IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Benoit v. Federation of Newfoundland Indians Inc.*, 2019 NLSC 116
Date: June 6, 2019
Docket: 201801G1147

BETWEEN:

SHAWN BENOIT, MATTHEW ANDERSON, MARIE TAPP MELANSON, BOBBIE TAPP GOOSNEY, PAUL BENNETT, AND JENNIFER SUE LE ROUX

PLAINTIFFS

AND:

FEDERATION OF NEWFOUNDLAND INDIANS INC.

FIRST DEFENDANT

AND:

HER MAJESTY THE QUEEN (CANADA)

SECOND DEFENDANT

Before: Justice Valerie L. Marshall

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: May 9 and 10, 2019

Summary:

The First Defendant sought an order from the Court declaring that two of the documents in the Plaintiff's list of documents are subject to solicitor-client privilege belonging to the Federation of Newfoundland Indians Inc. and/or the Qalipu Mi'kmaq First Nation Band.

HELD: The documents were solicitor-client privileged, but the privilege had been waived by the clients.

Appearances:

Keith S. Morgan	Appearing on behalf of the Plaintiffs
Philip J. Buckingham	Appearing on behalf of the First Defendant
Kelly A. Peck	Appearing on behalf of the Second Defendant

Authorities Cited:

CASES CONSIDERED: *Benoit v. Federation of Newfoundland Indians*, 2018 NLSC 141; *R. v. McClure*, 2001 SCC 14; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31; *Solosky v. Canada*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96; *Calcraft v. Guest*, [1898] 1 Q.B. 759 (Eng. C.A.); *Chan v. Dynasty Executive Suites Ltd.* (2006), 30 C.P.C. (6th) 270 (Ont. S.C.J.); *Airst v. Airst* (1998), 37 O.R. (3d) 654 (Ont. Gen. Div.); *Eizenshtein v. Eizenshtein* (2008), 62 R.F.L. (6th) 182 (Ont. S.C.J.); *Osiris v. 1444707 Ontario Ltd.* (2005), 21 C.P.C. (6th) 351 (Ont. S.C.J.).

STATUTES CONSIDERED: *Judicature Act*, R.S.N.L. 1990, c. J-4; *Corporations Act*, R.S.N.L. 1990, c. C-36; *Indian Act*, R.S.C. 1985, c. I-5.

TEXTS CONSIDERED: J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada*, Second Edition (Toronto: Butterworths, 1999).

REASONS FOR JUDGMENT

MARSHALL, J.:

INTRODUCTION

[1] The Federation of Newfoundland Indians Inc. (the "FNI") filed an interlocutory application in this proceeding seeking an order declaring that two

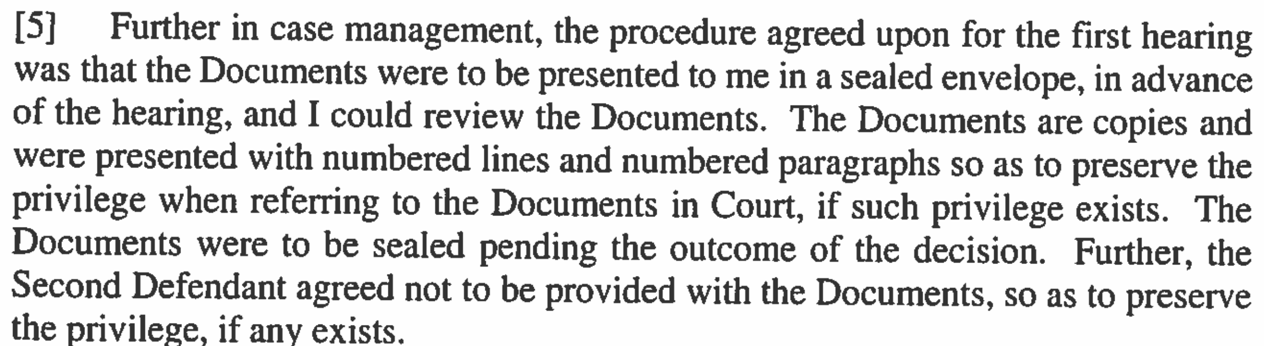
documents are subject to the solicitor-client privilege of the FNI and the Qalipu Mi'kmaq First Nation Band (the "QMFNB"). Copies of those two documents were in the possession of the Plaintiffs, and were set forth at tabs 17 and 25 of the Plaintiffs' list of documents. The two documents are described by the Plaintiffs in that list, as follows:

> Tab 17 - Letter from Stephen May to Federation of Indians Board dated July 6, 2009;
>
> Tab 25 - Correspondence from Cox & Palmer to Chief Brendan Sheppard dated June 19, 2013;

[2] These two documents shall collectively be referred to in this decision as the "Documents".

[3] The relief sought by the FNI in its application includes removal of the Plaintiffs' solicitor as counsel for the Plaintiffs, and other orders relating to the Documents, and the Plaintiffs' solicitor's file. The FNI further sought that the Plaintiffs' action be stayed as an abuse of process pursuant to section 97 of the *Judicature Act*, R.S.N.L. 1990, c. J-4.

[4] In case management, the parties' counsel agreed that this application would proceed in two parts; the first part being a hearing to determine whether the Documents are subject to solicitor-client privilege; and, if so, then a second hearing will proceed for the purposes of determining the appropriate remedy.



[5] Further in case management, the procedure agreed upon for the first hearing was that the Documents were to be presented to me in a sealed envelope, in advance of the hearing, and I could review the Documents. The Documents are copies and were presented with numbered lines and numbered paragraphs so as to preserve the privilege when referring to the Documents in Court, if such privilege exists. The Documents were to be sealed pending the outcome of the decision. Further, the Second Defendant agreed not to be provided with the Documents, so as to preserve the privilege, if any exists.

[6] The Plaintiffs and the FNI filed memorandums in advance of the hearing. The Second Defendant did not file a memorandum.

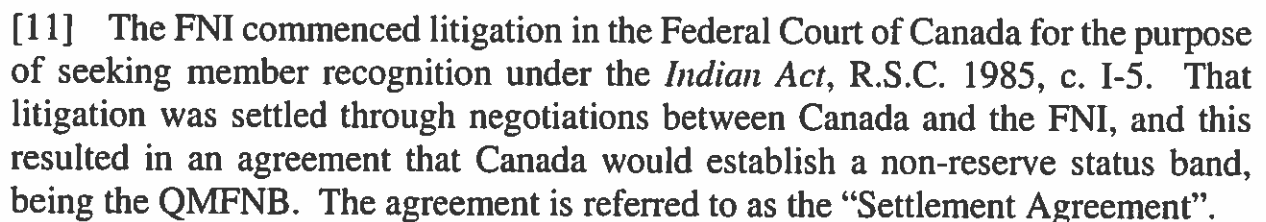
[7] On May 9 and 10, 2019 the hearing proceeded with respect to the first part of the application. The Second Defendant was present at this hearing, but did not take a position, and did not participate.

[8] The FNI's counsel confirmed at the hearing that the QMFNB was made aware of the application, and was served with it. The QMFNB did not seek to intervene in the application.

BACKGROUND

[9] Background facts were provided in the memorandum filed by the FNI. A comprehensive review of the background facts was also contained in *Benoit v. Federation of Newfoundland Indians*, 2018 NLSC 141; which was a decision of Justice Butler in this matter respecting an interim application for a declaration of rights under section 371 of the *Corporations Act*, R.S.N.L. 1990, c. C-36.

[10] On August 20, 1984, the FNI was established as a not for profit corporation under the *Corporations Act*. The FNI was established for the primary purpose of pursuing the recognition of the rights of the Mi'kmaq of Newfoundland.



[11] The FNI commenced litigation in the Federal Court of Canada for the purpose of seeking member recognition under the *Indian Act*, R.S.C. 1985, c. I-5. That litigation was settled through negotiations between Canada and the FNI, and this resulted in an agreement that Canada would establish a non-reserve status band, being the QMFNB. The agreement is referred to as the "Settlement Agreement".

[12] The Settlement Agreement was ratified through a vote of the FNI membership, which included the Plaintiffs; the Settlement Agreement was then executed by Canada and the FNI on June 23, 2008.

[13] On July 6, 2009, Stephen May of Cox & Palmer, (hereinafter the "Solicitor"), addressed correspondence to the FNI's board of directors (the "2009 document"). This is the correspondence referenced at tab 17 of the Plaintiffs' list of documents.

[14] In late October of 2009, the FNI held its annual general meeting. A special resolution was presented, and a vote was taken purportedly passing the special resolution. The special resolution resolved to transfer the undertakings of the FNI to the QMFNB, once the QMFNB had been formally established. The special resolution further resolved to replace the existing by-laws with new by-laws (the "Replacement By-laws"), after the undertakings were transferred from the FNI to the QMFNB. According to FNI's memorandum, once the Replacement By-laws were effective, the membership of the FNI would be comprised solely of the Band Council of the QMFNB.

[15] On November 30, 2009 the first round of enrollment for the QMFNB concluded, and 23,877 people qualified as the first founding members.

[16] The QMFNB was formally established by the Government of Canada on September 22, 2011. The first founding members included the Plaintiffs; the Plaintiffs received their registered Indian status in October of 2011 (see *Benoit v. Federation of Newfoundland Indians*, at paragraphs 15 and 19).

[17] In the FNI's memorandum, they stated that the Replacement By-laws took effect on September 12, 2012. However, in accordance with the pleadings, an issue to be determined at trial is whether the resolution for adoption of the Replacement By-Laws was made without proper corporate authority.

[18] On November 30, 2012, the second and final round of enrollment for QMFNB concluded, with a total of 101,743 people applying for membership in QMFNB. This number of applications was apparently far greater than the Government of Canada had anticipated under the Settlement Agreement. As a result, the Government of Canada requested that the FNI negotiate a "Supplemental Agreement" to clarify the evidentiary requirements for applicants seeking enrolment in the QMFNB.

[19] On June 19, 2013, the Solicitor sent a letter to Brendan Sheppard, then Chief of the QMFNB, ("the 2013 document"). That letter is the document referenced at tab 25 of the Plaintiffs' list of documents.

[20] On July 4, 2013, the FNI and the Government of Canada executed the Supplemental Agreement. Following its execution, and the passing of federal legislation in 2014, the Plaintiffs' status as registered Indians was reassessed, and they no longer qualified for status (see *Benoit v. Federation of Newfoundland Indians*, at paragraphs 28 and 29).

[21] On February 14, 2018, the Plaintiffs commenced this action by statement of claim, which was subsequently amended in October, 2018. At paragraph 9 of the amended statement of claim, the Plaintiffs claim the following relief:

> 9. The Plaintiffs claim the following relief;
>
> a) Rescission of the Supplemental Agreement entered into between the FNI and Canada dated July 4, 2013 (the "Supplemental Agreement") pursuant to s. 371 of the *Corporations Act*, R.S.N.L. 1990 c. C-36. The Plaintiffs claim member oppression resulting from the adoption and implementation of the Supplemental Agreement by the FNI and Canada which deprived the Plaintiffs and other Newfoundland Mi'Kmaq claiming indigenous recognition of a fair and proper evaluation of their applications for inclusion within the Qalipu Mi'kmaq First Nation Bard. (the "Qalipu Band")
>
> b) An Order that the applications of the Plaintiffs and all those rejected as a result of the application of the Supplemental Agreement be re-

evaluated solely in accordance with the terms of the Settlement Agreement.

c) In the alternative, an Order striking the prejudicial provisions of the Supplemental Agreement with a further Order that all rejected applications be re-evaluated without reference to those provisions struck from the Supplemental Agreement.

d) In the further alternative a Declaration that the Supplemental Agreement constituted member oppression and entered into by the FNI without proper corporate authority.

e) Costs of the action as against the First and Second Defendants.

[22] Defences were filed in response to the Plaintiffs' claim.

[23] On February 14, 2018, prior to a new founding members' list becoming effective, the Plaintiffs also filed an application requesting extraordinary interim relief. That application was subsequently amended, and heard in June of 2018. The application was granted, and Justice Butler's declaratory order included that the Plaintiffs had the right for their names to remain on the founding members' list of the QMFNB as created under the Settlement Agreement, until a determination of the validity of the Supplemental Agreement (see *Benoit v. Federation of Newfoundland Indians*, at paragraph 135).

[24] The foregoing background provides context for this application, in which the FNI asserts that the Documents are subject to solicitor-client privilege.

[25] Apparently the Documents are currently published on a website, and are accessible by the public.

ISSUE

[26] The FNI claims that the Documents are subject to solicitor-client privilege; whereas the Plaintiffs dispute whether the Documents are subject to privilege.

[27] The Plaintiffs claim that the privilege has been waived. The Plaintiffs also claim to have a joint interest privilege in the Documents.

[28] The issue to be determined is whether either or both Documents were solicitor-client privileged. If so, the issue then becomes whether the privilege remains.

SUMMARY OF THE EVIDENCE

[29] In support of the application, an affidavit was filed on behalf of the FNI by Brendan Mitchell. Mr. Mitchell was cross-examined on his affidavit at the hearing.

[30] Mr. Mitchell has been the President of the FNI since November of 2015, and he has been a member of the board of directors of the FNI since November of 2012. He is also the current Chief of the QMFNB, and has served as a band councillor since November of 2012.

[31] Mr. Mitchell was therefore neither a director, nor officer, of the FNI when the 2009 document was created. However, he was a director when the 2013 document was created.

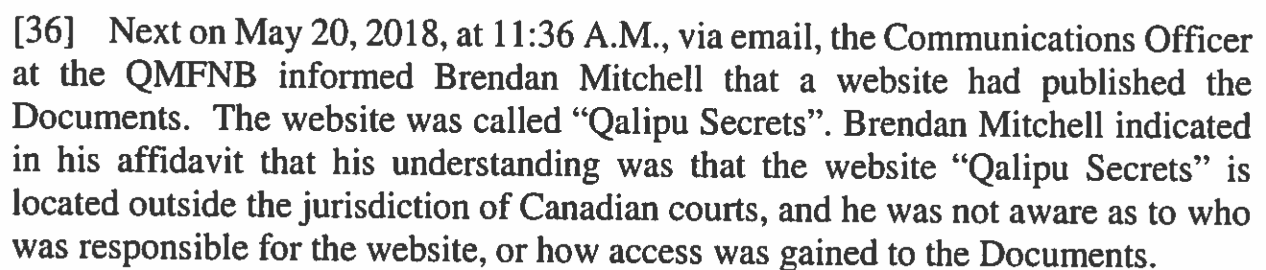
[32] Mr. Mitchell was of the view that the Documents were subject to solicitor-client privilege. He recalled that in June of 2016, the Documents were treated as

privileged and confidential at a meeting with the Solicitor, at which time the Documents were reviewed.

[33] Mr. Mitchell acknowledged in his evidence that he did not know whether the Documents were distributed to anyone other than the directors, and the former President of the FNI, when the Documents were created. Further, Mr. Mitchell agreed it was possible that a former director, or officer, could have been responsible for distributing the Documents to the website.

[34] On April 17, 2018, Mr. Mitchell was made aware by the Solicitor that the 2013 document had been provided to a CBC reporter. As a result, QMFNB instructed the Solicitor to file an injunction application asserting privilege over that document. According to Mr. Mitchell, prior to that application being heard, CBC agreed to refrain from publishing the 2013 document, and advised they would destroy the correspondence.

[35] Brendan Mitchell's affidavit indicated that on Saturday, May 19, 2018 at 9:43 A.M., one of the Plaintiffs, Marie Tapp Melanson, sent him an email containing copies of the Documents.



[36] Next on May 20, 2018, at 11:36 A.M., via email, the Communications Officer at the QMFNB informed Brendan Mitchell that a website had published the Documents. The website was called "Qalipu Secrets". Brendan Mitchell indicated in his affidavit that his understanding was that the website "Qalipu Secrets" is located outside the jurisdiction of Canadian courts, and he was not aware as to who was responsible for the website, or how access was gained to the Documents.

[37] He further asserted that on May 21, 2018 at 2:35 P.M., Marie Tapp Melanson, sent a mass email that included the May 19, 2018 email that had been sent to him, which also included the documents posted on the website.

[38] Mr. Mitchell's evidence was that he and the FNI did not respond to Ms. Melanson's emails; and did not indicate to her that the FNI was claiming solicitor-client privilege over the documents in the emails. Rather, the entire matter was turned over to the Solicitor.

[39] Mr. Mitchell's evidence (as per paragraph 11 of his affidavit) was that the Solicitor advised "it may prove expensive to first obtain and then enforce an injunction order by a Canadian court in a United States court", and that the Solicitor was not able to advise whether such action would be successful. Mr. Mitchell further stated at paragraph 11 of his affidavit, as follows:

> "... In my opinion, if an order were obtained in a Canadian or United States court, or both, nothing would prevent the information posted on "Qalipu Secrets" from simply being posted to another website. Neither QMFNB nor FNI has the financial resources to seek to enjoin foreign websites but in no way has either FNI or QMFNB acquiesced in the unauthorized use of the solicitor-client privileged correspondence so as to waive its solicitor-client privilege."

[40] Marie Tapp Melanson filed an affidavit on behalf of the Plaintiffs in this matter. She was also cross-examined.

[41] Marie Tapp Melanson's evidence was that around May 19, 2018 she searched the web, and visited the website named "Qalipu Secrets". She found the Documents posted on that website, and the Documents were available for download. She proceeded to download and review the Documents.

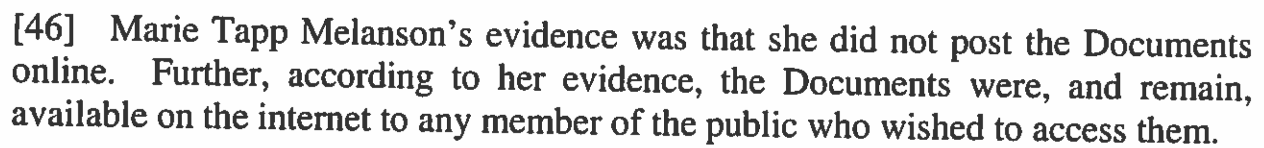
[42] After reviewing the contents of the Documents, she forwarded the Documents through email, together with an expression of her disgust, to all board members of the FNI, as well as to the FNI's president, Mr. Brendan Mitchell. Ms. Melanson's evidence was that she has received no reply to her emails from any members of the board, and Mr. Mitchell.

[43] Marie Tapp Melanson's evidence was also that subsequent to her forwarding the documents to the FNI board members, she posted the Documents on Facebook, and she made other Facebook groups aware of the Documents. At no time has she been contacted by anyone requesting that she remove those posts. Rather, Ms. Melanson received no indication of a claim of privilege over the Documents until she was advised by her legal counsel, following the filing of the Plaintiffs' list of documents.

[44] Ms. Melanson's evidence was that she recognized the Documents came from a law firm; however, she had no concern with respect to confidentiality of the Documents, as they were online and in the public domain. Further, because the Documents were online, she was of the view that she could distribute them. In any event, Ms. Melanson agreed that even if she had found them in a manner other than online, the contents of the Documents justified her distribution of same.

[45] She expressed the view in her affidavit (at paragraph 9) that she is a member of the FNI, and she believed, as follows:

> "... I believe I ought to be able to access these and any other documents that might assist me and the Court to determine why the leadership of the Federation acted as they did. I believe only then will the Court be able to determine whether the actions of the Federation were oppressive as against me and the other Federation members as I and my fellow litigants maintain."



[46] Marie Tapp Melanson's evidence was that she did not post the Documents online. Further, according to her evidence, the Documents were, and remain, available on the internet to any member of the public who wished to access them.

[47] Interrogatories and answers were entered as a consent exhibit. Interrogatories were sent by the FNI to all the Plaintiffs containing the following questions:

1. When did you first access or receive the information contained in each document?

2. How, and from whom, did you receive one, or both, of these documents?

3. Did you provide a copy of the document at Tab 17 or Tab 25, or both, to your legal counsel? If so, when was this information provided, and how was it delivered or transmitted?

4. To what other persons or entities, if any, have you distributed the information in Tabs 17 and 25, or a copy of the documents located at Tabs 17 and 25?

5. When did you distribute this information and by what means was such distribution accomplished?

[48] On January 9, 2019 FNI's counsel (in this matter) received responses to the interrogatories from four of the six Plaintiffs. Matthew Anderson and Shawn Benoit apparently responded that they had never seen the Documents. Ms. Melanson indicated she had downloaded the Documents from a website, which she accessed from Facebook. Bobbie Tapp Goosney responded that the Documents were received by Facebook Messenger from Ms. Melanson.

[49] There was an indication in the responses that the Documents were provided to the Plaintiffs' counsel by Helen Darrigan. As a result, FNI's counsel sent interrogatories containing the same questions to Helen Darrigan on January 16, 2019. Ms. Darrigan supplied answers on January 22, 2019. In Ms. Darrigan's answers to interrogatories, she stated that she was first aware of the Documents on May 19, 2018, and that she accessed the Documents from the Qalipu Secrets website link. Ms. Darrigan further stated in her response, as follows:

> 3. In relation to Interrogatory No. 3, I can state that I did not provide the documents directly to my legal counsel, however, I did provide him with the website link to Qalipu Secrets by email on May 20, 2018.

[50] Marie Tapp Melanson's evidence was also that she did not provide the Documents to the Plaintiffs' legal counsel. At paragraph 3 of her answer to interrogatories, Ms. Melanson stated:

> 3. In relation to Interrogatory No. 3, I can state that I did not provide the documents directly to my legal counsel, however, I understand that the link was provided by email by Helen Darrigan who has been instructing counsel on my behalf.

[51] She clarified in her evidence that she "assumed" Helen Darrigan forwarded the Documents to the lawyer.

ANALYSIS

[52] The first determination to be made is whether the Documents were solicitor-client privileged.

Solicitor-client privilege – a substantive rule of law

[53] In *R. v. McClure*, 2001 SCC 14, the Supreme Court of Canada reviewed the evolution of solicitor-client privilege. They refer to the privilege as a "fundamental civil and legal right", which has evolved from a rule of evidence to a substantive rule of law. At paragraph 24 of *R. v. McClure*, the Supreme Court of Canada stated, as follows:

> **24** In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at p. 383, Wilson J. confirmed that in *Solosky*, supra, solicitor-client privilege was a "fundamental civil and legal right". Finally, in *Smith v. Jones*, [1999] 1 S.C.R. 455, Cory J. for the majority stated at para. 45: "solicitor-client privilege has long been regarded as fundamentally important to our judicial system" and at para. 48: "now it has evolved into a substantive rule."

[54] Further, in *R. v. McClure*, the Supreme Court of Canada described solicitor-client privilege as being "as close to absolute as possible". They stated at paragraph 35, as follows:

> **35** However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[55] In *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, the Supreme Court of Canada referred to *Solosky v. Canada*, [1980] 1 S.C.R. 821 and to *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 to describe the scope of the privilege, and the criteria to establish the privilege. They stated in *Pritchard*, at paragraphs 15 and 16, as follows:

> **15** Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation [page817] for legal advice, whether litigious or not: see *Solosky*, at p. 834.
>
> **16** Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see *Solosky, supra*, at p. 835.

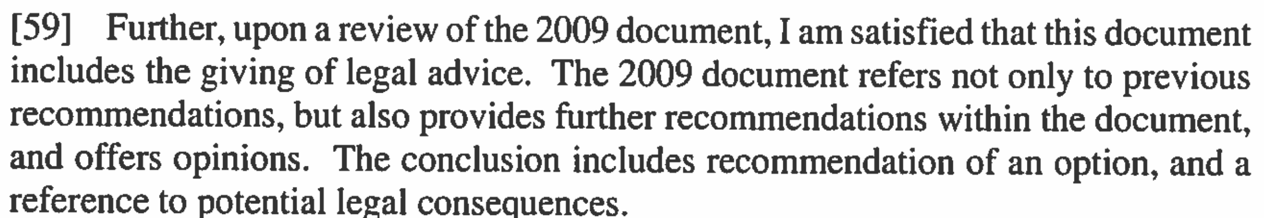
[56] As noted in the foregoing excerpt, in *Descôteaux v. Mierzwinski* the Supreme Court of Canada stated that the privilege attaches "to all communications made within the framework of the solicitor-client relationship". At paragraph 71 of *Descôteaux*, they stated as follows:

> **71** In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

Are the Documents solicitor-client privileged?

[57] The Plaintiffs take the position that neither of the Documents are privileged, and they dispute whether the Documents were created in a context of providing legal advice to the FNI. The Plaintiffs further submitted that there was no evidence to suggest the Documents were intended to be confidential. However, based upon the *Solosky* criteria, I respectfully disagree with the Plaintiffs.

[58] To begin with, the 2009 document is clearly between solicitor and client. This 2009 document is addressed to the FNI's board of directors; and I conclude that the corporation, being the FNI, is the client. At the time the 2009 document was created, the QMFNB did not hold privilege in the 2009 document. As stated, the QMFNB was not formerly established until September of 2011.



[59] Further, upon a review of the 2009 document, I am satisfied that this document includes the giving of legal advice. The 2009 document refers not only to previous recommendations, but also provides further recommendations within the document, and offers opinions. The conclusion includes recommendation of an option, and a reference to potential legal consequences.

[60] As well, the 2009 document was addressed to the FNI board of directors from the Solicitor, and there is nothing to suggest that it was not intended to be a

confidential communication "within the framework of the solicitor-client relationship" (as per *Descôteaux*, at paragraph 71). Further, I am satisfied that the contents of the 2009 document permits the inference of an intention of confidentiality. It is a solicitor-client privileged document, and the privilege clearly belongs to the FNI.

[61] The 2013 document is from the Solicitor to Brendan Sheppard. Mr. Sheppard was the former Chief of the QMFNB, and the former President of the FNI. In Chief Brendan Mitchell's affidavit he stated (at paragraph 6) that the 2013 correspondence "contains legal advice offered to both FNI and QMFNB". At paragraph 7, he further referred to asserting "QMFNB privilege" over the document in the injunction application against the CBC.

[62] I have reviewed the 2013 document in its entirety, and I am satisfied that the 2013 document does indeed provide legal advice for the FNI and the QMFNB. The purpose of the 2013 document is established in the first sentence, and clearly the purpose is the provision of advice. Further, as submitted by the FNI, the entire 2013 document reviews the impact, application and interpretation of an agreement between the FNI and a third party. As well, from the contents I can again readily infer that the correspondence was intended to be confidential to the clients. It is a solicitor-client privileged document and, in my view, the privilege holders are both the FNI and the QMFNB.

[63] I have therefore concluded that both Documents were subject to solicitor-client privilege.

Has the solicitor-client privilege been waived?

[64] Having determined that the Documents were indeed solicitor-client privileged, the next issue to determine is whether there has been a waiver of that privilege, by the privilege holder (or holders). It is not disputed that there has not been an express waiver. Rather, the Plaintiffs take the position that an implied waiver has occurred. The FNI takes the position that there has been no such waiver.

[65] Both Counsel provided case law to support their submissions.

[66] In *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96, the New Brunswick Court of Appeal considered the issue of waiver of solicitor-client privilege over documents in a case involving allegations of tax evasion. The *Chapelstone* decision provides a comprehensive summary of the law with respect to waiver of solicitor-client privileged communications. At paragraph 45, the New Brunswick Court of Appeal indicated that a client's waiver of the privilege may be implied, and they stated, as follows:

> **45** My understanding of the law with respect to waiver of privileged communications and the legal consequences flowing from their inadvertent disclosure is as follows: (1) as a general proposition, privilege belongs to the client and, therefore, can be waived only through his or her informed consent; (2) however, there is room in the law for an implied waiver; and (3) the inadvertent disclosure of privileged communications does not automatically lead to an implied waiver, more is required. ...

[67] Further, at paragraph 49 of *Chapelstone*, reference is made to older English case law which held that solicitor-client privilege was lost when disclosure was inadvertent, such as when a solicitor-client privileged document has been dropped on the street (see *Calcraft v. Guest*, [1898] 1 Q.B. 759 (Eng. C.A.)). However, in Canada, inadvertent disclosure does not automatically result in an implied waiver; rather something more is required. As stated in *Chapelstone* (at paragraph 50), this "modern approach" emanated from the Supreme Court of Canada's decision in *Descôteaux v. Mierzwinski* which clarified that solicitor-client privilege was a substantive rule.

[68] At paragraph 54 of *Chapelstone*, the New Brunswick Court of Appeal referred to Sopinka, Lederman and Bryant's text *The Law of Evidence in Canada*, Second Edition (Toronto: Butterworths, 1999), and the view that the circumstances of each case will determine whether the inadvertent disclosure of privileged information has resulted in a waiver of privilege. At paragraphs 54 and 55 of *Chapelstone*, the New Brunswick Court of Appeal stated, as follows:

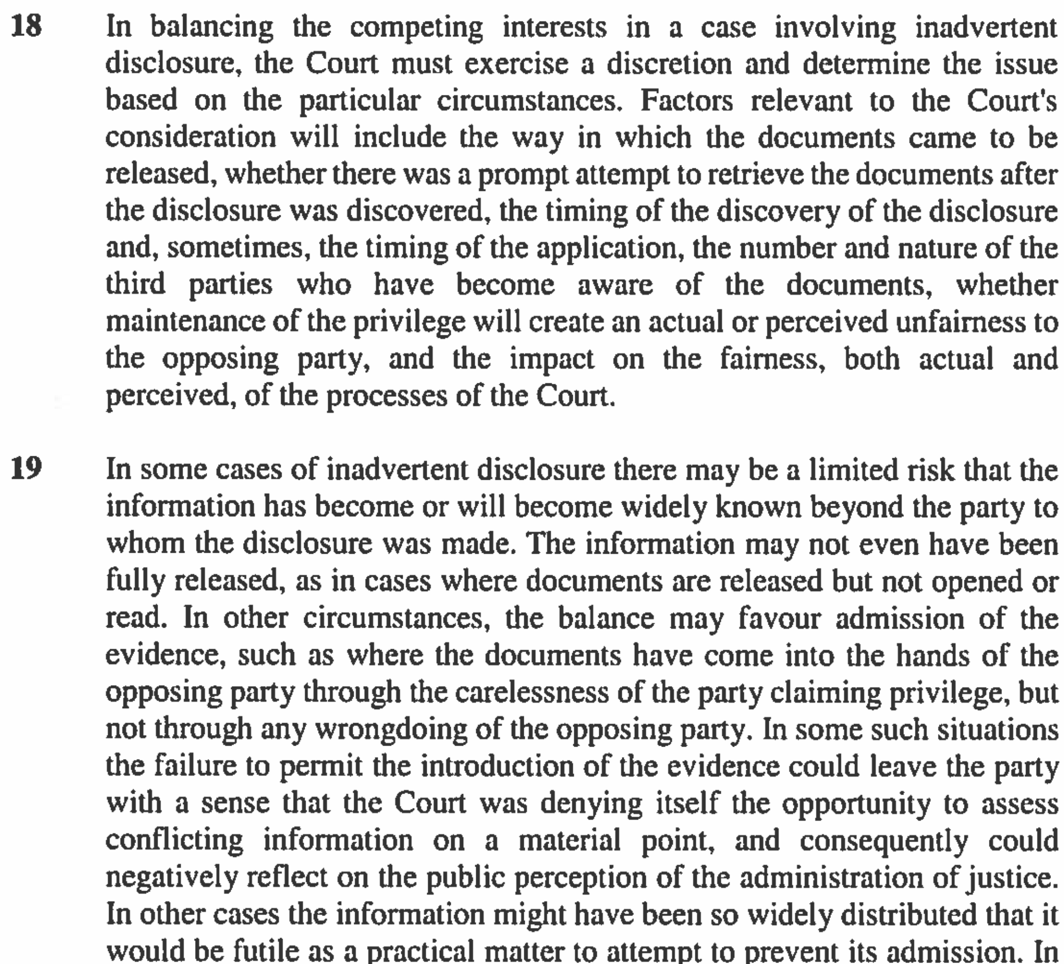
> 54 In their text, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999), Sopinka and Lederman reinforce the view that inadvertent disclosure of privileged information does not automatically result in its inclusion. It all depends on the circumstances of each case. At 767, they write:
>
> > Where the disclosure of privileged information is found to have been inadvertent, recent Canadian cases have chosen not to adhere to the principle in *Calcraft v. Guest*, holding that mere physical loss of custody of a privileged document, does not automatically end the privilege. With rules of court now providing for liberal production of documents, the exchange of large quantities of documents between counsel is routine and accidental disclosure of privileged documents is bound to occur. A judge should have a discretion to determine whether in the circumstances the privilege has been waived. Factors to be taken into account should include whether the error is excusable, whether an immediate attempt has been made to retrieve the information, and whether preservation of the privilege in the circumstances will cause unfairness to the opponent.
> >
> > [Footnote omitted.]
>
> 55 In summary, the general rule is that the right to claim privilege may be waived, either expressly or by implication. However, inadvertent disclosure of privileged information does not automatically result in a loss of privilege. More is required before the privileged communication will be admissible on the ground of an implied waiver. For example, knowledge and silence on the part of the person claiming the privilege and reliance on the part of the person in receipt of the privileged information that was inadvertently disclosed may lead to the legal conclusion that there was an implied waiver. In the end, it is a matter of case-by-case judgment whether the claim of privilege was lost through inadvertent disclosure.

[69] Similarly, in *Chan v. Dynasty Executive Suites Ltd.* (2006), 30 C.P.C. (6th) 270 (Ont. S.C.J.), the Ontario Court reviewed three factors to be considered when determining if inadvertent disclosure permitted a finding of waiver of privilege. The Ontario Court also referred to Sopinka, Lederman and Bryant's text, and stated as follows, at paragraph 31:

> 31 Whether or not privilege has been waived through inadvertent disclosure depends on the circumstances and requires the court to consider three factors -- whether the error was in fact inadvertent and thus excusable;

> whether an immediate attempt has been made to retrieve the documents; and whether preservation of the privilege in the circumstances would cause unfairness to the receiving party: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada, supra*, at 14.122.

[70] Of further assistance to the analysis of waiver is the decision in *Airst v. Airst* (1998), 37 O.R. (3d) 654 (Ont. Gen. Div.). *Airst* was a decision respecting an issue arising in a matrimonial trial requiring a determination on whether to preserve privilege over documents. A joint evaluation report had been ordered, and solicitor-client documents were inadvertently disclosed to a valuator. The issue was whether there was a loss of privilege. Justice Wein's decision considered several factors which well assist in an analysis of whether there has been waiver in circumstances of inadvertent disclosure of privileged documents. She stated at paragraphs 18 and 19, as follows:



> **18** In balancing the competing interests in a case involving inadvertent disclosure, the Court must exercise a discretion and determine the issue based on the particular circumstances. Factors relevant to the Court's consideration will include the way in which the documents came to be released, whether there was a prompt attempt to retrieve the documents after the disclosure was discovered, the timing of the discovery of the disclosure and, sometimes, the timing of the application, the number and nature of the third parties who have become aware of the documents, whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party, and the impact on the fairness, both actual and perceived, of the processes of the Court.
>
> **19** In some cases of inadvertent disclosure there may be a limited risk that the information has become or will become widely known beyond the party to whom the disclosure was made. The information may not even have been fully released, as in cases where documents are released but not opened or read. In other circumstances, the balance may favour admission of the evidence, such as where the documents have come into the hands of the opposing party through the carelessness of the party claiming privilege, but not through any wrongdoing of the opposing party. In some such situations the failure to permit the introduction of the evidence could leave the party with a sense that the Court was denying itself the opportunity to assess conflicting information on a material point, and consequently could negatively reflect on the public perception of the administration of justice. In other cases the information might have been so widely distributed that it would be futile as a practical matter to attempt to prevent its admission. In

> every case there must be a balancing of the relevant factors in the individual circumstances of the case, thus no hard rule can be laid down.

[71] As stated above in *Airst* (at paragraph 19), if a document is "widely distributed", it may be "futile as a practical matter to prevent its admission". Similary, in *Eizenshtein v. Eizenshtein* (2008), 62 R.F.L. (6th) 182 (Ont. S.C.J.), Justice Wildman listed a number of considerations for an analysis of "exceptions to privilege". These included whether the documents are in the "public realm". He stated, at paragraph 45, as follows:

> **45.** ...
>
> - How widely circulated was the disclosure? If the communications have now entered the "public realm", there is a much stronger argument against keeping this information from the court. If the communications have entered the "public realm", how did that come to be? Is that due to any improper conduct by the person seeking to admit the communications? For example, it would not strengthen the argument to admit presumptively privileged communications for a person who has obtained them improperly to circulate them or publish them in a newspaper or on the internet and then argue they had entered the "public realm".
>
> ...

[72] At the same time, Justice Wildman expressed the view (at paragraph 42) that the "law must evolve to protect solicitor-client communication in an electronic world".

[73] Further, in *Osiris v. 1444707 Ontario Ltd.* (2005), 21 C.P.C. (6th) 351 (Ont. S.C.J.), the Ontario Court indicated that acquiescence may lead to a finding of implied waiver, and they stated, at paragraph 66, as follows:

> **66** Privilege may be waived expressly or impliedly. An implied waiver may occur when an intention to abandon the privilege can be inferred from the

> conduct of the privileged party. Implied waiver is, however, not limited to such cases: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2nd edition, 1991), paras. 14.100-14.106. As the learned authors indicate, fairness to the opposing party may require a finding that privilege has been impliedly waived, whether or not this was intended. In principle, I see no reason why this may not occur as a result of the privileged person's acquiescence in the use of the privileged material by the opposing party at an earlier stage of the proceedings. In *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, La Forest J. stated (at para. 100):
>
>> Acquiescence is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow and Lehane ... identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches -- after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived.

[74] I agree that implied waiver of solicitor-client privilege may arise from acquiescence.

[75] Based on the analysis in *Chapelstone, Chan* and *Airst*, it is necessary to first consider the circumstances of disclosure of the solicitor-client privileged Documents to the Plaintiffs.

[76] As indicated by Justice Wein in the *Airst* decision, when privileged information has been obtained by "improper means" or "wrongdoing", that information clearly ought not to be disclosed (see paragraphs 14 and 19 of *Airst*). On this point, in the case before me, I have considered all the evidence, and I find that the evidence does not suggest that the Documents were obtained by any of the Plaintiffs by "improper means", or "wrongdoing". Rather, the evidence suggests that the Documents were sourced from the internet, and that none of the parties know how the Documents ended up on the website. The evidence is also that the Plaintiffs' counsel was provided the website link by Ms. Darrigan; and she also accessed the Documents from the website.

[77] To elaborate, Marie Tapp Melanson's evidence was credible, and I accept that she first accessed the Documents on the "Qalipu Secrets" website. Further, I accept Ms. Melanson's evidence that she was not the person responsible for posting the Documents on the website. There is no evidence to suggest that any of the Plaintiffs were responsible for the posting of the Documents on the website.

[78] Further, in my view it is nothing more than mere speculation, on the part of the FNI, to assert that "in all likelihood the documents were surreptitiously removed or obtained from FNI" (as per paragraph 60 of FNI's memorandum). There was insufficient evidence to support this assertion.

[79] To elaborate, there was no evidence of any controls, or limits on distribution, put in place by the FNI over the Documents. Such evidence may have supported a finding that any release of the Documents would have had to have been by improper means.

[80] Further on this point, Chief Mitchell was credible; and I accept his evidence that the Documents were indeed treated as privileged by the Board, at a meeting in June of 2016. However, Chief Mitchell was not on the Board until 2012. He was therefore not on the Board when the 2009 document was created. As well, he was neither Chief of the QMFNB, nor President of the FNI, when both of the Documents were created; and he acknowledged that he did not know if the Documents had been distributed to anyone other than the Board of the FNI.

[81] Based on the evidence, I conclude that it is not reasonable to infer that the Documents ended up on the website through improper means. It is possible, but it is also possible that the Documents were inadvertently disclosed before being published on the website. It is simply unknown how the Documents ended up there.

[82] Granted, the onus is on the Plaintiffs to establish waiver. Nevertheless, there is insufficient evidence to reasonably suggest, or infer, that the release of the Documents was surreptitious, or even tangentially involved the Plaintiffs. Indeed, the FNI did not suggest the Plaintiffs were involved with the release of the

Documents to the website. As stated, the evidence suggests that the Plaintiffs obtained the Documents through the website.

[83] I add that if the evidence had indicated that the Documents were obtained by the Plaintiffs through improper means, then no further analysis would be necessary. Such a circumstance would lead to the conclusion that the solicitor-client privilege had not been waived.

[84] As stated, however, I have found that there was no evidence of wrongdoing by the Plaintiffs; and that the Documents were not obtained by the Plaintiffs through improper means. As a result, in my view, it is therefore appropriate to conduct the analysis as if the disclosure of the Documents had been inadvertent. Consequently, I have considered all the evidence in light of the factors for analysis as reviewed in *Chapelstone*, *Chan* and *Airst*.

[85] To begin with, based on the evidence I have found that the Documents were obtained from the website. Therefore, the Plaintiffs' possession of the Documents is "excusable" (see *Chan*, at paragraph 31; *Chapelstone*, at paragraph 54; and Sopinka, Lederman and Bryant's *The Law of Evidence in Canada*, at page 767).

[86] With respect to timing, I have considered that in April of 2018, the FNI was aware that the 2013 document had been provided to a CBC reporter; and that the QMFNB promptly attempted to retrieve that document, by bringing an application for an injunction against CBC with respect to same. By contrast, when the FNI discovered that the Documents had been published on the "Qalipu Secrets" website, there was no immediate attempt by the FNI, or the QMFNB, to retrieve the Documents from the website. The FNI was made aware of the Documents being on the website in May of 2018.

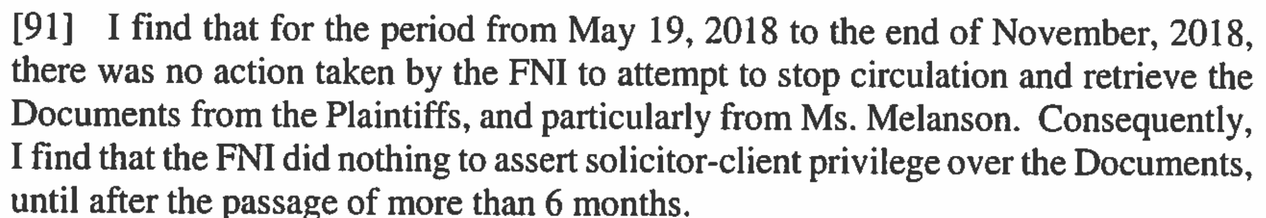
[87] Granted, the evidence was that the inaction of the FNI, and the QMFNB, was in response to the Solicitor's advice, which lead Chief Mitchell to the conclusion that seeking an injunction was futile. At the same time, however, there was no evidence that the FNI and the QMFNB even attempted to communicate with the

website administrators, through correspondence or otherwise, to advise of their position that the Documents were subject to privilege. Indeed, the evidence suggests that the FNI and the QMFNB have still not taken any action with respect to the website.

[88] Further, in my view the FNI did not act promptly to retrieve the Documents from the Plaintiffs. With respect to the timing of disclosure to the Plaintiffs, Ms. Melanson's evidence was that she discovered the Documents on May 19, 2018; and the evidence suggests that she then sent emails attaching the Documents to Brendan Mitchell and to the FNI board members on May 19 and 21, 2018. She received no response from the FNI in relation to her circulation of those Documents. There was never a reply email.

[89] Indeed, no action was taken by the FNI against the Plaintiffs, until after the Plaintiff's list of documents was filed on November 29, 2018. The FNI's legal counsel received the list of documents on November 30, 2018, and then became aware of the Plaintiffs' possession of the Documents. FNI's counsel immediately asserted FNI's claim for privilege, and subsequently filed this application. For clarity, the FNI's legal counsel in this matter is not the "Solicitor".

[90] With respect, I do not consider relevant the fact that FNI's legal counsel did not know of the Plaintiffs' possession of the Documents until November 30, 2018. Rather, I consider relevant that the FNI knew the Documents had been treated as privileged; and that in May of 2018, the FNI knew that Ms. Melanson had possession of copies of the Documents.



[91] I find that for the period from May 19, 2018 to the end of November, 2018, there was no action taken by the FNI to attempt to stop circulation and retrieve the Documents from the Plaintiffs, and particularly from Ms. Melanson. Consequently, I find that the FNI did nothing to assert solicitor-client privilege over the Documents, until after the passage of more than 6 months.

[92] In other words, there was a significant passage of time from the FNI's discovery of the disclosure of the Documents to the Plaintiffs, up until the time the FNI, through its legal counsel, took action in response to the Plaintiff's list of documents. In the interim, there was silence by the FNI, and a failure to act; when the FNI knew that the Documents were in the hands of Ms. Melanson. There was no "immediate attempt" to retrieve the documents from Ms. Melanson (see *Chan*, at paragraph 31). In my view, the FNI's failure to promptly act supports the Plaintiffs' position that there had been an implied waiver, through acquiescence, on the part of the FNI.

[93] With respect to the factor of unfairness to the Plaintiffs if the privilege was preserved, I have considered that the Documents remain on the website, and continue to be accessible to all. As stated, the FNI has not attempted to assert privilege directly with that website.

[94] I have also considered and agree with Justice Wein's comments in *Airst*, at paragraph 19, that in some cases "the information might have been so widely distributed that it would be futile as a practical matter to prevent its admission". Similarly, I agree with the Ontario Court's suggestion in *Eizenshtein*, at paragraph 45, that if the documents are in the "public realm" then "there is a much stronger argument against keeping this information from the court". In my view, in the circumstances of this case, the widespread public accessibility to the Documents on the internet suggests that it would be unfair to the Plaintiffs to maintain the privilege.

[95] I have also considered the Plaintiffs' submission that the Documents are relevant for the purposes of providing insight into the decision making of the FNI board, which may, in turn, have some relevance to the analysis of the oppression remedy. Indeed, Ms. Melanson's evidence suggests that she has relied on the Documents, hoping they will assist her case. I accept that the Documents may have some probative value in establishing how decisions were made by the Board of the FNI, which in turn relates to the claim for oppression; and that the extent of public disclosure suggests there would be minimal prejudice in admitting the Documents.

[96] For clarity, the above comments on fairness and relevance are made only in the context of an analysis of waiver of privilege, not admissibility. The determination as to the admissibility of the Documents ultimately rests with the trial judge.

[97] I add that the Court's foregoing analysis of factors must be considered in light of the Supreme Court of Canada's direction at paragraph 35 of *R. v. McClure*, that solicitor-client privilege must remain "as close to absolute as possible". Therefore a decision finding waiver of that privilege would indeed be rare. Such a decision cannot be made lightly. As stated in *R. v. McClure* (at paragraph 35), the privilege would only "yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis".

[98] Based on the foregoing analysis, it is my view that these are such "clearly defined circumstances"; and I find that solicitor-client privilege has indeed been waived by the FNI with respect to the Documents. I conclude this after considering all submissions of counsel, along with the cases, and all the evidence. I have particularly considered the circumstances of disclosure, the extent of public disclosure and accessibility, and the passage of time before the FNI asserted privilege against the Plaintiffs. Further, the evidence suggests that the FNI has not asserted privilege with the website, even by email or correspondence.

[99] Similarly, based on the foregoing analysis, I have no difficulty finding that the QMFNB also waived its solicitor-client privilege.

[100] To recap, the QMFNB was a privilege holder, along with the FNI, with respect to the 2013 document. The QMFNB was not a party to this proceeding. However, Chief Mitchell stated at paragraph 1 of his affidavit that he has instructed counsel on behalf of the QMFNB and the FNI. Further, the QMFNB was served and aware of this application. Considering also the relationship between the FNI and the QMFNB, I am satisfied that the QMFNB had knowledge that Ms. Melanson distributed the Documents by email, and that the Documents had been published on the "Qualipu Secrets" website. The QMFNB did not act in response, and chose not

to intervene in this application. Further, considering the foregoing analysis, I have no difficulty finding an implied waiver of privilege by the QMFNB.

[101] Based on these determinations, it is not necessary to consider the Plaintiffs' position regarding joint interest privilege.

CONCLUSION

[102] In the foregoing analysis, I have found that the Documents were solicitor-client privileged, but that the privilege attached to the Documents had been waived. As a result, the FNI's application is dismissed.

[103] Party party costs of the application are awarded to the Plaintiffs, on a Column 3 basis.

[104] The Second Defendant attended the hearing; but the Second Defendant did not participate, and did not take a position. There shall be no order for costs for the Second Defendant.

VALERIE L. MARSHALL
Justice