge found, Phil relied on the Draft Claim and its similarity to the Filed Claim, as objective evidence of the "patent facts".

[58] Phil's own understanding of his legal position, implicit or otherwise, is simply not material to whether the impugned statements were made on an occasion of absolute privilege. Nor is it material to whether the doctrine of absolute privilege applies to the tort of abuse of process, or any other live issue for determination in the case. On the contrary, as Justice Groves stated in *Peak Innovations*, whether a statement was made on an occasion of absolute privilege must be "determined by considering the objective patent facts and circumstances. To do otherwise would be

to ignore the very nature of absolute privilege": at para. 61. Whether the doctrine of absolute privilege applies to the tort of abuse of process is a question of law.

[59] Further, and importantly, a privilege-holder does not voluntarily make their own understanding of their legal position relevant in litigation where absolute privilege is a material issue, and impliedly waive solicitor-client privilege, merely by asserting the privilege and stating as a matter of fact that it applies because an impugned statement was made when there were conditional instructions to sue. That is all that happened here. Otherwise, merely to assert the defence of absolute privilege and the basis for its application would amount to an implied waiver of solicitor-client privilege. But it does not: see *Soprema* at paras. 28–29, and *Doman* at paras. 19–20. It follows that, while the doctrine of absolute privilege is a matter of substance in the litigation, the content of Phil's conditional instructions, like most instructions, is not an issue open to exploration at trial or beforehand. Although potentially relevant, those instructions are protected by solicitor-client privilege: see *Soprema* at para. 53.

[60] For these reasons, I would not give effect to this ground of appeal.

Did the judge err by concluding that Phil did not waive solicitor-client privilege when he voluntarily introduced the conditional instructions in support of his strike application and sought to use confidentiality as a sword rather than as a shield?

[61] In the alternative, John and the Peak Group submit that the statement of general principle expressed in *Soprema* does not apply in cases such as this where a party voluntarily introduces its instructions to counsel in respect of a material issue in litigation. In support of this submission, they rely on Justice Warren's statement in *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 that waiver of solicitor-client privilege will not only be implied where a party relies on legal advice or its understanding of the law to justify or explain its conduct. Rather, they say, as Justice Warren observed, as a matter of fairness and consistency, waiver will be implied wherever a privilege-holder attempts to use solicitor-client privilege as a sword by relying on privileged information to explain or justify its conduct while at the

same time attempting to use privilege as a shield by preventing the other party from testing the justification or explanation: *Huang* at paras. 141–143. Accordingly, John and the Peak Group submit, in advancing the conditional instructions to support his application to strike the counterclaim, Phil impliedly waived solicitor-client privilege because he sought to use confidentiality as a sword rather than as a shield.

[62] I see no merit in this submission. As Phil is not relying on the content of his conditional instructions to explain or justify his conduct, in relying on solicitor-client privilege to prevent their disclosure he is not seeking to use that privilege as both a sword and a shield. Rather, he is relying on the assertion that the impugned statements were made on an occasion of absolute privilege as a shield against the counterclaim.

Conclusion

[63] For all of the foregoing reasons, I would dismiss the appeal.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Grauer"