Original

IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Federation of Newfoundland Indians Inc. v. Benoit*, 2020 NLCA 16
Date: May 5, 2020
Docket Number: 201901H0055

BETWEEN:

FEDERATION OF NEWFOUNDLAND INDIANS INC. — APPELLANT

AND:

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

AND:

HER MAJESTY THE QUEEN (CANADA) — SECOND RESPONDENT

Coram: Fry C.J.N.L., Green and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division - 201801G1147 (2019 NLSC 116)

Appeal Heard: November 19, 2019
Judgment Rendered: May 5, 2020

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Reasons for Judgment by: Hoegg J.A.
Concurred in by: Fry C.J.N.L. and Green J.A.

Counsel for the Appellant: Phillip J. Buckingham
Counsel for the First Respondents: Keith S. Morgan
Counsel for the Second Respondent: Kelly A. Peck

Hoegg J.A.:

INTRODUCTION

[1] In February 2018 Shawn Benoit, Matthew Anderson, Marie Tapp Melanson, Bobbie Tapp Goosney, Paul Bennett and Jennifer Sue Le Roux (collectively referred to as *Benoit*) filed suit against the Federation of Newfoundland Indians Inc. (*FNI*) and Her Majesty the Queen (Canada) seeking an oppression remedy under the provisions of the *Corporations Act,* R.S.N.L. 1990, c. C-36.

[2] In May 2018, counsel for *Benoit* was notified of the existence of two letters dated July 6, 2009 and June 29, 2013 (the documents) on the American website "Qalipu Secrets". Counsel accessed the website, obtained the documents, and listed them in *Benoit's* List of Documents filed in the regular course of litigation on November 29, 2018.

[3] Upon receiving *Benoit's* List of Documents, counsel for *FNI* contacted counsel for *Benoit* and asserted solicitor-client privilege over the documents. Counsel for *Benoit* did not agree that the documents were privileged. Accordingly, *FNI* applied to the Supreme Court of Newfoundland and Labrador, General Division for a declaration that the documents were solicitor-client privileged and that *FNI* had not waived its privilege over them.

[4] A Judge of the Supreme Court of Newfoundland and Labrador, General Division determined that both documents had been subject to solicitor-client privilege held by *FNI*, but that the "clearly defined circumstances" of the case established that "solicitor-client privilege has indeed been waived by the *FNI* with respect to the Documents" (paragraph 98 of the Judge's decision).

[5] *FNI* appeals the Judge's decision that it waived its solicitor-client privilege over the two documents.

BACKGROUND

[6] The facts informing the appeal are not in dispute.

[7] *FNI*, a charitable corporation, was established in 1984 to pursue recognition of rights for Newfoundland Mi'kmaq and their registration as Indians within the meaning of the *Indian Act,* R.S.C. 1985, c. I-5 (the "*Act*"). To this end, *FNI* eventually commenced litigation against Canada in the Federal Court (*Federation of Newfoundland Indians v. Canada,* 2011 FC 683) seeking member recognition pursuant to the terms of the *Act*. The litigation was resolved by an agreement that Canada would establish a non-reserve status band, the Qalipu Mi'Kmaq First Nation Band (QMFNB), now known as the Qalipu Nation, for Qalipu who met the membership criteria.

[8] The *Benoit* plaintiffs are former members of the *FNI*. However, they lost their membership status as a result of the settlement agreement. This loss meant that they lost certain benefits. So, on February 14, 2018, *Benoit* commenced the current proceeding in an effort to be compensated for the losses resulting from their loss of status.

[9] The two documents at the centre of this litigation are: (1) correspondence dated July 6, 2009 from a solicitor at Cox & Palmer to the *FNI* Board of Directors, and (2) correspondence dated June 29, 2013 from the same solicitor at Cox & Palmer to Brendan Sheppard, who was Chief of QMFNB at that time.

[10] On April 17, 2018, *FNI* became aware that a CBC reporter was in possession of the 2013 Cox & Palmer correspondence to Chief Sheppard. Counsel for *FNI* immediately asserted solicitor-client privilege over the document and initiated legal proceedings against the CBC to prevent them from publishing it. In the end, CBC agreed not to publish the 2013 document and to destroy all copies of it in its possession.

[11] On May 19, 2018, Marie Tapp Melanson, one of the *Benoit* plaintiffs, sent an email containing a number of attachments to Chief Brendan Mitchell, current Chief of *FNI*. Among the attachments were copies of the two documents at the centre of this litigation.

[12] On May 20, 2018, Chief Mitchell learned from a person in the QMFNB Communications Office that both documents were available in a downloadable format on an internet website entitled "Qalipu Secrets".

[13] Also on May 20, 2018, a non-party assisting *Benoit* in this litigation provided counsel for *Benoit* with a link to the Qalipu Secrets website.

[14] On May 21, 2018, Marie Tapp Melanson sent a mass email to Chief Mitchell and others that included the two documents. She also posted the two documents on her Facebook page, along with a note expressing her disgust at their content.

[15] *FNI* subsequently sought legal advice (not from their legal counsel in this litigation), respecting removal of the documents from the website. They were advised that the website was based in San Francisco, United States of America, and that legal action to force the removal of the letters from the website would be costly. They were also advised that such action would likely be ineffective; for even if they were successful in removing the documents from the Qalipu Secrets website, the documents, already in the public domain, would in all likelihood be uploaded forthwith on a different website, necessitating proceedings *ad infinitum*. In short, the genie was out of the bottle and control over the documents would be virtually impossible to maintain.

[16] As indicated above, some six months after having obtained the documents from the internet, counsel for *Benoit* provided its List of Documents to counsel for *FNI*. The next day counsel for *FNI* wrote to counsel for *Benoit* claiming solicitor-client privilege over the documents. Counsel for *Benoit* took the position that the letters were not subject to solicitor-client privilege.

[17] *FNI* filed an application in the General Division of the Supreme Court of Newfoundland and Labrador seeking a declaration that the letters were protected by solicitor-client privilege held by *FNI*, and that *FNI* had not waived its privilege. Affidavit evidence was filed by both *FNI* and *Benoit*. The affiants were cross-examined.

[18] The Judge determined that both of the documents contained legal advice, and therefore had been protected by solicitor-client privilege, but concluded that *FNI* had waived its privilege over the documents.

[19] The Judge determined that *FNI* had waived its solicitor-client privilege because it had acquiesced in its breach for some six months prior to when it attempted to reassert it on November 30, 2018. Specifically, she found that *FNI* knew of the availability and distribution of the documents on the Qalipu Secrets website – having been so informed by Marie Tapp Melanson on May 19, 2018 and the QMFNB office on May 20, 2018, and having actually received copies of

the documents by email from Ms. Tapp Melanson on both May 19, 2018 and May 21, 2018 – and did not assert solicitor-client privilege over the documents "until 6 months later", which meant, in her view, that *FNI* had implicitly waived its solicitor-client privilege over the documents.

[20] In her reasoning, the Judge determined that there was "no evidence to suggest that any of the [*Benoit* plaintiffs] were responsible for the posting of the Documents on the website", saying that "if the evidence had indicated that the Documents were obtained by the plaintiffs through improper means", that "would lead to the conclusion that the solicitor-client privilege had not been waived" (paragraphs 77 and 83 of the Judge's decision).

[21] There was no evidence respecting how the documents were disclosed or whether the disclosure was inadvertent. The Judge determined that it was "simply unknown" how the documents ended up on the Qalipu Secrets website (paragraph 81 of the Judge's decision).

[22] The Judge also found that it was not relevant that *Benoit's* counsel knew of the breach some six months before *FNI's* counsel in this litigation knew of it, or that *Benoit's* counsel had possessed the documents during this six month period.

[23] The Judge then decided that she would approach determination of the waiver issue from the perspective that the documents had been disclosed inadvertently, stating as follows at paragraph 84:

> "... 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.*"

THE APPEAL

The Issues

[24] *FNI* submits that the Judge made three errors in concluding that *FNI* had waived its privilege over the documents.

[25] First, *FNI* argues that the Judge erred in concluding that *Benoit's* counsel's possession of the documents from May 2018 was irrelevant, saying that *Benoit's* counsel had a duty to advise opposing counsel of the availability of

the potentially privileged documents on the Qalipu Secrets website once he became aware of their existence in May 2018.

[26] Secondly, *FNI* argues that the Judge erred in failing to find that the acquisition of the documents and their publication by an unknown third party (or parties) on the Qalipu Secrets website were improper. *FNI* submits that when the circumstances of the acquisition and publication of solicitor-client privileged documents are unknown, improper breach of the privilege should be presumed, and such impropriety should result in a determination that the privilege is maintained and unable to be displaced by waiver.

[27] Thirdly, *FNI* argues that the Judge erred in approaching her analysis of waiver from the perspective that the breach was inadvertent, saying this approach placed an impossible burden of proof on *FNI*.

[28] *Benoit* submits that the law respecting the protection and waiver of solicitor-client privilege is well established, and that the Judge's conclusion that *FNI* waived its privilege over the documents is correct. *Benoit* argues that the errors *FNI* alleges are not errors, and that to rule that they are would require this Court to establish legal principles and ethical rules for solicitors respecting solicitor-client privilege that are neither required nor appropriate.

ANALYSIS

The Law

Solicitor-Client Privilege

[29] Originally a common law evidentiary rule, the doctrine of solicitor-client privilege in Canada has evolved into a principle of substantive law (*Solosky v. The Queen,* [1980] 1 S.C.R. 821 at 836). In *R. v. McClure,* 2001 SCC 14, the Court describes the origin of the rule, the policy informing it, and its importance to our legal system. At paragraph 33, Major J. explained:

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

[30] Solicitor-client privilege is a privilege held by a client, not the client's solicitor (*McClure* at paragraph 37). It is intended to protect solicitor-client communications that are for the purpose of obtaining lawful legal advice. It does not protect solicitor-client communications that are undertaken to facilitate the commission of a crime (*R. v. Campbell,* [1999] 1 S.C.R. 565).

[31] In *Smith v. Jones,* [1999] 1 S.C.R. 455 at paras. 51-59, the Supreme Court of Canada lists three limitations on solicitor-client privilege:

(1) when the innocence of an accused is at stake;

(2) when communications are in themselves criminal or are made with a view to obtaining legal advice to facilitate the commission of a crime; and

(3) when public safety is jeopardized by maintaining the privilege.

As well, although solicitor-client privilege generally survives the relationship and the client's death, an exception is made for cases involving wills and trusts, because disclosure of solicitor-client confidences in those cases furthers the interests of the former client which are central to the litigation (see *Geffen v. Goodman Estate,* [1991] 2 S.C.R. 353 (S.C.C.) and *R. v. Jack* (1992), 76 Man. R. (2d) 168 (Man. C.A.)).

[32] Canadian law recognizes that a holder of solicitor-client privilege can waive the privilege, either expressly or implicitly. Express waiver needs no explanation. Implied waiver is inferred from the circumstances in any given case.

[33] In *The Canadian Law Dictionary*, "waive" is defined as:

> "To intentionally give up, or not insist on some right, claim or privilege that one is otherwise entitled to enforce. It may be express or it may be implied by such conduct as warrants an inference of the relinquishment or waiver of such rights. The act of waiving involves both knowledge and intention."

Further, "waiver" is defined as:

> "The act of waiving. It implies an intention to carry out an agreement while foregoing some conditions therein. It is based on intention with full knowledge of the facts."

(Sodhi & Vasan, *The Canadian Law Dictionary* (Don Mills, ON: Law and Business Publications Canada Inc., 1980.)

[34] Implied waiver of solicitor-client privilege has been found when the actions of a privilege-holder suggest an intention to waive the privilege, or when a privilege holder's actions enable a court to infer an intention to waive the privilege. There are also circumstances where solicitor-client privilege can be found to be waived for reasons of fairness and policy.

[35] In *M.(K.) v. M.(H)*, [1992] 3 S.C.R. 6, the Supreme Court of Canada considered how acquiescence could justify a finding of implied waiver. *M.(K)* involved a plaintiff who was alleged to have waived her right to pursue her claim. The argument was that she had acquiesced in the deprivation of her right to claim by virtue of delay and therefore was precluded by the doctrine of laches from proceeding with it.

[36] The Court ultimately ruled that the plaintiff had not acquiesced in the deprivation of her right to claim for the wrongful conduct and that she was not barred from proceeding with it by the doctrine of laches. In so doing, the Court described acquiescence as a fluid term, and identified three different contexts where acquiescence could be found (at page 78):

(i) The plaintiff stands by and watches the deprivation of her rights and does nothing;

(ii) After deprivation of her rights and in the full knowledge of their existence, the plaintiff delays; and

(iii) The delay causes the defendant to rely on the plaintiff's inaction to mean that the plaintiff is not going to pursue her rights.

[37] The *M.(K.)* court identified the length of delay and the nature of the acts done in the interval as important considerations in the analysis. The Court made clear that delay cannot, on its own, defeat a claim (at 76-78). The Court also made clear that delay must be considered in the context of whether the party alleged to have acquiesced had full knowledge of the right to make a claim in order for a waiver by acquiescence to be inferred (at 78-79).

[38] This reasoning was followed in *Newfoundland Association of Public Employees v. Newfoundland (et al.)* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. S.C.T.D.), (*NAPE*) wherein Green J. determined that NAPE had not acquiesced in the acceptance of the appealable decision of a lower court by reason of its delay in filing an appeal.

[39] The courts in both *M.(K.)* and *NAPE* referred to *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, which established that "the length of the delay and the nature of the acts done in the interval, which might affect either party or cause a balance of justice or injustice..." were what mattered to a determination of acquiescence (at 239-240).

[40] Unfairness can also defeat a claim of solicitor-client privilege. Waiver of privilege can be inferred on the basis of fairness when a privilege holder defends his or her conduct by asserting reliance on legal advice but does not disclose the advice (see *Chapelstone*, at paragraphs 56-58 and *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38). Similarly, when a privilege holder deliberately discloses only part of a privileged communication in circumstances where disclosure of the whole communication is warranted, fairness can determine that privilege over the whole communication is lost. This was the result in *Imperial Tobacco v. Newfoundland and Labrador (Attorney General)* (2008), 276 Nfld. & P.E.I.R. 123 (N.L.S.C. T.D.). In that case, the *Attorney General* took a public position professing "transparency and fiscal responsibility" with respect to its retention of counsel to prosecute its claim against *Imperial Tobacco* to recover health care costs related to cigarette smoking. The *Attorney General* had held a press conference in which it had disclosed some privileged information for political purposes, but declined to disclose the fee agreement associated with its claim of transparency and fiscal responsibility, saying it had not intended to waive privilege over that aspect of solicitor-client communications. The Court decided that by disclosing the fact that it had entered into a contingency agreement with its solicitors, the *Attorney General* had waived solicitor-client privilege over the fee agreement.

[41] Fairness can also serve to justify waiver of solicitor-client privilege when a third party possessed of confidential solicitor-client communications seeks to introduce them into evidence if the third party establishes that the communications are important to the outcome of the case and there is no reasonable alternative form of evidence that could be used for that purpose (*Descôteaux v. Mierzwinski,* [1982] 1 S.C.R. 860 at 876). Authors David M. Paciocco and Lee Stuesser also recognize this principle at page 242 in *The Law of Evidence,*7th ed. (Toronto, ON: Irwin Law, 2015), saying that inadvertently disclosed communications "can be used when the communications are important to the outcome of the case and there is no reasonable form of evidence that can serve the same purpose".

[42] The jurisprudence shows that solicitor-client privilege can also be lost through inadvertence. However, some courts have ruled that inadvertently

disclosed solicitor-client privileged material may still remain privileged. Such rulings are a deviation from the rule set out by the English Court of Appeal in *Calcraft v. Guest,* [1898] 1 Q.B. 759 (C.A.). In *Calcraft,* a privileged document found on the street was admitted into evidence on the basis that once the privilege was breached, it was lost regardless of the circumstances of the breach. The ruling in *Calcraft* is thought to be based on the principle that a court should not be deprived of relevant evidence. At page 241 of *The Law of Evidence*, Paciocco and Stuesser explain three rationales for the *Calcraft* rule:

> First, there is the principle that privilege protects the source of the information and not the information *per se*. Second, privileges are narrowly construed by the common law courts in order to minimize the loss of evidence. Third, those involved in the privileged relationship are obliged to safeguard their communications, and if they do not, then so be it, and the privilege is lost.

[43] The rule that solicitor-client privilege is lost no matter the circumstances of the breach was later effectively qualified in England in *Lord Ashburton v. Pape,* [1913] 2 Ch. 469 (Eng. C.A.), wherein the Court forbade use of privileged information that had been unlawfully or improperly obtained by the party seeking to use the information. This equitable principle appears to be based on the proposition that a wrongdoer cannot benefit from his own wrongdoing.

[44] In *Descôteaux,* the Supreme Court of Canada emphasized the importance of protecting solicitor-client communications as ruled in *Solosky*, and took Canadian law in an even more forgiving direction than that set out in *Lord Ashburton.* In *Descôteaux,* the Court determined that when disclosure of solicitor-client privileged material has been due to an inadvertent mistake and the holder of the privilege had no intention of waiving the privilege, solicitor-client privilege could be maintained by means of granting an injunction in advance of use of the privileged information.

[45] Case law and academic writing suggest that intention to waive a right can also be a factor in considering whether waiver by acquiescence has occurred. However, intention must be cautiously assessed, as Green J. pointed out at paragraph 107 of *Imperial Tobacco*:

> "The bare self-serving *ex post facto* assertion of an intention to maintain confidentiality, in the knowledge that an opposing party has claimed that actions of the party claiming privileges show that confidentiality or that the privilege has been waived, should not be given such weight. As Wigmore has stated: "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation." (8 Wigmore, Evidence McNaughton rev. 1961 at paragraph

> 2327). This is especially so when it is being asserted after the fact in the face of events that show a contrary conclusion. The actions of the privileged party in how he or she actually treated the information will generally be a much better basis for inferences of intention."

[46] Also pertaining is the Supreme Court of Canada's definition of "acquiescence" in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paragraph 147:

> Acquiescence depends on knowledge, capacity and freedom: *Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912. In the context of this case — including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants — delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver. As explained below, the first branch of the *Lindsay* test is not met here.

[47] In *Chapelstone,* Justice Robertson stated considerations leading to a determination that a holder of solicitor-client privilege who has inadvertently disclosed privileged material has waived privilege, saying at paragraph 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.

[48] In summary, solicitor-client privilege can be found to be waived if the holder of the privilege acquiesces in its breach. A finding of waiver depends on the circumstances of a case. First and foremost, the privilege-holder must be shown to have known that he or she has a right to seek to maintain the privilege. One cannot waive what one does not know one has. Secondly, and very importantly, are the actions or inaction of the privilege holder respecting protection and maintenance of the privilege. Actions or inaction speak louder than words. Delay in taking action and professed intention are also considerations, although either alone is not generally determinative. Reliance on an assumption that the privilege has been waived by the party seeking to use the privileged materials can also be a consideration. Finally, inadvertently disclosed

communications may be able to be used as evidence regardless of acquiescence if certain policy rationales are satisfied.

[49] In this case, application of these factors involves considering *FNI's* knowledge of its right to protect privilege over the documents, its actions or inaction, its intention to waive, and delay. Whether *Benoit* relied on using the documents before solicitor-client privilege was asserted may also be considered.

Application of the Law to the Issues

The Role of Counsel for Benoit and FNI

[50] *FNI* argues that counsel for *Benoit* had a duty to advise counsel for *FNI* in this litigation of the availability of the documents on the Qalipu website as soon as he learned of their existence. *FNI* also argues that once its counsel in this litigation learned of the breach and asserted solicitor-client privilege over the documents in late November 2018 and counsel for *Benoit* disagreed, counsel for *Benoit* had the duty to seek judicial determination respecting whether the documents could be used in the litigation or whether they remained protected by solicitor-client privilege. In other words, *FNI* argues that if its counsel in this litigation had known of the breach, he would have assured that privilege over the documents would have been asserted at that time, and thus *FNI* could not have been found to have acquiesced in the breach. *FNI* says the Judge ought to have considered the fact that counsel for *Benoit* knew of the breach and did not advise *FNI* counsel in May 2018 important, because the very six months during which *FNI* was found by the Judge to have acquiesced in the breach is the very six months that counsel for *Benoit* was in possession of the documents and did not advise counsel for *FNI*.

[51] As noted above, solicitor-client privilege is held by a client not the client's solicitor. *FNI*, the client, was fully aware of its right to seek to maintain privilege over the documents. This is especially so given its experience with CBC. As well, *FNI* was fully aware of the publication of the privileged documents on the Qalipu Secrets website in May 2018. Despite this knowledge, *FNI* did not assert to Ms. Tapp Melanson that the documents were protected by solicitor-client privilege nor did it demand that she destroy copies of the documents that she had in her possession or demand that she cease sending them to others. Neither did *FNI* attempt to contact the recipients of Ms. Tapp Melanson's May 21, 2018 email or her Facebook message and assert privilege over the documents. While *FNI* did get legal advice respecting the publication of the documents on the Qalipu Secrets site, this purported attempt to suppress

publication of the documents on the US Website does not explain its failure to take action to assert the privilege against Melanson and the *Benoit* plaintiffs. In short, *FNI* did not assert the privilege in full knowledge of its right to do so and that *Benoit* was in possession of the information since May 19, 2018. This circumstance was sufficient to enable the Judge to draw the inference that *FNI* did not intend to maintain its claim of privilege over the documents.

[52] *FNI's* counsel in this litigation is not the same *FNI* counsel who authored the documents in 2009 and 2013 or who provided advice to Chief Mitchell in May 2018. However, this fact does not make a difference to the analysis. It is *FNI's* actions or lack of action that determines whether the privilege has been waived. It does not matter whether or when *Benoit's* counsel knew of the availability of the documents on the internet or whether *FNI's* counsel in this litigation would have taken a different approach to the issue than the counsel whom *FNI* consulted after learning that the documents were on the internet. What matters is that *FNI* knew the privilege was breached by the availability of the documents on the internet in May 2018, and knew that it had the right to assert privilege over the document, but delayed in so doing until November 30, 2018 - six months later.

[53] The issue is brought into sharper focus by the fact that despite *FNI's* knowledge that the documents were available on the internet and had in fact been accessed by *Benoit, FNI* did not advise its counsel in this litigation of the situation. One would have expected *FNI* to notify its counsel in this litigation of the availability of the documents on the website and their subsequent wide distribution. This is especially curious given that the documents appear to be highly relevant and given that *FNI* learned of their disclosure on the Qalipu site after *FNI's* experience with CBC. The fact that different counsel for *FNI* could have different points of view on how to handle the matter is not material, for it is not about what different lawyers would or would not do. What is material is *FNI's* decision not to assert privilege in full knowledge of the breach. Instead of considering its own actions, *FNI's* approach appears to be an attempt to cast aspersions on *Benoit's* counsel.

[54] There was no direct evidence respecting *FNI's* intention to waive or maintain solicitor-client privilege. Chief Mitchell's evidence did not touch on the intentions of previous *FNI* administrations or Chiefs in the years before this matter was heard.

The Presumption of Impropriety

[55] *FNI* invited this Court, as it had invited the Judge, to presume that the breach of solicitor-client privilege which resulted in the documents being put on the internet was a surreptitious breach for an improper purpose. Such a presumption is secondary to *FNI's* argument that whenever a solicitor-client privileged document is accessed or accessible from the internet, and it is unknown how or by whom it was obtained and published there, the document must be presumed to have been improperly obtained and published. This presumed impropriety, *FNI* argues, would automatically result in a determination that the document remains protected by privilege, and unable to be displaced by waiver. The Judge declined to make such a presumption, saying that impropriety was "mere speculation" (paragraph 78 of the Judge's decision).

[56] In this case there was no evidence that *FNI* had mistakenly or inadvertently disclosed the documents. The current chief, Chief Mitchell, gave evidence that he, speaking for *FNI* in May 2018 in support of maintaining the privilege, was unable to shed any light on whether *FNI* had intended to preserve or waive the privilege in the several years between when the documents were sent to *FNI* in 2009 and 2013 and when Chief Mitchell learned of the breach in May 2018, or how *FNI* had been protecting the privilege in those previous years. Moreover, Chief Mitchell acknowledged in his evidence the possibility that the documents could have been disclosed by someone within the FNI.

[57] The proffered evidence of Chief Mitchell and Ms. Tapp Melanson permitted the Judge to conclude that *Benoit* was not the cause of the breach, and this conclusion is not disputed. Once it was determined that *Benoit* was not the cause of the breach, and there was no evidence respecting how the breach occurred, the manner in which the breach occurred did not figure into the Judge's analysis. She determined that *FNI* had implicitly waived solicitor-client privilege over the documents on the principle of waiver by acquiescence.

[58] *FNI's* proposition that any breach of solicitor-client privilege which is not able to be explained must be presumed to have been improper is quite different from a determination of impropriety based on evidence. Our legal system is based on evidence, and findings of inadvertence so as to salvage solicitor-client privilege which would otherwise be determined to be waived have been based on evidence. This evidence-based exception has been carved out of the general principle – that once breached, solicitor-client privilege is no longer protected – for the purpose of excusing a mistake when disclosure of privileged information results from a genuine mistake. Generally in cases of inadvertence,

it is obvious that there has been mistaken disclosure. Moreover, in some cases the privilege-holder may not even be aware of the inadvertent disclosure. In such cases, opposing counsel are obliged not to take advantage of the mistake by making use of the material until the matter of its availability for use has been determined. *FNI* did not adduce any evidence to support the drawing of inferences with respect to whether disclosure of the documents was by mistake, otherwise inadvertent, or by improper means. Presuming impropriety in circumstances where there is no evidence of impropriety affecting a privilege-holder or that the party seeking to use the information has acted wrongly, is not warranted on the facts of this case.

The Judge's Approach from the Perspective of Inadvertence

[59] *FNI* submits that the Judge erred in determining the case from the perspective of inadvertence, because this approach required *FNI* to prove it had taken all reasonable care to protect the privilege. *FNI* maintains that this approach effectively placed a burden on *FNI* to demonstrate that it had acted responsibly to protect solicitor-client privilege over the documents - a burden it argues is next to impossible to discharge.

[60] When solicitor-client privilege has been breached inadvertently, the jurisprudence allows for consideration of the circumstances and context surrounding the breach to determine whether or not privilege has been waived. In this regard, I note that Paciocco and Stuesser say in *The Law of Evidence*, that the obligation of privilege-holders to safe-guard their communications can be a factor in determining whether solicitor-client privilege is lost through inadvertence (at page 241). While I agree with *FNI* that proving that reasonable care was taken to protect privileged documents may have been difficult in this case, I do not agree that it would have been next to impossible to do. In both *Airst v. Airst* (1998), 37 O.R. (3d) 654 (Ont. Gen. Div.) and *Eizenshtein. v. Eizenshtein* (2008), 62 R.F.L. (6th) 182 (Ont. S.C.J.) there was evidence led respecting how the solicitor-client privileged documents in those cases got disclosed despite efforts to protect them as privileged and that evidence informed the respective judicial determinations. A privilege-holder ought to be able to provide some evidence of how the privileged documents were safe-guarded to protect the privilege for it is within its power to do so. A party seeking to use the privileged documents it obtained on a public website would have a more difficult challenge to prove how the documents escaped the

privilege-holder's grasp, for it would not be within that party's ability to know how the privilege-holder was protecting the privileged material.

[61] In my view, the Judge's approach to the waiver issue from the perspective of inadvertence gave *FNI* the opportunity to show that disclosure was mistaken or inadvertent, so as to escape a waiver determination. The Judge's approach was fair to *FNI*. She did not err by conducting her analysis on the assumption that the documents could have been disclosed inadvertently.

[62] In this case, there has been a significant passage of time between when the documents were received by *FNI* in 2009 and 2013 and when the parties learned of their disclosure on the website in May 2018. There was no evidence respecting how the documents were treated during this time and no evidence respecting the numbers of different people on the *FNI* Board over the years, including changes in Chiefs. The documents have been publically available and widely distributed on the internet, as well as thought by *Benoit* to be able to be used for some period of time before solicitor-client privilege was asserted. I also note that after the CBC incident, the QMFNB published *FNI's* indemnity agreement with *Canada* on its website. That agreement had not previously been made public. In short the use of the documents is impugned in the context of an ongoing and controversial public debate as to Qalipu membership. These circumstances are a concern with respect to depriving a court of evidence relevant to the current litigation, as well as fairness to *Benoit,* as per the *Descôteaux* principle that privileged communications may be able to be used if they are important to the outcome of the case and there is no reasonable alternative form of the evidence.

[63] In summary, I am of the view that the Judge's rulings respecting the role of counsel for *Benoit* and counsel for *FNI*, her refusal to presume that the documents were improperly obtained and distributed, and her considering whether *FNI* could demonstrate inadvertence, do not disclose error. Her decision that *FNI* waived privilege over the documents by acquiescing in its breach was correctly determined.

DISPOSITION

[64] In the result, I would dismiss *FNI's* appeal.

COSTS

[65] I would award *Benoit* its column three costs of the appeal.

L. R. Hoegg J.A.

I Concur:
D. E. Fry C.J.N.L.

I Concur:
J. D. Green J.A.