

The Corporation of the City of Kawartha Lakes v. Gendron, 2018 ONSC 3498

Rarely will a party be found to have waived privilege over its solicitor and client file and other confidential information but it can happen. In this decision on an appeal from a Master's order Justice Woodley found that the City of Kawartha Lakes (The "City") had waived privilege over a whole host of otherwise privileged documents by outlining in an affidavit a detailed narrative of the City's "reasonable" conduct in an attempt to justify its request for costs. The city solicitor, Ms. Carlson was found, through her affidavit, to have:

provided voluntary and detailed evidence of professional and confidential communication relating to ongoing settlement discussions, to the "reasonableness" of the City's conduct, and to the City's settlement strategy. Carlson referenced legal advice she received from external counsel. She also included affidavits from other city officials in her affidavit; those affidavits referred to solicitor client communications with external counsel.

It is helpful to know that the affidavits which were found to have waived privilege were prepared in a context where the City was bringing a motion for a bar order to facilitate a partial settlement of its action and our client, Gendron, along with a co-defendant, Farmer's Mutual Insurance Company, were bringing motions for summary judgment, alleging abuse of process, and seeking costs. In the context of those motions the City solicitor swore an affidavit setting out the chronology of the action and referencing advice received from counsel in an attempt to paint the City as a reasonable actor and Gendron as an unreasonable actor. Gendron then cross examined the city solicitor on that affidavit and the City refused to answer questions and produce documents claiming privilege. Gendron brought a motion before Master Brott who found that the City had waived privilege and the City appealed that order. Justice Woodley dismissed the appeal.

The action was brought by the City to recover costs borne by the City in remediating an oil spill on Gendron's property. At the same time the City was prosecuting an Order it had issued under the *Environmental Protection Act* (the "EPA") against Gendron for the same costs. Hence Gendron's abuse of process claim against the City. The hearing of the appeal of the City's EPA order was adjourned by the Environmental Review Tribunal (The "ERT") pending resolution of the civil action. In order to defeat a further adjournment request by Gendron of the ERT hearing the City told the ERT it that the civil action had partially settled while Gendron argued it had not. On the basis that the civil action had settled the ERT denied Gendron adjournment request and the City garnered an order compelling Gendron to pay \$313,000. Meanwhile the City had supposedly partially settled with the other defendants in the civil action for a payment of \$325,000. Gendron alleged the City had doubly recovered its damages. In his motion for summary judgment Gendron seeks costs alleging abuse of process and alleging double recovery against the City. In that context the City's solicitor and client file and numerous other otherwise

confidential documents were found to be relevant. So long as a matter is included in an affidavit and is relevant to the issues in the motion then it is relevant for the purposes of cross examination on that affidavit.

Once relevance was found the court turned its mind to privilege. Privilege was found to be waived using the reasoning of Justice Brown in *Ebrahim v. Continental Precious Metals Inc.*, 2012 ONSC 1123, [2012] O.J. No. 716 where Justice Brown described the plaintiff's disclosure was:

an obvious scenario of waiver", as described in Sopinka, Lederman and Bryant, because the holder of the privilege ... made a voluntary disclosure of a material part of a privileged solicitor-client communication by testifying on his own behalf, through his affidavit, thereby giving evidence of a professional, confidential communication.

The key phrase is "a voluntary disclosure of a material part of a privileged solicitor-client communication". A disclosure is voluntary where it can be said to have been done thoughtfully and not in an off the cuff or careless manner.

The materiality of the disclosure is found because the disclosure goes to the "reasonableness" of the parties conduct, the decision to begin more than one proceeding to recover the same damages, and the strategy to partially settle the claim for an amount greater than the damages, which are factors when deciding costs, abuse of process, and double recovery respectively, all issues in the various motions.

So the take away is that if your client signs an affidavit, as opposed to saying something without thinking it through on a cross examination or in discovery, which describes the advice she was given by you, and that affidavit attempts to make her conduct of the litigation appear "reasonable" or another party's appear "unreasonable" or is otherwise relevant to the issues in the motions she will be held to have waived privilege over all of her solicitor and client file and potentially other confidential documents.