LIMITED WAIVER OF PRIVILEGE

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Introduction

Where a party makes privileged documents available for a limited purpose, it can be argued that the disclosure cannot be construed as a full waiver of the privilege to which the party was entitled. Limited waiver may apply in two ways: (1) preventing use of the documents in subsequent contexts unrelated to the purposes for which the limited waiver was given; or (2) preventing waiver of privilege over certain documents from being extended to other documents that were not within the scope of the limited waiver. Most of the cases point to the existence of a statutory compulsion requiring disclosure of the documents in the first instance as a basis for the finding of limited waiver. However, these cases do not appear to require that the statutory obligation to disclose be directly invoked. Rather, it appears to be sufficient if the parties knew the disclosure was required by statute, and merely proceeded accordingly. In later case law, however, particularly in Alberta, there are examples of cases that suggest that a limited waiver may be recognized even in the absence of any statutory necessity compelling the disclosure. Further, it does not appear to be mandatory for an express reservation of privilege, or an express stipulation of the limited nature of the waiver, to have been made at the time of the original disclosure, in order for a limited waiver to be recognized.

Review of Case Law

A leading decision on limited waiver is ***Philip Services Corp. (Receiver of) v. Ontario Securities Commmission***, 77 O.R. (3d) 209, [2005] O.J. No. 4418 (Ont Div Ct), which dealt with a summons for production of documents brought by the OSC in the context of its investigation of whether Philips had made adequate disclosures in its prospectus when launching a public offering of shares. Prior to the launch, senior management at Philips had learned that a senior officer was fraudulently diverting company funds. After receiving legal advice, Philips elected not to disclose that information in its prospectus. Philips claimed that the legal opinions and correspondence exchanged with its counsel in relation to that issue were privileged. The OSC

argued privilege had been waived when Philips provided those materials to its auditors, as it was required to do under s. 153 of the *Ontario Business Corporations Act*, without cautioning the auditor that the documents were privileged or requesting the maintenance of confidentiality. Lane J rejected the OSC's arguments, holding that a limited waiver of privilege is possible where documents are disclosed only for a narrow purpose pursuant to statutory compulsion. He further held that it is not necessary that an express reservation of privilege for all other purposes be expressed at the time disclosure is made, nor that the statutory compulsion be overtly or directly invoked, in order for the doctrine of limited waiver to apply. Lane J stated:

> "[51] While the present case does not involve a Charter challenge, the message from the Supreme Court jurisprudence is clear: **restrictions on solicitor-client privilege to attain other important societal objectives are to be closely scrutinized and restricted to what is absolutely necessary for the competing objective so as to achieve the minimal necessary impairment of solicitor-client privilege**. It would follow, therefore, that s. 153 of the OBCA cannot be read as authorizing the auditor to ignore the solicitor-client privilege with which the documents are impressed in his hands by their nature as Legal Opinions and the limited use that may be made of them.
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> [57] In my view, there is no necessity, in order to achieve the societal objective of fair financial statements certified as fair by fully informed auditors, that the waiver go beyond the auditors. By definition, the waiver enables the auditors to comply with the full scope of their audit standards. To hold that the waiver is broader than that, is to sanction a more than "minimal impairment" of this privilege which is fundamentally important to our justice system. In my view, the jurisprudence prevents finding that the Legal Opinions, once given to the auditors in that capacity for their purposes, were thereby made available to be handed over to the Commission for its purposes. **That the statute compelling production to the auditors was not directly invoked seems to me to be irrelevant: it was there in the background. Even if the statute did not exist, the fundamental importance of solicitor-client privilege would dictate the narrow waiver rather than the broad**.
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> [58] In my view, the Commission erred when it found that the giving of the Legal Opinions to Deloitte constituted an unlimited waiver of the solicitor-client privilege." [Emphasis added]

The doctrine of limited waiver was also recognized in an earlier decision, relied on in ***Philip***. In ***Interprovincial Pipe Line Inc. v. Canada (Minister of National Revenue -M.N.R.)***, [1995]

F.C.J. No. 1360, 22 B.L.R. (2d) 147 (FC), legal opinions had also been disclosed to the company's auditors, in that case pursuant to s. 170 of the *Canada Business Corporations Act*, and disclosure was sought by MNR, who argued that privilege had been waived. Gibson J held that a proper interpretation of the provisions compelling disclosure required that any waiver of privilege by the company be limited to the purposes of the audit only, and did not entitle MNR to access the documents. Gibson J also appeared to consider that no formal reservation of waiver, or formal compulsion, was necessary for a limited waiver to be recognized:

> "12 By reference to the facts here at issue, subsection 170(1) of the Canada Business Corporations Act clearly gives someone, an auditor, the authority to do something, demand access to records and documents, which, in the circumstances of the case, might interfere with solicitor-client confidentiality, as for example, when the respondent, as here, serves requirements for document production and information relating to the auditors' audit and examination of the financial statements of a client. In accordance with proposition 3, **subsection 170(1) should be invoked only as necessary and then only in a manner that will limit the interference with the confidentiality or privilege to only the extent that is absolutely necessary**. Further, by virtue proposition 4, **provisions such as subsection 170(1) must be interpreted restrictively**.
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> 13 On the facts before me, subsection 170(1) was not directly invoked on behalf of Price Waterhouse, Edmonton, but the applicants' knowledge of its existence and of the auditor's rights under that provision led to the disclosure of solicitor-client privileged information on a voluntary basis and only under strict limitations, albeit limitations that were only imposed orally.
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> 18 The foregoing passages can be adopted here by analogy. It was clearly the applicants' intent to disclose the legal opinions that it had received for a limited purpose only, namely to assist in the conduct of the audit and examination of its financial statements. It made the legal opinions available in accordance with its duty to assist that can be drawn from subsection 170(1) of the Canada Business Corporations Act. **It would, in my view, be contrary to public policy if the applicants' action in making the legal opinions available for audit purposes "...had the effect of automatically removing the cloak of privilege which would otherwise be available to them..." on an audit by the respondent**. This conclusion is, I am satisfied, consistent with the propositions quoted above that have been enunciated by the Supreme Court of Canada and consistent with a strict interpretation of the impact on solicitor-client privilege of subsection 170(1) of the Canada Business Corporations Act. If Parliament had intended there to be a secondary purpose in subsection 170(1) of the Canada Business Corporations Act

> beyond the primary purpose of accuracy in financial reporting, it was open to it to enunciate that purpose by clear direct or indirect amendment to the Income Tax Act stating that any disclosure of a solicitor-client privileged document pursuant to subsection 170(1) amounted to a waiver of privilege for the purposes of tax investigations. Since Parliament did not do so, **it would be inappropriate and, indeed, contrary to the principles enunciated in Descoteaux [*Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860], to interpret subsection 170(1) more broadly than necessary to achieve the end clearly sought to be served**." [Emphasis added]

In reaching his conclusion in ***Interprovincial***, Gibson J relied on an earlier Alberta decision, ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.,*** [1988] A.J. No. 810, 90 A.R. 323 (CA). In that case, the plaintiff sought production of working papers created by the defendants' chartered accountants during preparation of a report which was provided to the Director of Research and Investigation in the context of an investigation under the *Combines Investigation Act*. No charges ever resulted from that investigation. The report itself was also disclosed during examination on discovery in the civil proceedings, but disclosure of the working papers was refused. On application by the plaintiff, the Queen's Bench held that privilege had been waived and ordered that the working papers be disclosed, but that decision was overturned on appeal, with the Court providing the following reasons among others:

> "The respondent also contends that, if the privilege existed, the Caterpillar Companies waived that privilege, first by handing the report to the Director, or secondly by failing to object when the report was produced at the examination for discovery of the officer of R. Angus Alberta Limited. Again, in my view, neither argument has substance.
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> It must first be noted that the Director's inquiry is not a public proceeding. The Director hears witnesses in private and even in the absence of other subjects of the inquiry and their solicitors. Secondly, **to hand a privileged document to one party to litigation for the purpose of settlement or any other purpose, does not, in my opinion, show any intention that the privilege is thereby to terminate as to other parties or in related litigation**.
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> The Respondent also argued that the Caterpillar Companies waived any privilege which existed by failing to object when the officer of R. Angus Alberta Limited produced the Price Waterhouse report on his examination for discovery. The simple answer is that, even if one litigant has the status to interject on the examination for discovery of another, the objection is pointless if his co-defendant is resolved to produce the document. **Waiver depends on intention**. Failure to make a pointless

> objection does not, in my opinion, demonstrate that intention." [At pp. 15-16 (QL), emphasis added]

The decisions in ***Interprovincial*** and ***Ed Miller*** were relied on to reach a similar conclusion in ***Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.,*** 1998 ABQB 455, [1998] A.J. No. 575. In that case, documents which had been disclosed to auditors of the defendant's parent company, NOVA, for purposes of preparing a fairness opinion in relation to a proposed merger which was at issue in the litigation, were held to have been disclosed under limited waiver of privilege only. The plaintiffs, who had received a copy of the documents by mistake, were required to return them, and not entitled to invoke them in support of its claims in the civil litigation.

> "28 With respect to disclosure by NOVA of the documentation to its financial advisors, it is useful to review the purpose of such disclosure. Securities law and regulation requires that a fairness opinion from an independent financial advisor be provided to shareholders of a corporation in certain circumstances where a merger or plan of arrangement is being proposed by the corporation. The requirement for such an opinion often forms part of the interim order relating to the arrangement made by the court under the appropriate corporate statute. **There was no evidence before me as to whether a fairness opinion is being provided to shareholders of NOVA by requirement of law or voluntarily as part of what is considered good disclosure to its shareholders, but the situation is analogous to the situation in *Interprovincial Pipeline Inc. v. M.N.R.* [1996] 1 F.C. 367 (T.D.).** […].
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> 29 **Waiver is a matter of intent** (*Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co*. [1998] A.J. No.810 (C.A.) at page 3).
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> 30 I find that disclosure of documentation on which a valid claim of solicitor-client or litigation privilege can be made to financial advisors for the purpose of the provision of a fairness opinion mandated by securities law **is waiver for a limited purpose only and does not constitute a general waiver for other purposes**." [Emphasis added]

In ***Refco Alberta Inc. v. Nipsco Energy Services Inc.,*** 2002 ABCA 312, [2002] A.J. No. 1567, the Alberta Court of Appeal applied the doctrine of limited waiver, and held that where the scope of the waiver is subject to dispute, it can be construed by the Court. In that case, the plaintiff sued both the corporate defendant, as well as certain of its directors in their personal capacity. The individual defendants invoked a defence of good faith reliance on legal advice, and in doing so were deemed to have waived privilege over documents related to the legal advice given. The

corporate defendant, however, asserted that the waiver was limited only to materials related to the advice given to the directors, and not to other materials in the advising lawyer's file. The Court agreed, with Berger JA giving the following reasons:

> "6 Mr. Justice Major, speaking for a unanimous Supreme Court of Canada in R. v. McClure, [2001] 1 S.C.R. 445 at 450, stated that "the occasions when the solicitor-client privilege yields are rare and the test to be met is a stringent one." He went on to say (at p. 459): "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis."
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> 9 In our view, when a s. 123 defence is proffered, and a waiver executed to facilitate the defence, the intent of the waiver must be construed. In the case at bar, the intent is specified in Mr. Carscallen's letter. The stated purpose of the waiver is to allow the interested parties "to understand the nature and extent of the advice that was given by Mr. McCarthy." That, in our opinion, is an effective limitation of the waiver. The waiver applies only to all communications relevant to the particular issue to be tested, in this instance the s. 123 defence.
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> 10 To be clear, the content of all legal opinion, relevant to the s. 123 defence, communicated to the non-corporate defendants should be disclosed whether relied upon or not. As to the issue of fraudulent preference and waiver of privilege, mindful of the standard of review, we are not inclined to disturb the decision of the chambers judge. …"

Although this judgment does not deal with limited waiver as applied in the context of subsequent proceedings, it does nonetheless confirm the validity of the doctrine of limited waiver in Alberta, and further indicates that the waiver should be construed as narrowly as possible, to cover only those documents related to the specific purpose of the waiver.

In ***Rhino Legal Finance Inc. v. Salmon***, 2012 ABQB 169, [2012] A.J. No. 279, a client borrowed money from the plaintiff loan agency in order to fund a lawsuit related to a motor vehicle injury. As part of the loan agreement, the client gave a waiver to his lawyer, the defendant Salmon, to release information related to the litigation to the lender. The suit ultimately did not proceed, and the lender sued the lawyer for repayment of the loan. In that context, the lender sought production of the lawyer's entire file related to the matter. Master

Schlosser held that the waiver given as part of the loan was for the limited purpose of allowing the lender to examine the underlying lawsuit, and did not extend to a waiver for the purpose of lender's suit against lawyer. Master Schlosser stated:

> "12 There is also a very high threshold for disclosure of privileged records: Re Bre-X Minerals Ltd. 2001 ABCA 255 (at para. 69); Bell v. Smith [1968] SCR 664. The waiver must be clear and unequivocal: Histed v. Law Society (Manitoba) (2005) 18 CPC (6th) 230 (Man. CA). The waiver must be made clearly and conscientiously with a full understanding of its consequences.
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> 13 **Waiver can be for a limited purpose. If there is any uncertainty, the extent of the waiver can be construed**. Refco Alberta Inc. v. Nipsco Energy Services Inc. et al, (2002) 317 AR 316. Typically, **the protection afforded by solicitor/client privileged is close to absolute and does not require balancing interests on a case by case basis**. Refco at paragraph 6, referring to R. v. McClure (D.E.) [2001] 1 SCR 445 at p. 450.
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> 14 I am not convinced that the waiver given by the client for the limited purposes of allowing Rhino to examine the lawsuit against the defendant in the underlying motor vehicle action can be construed as an absolute waiver for all purposes. In other words**, the waiver relied upon by Rhino appears to be for a limited purpose in a defined context. At the very least, it is not clear that the waiver was intended to apply to these circumstances**." [Emphasis added]

The question of the scope of documents covered by a limited waiver was again addressed in ***Ziolkoski v. Unger,*** 2012 ABQB 18, [2012] A.J. No. 297. In that case, the defendant was an administrator with the provincial victims of crime compensation scheme. The plaintiff sued her and several other defendants in relation to a claim for compensation that was refused. During examination on discovery, the defendant gave information that was inconsistent with other evidence in the matter, but passed away before the inconsistencies could be clarified. The other defendants waived privilege over certain communications between the deceased and counsel for the compensation scheme in order to clarify the inconsistencies. The plaintiff then sought to extend the waiver to other communications between the parties. Neilsen J refused to do so, stating:

> "30 **The fact that the Defendants have waived solicitor-client privilege in relation to the communications between Ms. Unger and Mr. Whittaker does not automatically result in a waiver of solicitor-client privilege in respect of**

> **the communications between Ms. Unger and McLennan Ross LLP in relation to the McLennan Ross Letter**.
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> 31 Having reviewed the subject documents, I am of the view that neither fairness nor consistency require the Defendants to produce the documents relating to the communications between Ms. Unger and McLennan Ross LLP in 2007 in relation to the McLennan Ross Letter. There is nothing which would suggest that the Defendants are attempting to take unfair advantage or present a misleading picture by disclosing only those documents in relation to the communications between Ms. Unger and Mr. Whittaker. Withholding of disclosure of the communications between Ms. Unger and McLennan Ross LLP, in my view, will in no way mislead either Ms. Ziolkoski or the court in its ultimate consideration of the issues between the parties. **Maintaining solicitor-client privilege with respect to those documents will not be unfair or inconsistent**. The documents are, in fact, documents outlining communications between Ms. Unger and McLennan Ross LLP with a view to clarifying Ms. Unger's evidence in relation to the Whittaker Letter so as to ensure that Ms. Ziolkoski was not in any way misled by Ms. Unger's previous evidence. That is, this was an attempt to ensure that evidence that Ms. Ziolkoski might rely on and which might be put before the court accurately reflected the dealings between Ms. Unger and Mr. Whittaker in September 2003. These documents add nothing to the information conveyed in the documents which have been disclosed in relation to the Whittaker Letter.
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> 32 In these circumstances, **there is no reason to erode solicitor-client privilege which, as set out previously herein, is a cornerstone of our legal system. The limited waiver of solicitor-client privilege by the Defendants with respect to all materials related to the Whittaker Letter need not be extended to apply to all materials related to the McLennan Ross Letter**." [Emphasis added]

Outside of Alberta, in the case of ***British Columbia (Auditor General) v. Butler,*** 2011 BCSC 1064, [2011] B.C.J. No. 1502, a limited waiver was held to have been given by two ministerial assistants who had received indemnity from the Province in relation to criminal proceedings brought against them. The Auditor General sought production of documents in the possession of the Province and the lawyer responsible for applications for indemnity, in relation to the indemnity arrangement. The two individuals had consented to disclosure of the documents, and this was confirmed by the Court to be a limited waiver for purposes of the Auditor General's inquiry only:

> "67 I am satisfied on a review of the background of this matter, and after reviewing the communications passing between Messrs. Virk and Basi and counsel for the Auditor General as set out above, that in this case both Messrs. Virk and

> Basi have chosen, with full knowledge of their rights, to waive such rights to any existing privilege and confidentiality they may have to documents in the possession of the Province as requested by the Auditor General for the expressed purpose of, and for no other purpose, than enabling the Auditor General to conduct his inquiry and examination pursuant to this Act."

Subsequently, in relation to the same events, a member of the Legislative Assembly of BC requested information from the Ministry of Justice related to the decision to fund the legal expenses of the two ministerial assistants. The request was contested by the Ministry and the two ministerial assistants, on grounds, among others, that the documents were covered by privilege. The Adjudicator agreed, rendering the decision set out in ***Order F14-02; British Columbia (Ministry of Justice) (Re)***, 2014 BCIPC 2, [2014] B.C.I.P.C.D. No. 2. She referred to the ***Butler*** decision in concluding that the two individuals had not waived privilege over the documents, despite having disclosed them both to the Ministry and the Auditor-General:

> "44 The applicant submits that if any of the records are found to be protected by privilege, the privilege was waived because the records were communicated to the Ministry. I disagree that this amounts to a waiver because, as set out above, the Ministry was an agent of the Third Parties for the purpose of facilitating the attainment and provision of legal advice and representation.
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> 45 This case also raises the issue of whether privilege was waived when the Ministry publically revealed particulars of the Indemnity Agreements and their amendments. For example, on October 20, 2010 the Deputy Attorney General stated that the Indemnity Agreements contained a repayment condition and that the Third Parties had been released from that condition. At the same time, he also revealed conditions imposed on October 14, 2010 (in the category 2 records) as well as the nature and contents of the category 3 record.
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> 46 The Ministry explains that it obtained the consent of the Third Parties' lawyers before issuing the Deputy Attorney General's October 20, 2010 statement. However, there is nothing in the materials that demonstrates that their clients - the Third Parties - agreed to this disclosure or had any intention of waiving privilege. In fact, **Butler and Attorney General, as well as their submissions in this inquiry, indicate that the Third Parties have (with the sole exception of the Auditor General's audit) refused to relinquish their claim of privilege over the records related to their indemnification arrangement with the Ministry**.
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> 47 **I find that the Third Parties have not waived privilege over these records**." [Emphasis added]

Limited waiver has also been recognized to preclude production in a civil proceeding of materials that were disclosed in order to facilitate an earlier criminal proceeding. In ***Jourdain v. Ontario***, [2008] O.J. No. 2788, 91 O.R. (3d) 506 (SCJ), the plaintiff had been charged with sexual assault, but charges were eventually dropped and he brought a civil suit against the Crown and the police officers involved. The documents at issue were the notes of the investigating police officers, which the Crown had been compelled to provide to the plaintiff as part of its disclosure obligations in the criminal trial. Relying on the ***Philip*** decision, Shaw J held that the Crown had provided the police notes for the limited purpose of satisfying its disclosure obligations, which could not be construed as a waiver of privilege over the documents, and noted that in any event, the privilege belonged to the officers, not the Crown:

> "53 Although I accept that waiver of solicitor-client privilege can occur where the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive that privilege, I agree with the position of the Crown that in the circumstances of this case, the privilege attaching to the officers' notes has not been waived. See Imperial Parking Canada Corp. v. Toronto (City), [2006] O.J. No. 3792 at para. 6. Implicit in the statement in Wagg, supra at para. 25, namely that, "Since the documents in the Crown disclosure are relevant, they should be produced, unless some privilege applies (emphasis added)" is the principle that Crown disclosure in a criminal proceeding does not operate as a waiver of privilege for a subsequent civil proceeding.
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> 54 **Where disclosure is the result of a statutory compulsion to disclose, or where disclosure is made pursuant to the Crown's Stinchcombe disclosure obligations, such disclosure is not voluntary and does not waive the privilege except for the express purposes for which the document is disclosed**. The Crown in its factum refers to *Philip Services Corp. (Receiver of) v. Ontario Securities Commission*, [2005] O.J. No. 4418 (Div. Ct.) […].
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> 55 **The unredacted police notes were provided by the Crown to criminal defence counsel for the limited purpose of fulfilling the Crown's constitutional duty to make full and frank disclosure of all relevant information to Mr. Jourdain relating to his criminal charge and in furtherance of the public interest in ensuring that justice is done. There is nothing in the conduct of the Crown to demonstrate that it either expressly or impliedly waived privilege related to the subsequent civil litigation**. In my view, it would be contrary to public policy if the Crown, in making the disclosure mandated by Stinchcombe, had to guard against producing materials that may be privileged because of a concern of implied waiver. That would tend to narrow the scope of disclosure rather than widen it.

> 56 I also note that the privilege in this case belongs to the recipients of the privileged legal advice, namely the defendant police officers. See R. v. Campbell, [1999] 1 S.C.R. 565 (SCC) at para. 49. The plaintiffs have not established that the defendant police officers in any way waived the privilege." [Emphasis added]

Conclusion

Waiver depends on intention, and if there is any uncertainty the extent of the waiver can be construed. The fundamental importance of solicitor-client privilege has been held to mandate a narrow rather than a broad waiver. Waiver should be construed as narrowly as possible, to cover only those documents related to the specific purpose of the waiver.