# Court of Queen's Bench of Alberta

**Citation: Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP, 2011 ABQB 339**

**Date:** 20110520
**Docket:** 1001 01977
**Registry:** Calgary



Between:

**Scott & Associates Engineering Ltd.**

Plaintiff

- and -

**Ghost Pine Windfarm, LP, Fortuna GP, Inc., Fortuna Limited Partner Holding, ULC, NextEra Energy Canada, ULC and NextEra Energy Resources, LLC**

Defendants

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**Memorandum of Decision**
**of the**
**Honourable Mr. Justice Bryan E. Mahoney**

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## I. Introduction

[1] The Applicant claims that privilege does not apply to certain redactions on produceable documents made by the Respondents, and alternatively, that if privilege does apply, it should be waived. For the following reasons I find that privilege does apply.

[2] Scott & Associates Engineering Ltd. (the "Applicant") is an Alberta engineering services company. The Respondents are two of the Defendants, Ghost Pine Windfarm, LP ("Ghost Pine") and Fortuna GP, Inc. ("Fortuna"). Ghost Pine is a partnership created pursuant to the provisions of s. 52 of the *Partnership Act*, R.S.A. 2000, c. P-3 and Fortuna is the General Partner of that partnership.

[3] The other Defendants, Fortuna Limited Partner Holding, ULC, NextEra Energy Canada, ULC, and NextEra Energy Resources, LLC are not Respondents to this application.

## II. Facts

[4] This application arises over the ownership of a wind farm located near Three Hills, Alberta (the "Ghost Pine Wind Farm"). In 2007, the Applicant sued Finavera Renewables Inc. ("Finavera") in a separate action, in this Court (No. 0701 08472 - the "Finavera Litigation"). In the Finavera Litigation, the Applicant alleged that Finavera had used confidential information relating to the Ghost Pine Wind Farm (the "Confidential Information") unlawfully in breach of a duty of confidence. As well, the Applicant alleged that it was entitled to a constructive trust over Finavera's interest in the Ghost Pine Wind Farm.

[5] On August 29, 2008, Ghost Pine and Finavera entered into an Asset Purchase Agreement (the "APA"), in which Ghost Pine purchased from Finavera assets pertaining to the Ghost Pine Wind Farm (the "Ghost Pine Assets"). Paragraph 2.4(e) of the APA provides that Ghost Pine will retain a $1 million holdback (the "Holdback") as security for its indemnification by Finavera for any losses that Ghost Pine may incur with respect to the Finavera Litigation.

[6] In its Amended Statement of Claim in this action, the Applicant makes a number of allegations. First, it alleges that the Defendants purchased the Ghost Pine Assets; including the Confidential Information, with actual or constructive knowledge that the Applicant claims a constructive trust over those assets as claimed in the Finavera Litigation. Next, the Applicant alleges that the Defendants knowingly received trust property when they purchased the Ghost Pine Assets. As well, the Applicant alleges that, through the Holdback, the Defendants attempted to neutralize their knowledge of the constructive trust, providing the Applicant a basis for the fraud allegation required under s. 203 of the *Land Titles Act*, R.S.A. 2000, c. L-4. The Applicant also alleges equitable fraud based on the facts pleaded in the Amended Statement of Claim.

[7] The Respondents redacted portions of two documents in their Affidavit of Records (the "Redacted Documents"). The Redacted Documents are the APA, and an email (the "Email") between a counsel for Ghost Pine and a representative of Ghost Pine. Four portions of the APA are redacted. In total, there are five redactions before the Court (the "Redactions"):

(i) The "First APA Redaction", appearing at page GPW000256_0012 of the APA;
(ii) The "Second APA Redaction" appearing at page GPW000256_0026 to GPW000256_028 of the APA;
(iii) The "Third APA Redaction" appearing at page GPW000256_0035 to GPW000256_36 of the APA;
(iv) The "Fourth APA Redaction" appearing at page GPW000256_0053 of the APA (collectively, the "APA Redactions"); and
(v) The "Email Redaction", appearing on the top half of page GPW000356_001.

[8] On August 9, 2010, the Applicant filed a Notice of Motion and Cross-Motion seeking a declaration as to which records in the Affidavits of Records were privileged (the "Privilege Application"). Justice Nation made an order on August 18, 2010 which split the Privilege Application into two parts: a hearing on the merits and a hearing to determine the procedure to be followed, if the parties could not agree on the latter. Justice Strekaf heard the procedure application on December 3, 2010 and ordered the following:

(a) the Respondents were to file Affidavits attesting to the nature of the privilege claimed over the Redacted Documents;

(b) the Merits Application would be scheduled to address the merits of the Respondent's claim to privilege in respect of the redactions in the Redacted Documents;

(c) the Respondents were to file their brief for the Merits Application first, following which the Plaintiff was to file its brief; and

(d) the Respondents would provide the Court with an unredacted copy of the Redacted Documents in a sealed envelope for review in connection with the Merits Application.

[9] This application is the Merits Application. The Respondents argue that all the APA Redactions are protected by litigation privilege and common interest litigation privilege. They further argue that the First APA Redaction and the Fourth APA Redaction are protected by solicitor-client privilege, as well as the common interest exception to solicitor-client privilege. As regards the Email Redaction, the Respondents argue that it is protected by solicitor-client privilege. I have read the unredacted copy of the Redacted Documents which was supplied to the Court pursuant to the December 3, 2010 Order of Justice Strekaf.

[10] The Applicant denies that privilege applies to the Redacted Documents. In the alternative, if the Redacted Documents are privileged, the Applicant argues that privilege should be waived on a number of grounds.

## III. Issues

[11] The issues are as follows:

1) Are the Redactions privileged?

2) Does the crime-fraud exception to solicitor-client privilege apply?

3) Have the Respondents waived privilege by putting their state of mind in issue, or because fairness requires that privilege be waived?

## IV. Analysis

[12] The parties agree that the onus is on the party asserting the privilege to establish entitlement. Once the entitlement is established, the onus shifts to the party seeking to have privilege waived. See *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 202 A.R. 19 (Q.B.), citing *Syncrude Canada v. Babcock & Wilcox* (1992), 135 A.R. 21 (C.A.).

### 1) Are the Redactions Privileged?

#### (i) Solicitor-Client Privilege

[13] The Respondents seek to establish solicitor-client privilege and litigation privilege, as well as common interest privilege.

[14] Solicitor-client privilege protects the relationship between the lawyer and the client. In order for our complex system of justice to function properly, the client must be able to communicate candidly with his or her lawyer so that the lawyer can fully represent the client's interests: see *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 at para. 26; and *Bre-X Minerals Ltd. (Trustee of) v. Bennett Jones Verchere*, 2001 ABCA 255, 293 A.R. 73.

[15] In order to be protected by solicitor-client privilege, a communication must be made between a lawyer and a client, in the course of seeking or providing legal advice, and intended by the parties to be confidential. See *McClure* at para. 36, *Bre-X Minerals Ltd.* at para. 22.

[16] Solicitor-client privilege applies to a continuum of communications made in connection with the provision of legal advice. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112, 487 A.R. 71, the Court allowed a claim of privilege over correspondence between counsel and a client even though that correspondence did not contain advice or a request for advice. At para. 26, the Court cited with approval from *Balabel v. Air India*, [1988] Ch. 317, [1988] 2 All E.R. 246 (C.A.), including the following:

> There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.

[17] Solicitor-client privilege may apply to a whole document, or a portion of the document. See for example *Snehotta v. Zenker*, 2010 ABQB 556.

[18] However, communications with a lawyer not made for the purpose of obtaining legal advice are not privileged: see *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180. In *R. v. Campbell*, [1999] 1 S.C.R. 565, Binnie, J. stated for the Court that solicitor-client

privilege did not attach to communications where the lawyer provided business, not legal, advice. Further, "[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered": at para. 50.



**(ii) Litigation Privilege**

[19] Litigation privilege seeks to protect and facilitate the adversarial process by allowing a party to prepare for litigation without interference or fear of disclosure. It is not restricted to solicitor-client communications. Litigation privilege applies where related litigation is pending or even reasonably apprehended. See *Blank* at paras. 27-38; *Moseley v. Spray Lakes Sawmills (1980) Ltd.* 1996 ABCA 141, 184 A.R. 101 at paras. 14, 18.

[20] Litigation privilege protects the litigation strategies of counsel. In *Moseley*, Conrad, J.A. discussed the scope of litigation privilege, at para. 21:

> The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created particularly to prepare one's case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation.

[21] The test for litigation privilege is the "dominant purpose" test. A document will attract litigation privilege if the dominant purpose for which the document was prepared was for use in respect of litigation. See *Blank* at para. 60; *Moseley* at paras. 18 and 21; and *Keefer Laundry*. In *Moseley*, Conrad, J.A. emphasized that preparation for litigation must be the dominant purpose, and not only one possible purpose, of the document.

[22] In *Keefer Laundry*, Gray, J. noted that, to establish litigation privilege, the party asserting it will need to show evidence of the circumstances in which the documents were created, such as who created them, when they were created, who authorized them, and their uses.

**(iii) Common Interest Privilege**

[23] Common interest privilege allows parties with common interests to share certain privileged information without waiving their privilege.

[24] In *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2008 ABQB 552, 456 A.R. 244. Hughes, J. discussed the history of common interest privilege, stating at para. 54:

> Common interest privilege was first recognized in *Buttes Gas & Oil Co v. Hammer (No 3)* (1980), [1981] Q.B. 223, [1980] 3 All E.R. 475 (C.A.), rev'd on other grounds [1982] A.C. 888) (*Buttes*), in which Lord Denning affirmed at 243:

> There is a privilege which may be called a ‘common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him–who have the self-same interest as he–and who have consulted lawyers on the self-same points as he–but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation–because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> In all such cases I think the courts should–for the purposes of discovery–treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

[25] In *Griffiths McBurney & Partners v. Ernst & Young YBM Inc.*, 2000 ABCA 284, 271 A.R. 123, Wittmann, J.A. (as he then was) noted that common interest privilege extends to litigation privilege. That is, common interest privilege allowed parties with a common interest in the same anticipated or current litigation to share information protected by litigation privilege without waiving that privilege.

[26] For common interest privilege to apply, the persons sharing a common interest do not have to be co-parties. It is enough that they "anticipate litigation against a common adversary on the same issue or issues": *Genier v. CCI Capital Canada Ltd.*, 2008 CarswellOnt 209 (S.C.J.) at para. 18. As well, the position of the persons sharing information does not have to be identical, as long as there is sufficient common interest between them: *Sauvé v. Insurance Corp. of British Columbia*, 2010 BCSC 763.

[27] However, Alberta Courts have also extended common interest privilege past the litigation context. It has been applied to parties that have "a common interest in bringing a transaction to a successful completion....not dependent on an interest shared by the parties in ongoing or anticipated litigation": *Canmore Mountain Villas v. Alberta (Minister of Seniors and Community Supports)*, 2009 ABQB 348 at paras. 7-8 per Sanderman, J. See also *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 1998 ABQB 455, 229 A.R. 191; *Archean Energy Ltd. v. Minister of National Revenue* (1997), 202 A.R. 198 (Q.B.). The communication between the parties with a common interest must be made on a confidential basis.

[28] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) appears to be the leading Canadian case on common interest privilege. Carthy J.A. cited with approval an excerpt from a US case which differentiated between the application of common interest privilege to solicitor-client and litigation communications. The excerpt from the US case included the following statement: "...while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice to show waiver of the work product privilege": at para. 45. Carthy J.A. commented, at para. 46, "[a]lthough the subject of common interest has arisen in other contexts in Canadian cases, I am satisfied that the above two excerpts should be adopted as expressing both the applicable principle and the specific application of that principle to the issues on this appeal": at para. 46. Carthy J.A. then went on to cite authorities which include *Anderson* and *Archean*. However, Carthy J.A.'s meaning is equivocal, in that it is not clear if the judge intended to disagree with the extension of the common interest privilege in the Canadian cases, or simply felt no need to delve into the subject.

[29] In *Pinder v. Sproule*, 333 A.R. 132 (Q.B.), Slatter J. criticized the extension of the common-interest privilege in the *Anderson* case, but agreed with the result. He stated at para. 62:

> The *Anderson* case does not draw any distinction between the documents said to be subject to solicitor and client privilege, and those said to be subject to the litigation privilege. The decision tests whether there has been a waiver against the four-part *Wigmore* test, which as I have previously noted is not applicable to litigation privilege. I respectfully agree with the conclusion that disclosure to the financial adviser and the potential merger partner is not a waiver of the litigation privilege, although I would not have resort to the "common interest' exception to wavier by disclosure. The "common interest" exception was developed for parties with a common interest in litigation, not in business transactions. Potential parties to a merger or other business transaction are in many ways adverse in interest, and it strains the common interest except to try and fit disclosures between such parties within that exception. Disclosure in a commercial context should not amount to a waiver, as the party owning the document has every expectation that the recipient will respect the privilege, and will not disclose the document to the adversary. Furthermore, the document is being used for a purpose entirely outside the scope of the litigation, and no unfairness will fall on the adversary by not receiving the privileged document. In addition, within the framework of the adversarial system the adversary has no legitimate interest in seeing the privileged document just because the party holding the document is engaged in some collateral

> commercial transaction. A party involved in litigation is not required to put a halt to its business dealings in order to preserve privilege.

[30] In *Pitney Bowes of Canada Ltd. v. R.*, 2003 FCT 214, 229 F.T.R. 277, O'Reilly J. reconciled the extension of solicitor-client privilege with Slatter J.'s criticism of it as follows, at paras. 18-20:

> As mentioned above, in these kinds of cases the real issue is whether the privilege that would originally apply to the documents in dispute has somehow been lost - through waiver, disclosure or otherwise. This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure. I read the foregoing cases as authority for the proposition that in certain commercial transactions the parties share legal opinions in an effort to put them on an equal footing during negotiations and, in that sense, the opinions are for the benefit of multiple parties, even though they may have been prepared for a single client. The parties would expect that the opinions would remain confidential as against outsiders. In such circumstances, the courts will uphold the privilege.
>
> However, the cases do not say, as I read them, that the mere existence of a commercial transaction is sufficient on its own to insulate all shared solicitor-client communications from attempts to gain access to them. There may well be cases where the parties to a commercial transaction disclose privileged documents in circumstances that suggest that there has indeed been a loss or waiver of privilege. As mentioned, in the commercial setting it is less clear than in Lord Denning's example which parties have common interests. Therefore, it is more difficult to make a hard and fast rule. I agree with the observation of Slatter J. in *Pinder v. Sproule*, [2003] A.J. No. 32 (Alta. Q.B.) that "[p]otential parties to a merger or other business transaction are in many ways adverse in interest, and it strains the common interest exception to try and fit disclosures between such parties within that exception" (at para. 62).
>
> Still, in many commercial transactions, the parties will want to negotiate on the footing of a shared understanding of each other's legal position. They will seek legal advice from reputable solicitors whose opinions will be respected by the other parties. Indeed, the solicitors may represent more than one party to the deal. The sharing of legal opinions will ensure that each party has an appreciation of the legal position of the others and negotiations can proceed in an informed and open way. The advice may be provided for one or more party on the understanding that others should be provided copies. The expectation, whether express or implied, will be that the opinions are in aid of the completion of the transaction and, in that sense, are for the benefit of all parties to it. Such circumstances, in my view, create a presumption that the privilege attaching to the solicitor-client communications remains intact notwithstanding that they have been disclosed to other parties.

**(iv) The APA Redactions**

[31] The Applicant counters the Respondent's arguments that the APA Redactions qualify for litigation privilege arguing that their dominant purpose was not to prepare for the Finavera Litigation. Rather, the Applicant argues the dominant purposes of the APA Redactions were as follows:

(i) for the First APA Redaction, to enumerate two conditions precedent to the payment of the Purchase Price;

(ii) for the Second and Third APA Redaction, to manage the business risk in case the Applicant won the Finavera Litigation by providing for the terms of the Holdback; and

(iii) for the Fourth APA Redaction, to provide for a disclosure document relating to the legal advice of Finavera's solicitors regarding the Finavera Litigation.

[32] Next, the Applicant argues that the First and Fourth APA Redactions do not meet the test for solicitor-client privilege, as these documents are merely part of a sales agreement between two parties and do not entail the seeking or giving of legal advice. In particular, the Applicant argues that the First APA Redaction likely enumerates a satisfactory review of a legal opinion as a condition precedent, but is not the legal opinion itself; and that the Fourth APA Redaction is a reference to the legal brief of Finavera's solicitors but not the legal brief itself. As well, he argues that the Fourth APA Redaction has to do with a communication between two corporate entities, and doesn't entail the seeking of legal advice.

[33] Regarding common interest privilege, the Applicant simply submits that there can be none where there is no underlying privilege, or where the underlying privilege has been waived.

[34] Having read the unredacted documents and the affidavit evidence of Laura Contave, corporate representative of the Respondents, I find that the APA Redactions were prepared by counsel for the parties for the dominant purpose of preparing for and aiding in the conduct of the Finavera Litigation, which was ongoing when the APA was prepared. Furthermore, the common interest privilege applies, as Ghost Pine, Fortuna and Finavera all remain in ongoing litigation against a common adversary in respect of the same issues, namely the Applicant's claim of a constructive trust over the Ghost Pine Assets. The APA Redactions pertain directly to these shared issues, and were jointly prepared by the parties for the express purpose of litigating these shared issues.

[35] I find that APA Redactions One and Four are protected by solicitor-client privilege. These Redactions expressly refer to the substance of communications between Finavera's counsel, Finavera and Ghost Pine; that these communications were directly related to the formulation and provision of legal advice by counsel for Finavera to the parties in respect of the Ghost Pine Purchase; and that the parties to the communications intended them to be

confidential. Furthermore, the Respondents have not waived their solicitor-client privilege by sharing the First and Fourth APA Redactions with each other, due to common interest privilege. The legal advice to which the First and Fourth APA Redactions pertain was sought by the parties to the APA out of their mutual interest in successful completion of the purchase of the Ghost Pine Assets.



**(v) The Email Redaction**

[36] The Applicant argues that the Email Redaction is not properly protected by solicitor-client privilege because it relates to business communications and not legal advice. The Applicant theorizes that the Email Redaction is part of a chain of emails between the solicitors for Finavera and the solicitors for the Defendants. He argues that neither solicitor is the client of the other, and therefore no solicitor-client privilege can attach as no legal advice is being shared.

[37] I find, having again read the unredacted e-mail and the affidavit evidence of Laura Contave that the Email Redaction is protected by solicitor-client privilege because it falls within the continuum of communication within which legal advice was sought and provided related to the purchase of the Ghost Pine Assets. The Email Redaction is correspondence between counsel for Ghost Pine and a representative for Ghost Pine, and I find on the evidence that it arose in the context of legal advice being sought and received in connection with the purchase of the Ghost Pine Assets where there was an expectation of confidentiality.

**2) Does the Crime-Fraud Exception to Solicitor-Client Privilege Apply?**

[38] There is a well-established exception to solicitor-client privilege when the advice is given to facilitate a crime or fraud: *R. v. Campbell* at para. 55.

[39] For the exception to apply, the client must know or ought to know that the activity regarding which he or she seeks advice is unlawful at the time he or she seeks the advice. It does not matter whether the solicitor actively conspires with the client, or is deceived by the client into giving the advice. The exception will not apply where the solicitor merely advises a client about the legality of proposed conduct. See *R. v. Campbell* at paras. 55-61; *Dublin v. Montessori Jewish Day School of Toronto* (2007), 85 O.R. (3d) 511 (S.C.J.) leave to appeal allowed, [2007] O.J. No. 5230 (Div.Ct.) at para. 34.

[40] Here, in addition to arguing fraud, the Applicant also argues that the exception extends further than fraud, citing cases such as *Northwest Mettech Corp. v. Metcon Services Ltd.* (1997), 78 C.P.R. (3d) 86 (B.C.S.C.), *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C.S.C.) and *Dublin*. In particular, the Applicant seeks to apply the exception to an allegation that the Respondents knowingly received property which may become the subject of a constructive trust. As regards the Confidential Information, the Applicant includes the allegation that the Respondents knowingly received and profited from Finavera's alleged breach of confidence.

[41] In order for a Court to waive privilege under the crime-fraud exception, a mere allegation is not enough. The Applicant must show *prima facie* evidence to give colour to the allegation before privilege will be disallowed: *Yawrenko v. Boyle*, 1999 ABQB 946; 256 A.T. 115; *Refco Alberta Inc. v. Nipsco Energy Services Inc.*, 2002 ABQB 480, 315 A.R. 188 varied on other grounds, 2002 ABCA 312, 317 A.R. 316. In *Refco*, Power, J. cited the following, at para. 34:

> In *O'Rourke v. Darbishire and Others*, [1920] A.C. 581, [1920] All E.R. Rep. 1 Viscount Finlay speaking in the House of Lords stated as follows at page 6:
>
> ...
>
> > It is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The court will exercise its discretion not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purposes of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a prima facie case as would make right to treat the claim of professional privilege as unfounded.

[42] In *Canbrook Distribution Corp v. Borins* (1999), 7 C.B.R. (4th) 121 (Ont. Gen. Div.), Ground, J. held at para. 22:

> ...The pleadings by the plaintiff make allegations that these various steps were taken in furtherance of a fraud. It appears to me however, that the steps are equally consistent with a legitimate business transaction, and where the facts are neutral in that they are equally consistent with either a fraudulent or a legitimate transaction, the plaintiffs, in my view, have not made out a prima facie case of fraud sufficient to set asides solicitor/client privilege. I am supported in this view by the authorities which indicate that in the event of any doubt the court should err on the side of protecting solicitor/client privilege.

[43] Regarding the fraud argument, the Applicant submits that equitable fraud arises when a buyer purchases an estate which the buyer knows the vendor does not own, and intends in so

doing to deprive the true equitable owner of the estate. See *Holt Renfrew & Co. v. Henry Singer Ltd.* (1982), 37 A.R. 90 (C.A.) leave to appeal to SCC refused, [1982] 2 S.C.R. xi.

[44] As well, the Applicant submits that the fraud rises above the level of equitable fraud, and incorporates the "additional element" needed for fraud under s. 203(3) of the *Land Titles Act*, R.S.A. 2000, c. L-4. Section 203 provides:

> (2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,…
>
> > … (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
>
> (3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

[45] For a finding of fraud under s. 203(3), "something more than mere notice is required to constitute fraud: 'There must be an additional element', engaging an element of dishonesty: [citation omitted]": *1198952 Alberta Ltd. v. 1356472 Alberta Ltd.*, 2010 ABCA 42, 474 A.R. 274 leave to appeal to SCC refused, 33713 (Sept. 24, 2010) at para. 13. Mere equitable fraud is not actionable under the *Land Titles Act*. The Applicant argues a number of different possibilities for the "additional element", such as the existence of the holdback whereby the Respondents sought to indemnify themselves from the possible effects of the Finavera Litigation, as well as the purchase by Ghost Pine of leases and other assets, including the confidential information, potentially subject to the constructive trust claim.

[46] The Applicant also cites *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1992), 3 Alta. L.R. (3d) 210 (Q.B.), where Berger J. noted that solicitor-client privilege does not extend to the very issue of an action: at para. 7. The Applicant submits that fraud is one of the very issues of the action.

[47] Regarding the alleged unlawful conduct, the Applicant argues that conduct arises out of the Respondent's alleged knowing receipt of the Ghost Pine Assets, including the Confidential Information.

[48] The Applicant submits that counsel gave advice as to how to perpetrate a fraud when drafting the APA, and advising the Respondents on how to successfully complete the purchase of the Ghost Pine Assets.

[49] I find that the fraud-crime exception cannot apply in the present case, even assuming (without deciding) that the exception would extend to unlawful acts beyond fraud. The evidence before me is not enough to give colour to the charges of fraud or knowing receipt. The *prima*

*facie* evidence goes no further than that the Respondents purchased the Ghost Pine Assets while knowing of the Finavera Litigation, and sought to indemnify themselves against that litigation.

[50] Furthermore, a holdback or indemnity provision is a standard, commercial term included in agreements for purchase and sale of assets.

[51] As well, the Supreme Court of Canada was clear in *R. v. Campbell* that, for the exception to apply, the client must be in a position where it knows or ought to know, at the time the advice is sought, that the facilitated activity is unlawful. The Applicant has not shown that the Respondents knew or ought to have known that the facilitated activity was unlawful.



**3) Have the Respondents Waived Privilege by Putting their State of Mind in Issue, or Because Fairness Requires that Privilege be Waived?**

[52] The Applicants argue that the Respondents have waived solicitor-client privilege by putting their state of mind in issue, and because fairness demands waiver.

[53] Evidence justifying waiver must be "clear and free of ambiguity": *Maximum Ventures Inc. v. De Graaf*, 2007 BCSC 1215, aff'd 2007 BCCA 510, at para. 40.

[54] Where a party "voluntarily injects into the proceeding the question of its state of mind, and, in so doing, uses as a reason for its conduct the legal advice that it has received," that party will have waived the solicitor-client privilege attaching to that legal advice: *Fraser v. Houston*, 2002 BCSC 1378, aff'd 2003 BCSC 853 at para. 22. The rationale behind this rule is one of fairness, because allowing the party to maintain privilege would leave the other side unable to explore that state of mind: *Ed Miller*.

[55] In order for a party to waive solicitor-client privilege by putting his or her state of mind in issue, that party must give evidence to the effect that he or she simply adopted the solicitor's advice without any independent reflection. Kent, J. explained the requirement in *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2007 ABQB 80 at para. 3:

> ...When clients are given advice, it is precisely for the purpose of making decisions so as to instruct counsel. That invokes their state of mind. To create a waiver, it cannot be as simple as obtaining confirmation that a person received legal advice on the issue at hand and acted upon it. If that was the case, then the first two questions in any cross-examination in any action would be to create that waiver. There must be evidence from the party about whose privilege is in issue that they simply adopted their solicitor's advice without any independent reflection.

[56] There must be an affirmative allegation by a party that puts its state of mind in issue. It has been suggested that the state of mind cannot be waived by an allegation made by the party

seeking to have the privilege removed. However, in *Ed Miller*, Berger, J. held that view was not absolute, stating at paras. 16 -17:

> I would not, with respect, adopt so rigid a formulation. In a proper case, considerations of fundamental adjudicative fairness may be so compelling that the court may be persuaded to order disclosure of an adverse party's legal advice though such solicitor-client communications were not voluntarily placed in issue by that party.
>
> Such cases, it seems to me, would be rare, indeed. The court will not lightly penetrate the shield of solicitor-client privilege in reliance upon unilateral assertion of an issue by an adverse party.

[57] However, privilege may countermand release. Power, J. stated in *Refco* at paras. 36 and 41:

> Fairness does not require any broader release of clearly privileged communications, and in fact the fundamental importance of the doctrine of privilege strictly prohibits any broader release.
>
> ...
>
> The Plaintiff is entitled to specific evidence about legal advice relied upon by the Directors, and the relevant details and documents have been provided. They are not entitled to "fish" for evidence in the larger sea of privileged material.

[58] In its argument regarding fairness, the Applicant points out that the defendant's state of mind is a key issue in an action for knowing receipt. In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, La Forest, J. considered the threshold of knowledge needed for a claim of knowing receipt. He held that, to succeed, the plaintiff needs to show actual or constructive knowledge on the part of the defendant.

[59] The Applicant submits that privilege should be waived because the Respondents' state of mind is in issue. The Applicant concedes that it brought the Respondents' state of mind into issue by alleging the Respondents knowingly received the constructive trust property. However, the Applicant points out that the evidence shows that counsel for Ghost Pine drafted the APA, and gave legal opinions to facilitate the successful completion of the Ghost Pine purchase. Therefore, the Applicant submits that legal advice was relied on to generate the APA, and as a result the Respondents have put their state of mind in issue.

[60] Alternatively, the Applicant submits that fairness requires the disclosure of the Redactions, because the Applicant must be able to probe the state of the Respondents' knowledge in order to have a chance to prove its knowing receipt claim.

[61] I disagree with the Applicant's state of mind argument on two grounds. First, the Applicant has not introduced any evidence to show that the Respondents have put the state of their legal knowledge at issue. As well, the Applicant admits that it was the Applicant who brought into issue the Respondents state of mind. A party only waives privilege when it makes an affirmative allegation placing its state of mind in issue, not when the side which desires the information makes such an allegation.
[62] Second, the Applicant has not shown any evidence that the Respondents simply adopted their solicitor's advice without any independent reflection. The Applicant takes an unreasonable interpretation of the fact that the APA was drafted by counsel, and that counsel gave legal advice to facilitate the completion of the Ghost Pine purchase. The mere fact that the Respondents obtained legal advice is not sufficient to waive privilege over that legal advice.

[63] Regarding fairness, I agree with the Respondents that the grounds here are not compelling nor exceptional enough to require disclosure. In *Ed Millar*, Berger, J. emphasized that it would only be in rare cases that fairness would require waiver where the party had not voluntarily injected its state of mind into the proceedings. In *Ed Millar* the formulation was made in the limited context of privileged legal advice capable of speaking to the legal knowledge of a party. As a result, the principles of fairness do not constitute a general basis upon which I would waive otherwise applicable privileges.

## V. Conclusion

[64] For the reasons already stated I find that the APA Redactions are protected by litigation privilege and common interest privilege. The First and Fourth APA Redactions are protected by solicitor-client privilege as is the Email Redaction. The application is dismissed and one set of costs for one counsel are payable to the Respondents for a contested special application requiring written briefs under column 5 including an additional half day for cross-examination.

Heard on the 5th day of April, 2011.
**Dated** at the City of Calgary, Alberta this 20th day of May, 2011.

**Bryan E. Mahoney**
**J.C.Q.B.A.**

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