Kawartha Lakes (City) v. Gendron, [2018] O.J. No. 3281

Ontario Judgments

Ontario Superior Court of Justice

S. Woodley J.

Heard: February 8, 12 and 14, 2018.

Judgment: June 11, 2018.

Lindsay Court File No.: 072/11

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[2018] O.J. No. 3281 | 2018 ONSC 3498 | 294 A.C.W.S. (3d) 25 | 81 C.C.L.I. (5th) 313 | 2018 CarswellOnt 9856

RE: The Corporation of the City of Kawartha Lakes, Appellant, and Wayne Gendron, Liana Gendron, Doug C. Thompson Ltd., operating as Thompson Fuels, Her Majesty the Queen in Right of Ontario, Technical Standards and Safety Authority, D.L. Services Inc., R. Ian Pepper Insurance Adjusters Inc., Farmers' Mutual Insurance Copany and Les Reservoirs D'acier de Granby Inc, Respondents

(83 paras.)

Case Summary

Civil litigation — Civil procedure — Appeals — From Masters' decisions — Appeal by the City of Kawartha Lakes from a Master's endorsement on a refusals and undertakings motion dismissed — The motion was successfully brought by the defendants to compel the City to answer relevant questions at a cross-examination of the City's solicitor, Carlson — Carlson refused numerous questions pertaining to her affidavit — Her affidavit was filed in response to pending motions related to the City's underlying negligence action — The City was deemed to have admitted the relevance of information included in the affidavit — Solicitor-client privilege was waived — If settlement privilege applied, it was also waived.

Civil litigation — Civil evidence — Documentary evidence — Affidavits — Cross-examination on — Appeal by the City of Kawartha Lakes from a Master's endorsement on a refusals and undertakings motion dismissed — The motion was successfully brought by the defendants to compel the City to answer relevant questions at a cross-examination of the City's solicitor, Carlson — Carlson refused numerous questions pertaining to her affidavit — Her affidavit was filed in response to pending motions related to the City's underlying negligence action — The City was deemed to have admitted the relevance of information included in the affidavit — Solicitor-client privilege was waived — If settlement privilege applied, it was also waived.

Municipal law — Actions by and against — Actions by municipality — Evidence — Appeal by the City of Kawartha Lakes from a Master's endorsement on a refusals and undertakings motion dismissed — The motion was successfully brought by the defendants to compel the City to answer relevant questions at a cross-examination of the City's solicitor, Carlson — Carlson refused numerous questions pertaining to her affidavit — Her affidavit was filed in response to pending motions related to the City's underlying negligence action — The City was deemed to have admitted the relevance of information included in the affidavit — Solicitor-client privilege was waived — If settlement privilege applied, it was also waived.

Appeal by the Corporation of the City of Kawartha Lakes (City) from a Master's endorsement on a refusals and undertakings motion. The motion was brought by the defendants to compel the City to answer relevant questions and provide relevant documents at a cross-examination of the City's solicitor, Carlson. Carlson refused numerous questions pertaining to her affidavit, primarily on the basis of relevance and privilege. Her affidavit was filed in response to three pending underlying motions. Those motions related to the City's underlying negligence action, which related to a furnace oil spill on the defendant Gendrons' property. Pursuant to the Master's endorsement, the City was compelled to produce relevant documents, re-attend, and answer relevant questions in continuation of the cross-examination. The City took the position that the Master erred in law and committed palpable and overriding errors.

HELD: Appeal dismissed.

The City was deemed to have admitted the relevance of information included in the affidavit. The City, as the holder of the solicitor-client privilege, made a voluntary disclosure. As a result, solicitor-client privilege was waived. If settlement privilege applied, it was also waived as extensive details regarding settlement discussions were contained in the affidavit. Finally, section 239 of the Municipal Act did not create a new "closed session" privilege.

Statutes, Regulations and Rules Cited:

Environmental Protection Act, 1990, c. E.19, s. 100.1

Municipal Act, 2001, S.O. 2001, c. 25, s. 239

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 29.2.03, Rule 34.12, Rule 39.02

Counsel

Christine G. Carter, Counsel, for the Appellant.

Martin Forget and John Lea, Counsel for the Respondents Wayne Gendron and Liana Gendron.

William G. Scott, Counsel, for the Respondent Farmers' Mutual Insurance Company.

REASONS FOR DECISION ON APPEAL

S. WOODLEY J.

OVERVIEW

1 This is an appeal by the plaintiff/appellant--the Corporation of the City of Kawartha Lakes (the "City")--from the endorsement of Master Brott dated August 2, 2017 (the "Endorsement"), on a refusals and undertakings motion (the "Motion").

2 The Motion was brought by the defendants/respondents Wayne and Liana Gendron (the "Gendrons") and Farmers' Mutual Insurance Company ("FM") (together, the "Respondents") to compel the City to answer relevant questions and provide relevant documents at a cross-examination of the City's solicitor, Robyn Carlson.

3 Carlson was cross-examined on an affidavit she swore on March 31, 2016 (the "Affidavit"), which she filed in response to three pending underlying motions (the "Main Motions") commenced by each of the City, the Gendrons, and FM.

4 The Main Motions pertain to the underlying negligence action, which arose from a furnace oil spill on the Gendrons' property. In that action, the City reached a tentative settlement agreement with nearly all the defendants in its civil claim (the "Settling Defendants"), except for the Respondents.

5 The Endorsement ordered the relief that the Respondents requested: the City was indeed compelled to produce relevant documents, re-attend, and answer relevant questions in continuation of the cross-examination.

The Main Motions

6 The Main Motions seek the following cumulative relief:

* approval of a partial settlement between the City and the Settling Defendants;
* dismissal of the City's action against the Gendrons and FM;
* a declaration that the City's action constitutes an abuse of process;
* a bar order;
* a declaration that any amount found owing by the Gendrons to the City has been satisfied (through double recovery); and
* costs of the action claimed by the Respondents as against the City and claimed by the City as against the Gendrons.

The Affidavit and Cross-Examination

7 The Affidavit includes multiple references to the settlement reached with the Settling Defendants. These include references to: legal advice obtained and relied upon; the City's motivation and conduct; and the Gendrons' and FM's motivation and conduct.

8 At Carlson's cross-examination on April 25 and 26, 2016, she refused to both answer numerous questions and produce numerous documents pertaining to questions arising from her Affidavit, primarily on the grounds of relevance and privilege.

The Endorsement

9 By her Endorsement, Master Brott found as follows:

a. On relevance: the conduct of the parties is relevant to the underlying issues and the questions asked are relevant. Furthermore,

the fact that information is outlined in detail in Ms. Carlson's Affidavit permits the cross-examination. If information has been put in the Affidavit, the City is deemed to admit its relevance and cross-examination within the four corners of the Affidavit is permitted (para. 4).

b. On solicitor-client privilege (paras. 6-8): it is clear that "the information set out in Ms. Carlson's Affidavit was put into the Affidavit intentionally". Also, "given that the City, as 'the holder of the privilege, made a voluntary disclosure or consents to the disclosure of any material part of a communication' ... the privilege has been waived".

Further, because the City's conduct is critical to the issue on the Motion--given that the City put its conduct into the Affidavit--the Respondents are "entitled to test the veracity of the information and challenge the narrative". Cross-examination is a necessity so that the Respondents' rights of fairness are appreciated. The City is not entitled to set out all its discussions as being appropriate and then

> shield itself from answering questions about the conduct by way of asserting solicitor/client privilege. That conduct created a situation of necessity and fairness which opens the door to the guarded privilege of solicitor client communication (para. 8).

c. On settlement privilege (paras. 9-16): although it is the lowest class of privilege it is a privilege nonetheless that serves to promote settlement. As the Affidavit "sets out all of the meetings, negotiations, offers etc. leading to the alleged partial agreement", this disclosure was sufficient to constitute a waiver of settlement privilege and permit the questions to be answered.

d. Finally, on "closed session privilege" (paras. 17-19): section 239 of the *Municipal Act,* 2001, S.O. 2001, c. 25 does not create a new class of privilege. To the extent that the privilege referred to as closed session privilege would equate to either solicitor-client privilege and/or settlement privilege this issue has already been determined and held that, by its Affidavit, the City waived its privilege.

10 By her Endorsement, Master Brott ordered as follows:

1. Undertakings and answers to questions ordered to be answered shall be completed by October 6, 2017 (Tabs 1, 2, and 3 of the Brief of Undertakings and Refusals Charts);
2. Ms. Carlson shall, by November 3, 2017, re-attend to answer questions arising from the undertakings/ questions ordered to be answered and for the continuation of her cross-examination;
3. The parties shall use best efforts to resolve the issue of costs of the motions from July 2016, May 2017, and August 2, 2017. Costs shall follow the event, payable on a partial indemnity basis;
4. Any further "Master's" issues arising from the proceeding, Master Brott shall be seized.

APPEAL GROUNDS

11 The City asserts the following ten grounds of appeal (the "Appeal Grounds") in its notice of appeal:

a. The Master erred in law and committed a palpable and overriding error by failing to recognize the "sacrosanct nature" of solicitor-client privilege, failing to apply the test set out by the Supreme Court of Canada in *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31, [2006] 2 S.C.R. 32, and compelling the City to disclose to the Respondents all of its solicitor-client privileged documents spanning an 11-year period;

b. The Master erred in law and committed a palpable and overriding error by failing to apply the test regarding settlement privilege, set out by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37, [2013] 2 S.C.R. 623, and--contrary to *Sable*--compelling the City to disclose to the Respondents all communications surrounding the partial settlement;

c. The Master erred in law, misapprehended or failed to consider key evidence, and committed a palpable and overriding error by holding that the City waived solicitor-client privilege because the deponent either identified herself as a lawyer, included a reference to limitation period advice in

her Affidavit which was not at issue in the proceeding, or was required to respond to the Respondents' spurious allegations of abuse of process;

d. The Master erred in law, misapprehended or failed to consider key evidence, and committed a palpable and overriding error by failing to consider whether a generalized waiver of solicitor-client privilege over the entirety of all communications was proportionate and necessary, as opposed to a more limited waiver relating to settlement and a bar order;

e. The Master erred in law, misapprehended or failed to consider key evidence, and committed a palpable and overriding error in finding that "the cases relied upon by the [City] concern questions at examinations for discovery -- here, we have a cross examination so right away the situation is distinguishable". The City relied on *Leone v. Flexity Solutions Inc.,* 2017 ONSC 1536, 278 A.C.W.S. (3d) 559, and *Mordo v. HSBC Bank Canada,* 2016 BCSC 282, 263 A.C.W.S. (3d) 898, with *Mordo* concerning cross-examination and not an examination for discovery;

f. The Master erred in law and committed a palpable and overriding error by compelling the City to disclose privileged documents that it is prohibited from disclosing pursuant to section 239 of the *Municipal Act;*

g. The Master erred in law and committed a palpable and overriding error by ordering the City to answer 31 refusals (the "Refusals"), without permitting it to make any submissions on the vast majority of them. The Refusals dealt with discrete questions which warranted submissions, including the request to produce all communications between the City and its counsel. The Master's failure to permit the City to make submissions on the Refusals' relevance constituted a failure of natural justice and procedural fairness;

h. The Master erred in law and committed a palpable and overriding error by ordering the City to answer all Refusals--each of which deal with discrete questions--without reviewing and considering the actual questions refused, and without providing any (or sufficient) reasons explaining their relevance. The Master's failure to do so constituted a failure of natural justice and procedural fairness;

i. The Master erred in law and committed a palpable and overriding error by taking an overly broad and disproportionate approach to relevance in these circumstances: a bar motion in a concluded trial;

j. The Master erred in law, misapprehended or failed to consider key evidence, and committed a palpable and overriding error in awarding costs for the prior motion attendances in July 2016 and May 2017. Adjournments in that motion were necessitated by the conduct of the Respondents, and the Court losing the motion material--not the City's conduct.

DETERMINATION OF APPEAL GROUNDS

12 For the reasons that follow, I dismiss the appeal entirely and confirm the Endorsement.

BACKGROUND FACTS

13 The facts relating to the furnace oil spill are more precisely detailed by Justice Charney in *Gendron v. Thompson Fuels*, 2017 ONSC 4009, 12 C.E.L.R. (4th) 237, and Justice MacDougall in *Kawartha Lakes (City) v. Gendron*, 2012 ONSC 2035, 214 A.C.W.S. (3d) 151. I summarize them below for ease of reference.

14 On December 18, 2008, Thompson Fuels--as ordered--pumped 700 litres of furnace oil into the Gendrons' above-ground furnace oil storage tank located in their home's basement.

15 That same day, Wayne noticed that the oil had leaked onto his basement floor. Using tupperware containers, he took steps to gradually collect and fill seven "jerry cans" with 25 litres of oil each.

16 Wayne believed he had succeeded in collecting all the oil in the tanks and went to sleep. The next afternoon, he called Thompson Fuels to complain that it had not delivered the 700 litres he ordered.

17 Thompson Fuels confirmed that it indeed delivered the correct amount of oil. It sent a technician to the Gendrons' home to investigate Wayne's complaint. As events unfolded over the next few days, and based on the technician's observations, it became apparent that oil leaked from one of the tanks into a crack between the basement wall and floor. Some oil remained under the Gendrons home, and some leaked into Sturgeon Lake.

18 The technician advised Wayne to call the Ministry of Environment's Spills Action Centre, but Wayne still did not believe that all the oil was delivered. Rather than calling the Action Centre, he threatened to call the police to report that Thompson Fuels had not delivered the oil he purchased.

19 Meanwhile, Thompson Fuels called the Action Centre to report the spill, which led to a Technical Standards and Safety Authority (TSSA) site inspection. In turn, the site inspection resulted in a Provincial Officer's order--to remediate the spill on the Gendrons' property--issued against Wayne and later amended to add Liana. Wayne reported the matter to his insurer, FM.

20 FM retained R. Ian Pepper Insurance Adjusters Inc. ("Pepper Adjusters"), who then retained DL Services (DLS)--a remediation contractor--who began remediation of the Gendrons' property at the end of 2008. DLS notified the Action Centre that the spill had entered Sturgeon Lake.

21 In March 2009, a Provincial Officer's order--to remediate the contaminated public property--was issued against the City. The City retained Golder Associates Ltd. to provide remediation services. Nearly two million dollars was spent remediating the oil that spilled into Sturgeon Lake, and the Gendrons' home was eventually demolished to remove the contaminated soil under its foundation.

THE *EPA* ORDER

22 In June 2010, pursuant to s. 100.1 of the *Environmental Protection Act*, 1990, c. E.19 (*EPA*), the City ordered compensation for the clean-up--of $471,691.44--against the Gendrons, Thompson Fuels, and the TSSA (the "*EPA* Order").

23 In July 2010, the Gendrons filed an appeal of the *EPA* Order. Thompson Fuels and the TSSA also filed an appeal of the *EPA* Order. All three (the "Orderees") sought a hearing before the Environmental Review Tribunal (ERT).

THE CITY'S CIVIL PROCEEDING

24 On July 30, 2010, the City commenced a civil action against the Orderees and additional defendants (FM, Her Majesty the Queen in Right of Ontario, DLS, Pepper Adjusters, and Les Reservoirs D'Acier de Granby ("Granby")).

25 The City's civil claim sought compensation for costs incurred in remediating the oil spill, recovery of all costs incurred in remediating the oil spill, pre-judgment and post-judgment interest, and costs on a substantial indemnity basis.

26 The Gendrons also commenced a separate civil action against Thompson Fuels, the TSSA, and Granby for damages including contribution and indemnity as against any amount ordered to pay the City.

27 At the commencement of the City's civil proceedings--and the same time that FM filed its statement of defence--FM brought a motion for summary judgment against the City, seeking a dismissal of its claim. DLS and Pepper Adjusters also brought summary judgment motions which were heard at the same time. The motions were granted

in part, and the City's claim for breach of statutory duty was dismissed. The City's negligence claims continued, however, and were amended to add a claim against FM in negligence.

28 During the proceedings, the Gendrons sought several adjournments of the ERT hearing. They were obtained on the basis that the civil actions were more extensive, and dealt with the issues before the ERT as well as other issues such as the apportionment of damages between the various defendants. The adjournment requests were initially supported by Thompson Fuels and the TSSA, but opposed by the City.

THE PARTIAL SETTLEMENT AGREEMENT

29 Sometime in 2014 or 2015, the City reached a tentative settlement agreement with the Settling Defendants, but not with the Respondents in this motion--the Gendrons and FM. Based upon this tentative settlement, the City moved to schedule the ERT hearing.

THE ERT HEARING

30 Before the ERT would agree to move the matter forward, it required an undertaking from the City: that it would not proceed with the civil action, regardless of the ERT hearing's outcome. The City provided the necessary undertaking to the ERT, and the hearing was scheduled and subsequently heard commencing February 22, 2016.

THE MAIN MOTIONS

31 After the ERT hearing was scheduled and after the City undertook in writing to the ERT that it would not pursue the civil action provided, three motions were brought to the court seeking dismissal of the City's civil action (referenced above as the "Main Motions").

32 First, the Gendrons brought a motion for summary judgment dismissing the City's action against them with costs, which motion was amended to add a declaration of double recovery against the City and pleading abuse of process.

33 In response to the Gendrons' motion, the City served motion material seeking to dismiss its own action, and seeking the following additional relief:

a. approval of its partial settlement agreement with the Settling Defendants;

b. that the action be dismissed without costs against FM;

c. a bar order against the Gendrons;

d. that the action be dismissed with costs against the Gendrons; and

e. alternative relief of strict liability in nuisance against the Gendrons.

THE AFFIDAVIT

34 To support the City's motion and in response to Gendrons' motion, Carlson swore her Affidavit (described above). It included multiple references to the partial settlement agreement with the Settling Defendants, that agreement's terms, and a copy of the draft agreement attached as an exhibit. Carlson also referenced decisions made based on legal advice provided, and commented on the motivation and conduct of the City versus that of the Respondents.

35 In response to the City's motion, FM brought a motion seeking dismissal of the City's action with costs payable to FM.

THE CROSS-EXAMINATION AND MOTION FOR REFUSALS AND UNDERTAKINGS

36 As mentioned at the outset, Carlson was cross-examined on April 25 and 26, 2016, where she refused numerous questions pertaining to her Affidavit primarily on the basis of relevance and privilege.

37 Finally, the Respondents brought the Motion--for refusals and undertakings--heard by Master Brott on August 2, 2017, and resulting in the Endorsement--the subject of this appeal.

THE LAW AND ANALYSIS

Standard of Review

38 A Master's decision is subject to review if the Master made an error of law, exercised her discretion on the wrong principles, or misapprehended the evidence such that there was a palpable or overriding error: see *Zeitoun v. Economical Insurance Group*, [2008] O.J. No. 1771 (Ont. Div. Ct.), aff'd 2009 ONCA 415; *York Region Standard Condominium Corporation No. 1039 v. Richmond Hill (Town),* 2018 ONCA 511; *Republic National Bank of New York (Canada) v. Normart Management*, [1996] O.J. No. 3371 (Ont. Gen. Div.); and *Eisen (Trustee of) v. Altus Group Ltd*., 2016 ONSC 1301, [2016] O.J. No. 969.

39 When a Master has decided a matter of law, which includes determinations of whether a question is relevant or whether evidence is privileged, the standard of review is correctness: see *Kennedy v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2582, [2012] O.J. No. 1923; *Leadbeater v. Ontario* [2004] O.J. No. 1228 (Ont. S.C.); and *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649, [2012] O.J. No. 262.

40 Findings of fact made by a Master are entitled to deference by the appeal court. An appeal from a decision of a Master is not a hearing *de novo*. Rather, on questions of fact and mixed fact and law, deference applies and the role of the reviewing court is limited. An appellate court cannot substitute its interpretation of the facts or reweigh the evidence simply because it takes a different view of the evidence from that of the Master: see *Intact Insurance Co. v. 1367229 Ontario Inc.*, 2012 ONSC 5256, [2012] O.J. No. 4498 at para. 11; and *York Region*.

When Refusals to Answer Questions Are Proper

41 Rules 34.12 and 39.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 set out the authority and procedure for cross-examination on affidavits.

42 An affiant may refuse to answer a question if: (1) the question is not relevant to any matter in issue in the action; (2) the question is not proper; or (3) the question does not satisfy the proportionality requirement imposed by Rule 29.2.03: see *Eisen* at para. 18.

Relevance

43 The test of relevance is to be determined by what is relevant on the motion and what is contained in the affidavit material. It has been determined that if a matter is included in an affidavit then the relevance is admitted and cross-examination within the four corners of the affidavit is permitted: See *Bruce v. MacQuarie Premium Funding Inc.*, 2010 ONSC 2236, [2010] O.J. No. 1531; *St. Lewis v. Rancourt*, 2013 ONSC 3334, [2013] O.J. No. 2665; and *St. Lewis v. Rancourt*, 2012 ONSC 6985, 225 A.C.W.S. (3d) 79.

44 It is settled law that if a moving party deposes to a fact in an affidavit, that fact becomes the proper subject for cross-examination, even if it were not otherwise relevant to the issues on the pending motion: see *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, (2008), 167 A.C.W.S. (3d) 276 (Ont. S.C.).

45 The City argued that the questions asked of its solicitor Carlson would only be relevant if they helped determine whether a bar order ought to be issued; Master Brott correctly determined that this argument was flawed. The relief

the City sought was not restricted to a bar order and included:

* approval of a partial settlement;
* an order dismissing the action with costs against Gendrons;
* an order dismissing the action without costs against FM;
* an order dismissing cross-claims; and
* an order for summary judgment.

46 The Affidavit also responded to the relief sought by the Gendrons' motion, which contained underlying issues relating to the parties' conduct, abuse of process, and costs.

47 Master Brott properly and correctly noted that the fact that the information is outlined in detail in the Affidavit permits the cross-examination. If information is included in the Affidavit, the City is deemed to admit its relevance, so cross-examination within the four corners of the affidavit is permitted, per *MacQuarie*.

48 I reject the City's argument that the Master refused to permit it to make any submissions on the vast majority of the refusals thus constituting a failure of natural justice and procedural fairness. The City made extensive submissions to the Master on all issues argued, including the relevance issue. This ground of appeal is baseless.

49 For these reasons, the City's Appeal Grounds items **g**, **h**, and **i** are hereby dismissed.

Privilege

50 The City claims three privileges which it asserts permitted it to refuse to answer questions, as follows:

a. Solicitor-client privilege;
b. Settlement privilege; and
c. Section 239 of the *Municipal Act*.

51 Master Brott addressed the three privileges claimed and found that the City waived both solicitor-client and settlement privilege by outlining in the Affidavit a detailed narrative of the City's conduct with respect to the underlying proceedings. This narrative included references to the receipt of solicitor-client advice and a description of the settlement discussions with both the settling and non-settling defendants. Master Brott found that the City could not intentionally raise these topics in its Affidavit and then refuse to answer questions posed about those very topics; this would be unfair.

SOLICITOR-CLIENT PRIVILEGE

52 Many of the questions were refused on the grounds of solicitor-client privilege.

53 Master Brott noted that the information contained in Carlson's Affidavit sets out in detail the steps taken and the reasons those steps were taken. The City claimed that the information was simply narrative to inform the court about the proceedings before the court and the ERT.

54 Master Brott found, however, that the information was set out in the Affidavit intentionally and much of that information related to the City's conduct. Since that is critical to the issues of costs entitlement and abuse of process, the Respondents must be entitled to test the veracity of the information and challenge the narrative.

55 Master Brott noted as follows:

> The City is attempting to set out all of its discussions as being appropriate and then trying to shield itself from answering questions about the conduct by way of ascertaining solicitor-client privilege. That conduct has created a situation that essentially, in fairness, opens the door to the guarded privilege of solicitor and client communications.

56 The detailed evidence that Carlson disclosed of professional and confidential communications were issues at the heart of the controversy between the parties.

57 The disclosure that Carlson's Affidavit provided was not accidental but purposeful and relevant to determining of the issues before the court.

58 Master Brott held that while solicitor-client privilege must be zealously guarded, given that the City as the "holder of the privilege made a voluntary disclosure or consents to the disclosure of any material part of a communication", such privilege was waived.

59 To establish waiver of solicitor-client privilege, Master Brott followed Justice Brown's reasoning in *Ebrahim v. Continental Precious Minerals Inc.*, 2012 ONSC 1123, [2012] O.J. No. 716. Justice Brown found at para. 37 that 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 [quote omitted.]

60 The cases that the City referenced in its notice of appeal as establishing grounds for appeal--*Goodis, Leone*, and *Mordo*--are distinguishable.

61 *Goodis* did not involve a waiver of privilege. Rather, it involved a production of privileged information from the crown to a criminal defence lawyer. No waiver took place nor was any alleged. The case is entirely distinguishable.

62 *Leone* involved inadvertent waiver that occurred orally in an examination for discovery. Again, this case is entirely distinguishable.

63 Finally, *Mordo* involved affidavits of former counsel that set out the procedural history of settlement negotiations. Those affidavits were found only to inform the court about the state of affairs concerning the settlement--they were not tendered as evidence about a party's reliance on legal advice, nor to claim abuse of process against the affidavit's author or the affidavit-tendering party's client, nor as a costs claim. Again, this case is entirely distinguishable.

64 In the present case, Carlson--through her Affidavit--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.

65 I agree with Master Brott. The City as the holder of the privilege made a voluntary disclosure or consented to the disclosure of any material part of a communication. The privilege was therefore waived.

66 The City's Appeal Grounds items **a**, **c**, **d**, and **e** are hereby dismissed.

SETTLEMENT PRIVILEGE

67 Settlement privilege serves to promote settlement. As Master Brott noted, settlement privilege's purpose is to protect parties' efforts to settle disputes by ensuring their communications are kept quiet.

68 In this case, as Master Brott noted, the Affidavit's paragraphs 19-29 outline various meetings, negotiations, offers, emails, and discussions which, according to the City, all led to the partial settlement agreement.

69 The City submitted that the information contained in the Affidavit was necessary in light of the relief that it sought on its motion--namely, approval of the settlement and the bar order. The City asserted that the information is required to permit the court to properly assess the agreement.

70 The Respondents noted that the City provided extensive details regarding settlement discussions leading to the alleged settlement but did not disclose the actual agreed upon written settlement or even its terms. The Respondents argued that the Affidavit's purpose was to outline the City's reasonable approach to reaching the agreement, and contrast that approach with the Respondents' unreasonableness.

71 Master Brott found that the City is obligated to disclose the terms of the agreement so that the court may determine its fairness. Because the Affidavit describes all meetings, negotiations, offers, and discussions leading to the alleged partial agreement, the Affidavit alone is sufficient to permit these questions to be answered. Once information is contained in an affidavit, realizing that affidavit's purpose, that information becomes relevant and producible. For these reasons, Master Brott held that any settlement privilege was waived.

72 The City's argument that Master Brott erred in not following *Sable* is flawed. *Sable* concerned an application on a pure question of law: whether disclosure of settlement amounts in a Pierringer agreement should be provided along with non-financial terms. In *Sable*, the details of the settlement negotiations were sought in a context where the privilege was not waived in an affidavit.

73 In this case, as Master Brott noted, the City voluntarily disclosed the meetings, negotiations, offers, and discussions leading to the alleged partial agreement, but did not disclose the terms or content of the agreement itself. The information contained in the Affidavit was relevant to the issues and producible.

74 I agree with Master Brott's findings to the extent that if settlement privilege applied, it was waived via the disclosure of extensive details regarding settlement discussions contained in the Affidavit's paragraphs.

75 The City's Appeal Grounds item **b** is hereby dismissed.

CLOSED SESSION PRIVILEGE (SECTION 239 of the *MUNICIPAL ACT*)

76 Concerning the privilege claimed under the *Municipal Act,* Master Brott found that its section 239 did not create a new "closed session" privilege.

77 Master Brott found that the *Municipal Act* is silent about closed session discussion being privileged. Master Brott had already determined that advice subject to solicitor-client privilege was waived by the Affidavit's references to legal advice and the exhibits of affidavits sworn by other city officials.

78 I agree with Master Brott. Section 239 creates no new "closed session" privilege nor did the City provide any authority to support its claim.

79 The City's Appeal Grounds item **f** is hereby dismissed.

COSTS

80 I find no evidence to support any finding that the Master erred in law, misapprehended or failed to consider key evidence, or committed any palpable and overriding errors in awarding costs for the prior motion attendances.

81 The City's Appeal Grounds item **j** is dismissed.

DISPOSITON OF APPEAL

82 For the reasons above, this appeal is dismissed.

83 Subject to any offers to settle that may affect costs, the Respondents shall be entitled to their costs on a partial indemnity basis. In the event that the parties cannot agree on costs, the Respondents shall deliver their costs submissions limited to two (2) pages in length with bills of costs and costs outlines attached, within thirty (30) days of today's date. The Appellant shall respond within forty-five (45) days of today's date, limited to two (2) pages in length with bills of costs and costs outlines attached. Reply submissions, if any, are limited to one (1) page, to be delivered within fifty (50) days of today's date.

S. WOODLEY J.
